#1398

ARBITRATION

BETWEEN

OHIO DEPARTMENT OF PUBLIC SAFETY
DIVISION OF STATE HIGHWAY PATROL

and

Gr. #15-00-990119-0004-01-07
(Roscoe T. Bowman Discharge)

OHIO CIVIL SERVICE EMPLOYEES
ASSOCIATION, AFSCME LOCAL 11, AFL-CIO

APPEARANCES:

For the Employer: Captain Richard G. Corbin
Ohio State Highway Patrol
Columbus, Ohio

For the Union: Michael E. Martin
Staff Representative
Cincinnati, Ohio

OPINION AND AWARD OF THE ARBITRATOR

Frank A. Keenan
Labor Arbitrator

Statement of the Case:

The Grievant in the case, Roscoe T. Bowman, has been employed by the State's Department of Public Safety since 1985. He was first employed with the Bureau of Motor Vehicles. On April 29, 1996, the Grievant, while still employed with BMV, passed out and fell on the job, injuring himself. He was subsequently tested for drugs. His test results were positive for cocaine. On June 13, 1996, the Grievant signed an acknowledgment that he had received correspondence of the same date from Human Resources Commander Major J. M. Demaree, which read in pertinent part as follows:

> "On Friday, May 31, 1996 a pre-disciplinary meeting was conducted for you . . .
>
> The results of the meeting were that you were found to be in violation of Work Rule C10 (d), Failure of Good Behavior and Work Rule C13(b1), Substance Abuse Policy.
>
> Just cause exists for discipline, however discipline will be held in abeyance at this time based on Section 5 of Appendix M, "Drug-Free Workplace Policy." Section 5 of that policy states as follows:
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> > "On the first occasion in which any employee who is determined to be under the influence of, or using, alcohol or other drugs, while on duty, as confirmed by testing pursuant to this policy, the employee shall be given the opportunity to enter into and successfully complete a substance abuse program certified by the Ohio Department of Alcohol and Drug Addiction Services. No disciplinary action shall be taken against the employee, provided he/she successfully completes the program and is never again found to be under the influence of, or using or abusing alcohol or other drugs, while on duty."
>
> It is my understanding that as of this letter you have taken the appropriate steps to be in compliance with Section 5 of Appendix M."
>
> Following this disposition of the Grievant's being under the

influence of drugs while on duty in 1996 the Grievant successfully bid in to a Driver's License Examiner I position with the State Highway Patrol. The State's "Classification Specification" for said position provides in pertinent part as follows:

> Series Purpose: The purpose of the driver's license examiner occupation is to administer & score written, oral, interpreter, video, vision, & special BMV ordered examinations for all types of licenses & to conduct driving skills &/or maneuverability examinations for assigned categories of licenses.
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> At the lowest level, incumbents determine legality to issue license, administer & score written, oral, interpreter, video, vision, & special BMV ordered examinations for all types of licenses, and conduct vehicle inspection & driving skills &/or maneuverability examinations for all types of licenses, except for Commercial Driver's License.
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> Class Title: Driver's License Examiner 1
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> Class Concept: The full performance level class works under general supervision & requires working knowledge of laws & signs applicable for operation of motorized vehicles & Bureau of Motor Vehicles' policies & procedures governing testing for & issuing of licenses in order to determine legality to issue licenses, administer & score written, oral, interpreter, video, vision, & special BMV ordered examinations for all types of licenses & conduct vehicle inspection, & driving skills & maneuverability examinations for all types of licenses, except for Commercial Driver's License.

As the Employer notes, the Grievant is most often testing young driver's license seekers.

The Grievant was notified by letter dated January 7, 1999, from Superintendent Colonel Kenneth B. Marshall that Director of Public Safety Brown intended to terminate his employment with the Patrol for violation of work Rule C-10 (d), it being charged that the Grievant "failed to report to work due to using crack cocaine." This letter served as the Grievant's formal notice of a pre-

disciplinary meeting before meeting Officer S/Lt. Hook on January 12, 1999. Lt. Hook reported to Department of Public Safety Director Maureen O'Connor that the Grievant attended said meeting, with Union Representation, and gave testimony on charges that "on December 19, 1998, and again on January 5, 1999, he was unable to report to work due to illness, but later reported both incidents involved using crack cocaine." Lt. Hook found "just cause exists for discipline." Thereafter, by letter dated January 13, 1999, Director O'Connor advised the Grievant that his "employment with the Department of Public Safety will be terminated . . . Wednesday, January 13, 1999. You are being terminated for violation of Work Rule C 10 (d)."

Work Rule C 10 (d), Failure of Good Behavior, provides as follows:

> "d. **Failure of Good Behavior** - Any misconduct which violates recognized standards of conduct, including but not limited to unauthorized release of information, violation of traffic laws in state vehicles, misuse of position for personal gain, taking bribes, threats or acts of physical violence, verbal abuse or criminal convictions.
>
> NOTE: The Ohio Department of Public Safety expects its employees to maintain a standard of conduct that is consistent with the mission, goals and objectives of the Department. Employee actions that adversely affect their duties and compromise or impair the ability of the Department to carry out its mission, goals and objectives will be subject to the disciplinary process."

It is also noted that Work Rule C 10 (f) provides as follows:

> "f. **Off Duty Conduct** - An employee may be subject to discipline for off duty conduct which damages the reputation of the employer, impacts the ability of the

> employer to fulfill its mission, the ability of the employee to perform his/her job, or will result in reluctance of other employees to work with the employee and impacting their ability to perform their jobs."

The record reflects that, as the charge against the Grievant alleges, he in fact initially reported off "sick" on December 19, 1998 and shortly thereafter reported he was unable to work due to having smoked crack cocaine and further that he in fact initially reported why he was late, namely, due to baby sitting problems on January 5, 1999, and thereafter failed to report for work at all. On January 6, 1999 he reported to Supervisor Moore that he was unable to work due to having smoked crack cocaine. The record shows that the Grievant returned to work on December 23, 1998, after confirmation from treating medical professionals that he was authorized to resume work. The Grievant also indicated he was going to enter into treatment for his addiction. Grievant was placed on "limited duty" to ensure he was closely supervised and not in a position to endanger the public.

The Grievant timely grieved his termination on 1-13-99, denying that he'd violated Work Rule C-10 (d) and that he was removed without just cause, and while he was voluntarily participating in an Ohio EAP Program for drug and emotional problems. By way of remedy the grievance seeks that the Grievant be reinstated to his Driver Examiner 1 position without loss of seniority, receive all back pay, and otherwise be made whole.

The grievance was denied. On 2-11-99 Hearing Officer Captain M. A. King, in denying the grievance, made the following "Finding":

It is the position of the Employer that grievant was removed for just cause Grievant has no special protection from disciplinary action by the employer because he is an illegal drug user. The fact is grievant was removed because he has a poor deportment record, a history of drug use, is a current drug user and was unable to report for work because of his illegal drug use. It is easy to say there was a violation of the labor agreement as a result of grievant's removal, however, it is not supported by the facts.

For the Union to suggest that grievant was treated in a discriminatory or unfair manner is absolutely without foundation. The fact that grievant has relapsed does not establish grievant as a protected class. The simple fact is, current illegal drug users are not protected under federal or state law and certainly are not protected under the labor agreement.

The Union suggests grievant's attempt at a second rehabilitation, in less than three (3) years, somehow creates a "safe haven" for his misbehavior which clearly affected his ability to perform the essential functions of his job. The fact is he could not report to work because he was using illegal drugs. It is illogical for the union to suggest, at this point that grievant would claim illegal drug use as an excuse for failing to appear for work, unless it was true. The fact there was no chemical test for drugs is not a bar to believing grievant was using cocaine. It is simply an unfortunate truth.

A law enforcement Employer would be remiss in allowing continued employment for an individual who through his own illegal behavior makes himself unfit to continue in a position of public trust. It is the Union's job to represent bargaining unit members in nearly every circumstance of misbehavior. The Employer understands that duty. However, the Employer has a duty to insure that public employees are not only treated fairly, but that they also live up to reasonable behavioral expectations. In that regard, grievant has failed.

The grievance is denied.

Other matters of note concern the Grievant's department record which reflects as follows: 11/11/98: written reprimand - failure to follow proper procedure (conducted driving and maneuverability test on expired permit); 1/2/98: verbal reprimand - failed to

follow proper procedure (conducted a maneuverability test on an expired permit); 11/11/96: 3 day suspension - AWOl (neglect of duty and dishonesty); 8/20/96: written reprimand - tardy (neglect of duty/tardiness); 3/19/96: 1 day suspension - AWOL (neglect of duty/failure to appear without notification); 12/2/95: written reprimand - tardiness; 10/3/95: written reprimand - unauthorized absence/habitual absenteeism/failure to notify; 9/9/94: written reprimand - unauthorized absence - failure to follow notification procedures; 4/6/95: written reprimand - AWOL (unauthorized absence/failure to follow notification procedures); 6/9/95: written reprimand - tardy; 7/9/97: 1 day suspension - tardy (reported late for work 25 minutes).

Upon cross-examination the Grievant indicated that he'd used illegal drugs since 1987 "off and on"; that prior to 1996 his crack use "was not that often." The Grievant also testified that since 1/5/99 he had not used cocaine and that since said date he'd had five visits to a rehab program. The Grievant testified that he'd been diagnosed as a clinically dependent personality, with the consequence that there was always the potential for a relapse without a program. In this regard the Grievant indicated that after his 1996 EAP Program he'd "thought I'd beaten it," but that, obviously enough, he'd had a relapse.

Ellen DuPlessis, Intake Coordinator for the Ohio Employee Assistance Program, furnished the following letter to advocate Martin on January 12, 1999:

Be advised that Mr. Bowman has signed the appropriate Release of Information form that allows this information to be sent to you.

I received a call from Mr. Bowman on December 21, 1998 requesting EAP assistance in obtaining an insurance authorization for him to voluntarily enter an outpatient program in the Cincinnati area. With verification from his case manager in the Outpatient Department at Bethesda Hospital, Mr. Bowman was admitted into their Intensive Outpatient Program on December 28, 1998. To date, Mr. Bowman remains in compliance with the guidelines of the program. He has attended all sessions as required. He has had a total of four (4) drug screens done with all four (4) being "Negative." He reports attending at least four (4) community self help meetings per week as program guidelines require.

The Employer's Position:

In its opening statement the Employer took the position that the Grievant's poor attendance record coupled with his continued use of crack cocaine has rendered him unfit for employment as a driver's license examiner, a position requiring public trust. In its post-hearing brief, the Employer noted that in 1996 the Grievant had previously been afforded a second and last chance at conformance to the Employer's, and the public policy expectation that as a public safety employee he refrain from abuse of drugs. The Employer, pointing to the Contract's Appendix M, takes the position that in Appendix M the parties have codified their understanding that a single opportunity at rehabilitation is the standard, and that said standard is, with some exceptions (not applicable here), regarded as in effect for some five (5) years from and after the date the employee is accorded such a second chance. And here, argues the Employer, the Grievant has not upheld his end of the bargain with respect to the second chance accorded

to him in 1996. The Employer notes that at the hearing herein the Grievant acknowledged that he knew that in 1996 he would be terminated if he did not successfully complete a drug rehabilitation program. Grievant, asserts the Employer, willingly entered into a last chance agreement in 1996. It is the Employer's contention that pursuant to said Agreement the Grievant was required to complete an EAP monitored rehabilitation program and never again be found to be under the influence of drugs while on duty. No discipline was imposed because the Grievant successfully completed a rehabilitation program.

It is the Employer's contention that the purpose of a last chance agreement is to give the employee a final opportunity to conform to the behavioral expectations of the Employer. The impact of a last chance agreement is that it limits the just cause challenge to the existence of a triggering event; no challenge to the level of discipline is permitted. The parties have agreed upon a reasonable second chance expectation for substance abusers; third chances are not required or reasonable.

With respect to the Union's contention to the effect that the Grievant was not on duty while using crack cocaine and therefore not in violation of the Appendix M standard of purportedly but one chance at rehabilitation, the Employer takes the position that a clear nexus exists between Grievant's use of crack cocaine and his public safety employment.

The Employer takes the position that it does not view the

instant case as one which hinges on the existence or absence of a "last chance agreement." A determination that a "last chance agreement" was not in place simply requires the Employer to show just cause for removal. Given the totality of the circumstances Grievant was removed for just cause with or without the existence of a "last chance agreement." The Employer asserts that by his own admission the Grievant has been a user of illegal drugs since 1987, and there is no persuasive "after acquired" evidence to suggest Grievant is a recovered illegal drug user. Grievant's deportment record is further evidence of an employee who has established a long-term pattern of misbehavior. Just prior to his 1996 positive test for cocaine, the Grievant was routinely in violation of reporting procedures and absent without leave. The same pattern surfaced during the December 1998 and January 1999 incidents.

The parties have established a reasonable standard that employees will be given the opportunity to rehabilitate after the first incident of illegal drug use. Grievant was afforded that opportunity in 1996. The demand for a third opportunity is not only unreasonable, but dangerous given Grievant's status as a public safety employee. No public safety organization can continue the employment of any employee who has shown an inability to abstain from the use of illegal drugs. The risk to the public is unacceptable. The potential damage to the reputation of the organization is too great. Grievant has received great benefit and compassion from his Employer, his coworkers and his Union.

Unfortunately, the power of cocaine and his twelve year history of illegal drug use has left him unsuitable for continued employment in the field of public safety.

The Employer established just cause for Grievant's removal. The facts of this case and Grievant's poor employment history do not support clemency. The substitution of a lesser penalty would not be appropriate. The Employer asks that the grievance be denied in its entirety.

The Union's Position:

The Union takes the position that what is involved here is that the Grievant, who is chemically dependent, suffered a relapse on 12-18-98 and 1-5-99. The Grievant was entitled to and did use sick leave on these occasions. He had a significant sick leave balance. Chemical dependency is a nationally recognized treatable illness, but not a curable disease. There was no evidence that the Grievant ever used drugs while on duty. The Union notes that Management was aware of the Grievant's prior drug abuse two years ago and yet promoted him thereafter.

The Union contends that the Grievant showed good character and honesty by reporting his off duty drug use to his Employer and seeking help from the EAP. He also used good judgment, asserts the Union, by not reporting to work on the two occasions when he thought he might be under the influence of drugs. If the Grievant had not told on himself Management would not have known about his off duty use of an illegal drug. No discipline grid forewarned the

Grievant that he would be fired because he was honest with his supervisor about his off duty use and request for help from Management. The Grievant did the right thing, asserts the Union, by not coming to work when he felt he might be under the influence of a drug.

It is the Union's contention that Management removed the Grievant for being honest about his relapse and requesting help. And no case of excessive absenteeism, sick leave abuse or AWOL is made out. Furthermore, asserts the Union, the Grievant is not a law enforcement employee. Therefore, asserts the Union, in all these circumstances the Grievant's removal was not in conformance with the Contract's progressive and corrective discipline standards and just cause standards.

The Union also points to the testimony of supervisors and fellow employees alike who characterized the Grievant as a good worker, an employee with a good work ethic, and an employee well liked by his coworkers and drivers being tested by him, as well. The Union also points to the Grievant's participation in December and January in a supervised rehabilitation program. In light of these factors, Management "went too far," asserts the Union, in removing the Grievant, that is, removal of the Grievant was too severe.

Based on all the foregoing, the Union urges that the grievance be sustained.

The Issue:

The parties stipulated that the issue is:

"Was the Grievant terminated for just cause? If not, what shall the remedy be?

Discussion & Opinion:

First addressed are the Employer's apparent contention that the Grievant entered into a Last Chance Agreement in 1996 and the Union's apparent challenge to that conclusion. In light of the provisions of Appendix "M" prevailing at the time (and essentially so prevailing to date), coupled with the Grievant's admission that he understood that he would be fired if he did not successfully complete his 1996 rehabilitation program, and his written acknowledgment of receipt of Major Demaree's letter of June 13, 1996, it must be concluded that indeed the Grievant did enter into a Last Chance Agreement on 6/17/96, when he acknowledged Demaree's correspondence. To be sure it would be more comforting if such correspondence was clearly designated as a Last Chance Agreement, which it is not, but the record is clear that all parties, including the Grievant, understood that the Grievant was placed on a Last Chance Agreement. Under the terms of said Agreement, even to date still viable pursuant to the five-year-rule of the current Appendix "M", the Grievant committed to "never again" be found to be under the influence of, or using, or abusing drugs while on duty. (Emphasis supplied.) This concept of "while on duty" is found expressly in Appendix "M".

Additionally, this concept of "while on duty" is well established in labor-management relations and is a term of art. One need go no further than the Employer's own Work Rules for confirmation of this fact. Thus in Work Rule C 10 (f.) the Employer found it necessary to spell out that off-duty conduct, in contradistinction to on-duty conduct, could also be subject to Employer imposed discipline. Pursuant to well-established arbitral principles, in order to be subject to Employer-imposed discipline, there must be a connection, often referred to as a nexus, between the off-duty conduct and the employee's job. Accordingly, when in Appendix "M" the parties expressly provided that its terms applied to situations of being under the influence of, using of or abusing drugs "while on duty," and when in 1996 the parties agreed to the additional and very restrictive Last Chance Agreement term that the Grievant would "never again" be found to be under the influence of, using, or abusing drugs while on duty, by inference, the parties intentionally did not agree in either Appendix "M"'s restrictive rehabilitation requirements or in the 1996 Last Chance Agreement's restrictive "never again" term, to extend, by mutual agreement, such restrictive terms to off-duty misconduct. Had they intended to do so they would not have confined the 1996 Last Chance Agreement to "while on duty" situations. But here the conduct of December 18, 1998 and January 5, 1999, the triggering events leading to the

Grievant's discharge, involved off-duty misconduct. It follows and must therefore be concluded that the terms of the Grievant's 1996 Last Chance Agreement, confined as they are to "on-duty" offenses, are simply inapplicable to the "off-duty" situations involved here. Nor can this conclusion be avoided by the argument that, as the Employer in effect contends, because there is a "nexus" between the "off-duty" conduct here and the employee's job, said off-duty conduct is tantamount to conduct "while on duty." As Arbitrator Smith noted in the Stringer case cited by the Union, there is such a nexus here. Off duty drug abuse is incompatible with the Patrol's law enforcement mission. However, for the reasons previously advanced, the concepts of on-duty conduct and off-duty conduct are separate and distinct, and this being so, it must be inferred that the parties would have expressly extended the terms of the Grievant's 1996 Last Chance Agreement to off-duty misconduct if such had been their intent. Having failed to do so, it is found that the parties simply did not intend to encompass off-duty conduct, even off duty conduct having a nexus to the employee's job, within the understandings of the 1996 Last Chance Agreement. In sum no violation by the Grievant of the terms of the 1996 Last Chance Agreement can be found.

The case thus comes down to the question of whether termination stemming from the Grievant's off-duty illegal drug

use was warranted under the just cause standard applicable here. In my judgment, and for the reasons which follow, discharge was too severe.

On the merits of the case under the applicable just cause standard, it is to be noted at the outset that the Employer makes some valid points. Thus the Employer is correct when it asserts that attempted voluntary rehabilitation efforts such as the Grievant's do not thereby create a "safe haven" for illegal drug use. Nor do such incomplete efforts as shown here establish the "fact" of post-discharge rehabilitation. Similarly, current illegal drug users or relapsed drug dependents, are not a "protected class" under the Collective Bargaining Agreement, or State or Federal law. Nor is there any merit, or logic for that matter, in any claim (as the Union apparently at the time made) that in the face of the Grievant's voluntary concession/confession that he had abused the illegal drug of cocaine, the Employer was required to nonetheless test the Grievant to confirm that indeed he had been abusing cocaine. On the other hand, sound analysis of the Grievant's situation is hardly advanced by characterizing the Grievant, as the Employer does, as a user of illegal drugs since 1987. Thus, in the first place it is important to note that the Grievant revealed that he was but an occasional and infrequent user of illegal drugs. There is no evidence to the contrary. Similarly, there is no evidence supporting an

inference of drug dependency prior to 1996. Additionally, the fact that the Grievant was an occasional and infrequent user of illegal drugs was apparently adduced for the first time at the hearing herein, upon cross-examination of the Grievant, and hence such did not enter into the discharge decision under scrutiny here. Most significantly, however, these characterizations by the Employer simply do not comport with the parties' express recognition in Appendix "M", Section 1.A. that "substance abuse...is a serious and complex, yet treatable, condition/disease." Persons experienced in labor-management relations such as the advocates here, and the undersigned, regrettably too frequently encounter drug dependency issues in the workplace, and in this manner come to know for sure, what most people know even without such experience, namely, that as often as not, relapes occur with the drug or alcohol dependent. We also come to know that most "substances" that are abused are, as cocaine, illegal. We further come to know that patterns of misbehavior, and patterns of absenteeism in particular, are often a sign and indicia of drug or alcohol dependency problems. Although the Employer recognizes such "patterns" here, it has nonetheless elected to view and characterize same solely as misbehavior, and to not infer that such is equally appropriately viewed as symptomatic of the condition/disease of drug abuse and dependency. In this regard in my view the Employer's reliance on patterns of absenteeism

relatively near and prior to the Grievant's 1996 drug-related problem in the workplace, as simply misconduct, in the face of the Grievant's established drug dependency at that time, is particularly misplaced. Further undermining of the Employer's reliance on the pre-1996 absenteeism problems of the Grievant is the fact that following same the Grievant was nonetheless promoted to the Driver Examiner I position, the position he held at the time of his discharge. In this regard I note that Appendix M, Section 1,E. expressly provides that "no person with a substance abuse problem shall have his…promotional opportunities jeopardized by a request for diagnosis and/or treatment." It would appear and the inference is that the Employer took this provision into account in promoting the Grievant. And in any event, the mere act of promoting the Grievant in the face of his 1996 and pre-1996 purported patterns of absenteeism is simply inconsistent with the "misconduct" characterization the Employer here advances with respect to these same patterns. In my judgment, therefore, the Employer's reliance on the Grievant's job performance shortcomings, especially pre-1996, as grounds for discharge are insufficient under the just cause standard. At the same time, as previously noted, the Grievant's off-duty drug abuse is inconsistent with the Employer's law enforcement mission and subject therefore to discipline. Furthermore, the Grievant's presently insufficiently treated drug dependency

creates potentially serious safety concerns. Then, too, the Grievant's drug dependency has been shown by the triggering events here to be causing the Grievant to fail to perform his fundamental employment responsibility, namely, to report to work for duty. The just cause failure here is the premature abandonment of the Employer's contractual commitment to attempt to see that the Grievant's drug dependency problem is treated prior to relying [as it eventually would be quite justified in doing] upon the job performance issues said dependency is creating and has created. Assuming without deciding that the Employer is correct that in Appendix "M" the parties have contemplated but one Last Chance when it comes to drug offenses "while on duty," nothing in the Contract per se precludes an additional Last Chance where the issue involves off duty drug issues. Here the Grievant has taken at least the initial steps toward a successful treatment program. He has avoided the trap of self-denial of his dependency problem and elected not to conceal same from his Employer. In the face of the Grievant's failure in his initial attempt to recover from his drug dependency, any reinstatement perforce calls for stringent conditions, since understandably the Grievant's relapse has raised questions concerning the Grievant's ability to overcome his dependency. Accordingly, it is found that, at this juncture, termination and removal of the Grievant is without just cause, and he shall be reinstated without back

pay, but without loss of seniority. The Grievant's reinstatement is upon a Last chance basis, the terms of which absorb and supercede his 1996 Last Chance. Thus at the outset the Grievant shall submit to a diagnosis and determination by a neutral medical professional, said professional having been selected by a medical professional of the Grievant's choice and a medical professional of the Employer's choice, concerning the optimal drug rehabilitation Program available to the Grievant under the terms of his health insurance policy and/or the Ohio EAP Program. The Grievant shall agree to participate in whatever Program said neutral medical professional recommends. Should the Grievant fail to actively participate in said Program, or should the Grievant fail to be rehabilitated, the Grievant shall be terminated. In light of the Grievant's concession that there is always the potential of relapse without a Program, the Last Chance Agreement shall be of unlimited duration, and the neutral medical professional shall prescribe the nature of the kind of Program the Grievant needs to continue to participate in in the long run. In addition, the Grievant shall agree to verification of compliance with his Program to the Employer by his Program's administrators. The Grievant shall also be subject to random drug testing of an unlimited duration. Any valid positive test result shall be conclusive evidence of a failure to be rehabilitated and the Grievant shall therefore be subject to

immediate discharge. Until such time as the medical professionals in the Grievant's Program release him for return to field duty as a Driver Examiner 1, he shall serve on desk or other like duties, as he did upon his return to work on December 23, 1998.

Award:

For the reasons more fully set forth above, the grievance is sustained in part and denied in part. The Grievant is to be reinstated on a Last Chance basis as per the terms thereof more fully set forth above.

October 16, 1999

Frank A. Keenan
Arbitrator