#988

IN THE MATTER OF ARBITRATION

BETWEEN

State of Ohio, Department of Transportation	)	GRIEVANCE NO. 31-09(12-23-93)29-01-06
	)	
	)	GRIEVANT: MICHAEL R. BLYTHE
and	)	
	)	
Ohio Civil Service Employees Association, Local 11, AFSCME	)	OPINION AND AWARD
	)	

APPEARANCES:

On Behalf of the Employer

William Tallberg	District 12, Labor Relations Officer
Donald T. McMillen	Office of Collective Bargaining--Second Chair
Nick M. Nicholson	Labor Relations Officer
David Skinner	Labor Relations Officer
Harold Dryden	Highway Maintenance Supervisor
Linda Dillard	Safety Officer
Paul Kimble	Administrative Assistant, District 9

On Behalf of the Union

Donald Sargent	Staff Representative/Advocate
Michael Blythe	Grievant
Kenneth Grooms	Steward - Witness
Patty Graham	Observer/OCSEA Arbitration Dept.
Anesic Goodwin	Observer/OCSEA Arbitration Dept.

LAWRENCE R. LOEB, Arbitrator
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I. STATEMENT OF FACTS

The Grievant was hired by the Ohio Department of Transportation as a Highway Worker 2 on June 22, 1987 and assigned to District 9 which covers eight counties in south central Ohio. As a prerequisite to being hired, the Grievant was required to have a valid Ohio driver's license because at least seventy percent of his duties required that he operate heavy equipment. During the winter months, the percentage of his time spent driving increased to almost one hundred percent as Highway Worker 2's are heavily involved in snow removal. In late 1989 all employees of the Department of Transportation were notified that commencing January, 1990 those who operated a combination of trucks and equipment weighing in excess of twenty-six thousand pounds would have to obtain a commercial driver's license. In order to do so, candidates who did not fall under the grandfather provisions of the licensing law were required to pass both a written test and a practical driving examination. Those, like the Grievant, who had been operating heavy equipment would only had to pass the written section of the test. The Grievant took the written portion at the Adams County Garage in the company of a number of other ODOT employees. At the time that he took the examination, Section 37.08 of the Contract provided that:

> **ARTICLE 37 -- TRAINING/CONTINUING EDUCATION/ TUITION**
>
> **37.08 -- Accreditation, Licensure or Certification Requirements**
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> If accreditation, licensure or certification requirements of a position are changed and an employee serving in such a position does not possess the requirement(s), the affected employee shall meet such requirement(s) as soon as reasonably possible.

> If meeting the requirement(s) requires additional in-service training and/or leave for training/continuing education programs, Sections 37.03 and 37.04 may be applied.
>
> If an employee does not meet the requirement(s) within a reasonable period of time, the employee shall be moved into another position. If that position pays less than the employee's present salary, the employee's salary shall be frozen until such time as the employee's new pay schedule catches up with the frozen salary.

The Grievant passed the written examination and received his commercial driver's license. For the next three years he continued to work as a Highway Worker 2, receiving good evaluations from his supervisors throughout that period of time. In August, 1993, however, the Grievant was stopped while he was off duty and charged with driving while under the influence of alcohol. He was found guilty of that offense on August 20, 1993 and his driver's license was suspended for a period of ninety days. The Court, however, granted him occupational driving privileges so he could continue to work.

The Grievant's license expired on his birthday on September 29, 1993. But for the suspension, he would have been able to renew it as Ohio law provides for automatic renewal unless an individual had his license suspended within two years of the time the license comes up for renewal. Because he could not automatically renew his license, the Grievant had to take the commercial driver's license test again which required that he pass both the written and practical portions of the examination. He notified his supervisor on October 4, 1993 that he no longer had a valid commercial driver's license. As a result, Management informed him the following day that he had one week within which to obtain the license. It was at that point that he notified Management that he did not possess the reading and writing skills necessary to pass the written examination.

In an effort to accommodate the Grievant, Management obtained and delivered a video tape to the Grievant which consisted of an individual reading the manual the Grievant needed to study in order to pass the examination. Management also provided the Grievant with the name of a driver's license examiner who would give him an oral, instead of a written examination. The Grievant took the exam, but was unable to pass it. As a result, on October 29, 1993, Management issued a pre-disciplinary letter to the Grievant, notifying him that he was being charged with violating Ohio Department of Transportation Directive WR101, Sections H 2 C, failure to follow policies of Director, and H 27, actions that impair or compromise the ability of the employee to effectively carry out his or her duties as a public employee. The pre-disciplinary meeting was held on November 10, 1993, following which the Employer notified the Grievant that he would be discharged effective December 21, 1993.

The Union, on the Grievant's behalf, filed a timely protest to the termination, arguing that the Employer's action violated Sections 24.01, 24.02, 24.05, 37.08, 44.01 and 44.03 of the parties' Collective Bargaining Agreement, which sections provide in pertinent part:

ARTICLE 24 -- DISCIPLINE

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.

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 oral reprimand(s) (with appropriate notation in employee's file);

B. One or more written reprimand(s);

C. One or more suspension(s);

D. Termination.

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 as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the pre-discipline meeting.

ARTICLE 37 -- TRAINING/CONTINUING EDUCATION/ TUITION

37.08 -- Accreditation, Licensure or Certification Requirements

If accreditation, licensure or certification requirements of a position are changed and an employee serving in such a position does not possess the requirement(s), the affected employee shall meet such requirement(s) as soon as reasonably possible.

If meeting the requirement(s) requires additional in-service training and/or leave for training/continuing education programs, Sections 37.03 and 37.04 may be applied.

If an employee does not meet the requirement(s) within a reasonable period of time, the employee shall be moved into another position. If that position pays less than the employee's present salary, the employee's salary shall be frozen until such time as the employee's new pay schedule catches up with the frozen salary.

ARTICLE 44 -- MISCELLANEOUS

44.01 -- Agreement

To the extent that this Agreement addresses matters covered by conflicting State statutes, administrative rules, regulations or directives in effect at the time of the signing of this Agreement, except for ORC Chapter 4117, this Agreement shall take precedence and supersede all conflicting State laws.

44.03 -- Work Rules

After the effective date of this Agreement, agency work rules or institutional rules and directives must not be in violation of this Agreement. Such work rules shall be reasonable. The Union shall be notified prior to the implementation of any new work rules and shall have the opportunity to discuss them. Likewise, after the effective date of this Agreement, all past practices and precedents may not be considered as binding authority in any proceeding arising under this Agreement.

Management was unswayed by the Union's arguments with the result that the matter ultimately proceeded to arbitration at which time the Union relied upon the sections of the Contract set forth above and also argued that the Employer's action violated the Americans with Disabilities Act.

It was upon these facts that this matter rose to arbitration and award.

II. POSITION OF THE EMPLOYER

Management maintains that it had just cause to discharge the Grievant who violated ODOT Directives WR101, H 2 C, failure to follow the policies of the director, districts or offices and No. H 27, other actions that could compromise or impair the ability of the employee to carry out his or her duties as a public employee. Both of those violations stem from the same incident, the Grievant's failure to maintain a commercial driver's license which is a prerequisite of the Highway Worker 2 position, the position the Grievant held at the time of his

termination. When the commercial driver's license law became effective in January, 1990, the Grievant had been operating trucks and equipment weighing in excess of twenty-six thousand pounds so all he was required to do to obtain the license was to pass the written examination, which he did. His license would have been renewed without question in September, 1993 except that he was found guilty of driving while under the influence of alcohol the preceding month as a result of which his license was suspended for ninety days. If the Grievant had not had his license suspended, then the State of Ohio would have automatically renewed his commercial driver's license and this matter would have never arisen.

However, because the Grievant's license was suspended, the State required that he retake and successfully pass the commercial driver's license examination which consists of a written portion and a practical driving test. It was only at that point, three years after the Grievant had successfully passed the first written examination that he notified Management that he could not pass the exam because of limited reading and writing ability. The Department of Transportation made every effort to accommodate the Grievant, including providing him with video tapes which consisted of someone reading the manual to him as well as providing him with the name of a motor vehicle examiner who would give the Grievant a verbal, instead of a written examination. The State was also willing to give the Grievant up to six months to pass the examination. The Grievant, however, spurned that offer and at the time that this matter came on for hearing still had not obtained his commercial driver's license.

It is a given that at least seventy percent of a Highway Worker 2's duties require that he or she drive equipment subject to the Federal Commercial Driver's Licensing law. In the winter months, the percentage becomes even higher as a Highway Worker 2's time is almost entirely taken up with operating snow

plows and clearing roads. Without a commercial driver's license an individual cannot operate heavy equipment and, therefore, cannot perform the duties required of a Highway Worker 2. That is the position the Grievant is in as a result of his own misconduct.

It was he who brought this on himself, first by driving while under the influence of alcohol and then by failing to pass the commercial driver's license examination. Management did everything it could possibly do to accommodate him. Unfortunately, all of the Employer's efforts were for naught. The Grievant didn't pass the test, could not obtain the necessary license and cannot operate the equipment which is part of his job. His failure to obtain the license and, therefore, his inability to perform the work of his classification, tragic as it may be, violated the Department's rules and gave the Employer just cause to discharge him.

III. POSITION OF THE UNION

Whatever fault there is in this matter lies with Management, not the Grievant who made every effort to obtain a commercial driver's license. In fact, he took the written portion of the examination on four separate occasions and failed each time although he studied diligently with every resource available to him before he took those exams. The problem is that the Grievant suffers from a learning disability which severely effected his performance in school and consequently his ability to read and write. Instead of trying to work with the Grievant, though, or to accommodate his disability, Management heartlessly terminated him, blaming the Grievant for its decision as if he was deliberately trying to fail the test.

It is apparently to that end that Management so often pointed out that the Grievant passed the written portion of the commercial driver's license examination when he took it in 1990. What Management would like to overlook, but

what it cannot, is that the only reason the Grievant was able to pass the test at that time was that he copied from another employee's paper. He knew he shouldn't have done that, but he had no choice because Management demanded that every Highway Worker 2 had to take the examination. Why the Grievant's supervisors took that position is unclear. Most probably they did so because they wanted to impress their superiors with the number of Highway Worker 2's under them who obtained commercial drivers' licenses. However, by forcing the Grievant to take the exam and obtain the driver's license, Management violated Section 37.08 of the Contract which was written to cover just such circumstances as the Grievant found himself in. Thus, he could have refused to take the examination, been reclassified as a Highway Worker 1 and remained an employee of the Department of Transportation. It was only because his supervisors pushed him into taking the examination by failing to afford him the rights to which he was entitled to under the Contract that the Grievant finds himself in the position he is now in.

Management not only failed to permit the Grievant to exercise the rights guaranteed by Section 37.08 in 1990, but it has continued to do so up until the time of this arbitration. Thus, it could, as it did for so many other employees, reduce him from a Highway Worker 2 to a Highway Worker 1 which does not require that he maintain a commercial driver's license. The fact that the State has been so willing to do so for so many other employees indicates not only that it could have done the same for the Grievant, but that its failure to do so vitiates the discharge. It is a hallmark of just cause that all similarly situated employees must be treated equally. In this case, given the large number of employees the State has reduced from Highway Worker 2 or higher classifications to Highway Worker 1 positions it could have done the same for the Grievant and not terminate

his employment. Because it did, he is the victim of disparate treatment and is entitled to have the discharge overturned.

Even if he were not, the discharge should still be overturned as it is in violation of the progressive discipline and just cause sections of the Agreement. The former requires that Management begin imposing discipline in the least stringent manner and proceed in increments up the scale until finally it reaches the pinnacle. Only then can it impose the harshest penalty, discharge. In this case, Management, in spite of the fact that the Grievant had no other disciplinary incident on his record, chose to impose the harshest penalty for the Grievant's first offense. In doing so, it has made a mockery of the progressive discipline system outlined in the Contract. Additionally, the penalty Management seeks to impose is clearly punitive, not corrective in nature as called for by the Contract. Finally, because Management seeks to discharge the Grievant when it could simply transfer him as it is obligated to do under the Contract, it does not have just cause as that term is understood to take the action it did. Therefore, the discharge should be set aside.

IV. OPINION

Of all of the defenses raised on the Grievant's behalf by the Union, the most interesting is its claim that the Employer violated the Contract when it failed to reclassify the Grievant as a Highway Worker 1 and freeze his salary as provided by Section 37.08 of the Agreement. While the Union correctly quotes the language found in the last portion of Section 37.08, its argument is nonetheless unpersuasive. The problem with the Union's position is that the section in question consists of three interrelated paragraphs which cannot be read independently of each other. Thus, while it is true that the third paragraph does provide that if an employee fails to meet the licensing or certification requirements of a position, the Employer must move that employee to another

position and freeze his pay until such time as the employee's pay schedule catches up with the frozen salary, it is equally true that the Employer is only required to take such action if the circumstances outlined in the first paragraph of Section 37.08 apply. That is, it is only required to act if the license or certification requirements of a position change while the employee is serving in that position. That, however, is the only time the Employer is obligated to move an employee who cannot obtain the necessary credentials to perform his or her duties.

In the matter under consideration, the licensing requirement for a Highway Worker 2 changed in 1990 when the Federal Commercial Drivers' Licensing law went into effect. At that point, the Grievant could have availed himself of the protections afforded by Section 37.08 and demanded that the Employer reclassify him to a Highway Worker 1 because he could not pass the written examination necessary to obtain the commercial driver's license. Instead, the Grievant, probably in the hopes of having to avoid the embarrassment of telling his supervisors that he had difficulty reading and writing, took the examination and cheated when he ran into trouble. Most probably neither the Grievant nor those who assisted him saw anything wrong with what they were doing since they most probably felt that the test and the commercial driver's license were simply another bureaucratic impediment foisted upon them by a bunch of outsiders who were totally ignorant of what it takes to operate heavy equipment. Considering the Grievant's poor showing when he tried to obtain the license on his own after September, 1993, there is no question in the Arbitrator's mind that but for the assistance of his fellow workers, the Grievant would not have been able to pass the written portion of the commercial driver's license examination in 1990.

Be that as it may, the important point is that the Grievant was able to obtain a commercial driver's license when the law changed in 1990. The only change which occurred after that time was that the Grievant's license was suspended which forced him to retake the written portion of the commercial driver's license examination. There is a difference between losing a license which is a requirement for a position, though, and a change in the licensing laws. By Contract, only the latter situation triggers the application of Section 37.08. The former does not. Therefore, the Employer was not obligated under the Labor Agreement to reposition the Grievant when he lost his commercial driver's license in 1993.

The Union maintains that Management erred in 1990 when it failed to notify the Grievant that he had an option to be reclassified as a Highway Worker 1 instead of having to take the commercial driver's license examination. Further, it argues that because he was only able to pass the written portion of the examination with significant assistance from other employees, the Grievant never really took the commercial driver's license test on his own and, therefore, the provisions of Section 37.08 should apply now. Neither argument has any validity. The problem with the first, that the Employer should have notified the Grievant that he had an option to be reclassified to a lower position rather than take the examination, is that the Union is misreading the section in question to create a right which doesn't exist. What Section 37.08 does say is that an employee who must obtain a new certification or license to maintain his current employment and cannot do so must be reclassified by the State if he fails to obtain the new certification within a reasonable amount of time. The employee, however, must make a good faith effort to obtain the new certification or license required to maintain his position. He or she simply cannot throw up their hands in defeat and demand that the State reposition them. On the other hand, if an

employee does make a good faith effort to obtain the new certification or license required to maintain his or her position, but cannot do so, then the Employer has no choice under Section 37.08 but to reposition that employee.

Nothing in the scheme created by the parties, however, gives the employee the option to give up without trying or places the burden on the Employer to tell an employee that he or she does not have to attempt to obtain the new license or certification and instead can be repositioned into another classification. Instead, the Employer's obligation to reposition an employee only comes into play when the employee fails to obtain the licensing or certification necessary to continue to perform the duties of his or her position. Therefore, there was no Contract violation in 1990 as a result of Management's failure to tell the Grievant he had the option to be repositioned instead of taking the commercial driver's license examination.

The Union is well aware of the language of Section 37.08 and especially that it applies only when there has been a change in the licensing or certification requirements effecting individuals who already hold a position with the Employer. It was apparently for this reason that it raised its second argument, that because the Grievant never really took the commercial driver's license examination in 1990 the provisions of Section 37.08 should apply at this time. The problem with the argument is obvious. The Grievant did take the test in 1990 and regardless of how he did so, passed it and was awarded his commercial driver's license.

It takes little thought to realize that if the parties' positions in this matter were reversed, that is, if the Employer were arguing that the Grievant should have never been awarded a commercial driver's license in 1990 because he had help passing the examination, the Union would be vociferous in its

claim that Management has no right to look behind the license to see how the Grievant obtained it and that having obtained it, he cannot now be divested of the position he holds. The Union cannot have it both ways. The Grievant obtained his commercial driver's license in 1990, albeit with assistance and would have continued to maintain it but for having been found guilty of driving a motor vehicle while under the influence of alcohol. The Union cannot now go back in time and challenge the Grievant's license in an attempt to make the Contract stretch to fit the facts of this matter.

Just as those two arguments have no validity, neither does the Union's claim that the discharge should be set aside because it violates the just cause and progressive discipline provisions of the Contract. This unfortunately is not the first time that an Ohio Department of Transportation employee has lost his commercial driver's license and with it the ability to operate heavy equipment which is the essential element of a Highway Worker 2's position. Nor is it the first time that the Union has raised the argument that discharging an employee who has lost his commercial driver's license constitutes a violation of the just cause and progressive discipline sections of the Agreement. Thus, in Case No. 31-04(12-30-91)49-01-06 between these same parties, Arbitrator Nels E. Nelson declared with regard to those arguments:

> 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.

Likewise, in Case No. 31-12(06-09-92)07-01-06, Arbitrator Mollie H. Bowers essentially took the same position for the same reasons as did Arbitrator Nelson.

Like Arbitrators Nelson and Bowers, this Arbitrator is convinced that operating heavy equipment comprises the vast majority of the Highway Worker 2's

responsibilities. An individual in that classification can only operate such equipment, though, if he or she has a commercial driver's license. The Grievant had one, but lost it because the license was suspended after he was found guilty of driving while under the influence of alcohol. It doesn't matter that the offense took place while the Grievant was off duty since it set in motion the events which ultimately led to his inability to obtain a commercial driver's license. As was pointed out earlier in this opinion, had the Grievant not been found guilty of driving under the influence of alcohol and his license suspended, it would have been automatically renewed by the State of Ohio and this matter would never have arisen because the Grievant would have continued to work with a valid commercial driver's license regardless of his ability to read or write. His ability to obtain the license only became an issue when, through his own actions, he lost the license. More importantly, his failure to obtain the license which was a prerequisite for the position he held gave the Employer just cause to terminate him just as it gave the Employer just cause to do so in the cases before Arbitrators Nelson and Bowers.

If the Grievant is to avoid that penalty, then it must be because the Grievant, as the Union claims, is the victim of disparate treatment. In the hopes of establishing that defense the Union offered into evidence the names of a number of other Ohio Department of Transportation employees who were classified as Highway Worker 2's or above and who were reclassified as Highway Worker 1's when they did not obtain commercial driver's licenses. While the Employer challenged some of the names on the Union's list, the undersigned is willing to accept the Union's claim that every employee it made reference to was classified as a Highway Worker 2 or above and was reclassified to a lower position as a result of not obtaining a commercial driver's license. However, that evidence

does not lead to the conclusion the Union seeks to impress on the Arbitrator, that the Grievant was the victim of disparate treatment and is, therefore, entitled to be reinstated.

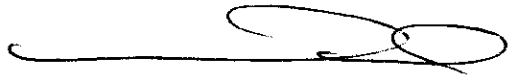
The problem with the Union's evidence is that the Commercial Driver's License Act, as applied by the Department of Transportation gave every effected employee until April, 1992 at the latest to obtain a commercial driver's license. Further, Section 37.08 provides that if an employee could not obtain the license within a reasonable amount of time Management had to reposition that employee. Thus, the Union's evidence, far from proving that the Grievant is being singled out for discipline, simply establishes that the Employer was doing exactly what it was required to do under the Federal Commercial Driver's License Act and the Contract. For the Union to prevail on this defense it would have had to show that the employees whose names it offered into the record, like the Grievant, had but subsequently lost their commercial driver's licenses and instead of being terminated as was the Grievant, were repositioned into different classifications. In the absence of such evidence, it follows that the Union's claim that the Grievant is the victim of disparate treatment must be overruled.

It is never easy to sustain a discharge and particularly not in circumstances similar to the ones which exist in this case. By all accounts, the Grievant was a good employee who worked very hard to perform his job in a competent and credible manner. Four years ago, believing that what he was doing was right, he obtained a commercial driver's license only to lose it through a mistake. Having lost it, he did not have the wherewithal to regain it. The Employer could have repositioned the Grievant had it wanted, but it was not obligated to do so under the Contract. Nor was it required to do so under the Americans with Disability Act which the Employer convinced the Arbitrator does not apply to the Grievant's circumstances. The undersigned, like the Employer

and the Union, is required to follow the Agreement. Unfortunately, in this instance doing so means that the undersigned must uphold the Employer's decision to discharge the Grievant.

V. **DECISION**

For the foregoing reasons, the grievance is denied.



LAWRENCE R. LOEB, Arbitrator

July 10, 1994
Date