

**STATE OF OHIO AND UNITED FOOD AND COMMERCIAL WORKERS  
LABOR ARBITRATION PROCEEDING**

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IN THE MATTER OF THE ARBITRATION BETWEEN:

UNITED FOOD AND COMMERCIAL WORKERS, LOCAL NO. 954

-AND-

THE STATE OF OHIO, OHIO LOTTERY COMMISSION

GRIEVANT: Melvin T. Mitchell (Discharge)

CASE NUMBER: 22-02-920723-0004-03-08

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**ARBITRATOR'S OPINION AND AWARD**

Arbitrator: David M. Pincus

Date: April 11, 1993

**APPEARANCES:**

**For the Employer:**

Philip Peer  
Robert Lockett  
Michael Masarro  
Rachel Livengood

Georgia Brokaw

Police Officer  
Investigator  
Personnel Director  
Acting Chief of  
Arbitration Services  
Advocate

**For the Union:**

Melvin Mitchell  
Hamilton Allen  
Robert S. Gilbert Jr.  
Robert Zelma  
John D. Franklin

Grievant  
Regional Manager  
Field Representative  
Law Clerk  
Attorney

## INTRODUCTION

This is a proceeding under Article 11, entitled Grievance Procedure of the Agreement between The State of Ohio, Ohio Lottery Commission, hereinafter referred to as the Employer, and United Food and Commercial Workers Union, State Organizing Committee, AFL-CIO, Local No. 954, hereinafter referred to as the Union, for the period April 1, 1992 to April 1, 1994 (Joint Exhibitor).

The arbitration hearing was held on January 28, 1993 at the United Food and Commercial Workers Union's office in Toledo, 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 post hearing briefs. Both Parties indicated that they would submit briefs.

## STIPULATED ISSUE

Article 10 - Discipline of the Collective Bargaining Agreement (Joint Exhibit 1) between the State of Ohio and the United Food and Commercial Workers, specifically Section 10.03 - Standard, states, "No employee shall be disciplined or discharged without just case. Employees of the Lottery Commission shall also be governed by O.R.C. 3770.02." In accordance with that section, was the Grievant removed for just case? If not, what shall the remedy be?

## PERTINENT CONTRACT PROVISIONS

### ARTICLE 10 - DISCIPLINE

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#### Section 10.03 - Standard

No employee shall be disciplined or discharged without just cause. Employees of the Lottery Commission shall also be governed by O.R.C. 3770.02.

...

\* \* \*

(Joint Exhibit 1, pg. 13)

#### Section 10.05 - Progressive Discipline

The employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

1. Verbal Reprimand (With appropriate notation in employee's file)
2. Written Reprimand
3. Suspension
4. Demotion or Removal

However, more severe discipline (or a combination of disciplinary actions) may be imposed at any point if the infraction or violation merits the more severe action. Disciplinary actions will not be utilized by the employer beyond the time period specified within Section 9.03 of this agreement.

The Department of Liquor Control shall follow the procedural aspects of progressive discipline as outlined in Exhibit B, Section 3, A., B., C., D. of the Akers consent decree until its termination.

\* \* \*

(Joint Exhibit 1, pg. 14)

### JOINT STIPULATION OF FACTS

1. The case is properly before the Arbitrator.
2. The Grievant was afforded his due process right in accordance with the Collective Bargaining Agreement.
3. The Grievant was employed by the Ohio Lottery Commission January 29, 1990 through July 24, 1992.

4. Grievant had no prior discipline.
5. Grievant was removed July 24, 1992 for violation of agency work rules; specifically #1a. Neglect of Duty - Major (endangers life, property or public safety) and #24 dishonesty.
6. Grievant's overall work performance was satisfactory and is not at issue in his removal.

#### CASE HISTORY

Melvin Mitchell, the Grievant, has been employed as a Lottery Sales Representative I by the Ohio Lottery Commission, the Employer, since January 29, 1990. The Employer was created by O.R.C. Section 3770 and is authorized by law to operate games of chance for play by the public. The State of Ohio's education system is the primary beneficiary of receipts generated by these games of chance. The relevant position description (Joint Exhibit 6) indicated the primary duties of the Grievant as a Lottery Sales Representative I in pertinent part as: the distribution and implementation of game materials within the Toledo, Ohio area; informs sales agents of marketing policies and administrative procedures at retail locations; and distribute game ticket allotments, special promotional and contest materials. It should be noted that a valid driver's license is also specified as a Minimum Acceptable Characteristic.

In January 1991, Virgil E. Brown was appointed as Executive Directory of the Ohio Lottery Commission by Governor George Voinovich. Brown initiated a series of routine background checks of all State Lottery Commission employees. These checks were properly authorized by O.R.C. Section 3770.02 which precludes the employment of those "convicted of a felony or unexpunged misdemeanor of the first, second, or third degree in any jurisdiction." It also authorized the gathering of information concerning the criminal records of employees and/or applicants.

As a consequence of the above-mentioned investigation, the Grievant completed a

background check (Employer Exhibit 2) during August of 1991. Michael Masarro, the Personnel Director, testified the information was forwarded to the State Highway Patrol for further verification. On or about June 4, 1992, he received a report (Employer Exhibit 3) from the Patrol indicating the Grievant's driving privileges had been suspended indefinitely, and his license had expired on November 23, 1990.

Shortly thereafter, Masarro contacted Hamilton Allen, the Toledo Regional Manager, and asked him to review the matter with the Grievant. Allen inspected the Grievant's driver's license and concluded it had expired and potentially suspended. These findings caused Allen to terminate the Grievant's driving privileges, and he was assigned to an office position.

Once he became aware of this potential driving record defect, the Grievant immediately initiated an inquiry regarding his suspension with the Bureau of Motor Vehicles. The Grievant was advised of his options and the proper procedure necessary to reactivate his driving privileges. The suspension was eventually cleared-up; and the Grievant received a valid driver's license on June 24, 1992 and commenced driving on or about July 1, 1992.

Masarro continued his independent investigation by having a Labor Relations Officer contact the Bureau of Motor Vehicles. This individual spoke to Robert Lockett, an Investigator, who informed him the Grievant had his driver's license suspended since July 8, 1987. The suspension had been engendered because he failed to pay a speeding ticket (Employer Exhibit 6) realized in Whitfield, Georgia. Lockett also asserted he failed to return his suspended license and failed to appear at the Toledo Municipal Court in direct violation of O.R.C. Section 4509.77. These violations caused Lockett to issue a formal complaint on December 9, 1987.

Pre-disciplinary meetings were conducted on June 15, 1992 and June 26, 1992. On July

18, 1992, Virgil E. Brown, the Executive Director, informed the Grievant he would be terminated on Friday, July 24, 1992 at 5:00 p.m. The termination was based on a number of transgressions involving the Grievant's driver's license suspension. He was found to be in violation of the following Rules and Regulations (Joint Exhibitor 4):

1. Neglect of Duty
  - a. major (endangers life, property or public)  
\* \* \*
24. Dishonesty

An initial offense of either of these work rules attaches a penalty of suspension of removal.

On July 23, 1992, the Grievant formally contested the removal decision. He maintained:

"...I have never been notified of a license suspension with my Ohio Driver's License..."

\* \* \*

(Joint Exhibit 3)

A Step 3 grievance hearing was held on July 30, 1992. Walter P. Budna, a Labor Relations Officer, denied the grievance. As justification for the removal he noted the Grievant knowingly drove his vehicle illegally since 1987 as a consequence of his suspended license. As such, he exposed the Employer to potential financial hardship and loss of integrity if he was ever involved in an accident or a traffic incident. His suspension, moreover, would have precluded employment because he did not possess a valid driver's license at the time of his application. The Grievant also transgressed by falsifying his civil service application by indicating he would be able to secure an Ohio driver's license in 1990. His driving status was further muddled by his failure to renew his driver's license card in 1990. In fact, his card remained expired from 1990 to June of 1992.

The Parties were unable to resolve the disputed matter. Neither party raised substantive

nor procedural arbitrability issues. As such, the grievance is properly before the Arbitrator.

### THE MERITS OF THE CASE

#### The Position of the Employer

It is the position of the Employer that it has just cause to remove the Grievant for neglect of duty and dishonesty. Both allegations were viewed as independent transgression justifying removal.

The Employer asserted the record credibly and unambiguously established the Grievant's dishonesty in terms of his application falsification. The Grievant misrepresentation was willful. Lockett's testimony, and his specific review of the relevant investigative reports, indicate the Grievant's actions were purposefully deceitful. He was fully aware of his suspended license and engaged in evasive activity for approximately five years, before the State Highway Patrol investigation surfaced his driver's license difficulties. A valid driver's license is material to hiring decisions involving the Grievant's job classification. This basic requirement was properly communicated to the Grievant during the interviewing process, orientation and through the acceptance and acknowledgment of pertinent personnel related materials. As such, the falsification precluded an accurate appraisal of the Grievant's future performance potential.

Even though the Grievant had his suspension removed and driver's license renewed prior to terminating these transgressions were material to his employment status at that time. The goodwill and trust necessary to cement the employment relationship were eradicated as a consequence of the misrepresentations and related disfavorable acts.

The Employer opined the falsification allegation was not somewhat minimized by the question asked on the employment application. The rule of reason should apply in this instance. It was reasonable for the Employer to expect the applicant to have a valid driver's license, and its critical importance should have been ascertained by the Grievant. The Grievant's representations appear to be quite egregious in light of the material he received and his conversations with Rudy Stralka, the Personnel Director, during the 1990 interviewing process. Even if the pertinent information was not so blatantly obvious, the Grievant, still, should be held to some standard of inquiry. As a potential job holder with driving-related responsibilities, the Grievant had some duty of inquiry and investigation about his own position and its requirements.

The various allegations proposed by the Grievant to prove his innocence were countered by the Employer. The Grievant's honesty cannot be supported by pointing to his eventual renewal of his driver's license. The process, itself, is not instantaneous and cannot be accomplished "overnight." Innocence, moreover, cannot be established by relying on the Grievant's acquiesce when asked by the Employer and the Toledo Police Department to have his driver's license copied. The Grievant had no choice but provide his driver's license. Otherwise, once confronted by these various individuals, he would have had to confess that his license was suspended and expired.

Reliance by the Union of O.R.C. Section 119.07, which deals with license suspensions and publication requirements, was thought to be unwarranted in this particular arbitration setting. The Grievant never challenged the procedure because he eventually caused the removal of the suspension. Also, the Employer claimed any potential procedural defect implemented by the Bureau of Motor Vehicles should be challenged in court by initiating an independent action. The

Employer would not be a party to such a proceeding.

The neglect of duty charge was based on several distinct violations. First, the Grievant neglected his duty by driving for a year and one half with an expired driver's license. He was clearly neglecting his duty with his Employer under these circumstances. Second, Masarro testified the Employer would have realized tremendous economic hardship if the Grievant had suffered an at fault accident while driving a State vehicle. A Department of Administrative Service directive (Employer Exhibit 8) indicated a person driving under a suspended license is not covered by the policy. A State agency would have to reimburse the fund for whatever liability caused by a suspended driver, as well as any related premiums. Last, the Employer is a sales oriented marketing organization with sales representatives spending a great deal of time with sales agents. Reinstatement of the Grievant would damage the Employer's public image.

The Grievant's general credibility was challenged by the Employer. There were a number of discrepancies concerning the number of times he had moved since 1987 and the location of these various addresses. His reason for departing from his previous employer, the Department of Liquor Control, was also confused. On the employment application (Joint Exhibit 7) in question he stated his departure was caused by "lay off, lack of work." Yet, other documents (Employer Exhibits 13 and 14) indicate the Grievant was asked to resign or be terminated. Although the Grievant maintained he did not resign, he did tender a letter of resignation in January, 1990.

The Employer admitted the Grievant's job performance was relatively meritorious. This condition, however, cannot mitigate the intentional falsification of an application. A misrepresentation of this sort reflects a disposition toward dishonesty. A personality trait,

moreover, which erodes the trust necessary for any functioning employee-employer relationship. Similarly, dishonesty also erodes the trust between the Employer and the public.

### The Position of the Union

The Union charged the Grievant was not deserving discharge. The Employer was unable to meet its burden of proof as to either the dishonesty or neglect of duty charges.

The Employer failed to establish a willful misrepresentation on the part of the Grievant or that the Grievant had knowledge of his suspended license. The Union stressed Investigator Lockett's report (Joint Exhibit 2) and his testimony shed little light on this issue. Lockett was unpersuasive in terms of establishing the Grievant lived on Perth Street in late 1987 and early 1988. The Employer's reliance on a LEADS police printout (Employer Exhibit 10) reviewed by Officer Peer also failed to establish the residence time period nexus. Peer claimed an individual's last known address would appear on this report, and would not necessarily reflect his specific residence at any given point in time. The Union also emphasized this document was inadmissible because it was not relied upon to discharge the Grievant.

The actual question answered by the Grievant on the job application (Joint Exhibit 7) did not implicate him as a dishonest person. He answered the question truthfully. He was never asked whether he currently possessed a valid driver's license. Rather the question asked: "Are you willing and able to secure an Ohio Driver's License if a license is required?" The Grievant credibly testified he believed at the time he had a valid driver's license. In fact, his ability and willingness to secure a valid license became evident when he was confronted with his oversights. He, in swift order, investigated the authenticity of the charges, determined the proper course of action and had his driving privileges reinstated.

The Grievant's actions during the course of the suspension period further support his claim dealing with his lack of knowledge. He made his license available to several individuals during his employment. If he had actual knowledge of his suspension, he never would have freely provided his driver's license upon request.

The dishonesty allegation was further muddled by the Employer's own actions. Hamilton Allen, the Regional Director, testified the Grievant was allowed to return to his normal assignment once he secured a valid Ohio Driver's License. If the Employer was, indeed, concerned about employing a dishonest individual, he would not have been entrusted with substantial amounts of money and valuable equipment.

Allen also maintained the Grievant was honest, trustworthy and responsible. No management witnesses presented testimony refuting these contentions.

The Employer was unable to establish the neglect of duty charge. The record did not establish that a suspended license diminished the Grievant's driving ability to such a degree that he endangered life, property and public safety. Masarro failed to support the nexus hypothesis raised by the Employer. Also the Employer's emphasis on the insurance liability issue falls short in substantiating neglect of duty charge because it does not fall within a category specified in the work rule.

The 1990 car accident discussed by Peer does not evidence a neglect of duty. Citations were not issued to the Grievant. Also, there is some question whether this citation was considered during the various stages of the grievance procedure.

The Employer, moreover, failed to establish another neglect of duty charge. Financial harm and a public relations nightmare were not proven. If reimbursement ever became

necessary, financial harm was never contemplated as a possible relation category. Also, the Employer's image would never be diminished because the outcome would never be known by the public. Other aspects of the Employer's allegations were improperly supported. The Employer failed to properly rebut the Grievant's claim he never noticed the license had expired. The Grievant's recollection regarding his employment history with the Liquor Agency should not be held against him. Any reasonable person, based on the time period in question, would not be able to accurately remember the circumstances of his separation.

#### THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony introduced at the hearing, and a complete and thoughtful review of the record, it is this Arbitrator's judgment the Grievant was dishonest when he presented himself as eligible for employment. The information contained in the employment application was intentionally deceitful because the Grievant was fully aware his license was suspended when he applied for the position in question.

The willfulness of the misrepresentation is the most difficult to prove because it must be inferred from the facts or circumstances surrounding the altercation. Here, the evidence and testimony indicate he knew a valid driver's license served as an important condition of employment and had knowledge of the suspension at the time he filled out the application.

The Grievant was properly placed on notice regarding the driver's license requirement and the potential consequences associated with any misrepresentation contained on his application (Joint Exhibit 7). The notary and oath taking requirements underscore the critical impart attached to any information provided in the application blank. Notice of a valid driver's license requirement was also openly and freely discussed in a conversation the Grievant had with Rudy

Stralka. This requirement was also contained in an Ohio Lottery Vehicle Handbook (Joint Exhibit 5) received by the Grievant and reviewed in a general staff meeting held by Hamilton Allen. With the emphasis placed on this condition of employment, a conscientious employee, fully aware of a speeding ticket received in Georgia and unresolved at the time of application, should have initiated some type of immediate corrective action, or removed himself from consideration. Instead, the Grievant intentionally deceived the Employer.

I am convinced the Grievant had knowledge of the suspension at the time of the application. A variety of sources lead to this conclusion based upon a critical mass of circumstantial evidence dealing with: the Grievant's residence at the time the Ohio Bureau of Motor Vehicles attempted to notify the Grievant about the suspension and personnel action forms documenting address changes.

Testimony and documents reviewed by Investigator Lockett were viewed as highly credible and clearly indicated the Grievant engaged in intentional evasive activity regarding his suspension. These evasive tactics suggest the Grievant was fully aware of the suspensions and resolved to avoid any reasonable and prompt resolution of the suspension.

Lockett provided testimony that indicated the Grievant resided at the Perth Street address for the period 1987-1988. The Ohio Bureau of Motor Vehicles made every attempt to contact the Grievant regarding his suspension. These contacts were made by certified mail (Joint Exhibit 2) which was unclaimed by the Grievant; and a number of regular mail attempts and personal contacts initiated by Lockett. Interestingly, none of the regular mail attempts were ever returned because the Grievant had moved without any forwarding address.

Probably, the most telling bit of pertinent information deals with a contact involving a

hearing date scheduled in January, 1988. A meeting was originally scheduled for December 9, 1987 but the Grievant failed to appear. The Grievant then called Lockett's office and left a message stating he would be at the office on January 12, 1988. As a consequence, Lockett delivered a notice on December 16, 1987 which documented the upcoming meeting; a meeting which the Grievant failed to attend. I would not characterize this sequence as an illogical claim of events. If anything, it credibly documents the Grievant's location and knowledge of his suspension.

A series of personnel action forms (Employer Exhibit 11) was introduced by the Employer for the period January, 1987 through May, 1988. Each form indicates the Perth Street address; which independently supports Lockett's allegations. It should be noted these documents track any address changes submitted by an employee. Yet, the Grievant was unable to rebut these inconsistencies.

The Union argued the previously reviewed evidence and testimony did not establish the Perth Street address as the Grievant's residence during the period in question. But, in my view, the Employer established a prime facie case for its residence argument which then shifts the burden to the Union. Not one piece of evidence was provided by the Union to rebut this allegation.

The Union's O.R.C. Section 119.07 argument seems a bit misplaced. The Grievant never formally raised this defense prior to the hearing. In fact, once confronted with the suspended license he engaged the procedure necessary for license renewal. As such, the document is irrelevant to the present determination.

Based upon the previous review, the Grievant's willingness to forfeit his license on

several occasions does not condone his falsification and evasive activities. He had no choice but allow the copying of his license. Otherwise, he would have been confessing to his suspended license status. Also, improper license reviewing practices by other agencies such as the Attorney General's Office and the Toledo Police Department do not anoint a dishonorable act with respectability.

Clearly, the misrepresentations in question were absolutely material to the hiring decision. The position description (Joint Exhibit 6) for the Lottery Sales Representative I position clearly indicates a valid driver's license as a Minimum Acceptable Characteristic. Knowledge of the suspension during the selection process would have clearly removed the Grievant from consideration. Equally important is another driving related misrepresentation perpetrated by the Grievant. His driver's license had expired for over a year at the time his driver's license suspension was exposed. Once again, the Grievant would have this Arbitrator believe that this misrepresentation was merely another unintentional oversight. Such a contention seems terribly flawed. Rather, it represents a pattern of intentional unmitigated deception.

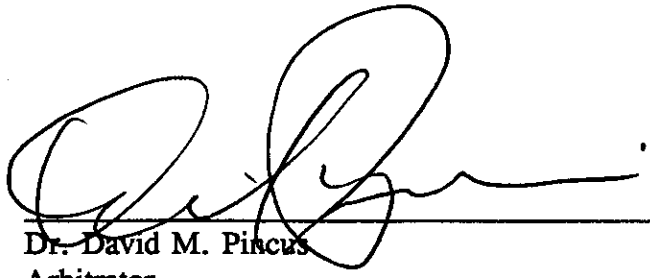
The Grievant's credibility was further tarnished by his testimony regarding his departure from his previous position with the Department of Liquor Control. His employment application (Joint Exhibit 7) indicates he left his prior position because he was laid off for lack of work. Yet, other documents (Employer Exhibits 13 and 14) clearly indicate he was asked to resign or be terminated because he did not report to work when requested. Under cross examination, the Grievant emphasized he did not resign. But, another document introduced by the Employer indicates the Grievant did, in fact, tender a letter of resignation.

The falsification charge, itself, serves as an independent and sufficient reason for removal within the context of the present fact situation. As such, there is no need to review the neglect of duty charge. Clearly, the Grievant was removed for just cause.

AWARD

The grievance is denied herewith.

4/11/93  
Date

  
Dr. David M. Pincus  
Arbitrator