THE STATE OF OHIO AND OHIO
CIVIL SERVICE EMPLOYEES ASSOCIATION
VOLUNTARY LABOR ARBITRATION PROCEEDING

IN THE MATTER OF THE ARBITRATION BETWEEN

THE STATE OF OHIO, STATE HIGHWAY PATROL

-and-

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

GRIEVANT: Siegrun Fink (Discharge)

OCB CASE NO.: 15-03(91 07 24)69-01-07

#764

ARBITRATOR'S OPINION AND AWARD
Arbitrator: David M. Pincus
Date: May 8, 1992

APPEARANCES

For the Employer	
Samuel J. McConnell	Witness
Gary A. Galliway	Lieutenant-State Hwy. Patrol
Larry Booth	Police Officer
Anne Arena	Ohio State Hwy. Patrol
Dennis E. Zwayer	Lieutenant-State Hwy. Patrol
Karen E. Franz	Records Management Supervisor
Robert Thornton	Second Chair
Richard Corbin	Advocate
For the Union	
Siegrun Fink	Grievant
Heins N. Fink	Observer
Patrick A. Mayer	Staff Representative

INTRODUCTION

This is a proceeding under Article 25 - Grievance Procedure, Sections 25.02 and 25.03 entitled Grievance Steps and Arbitration Procedures of the Agreement between The State of Ohio, State Highway Patrol, hereinafter referred to as the Employer, and Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO hereinafter referred to as the Union for July 1, 1991 to and including December 31, 1992. (Joint Exhibit 1).

The arbitration hearing was held on December 20, 1991 at the Office of Collective Bargaining, Columbus, Ohio. The Parties had selected 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 written closing arguments. Both parties indicated they would submit written closing arguments.

ISSUE

Was Siegrun Fink, the Grievant discharged for just and proper cause? If not, what shall the remedy be?

PERTINENT CONTRACT PROVISIONS

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 nay 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. One or more verbal reprimand(s) (with appropriate notation in employee's file);

B. One or more written reprimand(s);

C. One or more suspension(s);

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.

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(Joint Exhibit 1, Pgs. 37-38)

Section 24.08 - 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, the Employer will meet and give serious consideration to modifying the contemplated disciplinary action.

(Joint Exhibit 1, Pg. 40)

CASE HISTORY

At the time of the disputed incident, Siegrun Fink, the Grievant, had been employed by the Ohio State Highway Patrol, the Employer, for approximately fifteen years. The Grievant was classified as a Mail Clerk Messenger. In this capacity, she primarily worked in the mail room sorting mail, preparing mail for delivery, and distributing mail to various mail boxes. A portion of her duties also dealt with making deliveries outside of the office; primarily to satellite offices and other State of Ohio agencies. These delivery assignments often became her primary

responsibility when she had to cover for the Delivery Worker I in the office. It should be noted the Grievant was covering for the Delivery Worker I, who had transferred out of the office, at the time of the disputed incident. Although delivery assignments constitute some percentage of her normal job assignments, she had been primarily making deliveries for six (6) weeks prior to the alleged incident.

The incident in question took place on June 17, 1991 while the Grievant was on duty and operating a State of Ohio automobile. On the previously mentioned date, the Grievant was assigned the responsibility of delivering and picking up agency mail at several locations throughout the City of Columbus. At approximately 2:45 p.m., the Grievant was involved in a traffic accident on I-670 and Rt. 315. From testimony and exhibits introduced at the hearing, the following sequence of events took place; for the most part the facts are not in dispute.

The Grievant admitted she bought a bottle of vodka during a lunch break on June 17, 1991. Work related stress, the delivery of heavy boxes, and the delivery location purportedly engendered this stressful emotional state.

Samuel J. McConnell, a civilian, reviewed the circumstances which led to an eventual accident. He was driving northbound on Rt. 315 as he observed the Grievant driving a blue Ford Escort, at a very slow pace and having tremendous difficulty changing lanes. The Grievant was driving so erratically that other drivers were slowing down to get around the Grievant's vehicle. The situation

became so hazardous that McConnell called 911 and informed them of the situation. As McConnell was using the car phone, the Grievant weaved, came to a sudden stop and struck McConnell's vehicle. (Joint Exhibit B).

Police Officer Larry Booth arrived on the scene of the accident and began his investigation by interviewing McConnell. After a few minutes, the Grievant exited her vehicle and staggered to his cruiser; she held herself upright by hanging onto the cruiser. Booth placed both individuals in the back of his cruiser and immediately noticed a strong odor of an alcoholic beverage. Both asked the Grievant if she had been drinking; she remarked in the negative. While asking the Grievant some questions, her answers were unclear and garbled. Booth observed the Grievant's eyes were bloodshot; and she had a strong odor of alcohol about her.

Based on these observations, Booth asked the Grievant to exit the cruiser. He administered the Horizontal Gaze Nystagmus Test and determined both eyes were jerky and lacked smooth pursuit. She also had nystagmus in both eyes prior to 45 degrees and had a noticeable jerking at maximum deviation (Joint Exhibit 9). Booth testified he was unable to administer any other tests (i.e. one legged stand and heel to toe) because the surface of the road was uneven and on an incline. Once the testing was completed, Booth placed the Grievant under formal arrest. While surveying the Grievant's vehicle, Booth found a hidden bottle of vodka and a glass partially filled with a clear alcoholic substance.

Booth then escorted the Grievant to headquarters; and led the Grievant to the Blood and Alcohol Content Room for additional testing. She refused to execute a one-legged stand test. She also failed a breathalyzer test after several unsuccessful attempts; this constituted a legal refusal (Joint Exhibit 9).

After conducting an independent administrative investigation, the Employer removed the Grievant. The particular charges dealt with operating a state owned vehicle while under the influence of alcohol and causing a non-injury crash (Joint Exhibit 4).

On July 24, 1991, the Grievant formally protested the removal. The grievance charged violations of Article 24 and all other related sections and articles (Joint Exhibit 2).

On August 2, 1991, a step 3 grievance meeting was held by the Parties. The meeting officer found just cause existed for termination of the Grievant. The discipline was commensurate with the offense based on the infraction and prior work record.

The Parties were unable to resolve the grievance. Neither Party raised substantive nor procedural arbitrability issues. The grievance is properly before the Arbitrator.

THE MERITS OF THE CASE

The Position of the Employer

The Employer opined the Grievant was removed for just cause. Regardless of the standard of proof employed, the Grievant knowingly violated the work rules by drinking while driving a State vehicle and causing an accident. The evidence and testimony strongly supported this conclusion. Several non-employee witnesses

provided credible testimony supporting the Employer's conclusion. The Grievant, herself, admitted she purchased a bottle of vodka and drank a portion prior to the accident.

The Grievant's actions were viewed as extremely onerous because the Employer, through its agents, had attempted to change the Grievant's behavior. Each counseling attempt took place on or about the time of a previous discipline related incident. Three different supervisory staff members urged the Grievant to seek help via the Employee Assistance Program (EAP). Within this context, the Grievant's assertion that she initially found out about the EAP after the June 17, 1991 incident seems incredulous. Also, these various efforts substantiate a progressive discipline orientation and several independent second chances.

Post discharge treatment for alcoholism engaged in by the Grievant was viewed as immaterial. This self-initiated treatment effort was not viewed as a useful mitigating factor. The Grievant's actions after discharge were viewed as immaterial.

The Grievant's post disciplinary record was viewed as an exaggerating factor supporting the severity of the imposed penalty. Three incidents took place prior to the one resulting in the contested discipline; with the two most recent incidents dealing with related alcohol misconduct. The most recent incident resulted in a thirty day suspension for reporting to work under the influence of alcohol (Joint Exhibit 3).

For a number of reasons, the Union's unequal treatment claim was challenged by the Employer. The present matter was

distinguished from these other cases. Some of the causes dealt with off-duty alcohol related misconduct. While other cases involved individuals without prior discipline for alcohol related activity; either on or off duty. Based on this analysis, the Employer alleged the facts surrounding the present matter stand alone in determining just cause.

The Employer urged the Arbitrator not to substitute his judgement for that of the Employer. The level of discipline administered was not excessive, arbitrary or unreasonable based on the triggering incident and the Grievant's prior work record. Emphasis was placed on the Grievant's behavior which created a public danger and had enormous liability ramifications for the State of Ohio. These negative outcomes would again become possible if the Grievant was given one more chance and returned to work; an undesirable outcome.

The Position of the Union

The Union argued it would not contest the Employer's determination that it had just cause to discipline the Grievant. This conclusion was primarily based on the Grievant's own admission regarding her actions on June 17, 1991. The imposed penalty, however, was contested by the Union. The removal was not commensurate with the offense because it was not part of a progressive process nor administered in an equal, non-disparate, manner.

The Union asserted the Grievant should be given an opportunity to rehabilitate, considering she has only recently realized that

she had a drinking problem. The Grievant strongly emphasized she knew nothing of the EAP until her Union Steward provided her with the information after the incident in dispute. She could not recall any of the conversations alluded to by the supervisory staff. Even if the supervisors did in fact make an offer, there was no nexus between the Grievant's attendance difficulties and her drinking problem; there was nothing the Grievant could be treated for. After the thirty day suspension, positive action was not engaged in by the Grievant because she was unaware of her alcoholism problem.

The Grievant had voluntarily initiated a rehabilitation program by seeking the assistance of her physician. He, in turn, referred the Grievant for alcoholic counseling and treatment as an outpatient (Union Exhibits 3, 4, and 6). The Grievant, at the hearing, acknowledged her improved state and willingness to return to work. The outpatient facility, moreover, submitted a letter indicating the Grievant now possessed the knowledge to lead a productive life of "quality sobriety." The accolade should sufficiently reinforce the Grievant's return to work, and minimize any fear on the part of the Employer that the Grievant would revert to her prior destructive ways.

The Union also argued that other similarly situated employees were treated differently, and less harshly, even though they were engaged in similar misconduct. Several of these employees consumed alcohol during working hours and misused State of Ohio vehicles. Many of these bargaining unit members, however, had been suspended

rather than removed from their positions. Some of these individuals had less seniority and poorer overall work records, and yet, they were not removed for similar types of misconduct.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony introduced at the hearing, it is clearly evident the Employer gathered substantial evidence or proof that the Grievant was guilty as charged. She knowingly violated the work rules by drinking while driving a State vehicle and causing an accident. Even though the Grievant initially denied her condition at the scene of the accident, observations made by Booth and McConnell strongly support the severely inebriated state the Grievant was in. Subsequent testimony, although limited by the Grievant's inability to properly complete a breathalyzer test, further reinforced the tragic and dangerous condition. At the hearing, the Grievant, herself, admitted she consumed alcohol while on duty which engendered a drunken state causing the accident.

The Union withdrew from the field with respect to the "guilt" issue, and focused its defense on whether the degree of discipline administered was reasonably related to the seriousness of the proven offense, and the record of the Grievant with respect to her service with the Employer. On both of these counts, and other related issues, the Union failed to properly establish the need to mitigate the administered penalty. The removal decision will not be reversed nor modified for the following reasons.

It becomes plainly obvious upon reviewing the record the Grievant has a severe drinking problem which, over a number of

years, she has failed to overcome. Her reliance on her husband's job difficulties, her brother-in-law's death and stress related to her job after the transfer of her partner, seem to be contrived attempts to rationalize her drinking behavior. She was unable to persuade this Arbitrator this array of events was linked to her drinking problems. The Grievant blamed everyone but herself for her difficulties which resulted in her eventful demise.

The Grievant's credibility was also drastically undercut when she refused to accurately characterize her disciplinary record. When asked whether she had any disciplinary incidents prior to the most recent rash of incidents, she responded in the negative. And yet, as early as May 20, 1987, she was issued a written reprimand for consuming alcohol during lunch and absenting herself for two hours and nine minutes without prior supervisory approval (Employer Exhibit 9). After remembering the incident, the Grievant responded in a curious way. She noted the incident took place before the Employer established an anti-drinking policy during lunch. A troubling response in light of the subsequent incidents and the Grievant's professed rehabilitation.

The Employer provided the Grievant with progressive discipline and tried to help the Grievant by suggesting EAP options. These options were suggested throughout the discipline trail. Although the Grievant denied becoming aware of the EAP option prior to the accident incident, the record does not support this allegation which further deteriorated the Grievant's credibility. She strongly rebuked the supervisory staff's testimony regarding their

discussions with her about EAP. And yet, documents introduced at the hearing support the supervisor's recollections; several administrative investigations document these discussions (Employer Exhibits 3 and 10). As such, behavioral change was attempted through the penalty administration proceess and direct counseling regarding EAP. No one can legitimately argue the Grievant was not given several second chances. The Employer's leniency and understanding should not be viewed as a form of inattention but a concerted effort at rehabilitation.

This Arbitrator, within the previously described context, is unwilling to mitigate the removal decision based upon the Grievant's post-discharge behavior. It is generally a well-accepted principle that an employee's post-discharge behavior has no bearing on whether the employer had just cause to support a discharge. Typically, the only evidence viewed as relevant, and subject to review, are the facts which the person making the decision to discharge had in his/her possession at the time the discipline decision was made.[1] To substitue my judgement for the Employer's without anything else in the record would be clearly outside the scope of my authority. This Arbitrator believes the disciplinary action was well-withing the range of reasonableness for such an offense in this particular case.

Claims of unequal treatment normally fall within two categories of behavior. The first claim category deals with the

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[1] Borden's Form Products; 3 LA 607 (Burke, 1945; Chrysler Corp., 40 LA 935 (Alexander, 1963); Du-Co Ceramics Co., 63 LA 355 (Wagner, 1974).

lax enforcement of rules where employees are disciplined for actions for which other employees have not been penalized. The second claim category of unequal treatment cases concerns situations where some employees have been penalized less severely than others without some business-related basis such as longer service or a better work record, for the same type of violation.

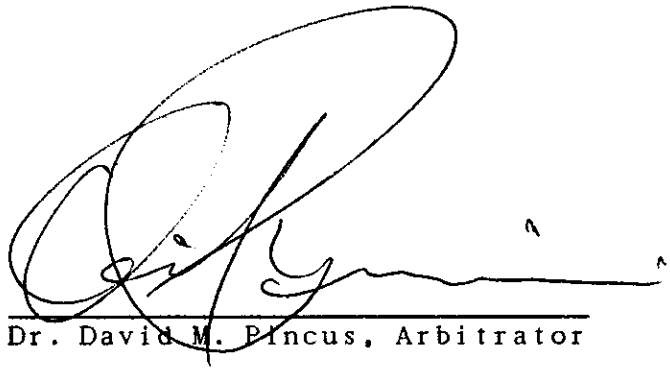
The litany of cases introduced by the Union failed to properly support an unequal treatment claim for either lax rule enforcement or inconsistent administration of penalties. It becomes quite dificult to evaluate the outcomes of the submitted cases and the present dispute because of the minimal information available for review purposes. One glaring difference appears obvious based upon my review of the cases. In some instances, the charges were a bit different and in virtually all respects, the Grievant's discipline trail differed dramatically from the submitted cases. Here, the Arbitrator is not dealing with an initial and isolated instance of alcohol-related on-duty misconduct. This most recent tragic incident represents the last of several prior alcohol-related violations. Each time the Grievant was counseled, provided with progressively more severe discipline and advised of EAP alternatives. None of the prior disciplinary outcomes were grieved including a thirty day suspension. In my mind, the Employer has been extremely patient based on the Grievant's disciplinary history. There is, indeed, a certain amount of mutual respect and admiration for the Grievant. But, there comes a point in time where the personal niceties cannot overcome derilict and

irresponsible behavior.

AWARD

The grievance is denied. The Employer has just and proper cause to terminate the Grievant.

5/8/92
Date



Dr. David M. Pincus, Arbitrator