#718

In the Matter of Arbitration	
Between	Case Number:
Fraternal Order of Police-Ohio Labor Council	25-18-(9-13-91)-31-05-02
	Before: Harry Graham
and	
The State of Ohio, Department of Natural Resources	

Appearances: For Fraternal Order of Police-Ohio Labor Council

Gwen Silverberg
Fraternal Order of Police-Ohio Labor Council
222 East Town St.
Columbus, OH. 43215

For Ohio Department of Natural Resources

William Demidovich Jr.
Ohio Department of Natural Resources
1930 Belcher Dr., Building D-2
Columbus, OH. 43224

Introduction: Pursuant to the procedures of the parties hearings were held on this matter on December 4 and 16, 1991. At those hearings the parties were provided complete opportunity to present testimony and evidence. No post hearing briefs were filed in this dispute and the record was closed at the conclusion of oral argument on December 16, 1991.

Issue: At the hearing the parties agreed upon the issue in dispute between them. That issue is:

> Was the Grievant removed for just cause? If not, what shall the remedy be?

Background: There is no dispute over the facts that prompt this proceeding. The Grievant, Joseph R. McKenna, is a veteran of sixteen years of service with the Department of Natural Resources, Division of Wildlife. He has been a Wildlife Investigator and according to his performance evaluations, a good employee. During his tenure with the Department he has been involved in a number of motor vehicle accidents. These prompted discipline of increasing severity. On August 2, 1991 the Grievant was traveling eastbound on Ohio Route 39. He was proceeding at a low rate of speed. Ahead of him he saw an automobile making a left hand turn at an unmarked intersection. Between that car and his vehicle was a motorcycle. At that instant Mr. McKenna had logged on his radio and was in the act of replacing the microphone on its receptacle in his vehicle. He glanced down to do so. As he did so, the motorcycle ahead of him stopped. Mr. McKenna struck the cycle from the rear. There was damage to the cycle. The motorcyclist was not injured. Mr. McKenna was cited by the Ohio State Highway Patrol for being "unable to stop in assured clear distance ahead." The charge was not contested.

As a result of this incident Mr. McKenna was removed from his position with the Department. A grievance protesting that act was promptly filed and the parties agree it is now before the Arbitrator for determination on its

merits.

Position of the Employer: The State points out that the incident under review in this proceeding is not an isolated event. During the course of his employment with the Division of Wildlife the Grievant compiled an unenviable driving record. As the Employer presents the record at the date of the event giving rise to his discharge Mr. McKenna had on his record the following disciplinary trail:

1. Motor vehicle accident	3 day suspension
2. Motor vehicle accident	10 day suspension, later reduced to a 7 day suspension
3. Motor vehicle policy violation	10 day suspension
4. Motor vehicle accident	20 day suspension

None of the disciplinary actions outlined above were grieved to arbitration. The 3, 10 and 20 day suspensions were not grieved at all.

During his tenure with the State the Department has been very concerned with Mr. McKenna's driving record. In order to assist the Grievant to improve his safety record the Department sent Mr. McKenna to three defensive driving courses. He was also sent to the driving course offered by the Ohio State Highway Patrol. These driving courses were paid for by the State. In addition, Mr. McKenna was administered a comprehensive physical examination at State cost in order to determine whether or not there was a

physical reason for his driving difficulties. No physical problems were found. In essence, the State says, enough is enough. The Employer is assuming a great risk of liability each time Mr. McKenna gets behind the wheel of a State vehicle. The Department has walked the last mile and beyond in an effort to assist Mr. McKenna to overcome his driving problems. It cannot be expected to do more. Nor can it be expected to retain in its employ an employee whose record of accidents is so poor as to inspire no faith whatsoever that he can improve.

The Department acknowledges that the circumstances surrounding Mr. McKenna's rearending of the motorcycle were unusual. The cyclist stopped for no apparent reason well short of the intersection. That should not be given weight in the view of the Department. The fact remains that Mr. McKenna was cited for failure to maintain assured clear distance. He pled no contest. This event represents the last straw in the driving history of the Grievant with the Department it insists. It is simply not reasonable to expect the State to continue to employ Mr. McKenna and assume the risk associated with having him behind the wheel of a State vehicle. As that is the case, the State insists the discharge under review in this situation was justified.

In the opinion of the State it has followed the principle of progressive discipline in this instance. That

is, Mr. McKenna received increasingly lengthy suspensions as he continued to experience accidents. At Section 17.05 of the Agreement the parties have agreed that records of suspensions and demotions will not be utilized by the Employer beyond a twenty-four (24) month period if no further disciplinary action has occurred within that period. That language permits the State to take into account the suspensions that preceded the 20 day suspension received by Mr. McKenna prior to his discharge in the opinion of the State. As is set forth more fully below, this point is hotly disputed by the Union. The State, through testimony of Eugene Brundige, former Director of the Office of Collective Bargaining, and Darryl Anderson, Captain in the Highway Patrol, asserts that the history of negotiation on this issue as well as the day to day operation of State agencies indicates the time to toll the two year limitation is from the date discipline was imposed, not the date of the incident giving rise to the discipline. As that is the case, it is proper for the State to have utilized earlier incidents of discipline against the Grievant in making its case that progressive discipline has occurred in this instance.

Position of the Union: In the Union's view, it is improper to consider any discipline arising prior to the final twenty day suspension administered to the Grievant. More than two years elapsed between the prior instance of discipline and the

twenty day suspension that preceded Mr. McKenna's discharge. The correct method of tolling the two year time period at issue in this dispute is the date from which the event giving rise to discipline occurred, not the date that discipline was imposed. When that is done, the instances of discipline cited by the State in addition to the twenty day suspension may not be properly considered by the Arbitrator. As that is the case, the only discipline on Mr. McKenna's record is the twenty day suspension that preceded discharge. To move to a discharge from a twenty day suspension is excessive in the Union's opinion.

On the merits of the dispute, the Union points out that this is a minor accident. No reason exists for the motorcyclist to have stopped well short of the intersection. No reasonably prudent driver would have expected that to occur. At the instant the accident occurred Mr. McKenna was well aware of his surroundings. He observed the vehicle turning left well ahead of him at the intersection. He saw the motorcycle between them. The vehicle he was driving, a Jeep Cherokee, was newly assigned to him. He had to look down for an instant in order to find the holster for the radio. To discharge a good employee, with sixteen years of service under such circumstances is unduly harsh in the Union's opinion.

The State has available to it options other than

discharge. It might have imposed a suspension longer than twenty days. It could have once again sent the Grievant to a driving training course. When consideration is given to the length of State service compiled by the Grievant, discharge is unwarranted in this circumstance according to the Union.

Discussion: Neutrals in situations such as this should not make decisions that are not required. In spite of the sound and fury attached to the issue over the counting of prior disciplinary entries in Mr. McKenna's record, it is not necessary to determine whether or not the time for tolling discipline is from the date of occurrence or the date of imposition. This is due to the fact that at Section 19.05 the Agreement indicates that while the Employer is to follow the principles of progressive discipline, "Disciplinary action shall be commensurate with the offence." Further in Section 19.05 it is provided that "more severe discipline may be imposed at any point if the infraction or violation merits the more severe action." Under the terms of the Agreement, the Employer has reserved to itself the authority to depart from the principles of progressive discipline if it sees fit. When it does so, as in this instance, it may be required to support its position before a neutral and establish that its deviation from progressive discipline was justified under the circumstances. As that is the case, it is unnecessary to determine if the time for tolling retention of disciplinary

entries is the date of occurrence or the date of imposition of discipline.

In situations where severe instances of misbehavior have occurred it is not to be expected that principles of progressive discipline must be strictly followed. For instance, should an employee be found stealing, assaulting co-workers or supervisors, or persistently failing to follow instructions, it should not be expected that progressive disciplinary procedures would be implemented. To the contrary, a severe form of discipline would be the result of such behavior. This might well include discharge. Under the terms of the this Agreement, the Employer has explicitly reserved to itself the authority to deviate from the principles of progressive discipline in situations where in its opinion, the "infraction or violation merits the more severe action." In this situation the task before the Arbitrator is to determine whether or not the more severe action, discharge, is justified.

The State has made every effort to assist Mr. McKenna to improve his driving record. He was sent to special training courses in order to help him acquire the skills necessary to drive without incident or accident. He was given a complete physical examination at the State's expense to determine if there were reasons why his driving was marked by repeated accidents. The driving schools failed to permanently

alleviate the problems being experienced by Mr. McKenna. The results of the physical examination show no reason for the difficulties he has experienced in driving. These facts provide no reason to believe that should Mr. McKenna be restored to employment that his performance behind the wheel would improve.

Similarly, the record of discipline given to Mr. McKenna over the years has not sufficed to alter his behavior. Most likely, it is impossible for him to change it. The record can give no confidence whatsoever that should Mr. McKenna be reinstated that he would remain accident free.

In this situation it must be stressed that Mr. McKenna was cited for failure to maintain assured clear distance. He struck a motorcycle from the rear. While the behavior of the cyclist was unusual, even bizarre, it must be accommodated by other motorists. Mr. McKenna's accident, coming at the end of a long string of such incidents, gives the State ample grounds for discharge.

The situation posed in this dispute is a tragedy. A person of long service, who loves his job and who is a good employee, is discharged. Under the circumstances which give the Arbitrator absolutely no confidence that restoration to employment will result in an accident-free driving record no option other than discharge is available. To sanction the continued placement of the Grievant behind the wheel of a

State vehicle would be irresponsible in the face of the record in this situation.

Award: The grievance is denied.

Signed and dated this 15th day of January, 1992 at South Russell, OH.

Harry Graham

Harry Graham
Arbitrator