

**ARBITRATION PROCEEDINGS**

In the Matter of Arbitration	)	Gr. No. 27-23-970109-047-06-10
	)	
between	)	Grievance of Mark A. Benner
	)	
The State of Ohio	)	Hearing Date: February 20, 1998
	)	Columbus, Ohio
and	)	
	)	Briefs Received: March 27, 1998
The State Council of	)	
Professional Educators, OEA/NEA	)	<b>DECISION AND AWARD</b>

**APPEARANCES****For the State:**

Joseph B. Shaver, Chief, DR&C Bureau of Labor Relations  
Ronald Edwards, Warden, RCI  
David Baker, Investigator, RCI  
Bryan Smith, Safety Officer, RCI  
Mike Crispin, Ohio State Patrol Trooper  
Keith Ault, Deputy Warden, RCI  
Heather Reese, OCB

**For the Union:**

Ronald H. Snyder, Esq., Attorney  
Henry L. Stevens, SCOPE  
Nathan Lyle, Deputy Sheriff  
Mark A. Benner, Grievant

## I. INTRODUCTION AND BACKGROUND

The State of Ohio ("employer") and the State Council of Professional Educators, OEA/NEA ("SCOPE") or ("Union") are parties to a Collective Bargaining Agreement from a period of 1994 through 1997. Article 5 of the Agreement contains a multi-step grievance procedure leading to arbitration at Step 4. The undersigned was selected as the arbitrator in this matter pursuant to Article 6, Section 6.05, which states that "the arbitrator shall have no power to add to, subtract from or modify any of the terms of this Agreement; nor shall the arbitrator impose on either party a limitation or obligation not specifically required by the expressed language of this Agreement." The arbitrator's decision shall be final and binding upon the parties. The hearing in this matter concluded on February 20, 1998. The parties stipulated and agreed that this matter is properly before the arbitrator for a decision and an award.

The grievance in this matter was filed by Mark A. Benner on December 9, 1996 alleging that he was removed from his employment by the Employer without just cause. He seeks reinstatement to his former position together with a full back pay and benefits.

The Employer discharged the Grievant for his alleged violation of work rules 1, 8, 24, 30a, 37 and 40, all of which will be discussed in more detail in the following opinion.

## II. FACTS

The Grievant, until the time of his discharge, was a 19 year State employee. He was employed for the last nine years as a vocational teacher at the Ross Correctional Institution (RCI). The Grievant requested and was granted an administrative leave from his regular work hours beginning on Wednesday, April 24, 1996, and ending at 3:30 p.m. on Friday, April 26, 1996. He requested the leave, as he had in the past years, in order to

participate in the VICA Program which took place at the Ohio State Fairgrounds in Columbus, Ohio. The program involved various craft competitions in which certain construction projects would be judged. The Grievant's schedule was similar to prior years; the set up of the competition occurred on Wednesday through Friday; and, the actual competition took place on Saturday. On Sunday, the Grievant was to participate in tearing down the projects in order to salvage materials which he would use at RCI in his classes. On this occasion, the Grievant requested and was granted permission to use a State vehicle for transportation between Chillicothe and Columbus. The RCI vehicle log indicates that the Grievant requested the use of the vehicle on April 1<sup>st</sup> for use from the period of April 24<sup>th</sup> through Saturday, April 27<sup>th</sup>. The Grievant had actually intended to use the vehicle through Sunday, April 28<sup>th</sup> when he transported the materials back from the program at the Ohio State Fairgrounds to RCI in Chillicothe. There was no objection from his supervisor so long as the Grievant returned the vehicle on Monday morning.

The Grievant traveled back and forth between Chillicothe and Columbus on Wednesday, Thursday and Friday. He intended to stay overnight in Columbus on Saturday because he had been offered a free hotel room at a hotel in Columbus in which his friends were participating in an Elks event. He arrived at the hotel after the program had concluded late Saturday afternoon. He intended to tear down the projects on Sunday morning and return to Chillicothe at that time.

After he arrived at the hotel, he began participating in various social gatherings with his friends at the Elks meeting. He would go with his friends from room to room in order to socialize and during this time he would eat and drink beer. After he returned from the parties late Saturday night, he discovered that he was missing some of the tools

he needed in order to tear down the projects on Sunday morning. He decided to drive back to Chillicothe at that time instead of staying in his hotel room. He planned to sleep at home and get up early in the morning and return to Columbus. In the early morning hours of Sunday, April 28<sup>th</sup>, at approximately 3:20 a.m., the Grievant became involved in a motor vehicle accident in which he and the other driver received serious injuries. As a result of this accident, the Grievant was charged with operating a vehicle while under the influence of alcohol; operating a vehicle with alcohol in his blood of .183 or 1% or more by weight which was above the legal limit for operating a motor vehicle; and, driving left of center. The operator of the other vehicle was also charged with operating a vehicle under the influence of drugs or alcohol. None of the charges against the Grievant were ultimately established and the Grievant was not convicted of any criminal or traffic offense related to this automobile accident.

The Grievant, because of the serious injuries he received, could not remember specifically how much alcohol he consumed in the afternoon and evening of April 27<sup>th</sup>. Prior to the accident, the Grievant was stopped by a Pickaway County Deputy Sheriff after his driving was observed to be erratic. The Deputy followed the Grievant for several miles and eventually pulled him over. The Grievant was observed by the Deputy and the Deputy permitted the Grievant to proceed, believing that the Grievant was subject to fatigue but was not intoxicated or otherwise under the influence of alcohol. The State Highway Patrol Trooper, however, who arrived at the accident scene did observe an odor of alcohol coming from the Grievant's vehicle and the Trooper formed the opinion that the Grievant was operating his vehicle under the influence of alcohol. A blood test was

ordered for the Grievant after he arrived at the hospital in order to determine his blood alcohol content.

The Grievant was thereafter charged with the violation of the following work rules: Rule 1, which includes drunkenness, immoral conduct, neglect of duty, failure of good behavior, or any other acts of misfeasance, malfeasance or nonfeasance in office; Rule 8, failing to carry out a work assignment or the exercise of poor judgement in carrying out an assignment; Rule 24, interference with or failing to cooperate in an official investigation or inquiry; Rule 30a, the possession or consumption of alcoholic beverages while on duty; Rule 37, actions that could harm or potentially harm the employee, or members of the general public; and, Rule 40, any act that would bring discredit to the employer. The Grievant's conduct on the night in question and during the State's investigation of the incident relative to each of these work rules will be separately discussed and analyzed below in order to determine whether or not there was just cause for the Grievant to be disciplined and whether or not the discharge from his employment was the appropriate discipline to be issued to the Grievant under the facts and circumstances of this case. Furthermore, the Grievant believes that he was denied certain procedural due process rights guaranteed to him under the Collective Bargaining Agreement. That issue will first be addressed.

### III. PROCEDURAL DUE PROCESS

Section 13.02 provides for an investigatory meeting to take place in order for the Employer to obtain information which might reasonably lead to disciplinary action against the Employee. The Employee has a right to have an Association representative present with him at this meeting. The Employee is required to respond to the allegations

“unless he/she is subject to criminal penalties.” Section 13.03 requires the Employer to provide the Employee with notice of a pre-disciplinary conference when the Employer plans to initiate a termination of the Employee’s employment. A notice must be provided to the Association representative and the notice must include a statement of the charges against the Employee, the contemplated disciplinary action, and the date, time and place of the conference. That section specifically provides that the pre-disciplinary conference “shall be conducted by a designee of the Appointing Authority who was not directly associated with the incident(s) which led to contemplated disciplinary against the Employee.” The Grievant argues that the Employer violated this provision when it permitted Mr. Ault, the Grievant’s Supervisor, to serve as the pre-disciplinary conference Hearing Officer. The Grievant believes that Mr. Ault was directly involved with the incident in question because it was Mr. Ault’s responsibility to authorize the assigned vehicles to employees including the assignment of the vehicle to the Grievant, which he was driving on the day in question. Mr. Ault authorized the Grievant to keep the vehicle through Sunday, April 28<sup>th</sup> and return it to the Institution on Monday, April 29<sup>th</sup>. Mr. Ault was interviewed by the investigators as part of the investigation of the Grievant’s conduct relative to the parameters of the vehicle assignment and the Grievant’s use of the vehicle. It was Mr. Ault who was called on the night in question and informed that there had been an accident involving the State vehicle.

The Employer maintains that Mr. Ault had no direct involvement in the incident in question; he was merely the person to be notified in order to determine where the damaged vehicle should be taken. There was no evidence presented by the Grievant that

Mr. Ault was biased or prejudiced in any respect against the Grievant when he served as a Hearing Officer.

While the elimination of Mr. Ault as a Hearing Officer would have been preferable from the standpoint of eliminating even the appearance of any impropriety, I agree with the Step 3 Hearing Officer in this case that there was no violation of Section 13.03 because Mr. Ault was not directly associated with the incident. The facts relative to Mr. Ault's involvement are undisputed and unrelated to the facts and circumstances surrounding the allegations of misconduct on the part of the Grievant. Mr. Ault testified that the Grievant was permitted to use the vehicle and that the vehicle could be returned on Monday morning to the Institution. The notification to Mr. Ault of the accident and his responsibilities for determining the custody of the vehicle are facts which are irrelevant to the issues of misconduct; namely, whether the Grievant was operating the vehicle in an unfit condition, in a negligent or reckless manner. Mr. Ault had no direct knowledge of the circumstances surrounding this issue and, therefore, there is no reason why he could not serve as a Hearing Officer under Section 13.03.

#### IV. FAILURE TO COOPERATE WITH THE INVESTIGATION

The Grievant asserts that he did not violate Rule 24 by refusing to cooperate with the investigation. Rule Section 13.02 of the contract is clear that an employee is not required to respond to the allegations if he is subject to criminal penalties. There were criminal charges pending against the Grievant at the time of his investigatory interview. Furthermore, the Grievant was entitled under Garrity v. New Jersey, (1967) 385 U.S. 493 to remain silent unless he was assured that the information in the interview would not be used against him in any criminal proceeding. The interviewers refused to sign a

document prepared by the Grievant's attorney, which attempted to secure the Grievant's rights, protected under Garrity. The State interviewers claim that they assured the Grievant of his rights verbally, but they were unwilling to sign the form prepared by the Grievant's attorney. The State argues that the Grievant violated Rule 24 when he would not respond after he received these verbal assurances that his rights would be protected.

The evidence, based upon the testimony of Mr. Baker, the interviewer, the Grievant, and Mr. Stevens, the Association representative, is that the Grievant did not receive all of the assurances to which he was entitled in order to protect his Garrity rights. Mr. Baker was somewhat equivocal when he provided the assurances to the Grievant and to Mr. Stevens. Mr. Baker, on one hand, advised the Grievant that he would not be subject to criminal penalties as a result of the interview, but Mr. Baker, on the other hand, advised the Grievant that he could not "speak for any law enforcement agency and what investigation or charges they may consider." This statement lacked the requisite assurance to the Grievant that statements made by him at the interview would not be ultimately used against him in a criminal proceeding. The Grievant was entitled to remain silent based upon that equivocal remark. The Grievant and his association representative could have understood from that remark that other law enforcement agencies could obtain information from the Grievant based upon his statements at the interview and ultimately use his statements to support criminal charges against him. The Grievant, therefore, was entitled to insist upon the full protection of his Garrity rights by remaining silent and he did not violate Section 13.02 by failing to respond to the allegations. Furthermore, the Grievant was not required to testify or respond to the



allegations at the pre-disciplinary conference. Accordingly, there is a finding that Rule 24 was not violated by the Grievant.

#### IV. THE GRIEVANT'S CONDUCT AND THE VIOLATION OF THE REMAINING WORK RULES

Based upon all of the evidence presented at the hearing, I find that the State has established by a preponderance of the evidence that the Grievant was in an unfit condition to operate the State motor vehicle and that his negligence caused the motor vehicle accident in which both he and Darlene Wills were injured. The testimony of State Trooper Crispin, together with the accident report, established to this arbitrator's satisfaction that the Grievant precipitated the collision by driving his vehicle left of the center line. The evidence, however, is unclear as to whether or not the Grievant was operating the vehicle with a blood alcohol content over the legal limit or whether he was under the influence of alcohol. The Grievant could not remember how much alcohol he consumed nor the effect of the alcohol upon him. State Trooper Crispin was of the opinion that the Grievant was under the influence of alcohol at the time of the collision. The interior of his vehicle had an odor of alcohol, however, he testified that he would not be comfortable with his opinion without the support of the blood alcohol test report which he reviewed and which stated that the Grievant's blood alcohol content was .183. The issue of whether the Grievant was under the influence is further clouded with uncertainty based upon the testimony of Deputy Sheriff Lyle. Deputy Lyle pulled the Grievant over after he observed the Grievant operating his vehicle left of center. Deputy Lyle proceeded to follow the Grievant for approximately three miles. He spoke with the Grievant and concluded that the Grievant was sleepy or fatigued. He did not notice an odor of alcohol on the Grievant, slurred speech, a lack of coordination, bloodshot eyes, or

any confusion on the part of the Grievant. The Deputy Sheriff, who obviously is a person experienced in observing and determining whether or not drivers are operating their vehicles under the influence of alcohol, concluded that the Grievant was not under the influence of alcohol, and the Deputy released the Grievant and allowed him to continue driving.

The blood alcohol test which was administered to the Grievant at the hospital could be a determinative piece of evidence to establish that the Grievant was intoxicated but the report is simply not reliable enough on its own to be persuasive on the issue. The report was not properly authenticated or admitted into evidence at the criminal trial. While the same standards might not be required in an arbitration proceeding, this arbitrator is aware that medical and laboratory tests such as the one at issue can be subject to errors. This is why there must be a proper foundation established for the admissibility of such tests in court proceedings including evidence of the chain of custody of the test sample and the following of proper procedures for determining the test results. Nothing was offered in these proceedings along those lines other than the test report itself. The test could be accepted as a piece of corroborative evidence if it conformed with the expert opinions which were offered in evidence; however, the expert witness police officers, Lyle and Crispin, had conflicting opinions as to whether or not the Grievant was operating his vehicle under the influence of alcohol. Accordingly, based upon all the evidence presented, including the test report, which was offered without any foundation, I cannot find by a preponderance of the evidence that the Grievant was under the influence of alcohol at the time of the accident.

Nevertheless, there was more than sufficient evidence, including testimony from the Grievant, that the Grievant was negligent, that he exercised poor judgement and that he was in an unfit condition for operating a motor vehicle. It was 3:20 a.m. and the Grievant had been without sleep for a considerable period of time. Because of his activities and responsibilities at the program, he had been receiving little sleep over the last several days. These circumstances, combined with the admission by the Grievant that he had consumed alcohol at regular intervals from late afternoon into the evening during the social activities at the Elks meeting at the hotel, make it clear that the lack of sleep combined with the alcohol consumption caused the Grievant to make poor decisions, including the decision to drive home in the early morning hours of Sunday when he was in no condition to do so. The Grievant's conduct amount to negligence, neglect of duty, and the failure of good behavior which violated Rule 1. He technically was off duty at the time but he was in the process of completing the self-imposed work assignment of tearing down the projects after the conclusion of the program in order to take the materials back to RCI. He certainly exercised poor judgement in carrying out these duties in violation of Rule 8. He knowingly and intentionally consumed alcohol at or near the time he intended to carry out this assignment and while operating a vehicle which was owned by the State. This could be considered a violation of Rule 30a even if it was not established that he was operating the motor vehicle at the time of the accident under the influence of alcohol. His actions were harmful to himself and to members of the general public in violation of Rule 37. The evidence did not, however, establish by a preponderance of the evidence that Rule 40 was violated. It is not clear as to whether negligent acts involving motor vehicle accidents are the types of acts that are considered

to be discrediting to the employer as contemplated by Rule 40. Nevertheless, the Grievant's conduct violated the above mentioned rules and was serious enough to require discipline commensurate with the violations.

This arbitrator agrees with the reasoning of Arbitrator Marvin J. Feldman in a case involving similar facts between the State of Ohio and OCSEA where Arbitrator Feldman found that these circumstances are not the type for which the concept of corrective progressive discipline applies. When the conduct in question is severely sub-standard, a discharge must be the appropriate discipline even on the first occasion, because corrective progressive discipline is reserved for those type of cases in which the infractions are relatively minor in nature, and in which the issuance of progressive discipline will correct the misconduct and prevent it from occurring again.

Arbitrator Feldman further considered the argument of the Union that the Employer violated the contract by not offering the Employee the opportunity to participate in the established alcohol treatment program. Likewise, the Grievant in this case alleges that the State violated Section 7.14 and Appendix F of the contract by terminating the Grievant rather than offering him an opportunity to participate in the treatment program. Section 5 of Appendix F states that no disciplinary action shall be taken the first time an employee is found to be under the influence of alcohol on duty. Arbitrator Feldman concluded that those sections did not provide a defense for an Employee who becomes under the influence of alcohol and, as a result, commits a gross sub-standard act of misconduct. The operation of the vehicle by the Grievant in this case in an unfit condition which resulted in a serious accident is the type of conduct which fits into the gross sub-standard category.

## V. THE TERMINATION DECISION

The determination of whether or not there is just cause in discharging an Employee involves two factors: (1) has the commission of the misconduct upon which the discipline administered was grounded, been adequately established by the proof; and (2) if proven, was the disciplinary penalty which was imposed reasonable in light of the nature, character and gravity of the offense. Unless the language of the Collective Bargaining Agreement provides otherwise, an arbitrator has the inherent power to determine the sufficiency of the cause and the reasonableness of the penalty imposed. Bd. of Trustees v FOP (1998) 81 Ohio St. 3d. 269, 272.

I find in the instant case that, while discipline and a severe penalty is warranted, the most severe penalty of discharge is unwarranted based upon the evidence of the Grievant's work record. In the Appleton discharge case between the State and OCSEA Arbitrator Feldman sustained the discharge decision because the Grievant was a relatively short-time employee. The Employee was operating the vehicle while under the influence at a high rate of speed, endangering his own life and the lives of State citizens. The facts in this case, however, with regard to mitigating factors are quite different. The Grievant in this case was a 19 year State employee with an unblemished excellent employment record. He received many commendations for his work performance and this instance was an isolated occurrence of negligence and poor judgement. The Grievant was in the process of attempting to perform a task which was to benefit his Employer by working on Sunday at the fairgrounds to tear down the projects in order to use the materials at RCI. He mistakenly believed that he was in fit enough condition to drive home early Sunday morning in order to retrieve tools which he needed to break down the

projects. While his decision was certainly careless and negligent it did not equal the type of reckless conduct considered by Arbitrator Feldman in the Appleton case. Since the misconduct in question was the only infraction over the Grievant's long and previously unblemished work career, this one instance, as severe as it is, should not cause his career to be destroyed. The discharge, therefore, should be converted to a suspension and the Grievant should be reinstated to his position without any back pay or benefits. It is recognized, based on the evidence presented, that the Grievant is presently considered totally disabled and he is unable to return to his duties at this time. Nevertheless, in the event he becomes able to return to his duties at some future time, he should be entitled to return to work, based upon his prior record.

V. AWARD

The grievance is sustained to the extent that the Grievant is reinstated to his former position; however, he is reinstated without back pay or benefits.

Date April 7, 1998

Mitchell B. Goldberg  
Mitchell B. Goldberg, Arbitrator