#775

VOLUNTARY ARBITRATION PROCEEDINGS
CASE NO. 31-08(11-26-92)67-01-06 (ROGER NAPIER)

THE STATE OF OHIO The Employer -and- OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION, LOCAL 11 A.F.S.C.M.E. AFL-CIO The Union	:	OPINION AND AWARD

APPEARANCES

For the Employer:

Carl C. Best, Advocate
Dick Daubenmire, Second Chair Advocate
Dennis Duncan, Witness
Ron Hurtt, Witness
James Fife, Witness
Carol Starner, Observer

For the Union:

Michael Muenchen, Advocate
Roger Napier, Grievant
Maultie Napier, Witness
Earl Lamb, Witness
Robert Redman, Witness
Jeff Smith, Witness
William Fair, Witness

MARVIN J. FELDMAN
Attorney-Arbitrator
1104 The Superior Building
815 Superior Avenue, N.E.
Cleveland, Ohio 44114
216/781-6100

I. SUBMISSION

This matter came before this arbitrator pursuant to the terms of the collective bargaining agreement by and between the parties, the parties having failed resolve of this matter prior to the arbitral proceedings. The hearing in this cause was scheduled and conducted on May 4, 1992, at the conference facility of the employer in Columbus, Ohio, whereat the parties presented their evidence in both witness and document form. The parties stipulated and agreed that this matter was properly before the arbitrator; that the witnesses should be sworn; that the witnesses should be sequestered and that post hearing briefs would be filed. It was upon the evidence and argument that this matter was heard and submitted and that this opinion and award was thereafter rendered.

II. STATEMENT OF FACTS

The grievant in this particular matter had two years of seniority at the time of the instant incident of termination. He was employed as a Highway Maintenance Worker II. The duties of that particular classification revealed that the individual must have a valid Ohio driver's license; that the individual will be scheduled to operate motorized equipment, snow plow, mow grass, spread salt and all other job related duties concerning the maintenance of federal and state highways. During the course of his duties the grievant received two employee performance reviews. One was for the period of May 30, 1989 to May 30, 1990 and one was for the period of May 30, 1990 to May 30, 1991. The expectation ratings of the grievant were met on those performance reviews although the later employee performance review revealed lower marks.

On August 18, 1991, the grievant received a citation for driving while under the influence of alcohol. That activity occurred in the grievant's private vehicle and he was not involved on state duty at that particular time. The grievant immediately informed his employer. The court, at hearing, relevant to that matter, suspended his driver's license, but provided him a modification order which revealed that the grievant was granted limited driving privileges to operate a motor vehicle only during the period of his employment hours with and for the Ohio Department of Transportation. That order of the court was dated October 3, 1991. It was determined on November 1, 1991, that as a matter of fact, the order of the trial court was invalid. The following memo was written concerning that particular matter on November 1, 1991 and a copy of it was distributed to the grievant. It revealed the following:

> "Please be advised that Warren County employee Roger Napier is suspended immediately from driving all motorized vehicles. The Modification Order from the Lebanon Municipal Court submitted by Mr. Napier is not sufficient to allow him to drive, per Central Office Safety, due to the fact that he is in violation of the twelve point suspension again. The Bureau of Motor Vehicles requires that Mr. Napier take a remedial driving course, show proof of insurance, and pay a one hundred dollar reinstatement fee before driving privileges can be restored thru a Modification Order. Mr. Napier and his supervisors were notified on 10-31-91 of this information. Thank you for your cooperation regarding this matter."

During the period from the date of the receipt of the citation, August 18, 1991, to the time of November 1, 1991, the grievant placed himself in a dry out center because of his alcoholism. In that regard it was determined from the evidence that the grievant entered into a

rehabilitation center where he remained for ten days, eight days of which were scheduled work days. He had four and a half days of leave available to him and he was therefore charged with at least three days of unauthorized absence.

A hearing was had in this particular matter under Directive A-601, effective December 10, 1990. The grievant was charged with two violations under that Directive. The first violation charged was Rule 24 which rule revealed that there can be a removal from employment for unauthorized absence for three or more consecutive days. The grievant was also charged with a violation of Rule 35 which stated that actions that could compromise or impair the ability of the employee to effectively carry out his duties as a public employee could be cause for discipline of a severe nature. As a result of the grievant's failure to obtain a valid driving permit and as a result of the unauthorized absence, the grievant received a termination order dated November 5, 1991, for the violation of rule charges. It stated as follows:

> "This letter is to inform you that you are hereby removed from employment as a Highway Maintenance Worker II, assigned to the Warren County Garage effective November 15, 1991.
>
> After reviewing the recommendation of the A-602 Impartial Administrator and others, it has been determined that just cause exists for this action.
>
> You are found to have violated Directive A-601,
>
> Items 24 - Unauthorized absence for three (3) or more consecutive days.
>
> 35 - Other actions that could compromise or impair the ability of the employee to effectively carry out his duties as a public employee."

To that, a protest was filed and it stated as follows:

> "Directive A-602 Items 24-35
>
> Article 9 Article 2 24.08
> Article 29.03 29.04 24.03 24.02 24.03 and any other related articles
>
> Statement of facts (who, what, where, when?): On Nov 13, 1991 The grievant received notification of dismissal effective Nov. 15, 1991 for the alleged violation of Directive A-601 Item 24-Item 35. This charge is not true, no proof has been obtained for just cause."

The employer had allowed other employees similarly situated to work in a somewhat reduced capacity for a period of up to thirty days from the date of the court order disallowing that person to drive, if in fact there can be obtained a modified award so as to cure the defect within that period of time so as to allow the grievant to drive at work in the furtherance of his duties. It might be noted in the instant matter that the DWI occurred on August 18; that the court date was October 3; that the termination from employment occurred on November 5, and that the grievance was filed on November 18, and received in the Department of Transportation deputy director's office for labor relations on November 26, 1991.

There were many allegations by the union of alleged employer improprieties that occurred in this particular matter. They were raised by the union for the purpose of defending the termination of the grievant. I will attempt to relate them item by item. The indication of them will not be in chronological order or in order of their importance, but they merely are an inventory of everything raised by the

union in this particular matter.

Article 9 of the contract of collective bargaining established an Employee Assistance Program and the union and the employer agreed in that contract to continue the program as previously existed and to work jointly to promote the program. Article 9 stated that that program was strictly voluntary. The union further stated that in a joint labor manager policy statement of April 17, 1984, the State of Ohio recognized the following stated principal:

> "The following principles are included in this policy:
>
> 1. It is recognized that alcoholism, drug abuse, family or marital distress, social and relationship problems, mental or emotional illness, legal problems, financial problems, and related environmental conditions are illnesses or problems that can be successfully treated or resolved."

Based upon those facts, the union argued that the three days of unauthorized leave for one involved in rehabilitation purposes should not be assigned as an unauthorized absence for a specification of a termination order, but that leave without pay should have been authorized under such circumstance pursuant to such contract language. The union as its further predicate in that particular argument cited Section 31.01 of the contract at Section C for such request. That section, in pertinent part, revealed the following:

> "C. For an extended illness up to one (1) year, if an employee has exhausted all other paid leave. The employee shall provide periodic,

written verification by a medical doctor showing the diagnosis, prognosis and expected duration of the illness. Prior to requesting an extended illness leave, the employee shall inform the Employer in writing of the nature of the illness and estimated length of time needed for leave, with written verification by a medical doctor. If the Employer questions the employee's ability to perform his/her regularly assigned duties, the Employer may require a decision from an impartial medical doctor paid by the Employer as to the employee's ability to return to work. If the employee is determined to be physically capable to return to work, the employee may be terminated if he/she refuses to return to work."

It might be further noted that the grievant participated in his own self help rehabilitation program on 9/5, 9/10, 9/17, 9/26, 10/8, 10/10, 10/15, 10/17, 10/22, 10/24, 10/31, 11/5, 11/19, 11/23, 11/25 and 12/5 with a group called Professional Counseling Associates.

The union further argued that certain individuals were given more than thirty days to present their order of modification to the employer, all without discipline, as the grievant received. In that regard the union produced a listing of six individuals other than the grievant who were so handled. In fact, the evidence revealed that in only one case did such occurrence of no discipline happen and the employer indicated and stated that there was error on the part of the employer in that failure to discipline. In other words, the employer could not explain the lack of discipline activity in that one case while the others were handled within the thirty day period.

The union further argued that the grievant in this particular case did not receive any progressive discipline. The union argued that the

instant matter triggered a discharge immediately rather than activity under Section 24.02 of the contract. That particular section stated as follows:

> "§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."

Further, the union presented several arguments under Section 24.04 of the contract. That section stated as follows:

> "§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. The employee may waive this meeting, which shall be scheduled no earlier than three (3) days following the notification to the employee. 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. When the pre-disciplinary notice is sent, 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 inimposing 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 ask questions, 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."

In that particular regard the union maintained that a second pre-disciplinary hearing was scheduled but that the employer never rescheduled it after it was continued. The union further suggested that the employer was "hiding" some evidence by not revealing it to the union as the union deemed it necessary under Section 24.04.

The union further indicated and stated that the employer discriminated against the grievant because of his illness and handicap of alcoholism. Article 2 stated as follows:

"ARTICLE 2 - NON-DISCRIMINATION

§2.01 - Non-Discrimination

Neither the Employer nor the Union shall discriminate in a way inconsistent with the laws of the United States or the State of Ohio or Executive Order 83-64 of the State of Ohio on the basis of race, sex, creed, color, religion, age, national origin, political affiliation, handicap or sexual orientation. Nor shall either party discriminate on the basis of family relationship. The Employer shall prohibit sexual harassment and

take action to eliminate sexual harassment in accordance with Executive Order 87-30, Section 4112 of the Ohio Revised Code, and Section 703 of Title VII of the Civil Rights Act of 1964 (as amended)."

The union further argued that under Section 24.08 of the contract that the employer could have delayed its discipline but it chose not to, contrary to contract. That particular agreement clause that was relied upon was Section 24.08, which stated as follows:

"§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. Upon successful completion of the program, the Employer will meet and give serious consideration to modifying the contemplated disciplinary action."

The union also stated that the grievant was intimidated by supervision and cited Section 24.03 of the contract in that regard. The contract stated as follows:

"§24.03 - Supervisory Intimidation

An Employer representative shall not use the knowledge of an event giving rise to the imposition of discipline to intimidate, harass or coerce an employee.

In those instances where an employee believes this section has been violated, he/she may file a grievance, including an anonymous grievance filed by and processed by the Union in which the employee's name shall not be disclosed to the Employer representative allegedly violating this section, unless the Employer determines that the Employer representative is to be disciplined.

The Employer reserves the right to reassign or discipline employer representatives who violate this section.

Knowingly making a false statement alleging patient abuse when the statement is made with the purpose of incriminating another will subject the person making such an allegation to possible disciplinary action."

From all of that, the union argued that there was lack of just cause shown. The contract at Section 24.01 stated:

"§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."

It was upon those multitudes of allegations that this matter rose to arbitration for opinion and award.

III. OPINION AND DISCUSSION

Let us for a moment review this matter in broad basic terms. The grievant who had a mere two years of seniority at the facility was engaged in a classification of work that involved his ability and need to drive heavy duty vehicles in a workload assigned to him on the state and federal highways within his work jurisdiction. That availability and scheduling of work was not novel to the grievant but was expected of him and by him in the furtherance of his classified duties which he knew full well at the time he entered into that classified occupation at the

facility.

Two things occurred to defeat the ability of the grievant to accomplish that workload. Firstly, the grievant became involved in alcohol abuse and ended up with a driving while intoxicated ticketing adventure in the jurisdiction of the Lebanon, Ohio, Municipal Court. The second item that occurred is that the grievant decided on his own to enter a rehabilitation center at a time when he had not yet accumulated sufficient sick leave to cover all of the patient days necessary in that center. The grievant was some three days without sufficient leave and those three days form the predicate for the unauthorized leave charge. Thus, both of those activities namely the unauthorized leave of three days of more and the inability to do the work as scheduled triggered activity by the employer under Directive A-601. The grievant was found guilty of two rule violations and then thereafter terminated.

Let me indicate at the outset that I found no supervisory intimidation as alleged by the union. That allegation must be held for naught without discussion. Simply put, the activity of supervisory intimidation did not even appear in the record of evidence made in this particular matter and it must therefore be dismissed out of hand.

The union raised the issue of unevenhanded treatment. In that regard the union placed into the record a listing of some six other employees who were allegedly given more than thirty days after their driving license was suspended without discipline in order to receive a

modification order so that they thereafter could drive the employer's vehicles as assigned. The evidence in fact did show that there was only one instance of such occurrence and the employer stated that it was in error. In the listing provided by the union therefore, the error was shown and nothing else. It is true that lack of evenhanded treatment is sufficient ground to set aside discipline. However, the evidence in this case falls far short of proving that the grievant in any way was discriminated against by the employer when others allegedly received a "break" and the grievant did not. That defense, therefore, must be held for naught.

When the grievant in this particular matter obtained the driving while intoxicated charge, the grievant almost immediately thereafter entered a rehabilitation center. The union alleged that alcohol abuse had been previously recognized as a disease. The union has further alleged that the contract recognized an Employee Assistance Program. There is no evidence, however, in the record that the grievant ever obtained permission of the employer to enter the program under the auspices of the employer nor is there evidence in the record to show that the grievant became involved in the program before serious events triggering his discipline was involved. Nor is there any evidence in the record which revealed that the grievant ever told the employer that he was an alcoholic and needed assistance. In other words, the grievant became involved in the program after the fact of the driving while intoxicated and not before and never sought employer or union assistance in that regard.

Further, the Employee Assistance Program at the facility is a voluntary program. Neither the union nor the employer denied the grievant any of his Employee Assistant Program rights that the grievant may have had under Article 9. The employee at his whim cannot use Article 9 to obtain relief for alcohol or drug treatment unless that employee obtains permission from the company to participate in that program and then only on a timely basis. Participating after the fact or participating outside of the program does not trigger the automatic availability of the program to that employee under the contract at his whim. Nor can the employer approach the employee. The contractual clause says that the employer or its representatives shall not direct an employee to participate and that such participation shall be strictly voluntary. The evidence does not reveal that the employee ever requested permission for an Employee Assistance Program activity under the contract prior to the DWI charge.

The union argued that the grievant was not given a second pre-disicipline hearing. The contract only demands one such pre-discipline hearing and the grievant received it. That defense therefore must be held for naught. In that regard the union also indicated and stated that the employer must provide additional testimony or evidence to the union when and if it becomes available. In the matter at hand, the employer did provide additional evidence to the union when it revealed to the union/grievant on November 1, that as a matter of fact, that the modification order of the Lebanon, Ohio, Municipal Court was not sufficient to trigger a modification order in order to allow the grievant to drive. That defense therefore of the union must also be

held for naught.

It might be noted that another defense raised by the union was that the employer did not participate in progressive corrective discipline in its meting out of discipline to the grievant in that the employer discharged the grievant at the first indication of substandard conduct. Not all acts of discipline trigger progressive corrective activity on the part of the employer. Let us for a moment look at each of these items. The grievant took three days of unauthorized leave.

The second advent of substandard conduct that the grievant was engaged in, was his inability to obtain a timely modification order from the Bureau of Motor Vehicles to allow him to drive so that he could accomplish his work duties at the facility. When an individual who was classified to accomplish certain work duties at the facility is unable to perform those duties because of his own activity then in that event that particular individual has created a gross act of substandard conduct which could trigger a discharge. In other words, the inability of an individual to accomplish his scheduled duties for a period of more than thirty days because of his own foolish activity is sufficient reason to trigger a just cause discharge. In that event, progressive discipline is unnecessary especially where the individual is a short time employee such as the grievant in this particular matter. The inability of the grievant to drive and carry out the duties, along with the three days of unauthorized leave is and was sufficient to trigger an immediate discharge under the facts herein without the intervention of progressive discipline.

The union also attempted to defend this matter on the basis that there was some discriminatory conduct shown to the grievant because he was suffering from alcoholism which condition was recognized as a disease. The fact of the matter is that the grievant was not terminated because of his alcoholism. He was terminated because of his inability to perform his workload as scheduled for which he was hired and because he also took unauthorized leave. An employer must make a reasonable accommodation to the employee because of the employee's disability. In this particular facility thirty days was determined to be a reasonable period of accommodation. The grievant was unable to obtain a Bureau of Motor Vehicle operating permit within the thirty day period. As a matter of fact, the employer waited some forty-three days before disciplining and/or discharge finally took place. It is apparent that there was an accommodation made for this grievant and quite frankly there is simply no discrimination or handicap harassment that can be shown from the evidence in this record.

From all of the evidence, it is apparent that the grievant was involved in severe substandard conduct in that he was employed as a person who needed a chauffeur's license and he was involved personally in activity which suspended that license for more than a period of thirty days. That is gross substandard conduct and sufficient just cause to terminate especially in light of Directive A-601 which at rule violation number 35 revealed that actions that could compromise or impair the ability of the employee to properly carry out his duties as a public employee is sufficient reason for appropriate discipline under the circumstances of that event. While the grievant was hired under a

similar impairment of a driving while intoxicated matter, discipline cannot and was not meted out for a second violation. This employer did not discipline for this matter on that basis but merely on the basis that the grievant could not carry out his assigned duties for a period of more than thirty days especially when compiled with three days of unauthorized leave.

The contract does not aid or assist the union in any of the contractual defenses raised. It might be noted that the final order from the Bureau of Motor Vehicles was finally mailed under date of December 27, 1991, certainly more than the thirty days allowed others at the same facility for the same event. (See Exhibit "1", attached hereto and under part hereof).

The grievant, however, does have some serious saving and mitigating behavior. His efficiency reports were not below expectation ratings for a period of two years. Further, his tenacity to become rehabilitated should be rewarded. He attended twelve sessions of rehabilitation and spent ten days in the rehabilitation center on a voluntary basis. His mother assisted him in that stay. Perhaps on the basis of that, the grievant deserves a second chance. Arbitrators are not prone to order their own industrial justice. There must be good reason in the record to modify. Such is the case in the instant matter. The record revealed some intense desire to rehabilitate. The record also revealed an employee who "met expectations" in his workload when he did work. Based upon those two factors, the grievant deserves a modification of termination.

IV. AWARD

Provided the grievant has a valid modification order, the grievant shall be reinstated July 1, 1992, subject to the terms of the contract, without back pay but without loss of seniority. He shall receive a last chance to preserve and protect his employment. The grievant shall provide to his employer on a weekly basis for a period of six months commencing July 10, 1992, proof of attendance at some recognized alcoholic rehabilitation session for at least three times per week. Failure to attend or further substandard conduct of any nature may trigger an immediate just cause discharge by the employer.

MARVIN J. FELDMAN, Arbitrator

Made and entered
this 5th day
of June, 1992.

OHIO
DEPARTMENT OF HIGHWAY SAFETY
BUREAU OF MOTOR VEHICLES

E# 1

P.O. BOX 16520 COLUMBUS, OHIO 43266-0020 ■ BUREAU OFFICE HOURS 8:00 a.m. to 4:45 p.m. M - F
GENERAL INFORMATION (614) 752-7500 7:00 a.m. to 6:00 p.m. M-F

GEORGE V. VOINOVICH, GOVERNOR | CHARLES D. SHIPLEY, DIRECTOR | MITCHELL J. BROWN, REGISTRAR

December 27, 1991

ROGER D NAPIER
9156 A CLEARCREEK
SPRINGBORO OH 45066

ALL CASES CLEARED

BMV CASE NUMBER	INSURANCE COMPANY
91-12658	PROGRESSIVE
POLICY NUMBER	**EFFECTIVE DATE**
0698247	02-02-89

This letter acknowledges receipt of the financial responsibility filing and appropriate reinstatement fee(s) made on your behalf for the above case.

1. A. ☒ You have valid driving privileges.

   B. ☒ You have valid registration privileges.

CARRY THIS LETTER FOR 15 DAYS WHILE OUR COMPUTER RECORDS ARE UPDATED.

2. You DO NOT have a valid driver status at this time:

   A. ☐ _____ Wait **15 days** before attempting to apply for your appropriate license. **THIS LETTER WILL SERVE AS YOUR PERMIT to drive for a period not to exceed 30 days** from the date of this letter.

   B. ☐ Present the enclosed examiners results (DL-1 Form) to your Deputy Registrar for further instructions.

   C. ☒ According to our records, you REMAIN UNDER A MODIFIED COURT SUSPENSION UNTIL 08-22-96

3. OTHER SEE M.O. DRIVE ACCORDINGLY

Mitchell J. Brown

MITCHELL J. BROWN
REGISTRAR
MJB:KMN:dw

OHIO BUREAU OF MOTOR VEHICLES
Attention: Drivers - Point Section
P.O. Box 16520
Columbus, Ohio 43266-0020

NOTE TO LAW ENFORCEMENT OFFICIALS: If 1-A or 2-A above is checked, this individual has valid driving privileges. This letter is issued as permit to drive while computer records are updated. If you have any reason to doubt the authenticity of this document, please contact the Bureau number listed above or through normal telex procedures.

BMV 2827 3/91

EXHIBIT "1" Page 1 of 1 Page