

#810

ARBITRATION DECISION

August 17, 1992

In the Matter of:

State of Ohio, Department)	
of Transportation)	Grievance No.
)	31-04(12-30-91)49-01-06
and)	Dennis Fields,
)	Grievant
Ohio Civil Service Employees)	
Association, Local 11, AFSCME)	

APPEARANCES

For the Union:

Steven W. Lieber, Staff Representative
Dennis Fields, Grievant
Steve Vendely, Steward

For the State:

Bill Tallberg, Labor Relations Officer
Paul Kirschner, Labor Relations Specialist, Office of
Collective Bargaining
Donald Campbell, Superintendent

Arbitrator:

Nels E. Nelson

BACKGROUND

The grievant, Dennis Fields, was hired by the Ohio Department of Transportation on April 7, 1986 as a highway maintenance worker 2 and assigned to Ashtabula County in district 4. The duties of the job included cutting grass and brush; sealing pavement; driving snow plows; operating loaders, tractors, and other equipment; doing minor repairs; and performing general cleaning. One of the requirements for the job was a valid Ohio driver's license.

The events giving rise to the grievant's removal began on March 25, 1988. On that date the grievant was involved in an automobile accident while driving his personal vehicle. The accident led to the grievant being held financially responsible for the damages he had caused. The grievant was also required to have insurance as a condition of having a driver's license.

On October 3, 1990 the grievant's license was suspended when he failed to continue to meet his financial responsibilities from his earlier accident. The grievant informed Don Campbell, the Ashtabula County Superintendent, who assigned the grievant to work which did not require a driver's license. The grievant's license was restored on March 22, 1991 after he resumed paying damages from the accident and obtained proof of financial responsibility. At that time the grievant was assigned to duties that involved operating state vehicles.

The grievant's driving privileges were suspended again

on June 10, 1991. The suspension was the result of the grievant's failure to continue payments for the March 25, 1988 accident. The grievant was notified of the suspension by a certified letter from the Bureau of Motor Vehicles which was received by his mother on July 5, 1991. The grievant, however, did not inform Campbell that his driving privileges were suspended and he continued to drive state vehicles.

On September 21, 1991 the grievant told Campbell that he had been arrested for speeding. Campbell asked Jack Drowy, the district 4 health and safety supervisor, to investigate. Drowy got a copy of the grievant's driving record from the Bureau of Motor Vehicles. It indicated that the grievant's license had been suspended on June 10, 1991 and that on September 21, 1991 he had been arrested for driving while his license was suspended.

On October 15, 1991 Campbell requested disciplinary action. He charged that the grievant violated the following items of Directive No. A-601: 1(b) neglect of duty; 2(c) - failure to follow policies of the director, districts, or offices; and 35 - actions that could compromise or impair the ability of the employee to effectively carry out his/her duties as a public employee. The pre-disciplinary hearing was held on October 31, 1991 and on December 13, 1991 the grievant was removed by Jerry Wray, the director of ODOT.

As a result the grievant filed a grievance on December 23, 1991. It charges that the state violated sections 24.01, 24.02, 24.05, and 24.08 of Article 24 of the collective

bargaining agreement. The grievance asks that the grievant be reinstated as a highway maintenance worker. It was denied at the third level of the grievance procedure on March 26, 1992.

The dispute was appealed to arbitration. An arbitration hearing was scheduled for June 18, 1992. On that date the grievant did not appear at the district office in Ravenna where the hearing was scheduled. The union stated that the grievant was unable to get to Ravenna because he had no driver's license and could not arrange transportation. The Arbitrator granted a continuance and the hearing was rescheduled for July 9, 1992 at the Ashtabula County garage.

The hearing went forward as scheduled on that date. The parties stipulated that the grievance was properly before the Arbitrator. Both sides presented testimony and evidence in support of their positions and made closing statements. The record was closed on July 17, 1992 upon the receipt of documents that the parties had agreed to submit after the hearing.

ISSUE

The issue as agreed to by the parties is as follows:

Was the grievant, Dennis Fields, discharged for just cause? If not, what shall be the remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE 17 - PROMOTIONS AND TRANSFERS

* * *

Section 17.09 - Demotions

Job movements to a lower pay range are demotions.

Employee requested demotions shall only be done with the approval of the Employer.

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.

* * *

Section 24.02 - Progressive Discipline

The Employer will follow the principles of progressive discipline. 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.

* * *

Section 24.05 - Imposition of Discipline

The Agency Head or, in the absence of the Agency Head, the Acting Agency Head shall make a final decision on the recommended disciplinary action ...

* * *

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

* * *

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

STATE POSITION

The state argues that there is just cause for the grievant's removal. It points out that a highway maintenance worker 2 must have a valid driver's license. The state maintains that when the grievant was hired he was made aware of the fact that a driver's license was required and that he had one when he was hired. It emphasizes that the position description for highway maintenance worker 2 indicates that 85% of the job duties require a driver's license.

The state contends that the grievant's lack of a license would create a hardship. It notes that Campbell testified that the average snowfall in Ashtabula County is 90" to 100" and that snowfall in recent years has been around 200". The state contends that everyone must be able to drive a snowplow during extended winter storms.

The state asserts that the grievant cannot return to work as a highway maintenance worker 2. It claims that as of April 1, 1992 federal law requires individuals who operate a vehicle with a gross weight in excess of 26,000 pounds to have a commercial driver's license. The state points out that Drowy testified that the grievant would be unable to get a commercial driver's license because his driving privileges had been suspended in the last two years.

The state indicates that it tried to accommodate the grievant when his license was suspended on October 3, 1990. It states that he was assigned to assist the route marker because the job did not require a driver's license. The

state claims that it allowed the grievant time to get his license restored when he said he needed a little more time.

The state argues that the grievant cannot be demoted to highway maintenance worker 1 which does not involve driving. It notes that Campbell testified that he cannot move employees from one classification to another classification. The state stresses that in any event it needs all the drivers it can get to plow snow and to salt roads during the winter.

The state charges that the grievant failed to follow Directive No. A-209, Section C(1)(a) which requires an employee to inform his or her supervisor if his or her driver's license is suspended. It points out that the grievant's license was suspended June 10, 1991 but he did not inform Campbell or any other supervisor. The state emphasizes that as a result he drove state vehicles from June 10, 1991 to October 1, 1991 without a valid driver's license.

The state rejects the union's contention that the grievant should be returned to work because he enrolled in an employee assistance program. It points out that Drowy, who is the employee assistance program coordinator in district 4, acknowledges that a union steward called him to see if the grievant could get in the employee assistance program but stresses that discipline had already started and that the grievant needed to make personal contact. The state further emphasizes that there is no connection between the employee assistance program and the fact that the grievant did not

have a valid driver's license.

The state maintains that no weight should be attached to a draft letter indicating that the grievant would be suspended for 30 days rather than removed. It claims that the draft is unsigned and is an internal document that the union got in error. The state stresses that under Directive A - 601(g); Directive A-602, item 11; and Article 24, Section 24.05 of the collective bargaining agreement only the director of ODOT can discipline employees.

The state asks the Arbitrator to deny the grievance in its entirety. It maintains that the grievant's own actions resulted in losing his license and his violation of the directives and policies. The state claims that the employee-employer relationship is damaged beyond repair.

UNION POSITION

The union argues that there is not just cause to remove the grievant. It maintains that the state failed to use progressive discipline as required by Section 24.02 of Article 24 and that the penalty was not commensurate with the offense in violation of Section 24.05 of Article 24. The union points out that the grievant had received only two written reprimands prior to his removal. It contends that the grievant should have received a lengthy suspension rather than being removed.

The union stresses that the recommended discipline to be imposed on the grievant was not removal. It points out that on October 30, 1991 David R. Dreger, the district deputy

director, recommended a 30-day suspension to Joe Jacobs, the labor relations officer. The union further notes that on December 6, 1991 a letter was prepared for Wray's signature that would have imposed a 30-day suspension. The union acknowledges that Wray never signed the letter but instead removed the grievant on December 13, 1991 for not having a driver's license.

The union charges that the state failed to consider mitigating and extenuating circumstances as required by Article 24, Section 24.05. It notes that the grievant testified that he was a nervous wreck due to problems at home and at work as well as financial problems. The union claims the grievant was treated by Dr. T. Cassidy, a psychologist, on October 15, 1991 and on five additional occasions.

The union accuses the state of violating Article 24, Section 24.08 by failing to consider the grievant's enrollment in the employee assistance program. It points out that the grievant stated that he saw a poster about the program and called the telephone number on the poster. The union maintains that since the grievant was removed and lost his health insurance, help is no longer available to him.

The union contends that the grievant should have been demoted to highway maintenance worker 1 which does not involve driving rather than being removed. It maintains that this could have been done on a temporary basis under Article 17, Section 17.09 of the contract. The union claims that this would have allowed the grievant to continue to work and

possibly to obtain a valid driver's license.

The union asks the Arbitrator to sustain the grievance. It requests that the removal be reduced to a suspension. The union further states that the Arbitrator should provide whatever additional remedy he deems appropriate.

ANALYSIS

The issue before the Arbitrator is whether there was just cause for the grievant's removal. The removal was based upon two charges. First, on June 10, 1991 the grievant's license was suspended and he failed to inform a supervisor about the suspension in violation of Directive No. A - 209, Section C(1)(a). The result was that the grievant drove state vehicles from June 10, 1991 to October 1, 1991 without a valid driver's license. Second, the grievant even up to the time of the arbitration hearing did not have a valid driver's license and as a result was unable to perform his job as highway maintenance worker 2. Furthermore, as of April 1, 1992 the grievant was required to have a commercial driver's license which he would be unable to obtain because his driving privileges had been suspended in the previous two years.

The Arbitrator believes that the testimony and evidence clearly supports the first charge. The Ohio Bureau of Motor Vehicles sent the grievant a certified letter informing him that his driving privileges were suspended and directing him to surrender his license. The letter was signed for by the grievant's mother. Although the grievant testified that he

"might have been aware his license was under suspension" and that he believed that his mother would take care of it, he is responsible for knowing the status of his driver's license.

The grievant's failure to inform a supervisor that his license was suspended is grounds for discipline. Directive A-209, Section C(1)(a) states:

1. No employee of the Ohio Department of Transportation shall operate any motor vehicle or equipment owned, leased or rented by the Ohio Department of Transportation anywhere unless such employee is legally licensed to operate that motor vehicle or equipment on public roads (i.e., possess a valid driver license, commercial driver license with appropriate endorsement, etc.).
 - a. All employees who operate any motor vehicle or equipment shall immediately inform their supervisor if any license or endorsement is revoked, suspended, expired or invalid for any reason.

However, even without this rule commonsense dictates that the grievant should know that he cannot drive a state vehicle without a valid license and that to do so is a serious matter warranting discipline.

The second charge against the grievant is that he was not able to perform his job. The grievant was hired as a highway maintenance worker 2 and held that position at the time of his removal. When he was hired for the position, a valid driver's license was required as it was at the time he was removed. Furthermore, it is not a case where driving is an occasional part of the job. In the winter in particular it is essential that employees be able to drive the trucks used to plow and salt the roads.

The Arbitrator should note that the grievant's situation

is not one where he is apt to be without a license for a short time. His driving privileges were suspended on June 11, 1991 yet at the time of the arbitration hearing on July 7, 1992 the grievant still did not have driving privileges. Furthermore, Drowy testified that as of April 1, 1992 a highway maintenance worker 2 was required by federal law to have a commercial driver's license which the grievant would not be able to obtain because his license had been suspended within the previous two years.

The Arbitrator finds no basis for the union's suggestion that the grievant should have been demoted to highway maintenance worker 1 rather than removed. Article 17, Section 17.09 states that "employee requested demotions shall be done with the approval of the Employer." In the instant case there is no evidence that the grievant requested a demotion to highway maintenance worker 1 or that the employer would have approved such a request since Campbell testified that there was no need for an employee who could not drive a snowplow.

The Arbitrator rejects the union's charge that the state failed to use progressive discipline as required by Article 24, Section 24.02 and that the penalty was not commensurate with the offense as required by Section 24.05 of Article 24. As indicated above, the grievant's failure to inform a supervisor that his driver's license was suspended and his driving of state vehicles for nearly four months without a valid license is a very serious matter. Perhaps more

important, to the extent that the grievant's removal can be viewed as having a non-disciplinary aspect based upon the fact that he cannot perform his job without a driver's license, progressive discipline and penalties commensurate with an offense are not applicable.

The union argued that the memorandum from Dreger to Jacobs suggesting a 30-day suspension and the letter drafted for Wray imposing a 30-day suspension, indicate that removal is too severe. The memorandum and the draft letter are both internal state documents which the union was given in error. While they may suggest that some members of the management may have felt that a long suspension was appropriate, it is clear under Article 24, Section 24.05 of the collective bargaining agreement as well as Directive Nos. A - 601 and A - 602, that the final decision regarding discipline rests with the director. The director may well have had to consider factors other than the factors considered by those who wrote the memorandum and drafted the letter. In any event, the grievant's removal is ultimately governed by the just cause standard of the contract rather than the varying opinions of management officials who may or may not have had all the facts.

The union argued that the grievant should be reinstated because the state failed to consider the mitigating circumstances. The grievant testified that at the time prior to his removal he was a "nervous wreck" because of problems at work and at home and because of financial difficulties.

He indicated that he saw a psychologist five times beginning October 15, 1991.

The Arbitrator does not believe that this can be the basis for reinstating the grievant. He does not see the relationship between these problems in October, 1991 and the grievant's loss of his license in June, 1991 and his failure to inform the state about his loss of his driving privileges. Furthermore, as emphasized above, the grievant cannot perform his job without a valid driver's license regardless of the reason for not having a license.

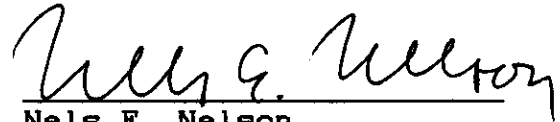
The union asserted that the grievant must be returned to work because he enrolled in the employee assistance program. The Arbitrator must disagree. Drowy testified that a union steward inquired about the grievant enrolling in the program but that the grievant never contacted him as is required so that it is unclear whether he did enroll. In addition, the inquiry about the employee assistance program came after the state discovered that the grievant had been driving state vehicles with a suspended license and that disciplinary action would be taken.

The Arbitrator concludes that the grievant's removal meets the just cause standard. The grievant was guilty of a very serious error in judgment on June 11, 1991 when he failed to inform a supervisor that he had lost his driving privileges and continued to drive state vehicles. Furthermore, when the grievant lost his driver's license, he was no longer able to perform the job for which he was hired

and which he was needed to perform and it was unlikely that he would be able to obtain a commercial driver's license which he was required to have as of April 1, 1992.

Award

The grievance is denied.


Nels E. Nelson
Arbitrator

August 17, 1992
Russell Township
Geauga County, Ohio