#952

In the Matter of Arbitration	*	
Between	*	Case Number:
OCSEA/AFSCME Local 11	*	15-03-9300721-059-01-07
and	*	Before: Harry Graham
The State of Ohio, Department of Highway Safety	*	

Appearances: For OCSEA/AFSCME Local 11:

Marva McCall
Staff Representative
OCSEA/AFSCME Local 11
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Columbus, OH. 43215

For Department of Highway Safety:

Ann Van Scoy
Labor Relations Officer
Department of Highway Safety
660 East Main
Columbus, OH. 43205

Introduction: Pursuant to the procedures of the parties a hearing was held in this matter before Harry Graham. At that hearing the parties were provided complete opportunity to present testimony and evidence. Post hearing briefs were not filed in this dispute and the record was closed at the conclusion of oral argument on February 2, 1994.

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

> Was the Grievant, Janine Banner, terminated for just cause? If not, what shall the remedy be?

Background: The parties agree upon the events that give rise to this proceeding. The Grievant, Janine Banner, was employed by the Department of Highway Safety as a Driver's License Examiner. She was hired in 1990. Under the law in Ohio drivers must have insurance to compensate for any damage or injuries they may cause. On December 17, 1992 Ms. Banner was involved in a traffic accident. She did not have the requisite automobile insurance. In due course the Bureau of Motor Vehicles imposed a ninety (90) day suspension of Ms. Banner's drivers license. That suspension commenced on July 13, 1993.

A major function of people employed as drivers license examiners is to test the ability of people to drive. This rountinely involves a road test. As Ms. Banner's driving privileges had been suspended she was unable to carry out a major part of the duties of drivers license examiner. She could not give road tests. As that was the case she was discharged from State service.

A grievance protesting that discharge was filed. It was processed through the machinery of the parties without resolution and they agree it is properly before the Arbitrator for determination on its merits.

Position of the Employer: The State points out that a major function of Drivers License Examiners is to give driving tests. In order to do that the Examiner must possess a

driving license. For a ninety (90) day period after July 13, 1993 Ms. Banner did not have a license. Her ability to perform her duties was impaired. The requirement that Examiners have a drivers license is not unreasonable. Without it, employees cannot perform the task for which they are hired.

Section 24.02 of the Agreement provides that the Employer must follow the principles of progressive discipline. That contractual provision is not ironclad. Section 24.05 indicates that "Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment." In this instance the State did not discharge Ms. Banner to punish her. Rather, it did so because she could not perform a central element of her duties, administration of driving tests.

The State acknowledges that some sort of accommodation for Ms. Banner likely could have been developed. She worked at a large facility with other people in the same classification. The rhetorical question, what is the limit of accommodation, is posed by the State. In other words, how much, if anything, does the Employer have to do to deal with an employee who cannot do her job due to her own fault. In this situation the State urges that it did not have to do anything. It is solely the responsibility of the Grievant to secure the necessary insurance. She did not do so. That is

her problem, not that of the State in the Employer's opinion.

When Ms. Banner came to be discharged the State cited her violation of Section 124.34 of the Ohio Revised Code. There is no impropriety in such a citation in the State's view. Her conduct in this situation provided ample just cause to discharge her. As that is the case, the contractual standard has been satisfied. Accordingly, the State urges the Grievance be denied.

Position of the Union: In the opinion of the Union the State has made a significant error in administering the discharge under review in this proceeding. In its view, reliance upon the Ohio Revised Code rather than the Agreement to justify discharge is improper.

Contained within the job description for Drivers License Examiner I, the position once held by the Grievant, is a list of "Illustrative Examples of Work." It indicates that the testing of applicants for driving licenses is one of many tasks performed by License Examiners. For instance, they interview applicants, inspect vehicles, keep accurate records, and keep the driving examining station clean and presentable. These and other tasks could have been performed by the Grievant while her driving license was suspended. Inquiry by Ms. Banner indicated that at least two of her colleagues would have traded duties with her in order that she would be able to work at the duties associated with the

Drivers License Examiner position without actually giving road tests. From time to time in the past such accommodation had been extended to other employees.

The Union points out that Ms. Banner made no attempt to conceal this situation. She contacted the appropriate supervisors and advised them of her predicament. She was concerned about this event and its consequences for her continued employment with the State. In this situation the Grievant acted wrongly be not having the required insurance. She erred. The penalty of discharge is too severe in the Union's view. It urges that the grievance be granted in full together with a make-whole remedy.

Discussion: When the Union asserts that the action of the State must be overturned as the discipline administered to Ms. Banner cited the Ohio Revised Code rather than the Contract it is in error. This argument represents the proverbial red herring and must be considered as such. All concerned in this proceeding are well aware that the Employer must satisfy the contractually mandated test of just cause in order to justify discipline. That the State cited the Code, rather than the Agreement in support of its action is irrelevant. Why the Union continually cites reference to the Ohio Revised Code, rather than the Agreement as a basis for overturn of discipline is mysterious given the observations of Arbitrator Anna Smith in Case No. 02-03-910805-0207-02-05.

In that decision Arbitrator Smith was of the view that citation of the Code did not usurp the Agreement. It was used in order to define conduct that the State regarded as being unacceptable. Arbitrator Smith was correct in her view and the continued reliance of the Union upon a discredited argument that has been repeatedly rejected is difficult to understand.

In this situation Ms. Banner acted improperly. It is the responsibility of citizens of Ohio who drive to secure insurance. That she did not do so compromised her ability to perform a central element of her duties for the State. That observation must be tempered with reference to the Job Description for the License Examiner. It indicates that Examiners perform many tasks associated with their position. Administration of actual driving exams is part of, but not the sole duty of, Drivers License Examiners. They perform a multitude of tasks in their daily routine. At the hearing it was uncontroverted that Ms. Banner's colleagues were willing to adjust their daily tasks to assist her during the time her license was suspended. There is nothing unusual in such activity. The State asks a relevant question when it asks how much accommodation is sufficient in a situation such as this? That question is not susceptible of hard and fast answer. As is the case with many situations in life, "it depends." That is, answers are forthcoming on a case-by-case basis. Life is

ambiguous and surrounded by uncertainty. The certainty sought by the State in this situation is unattainable.

In administration of discipline there must be a relationship between the severity of the discipline and the offense committed by the employee. There is the notion of proportionallity or fitting the penalty to the crime. This view was expressed by Arbitrator Smith in PYA/Monarch Food Service 94 LA 575 (Smith, 1990) who said:

> In arbitration law there is the belief that the punishment ought to fit the crime. This suggests that certain violations of work rules or contractual terms are best dealt with by verbal warning, while other violations are so severe that discharge on the first occurrence is justified.

In this situation there is nothing on the record made before the Arbitrator to indicate anything other than that the Grievant was a good employee. She has no history of live discipline in her file. Her offense had a direct effect upon some, but not all, of her daily tasks. Her inability to carry out part of the duties associated with her position was temporary. The State knew to the day when she would be able to resume administration of road tests. Her inability to do so for ninety days was inconvenient for the State. It did not significantly compromise the functioning of the Drivers License Examination station to which she was assigned.

Ms. Banner violated the law. She was improvident. In this situation her action does not provide sufficient basis for the discharge imposed by the State.

Award: The grievance is denied in part and sustained in part. Ms. Banner is to be restored to her former position with the State effective with the date of receipt of this award. She is to be paid all straight time wages she would have received but for this event less payment for thirty (30) calendar days which shall be considered to be a suspension for her action. All benefits that would have been received by the Grievant but for her discharge are to be paid to her. The Grievant is to promptly furnish to the Employer such records as it may require in order that its payment to her may be reduced by the amount of any income earned by the Grievant during her period off work.

Signed and dated this 17th day of February, 1994 at South Russell, OH.

Harry Graham
Arbitrator