SUBJECT:	**ARB SUMMARY 1544**
TO:	**ALL ADVOCATES**
FROM:	**MICHAEL P. DUCO**
AGENCY:	**Public Safety/Highway Patrol**
UNION:	**OCSEA**
ARBITRATOR:	**Robert Stein**
STATE ADVOCATE:	**Major Richard G. Corbin**
UNION ADVOCATE:	**William A. Anthony**
BNA CODES:	**118.01: Discipline in General; 118.6481: Dishonest in General; 118.6484: Falsification of Records**

The Grievance was SUSTAINED.

The Grievant was a Drivers License Examiner 1 with fifteen years of seniority and no previous discipline when she was removed from her position for violation of departmental rules prohibiting Failure of Good Behavior of the Ohio Department of Public Safety.

The Grievant had been assigned to the Town and Country Drivers License Examination Station in Columbus for approximately six months when she was implicated in the fraudulent issuance of a commercial drivers license (CDL) to an acquaintance. An investigation discovered the recipient's fraudulent application with the Grievant's signature and her official state seal in the home of KH. The State concluded that the grievant and KH were involved, along with others, in a criminal ring for the purpose of issuing fraudulent licenses for monetary gain.

Management argued that an application for a CDL in the name of GF (a former inmate), and bearing the signature and official seal of the grievant was found in the home of KH. KH had been formerly associated with a truck driving school and he knew how to use a farm exemption waiver to obtain CDLs without having to pass the practical driving exam. The Grievant was obviously involved in a conspiracy with GF and KH to provide GF with an illegally obtained CDL for a monetary gain of $200. The Grievant's admitted long time association with these and other felons and criminal suspects lends credence to Management's conspiracy theory. Management also provided corroboration in the form of testimonial evidence from KJ, acquired after the Grievant's discharge.

The Union argued that Management's case is laid on a base of circumstantial suspicion, but not proof. GF did at no time during the hearing directly identify the grievant as the employee who provided him with the fraudulent CDL for $200. The Grievant had worked at the Town and Country location for less than a year and could not have gained the expertise to manipulate the system in the manner described by Management. The Grievant testified that she processed only one CDL application while at Town and Country. Management did not provide any evidence that would preclude the possibility that another Drivers License Examiner had used her seal in processing the fraudulent application. The Union further argued that the evidence acquired after the Grievant's discharge should not be considered by the Arbitrator. The deposition was taken from a convicted criminal nearly 20 months after the Grievant's removal, and this convict was not present at the hearing to be cross examined.

Arbitrator Stein noted the serious potential consequences of permitting unqualified drivers to operate massive vehicles on public roads. He found, however, that Managements efforts to establish just cause for the removal of the Grievant fell short of the mark. He noted the testimony of a Sgt. Mendenhall that employees at Town and Country, " . . . from the supervisor on down . . ." had been arrested in connection with the sale of CDLs. This testimony of GF was evasive and inconsistent, the only consistency being his steadfast assertion that he could not identify the grievant. Management's inability to clearly like GF to the Grievant is problematic. The Arbitrator found that Contract Articles 24.02 and 24.04 preclude any consideration of the after discharge acquired evidence. Discipline is to be commensurate with the offense and based on the evidence know at the time of the discipline.

The Arbitrator fully SUSTAINED the grievance.

ARBITRATION SUMMARY AND AWARD LOG
OCB AWARD NUMBER: #1544

OCB GRIEVANCE NUMBER:	**15-00-19990714-0076-01-09**
GRIEVANT NAME:	Michelle Black-Hosang
UNION:	OCSEA/AFSCME Local 11
DEPARTMENT:	Public Safety/Highway Patrol
ARBITRATOR:	Robert G. Stein
MANAGEMENT ADVOCATE:	Major Richard G. Corbin
2ND CHAIR:	Neni Valentine
ARBITRATION DATE:	August 29, 2001; October 19, 2001
DECISION DATE:	December 21, 2001
DECISION:	Grievance sustained
CONTRACT SECTIONS:	Article 24

HOLDING: Management did not meet its burden of clear and convincing proof. After acquired evidence not admitted.

COST: $

SUBJECT: **ARB SUMMARY #1544**

TO: **ALL ADVOCATES**

FROM: **MICHAEL P. DUCO**

AGENCY: **Public Safety/Highway Patrol**
UNION: **OCSEA/AFSCME Local 11**

STATE ADVOCATE: **Major Richard G. Corbin**

UNION ADVOCATE: **William A. Anthony**

BNA CODES: **118.01; 118.6481** 118.6484

Grievance is sustained.

The grievant was a Drivers License Examiner 1 with fifteen (15) years of seniority and no previous discipline when she was removed from her position for violation of departmental rules prohibiting *Failure of Good Behavior of the Ohio Department of Public Safety.*

The grievant had been assigned to the Town and Country Drivers License Examination Station in Columbus for approximately six (6) months when she was implicated in the fraudulent issuance of a commercial drivers license (CDL) to an acquaintance. An investigation discovered the recipient's fraudulent application with the grievant's signature and her official state seal in the home of KH. The State concluded that the grievant and KH were involved, along with others, in a criminal ring for the purpose of issuing fraudulent licenses for monetary gain.

Management argued that an application for a CDL in the name of GF (a former inmate), and bearing the signature and official seal of the grievant was found in the home of KH. KH had been formerly associated with a truck driving school and he knew how to use a farm exemption waiver to obtain CDLs without having to pass the practical driving exam. The grievant was obviously involved in a conspiracy with GF and KH to provide GF with an illegally obtained CDL for a monetary gain of $200. The grievant's admitted long time association with these and other felons and criminal suspects lends credence to Management's conspiracy theory. Management also provided corroboration in the form of testimonial evidence from KJ, acquired after the grievants discharge.

The Union argued that Managements case is laid on a base of circumstantial suspicion, but not proof. GF did at no time during the hearing directly identify the grievant as the employee who provided him with the fraudulent CDL for $200. The grievant had worked at the Town and Country location for less than a year and could not have gained the expertise to manipulate the system in the manner described by Management. The grievant testified that she had processed only one CDL application while at Town and Country. Management did not provide any evidence that would preclude the possibility that another Drivers License Examiner had used her seal in processing the fraudulent application. The Union further argued that the evidence acquired after the grievant's discharge should not be considered by the Arbitrator. The deposition was taken from a convicted criminal nearly 20 months after the grievants removal, and this convict was not present at the hearing to be cross examined.

Arbitrator Stein noted the serious potential consequences of permitting unqualified drivers to operate massive vehicles on public roads. He found, however, that Managements efforts to establish just cause for the removal the the grievant fell short of the mark. He noted the testimony of a Sgt. Mendenhall that employees at Town and Country, *"....from the supervisor on down..."* had been arrested in connection with the sale of CDLs. This testimony establishes an appearance that this Office was fraught with impropriety. The testimony of GF was evasive and inconsistent, the only consistency being his steadfast assertion that he could not identify the grievant. Managements inability to clearly link GF to the grievant is problematic. The Arbitrator found that Contract Articles 24.02 and 24.04 preclude any consideration of the after discharge acquired evidence. Discipline is to be commensurate with the offense and based on the the evidence known at the time of the discipline.

The Arbitrator fully sustained the grievance.

#1544

IN THE MATTER OF ARBITRATION

BETWEEN

THE OHIO DEPARTMENT OF PUBLIC SAFETY
DIVISION OF STATE HIGHWAY PATROL

AND

THE OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION/AFSCME-AFL-CIO

Before: Robert G. Stein

PANEL APPOINTMENT

CASE # 15-00-9990714 0-0076-01-09
Michelle Black-Hosang, Grievant

Advocate(s) for the UNION:

William A. Anthony Jr., Field Staff Representative
Herman S. Whitter, Esq., Director of Dispute Services, 2nd Chair
OCSEA Local 11, AFSCME, AFL-CIO
390 Worthington Rd. Ste. A
Westerville OH 43082-8331

Advocate for the EMPLOYER:

Major Richard G. Corbin, Advocate, OSHP
Neni Valentine, 2nd Chair, OCB
Office of Collective Bargaining
107 N. High St., 7th Floor
Columbus OH 43215

INTRODUCTION

A hearing on the above referenced matter was held on August 29, 2001 and on October 19, 2001 (partial day) in Columbus, Ohio. The parties stipulated to the fact that the issue was properly before the Arbitrator. During the hearing the parties were given a full opportunity to present evidence and testimony on behalf of their positions. The parties submitted briefs in lieu of closing arguments. The hearing was closed on November 10, 2001. The Arbitrator's decision is to be issued within forty-five (45) calendar days or no later than December 25, 2001.

ISSUE

The parties agreed upon the following definition of the issues:

Was the Grievant, Michelle Black-Hosang, removed for just cause? If not, what should be the remedy?

RELEVANT CONTRACT LANGUAGE

(Listed for reference, see Agreement for language)

ARTICLE 24 DISCIPLINE

BACKGROUND

The issue in dispute in this matter involves the termination of Michelle Black-Hosang. At the time of her removal Ms. Black-Hosang was a Driver's License Examiner 1 and was assigned to the Town and Country Driver's License Examination Station. Ms. Black-Hosang had fifteen years of service.

The Grievant was charged with violating Rule: DPS-501.01 (C) (10) (d) Failure of Good Behavior of the Ohio Department of Safety ("Employer" or "Department"). The Employer claims that on April 1, 1999, the Grievant provided an invalid commercial driver's license to Gervase Flipping for a payment of $200. Mr. Flipping's fraudulent application for the driver's license that contained the signature and the official seal of the Grievant was found in the home of Kenny Hairston following a search by OSHP investigators. Mr. Flipping was subsequently arrested on a falsification charge. Mr. Hairston was formerly associated with a truck driver training school, and he was familiar with using farm exemption waivers to obtain commercial driver's licenses ("CDL"). The waiver would allow someone to avoid the cost and difficulty of taking the driving test.

In this case, the Employer acquired additional evidence several months after the Grievant was terminated. Investigators interviewed convicted felon and inmate Keith Jones. Mr. Jones was incarcerated for Insurance Fraud, Theft, Burglary, Misuse of Credit cards, and other related charges (UX 2). Mr. Jones and the Grievant knew each other for approximately 10 years. According to Mr. Jones, he and Ms. Black-Hosang dated for a period of time during 1993 and have remained friends since that time. Mr. Jones has been incarcerated since July of 1994.

In summary, the Employer alleges that the Grievant was part of a conspiracy with Mr. Hairston and Mr. Flipping. The evidence also demonstrated that several employees in the office, including the supervisor, were arrested for their alleged involvement in issuing fraudulent driver's licenses.

The Grievant filed a grievance in response to the Employer's actions arguing her discharge was not for just cause.

EMPLOYER'S POSITION

The Employer firmly asserts that the Grievant engaged in a pattern of criminal activity that was corroborated by evidence acquired after the Grievant's discharge. The evidence acquired was the disposition of inmate Keith Jones (MX 3). The Employer argues that Mr. Jones' deposition demonstrates that for many years Ms. Black-Hosang willingly used her position in the Department to access state archives and assist criminals in obtaining commercial driver's licenses. In particular, the Employer argues that the evidence demonstrates that the Grievant assisted Mr. Gervase Flipping in falsely securing a commercial driver's license and was paid $200 for her efforts.

In the words of the Employer, the following conclusions were provided to the Arbitrator:

CONCLUSION

The evidence in this case supports removal of grievant from the position of driver's license examiner. The defense of denial will simply not shield her from the obvious conclusion of her involvement.

Grievant has admitted association with individuals who knowingly and willingly committed criminal offenses. This association dates back more than ten years and overlaps her entire tenure as an employee with the State of Ohio. Grievant's husband was sentenced to Federal prison during this time on drug related charges. While he was away Grievant admits performing a special favor for her associate and former lover Mr. Jones, just prior to his incarceration on fraud convictions. She testified it was the only

time she **walked** documents through the BMV system for anyone. As you know, Mr. Jones stated she did much more to assist him in his criminal endeavors.

All of these coincidences did not simply befall an otherwise innocent and unwitting State of Ohio employee. Grievant was intimately involved in the issuance of Gervase Flipping's phony commercial driver's license. There was no clandestine meeting at a bar between two strangers one of whom needed a license and the other of whom could arrange it. Gervase Flipping, Michelle Hosang-Black, and Kenny Hairston hatched the plan and carried it out. Michelle did everything from grading his written test to signing and sealing both the red and blue copy of the license application. The only thing Flipping had to do was pay his co-conspirators and take the document along with the Farm Exemption Waiver to a deputy registrar and obtain the license. Hairston's involvement stems from his former association with a truck driver training school and his understanding of how to fake the farm exemption waiver. This explains how he came into possession of multiple forged documents; he handled the paper work and was compensated for his knowledge of the scam. Certainly, Kenny Hairston's testimony can only be classified as "street stupid." He could not remember or comprehend anything while under oath on the stand. Flipping was told to take the documents authenticated by Hosang-Black to a deputy registrar other than the one across from the exam station where the Grievant worked. He followed those instructions well.

Everything worked out until the search warrant produced the incriminating temporary permit document in the possession of Mr. Hairston. From there the trail led back to Michelle Black-Hosang, her relationship to Flipping, her signature, her seal, her unit number and her admitted involvement in issuing Mr. Flipping's documents.

It is apparent she did not get her story straight with Mr. Flipping before the investigators talked with them independently. She tried, based on her phone call to Flipping the day after her first interview. Unfortunately for them, Flipping tried to claim he did not know Michelle Black-Hosang at the time his license was issued and when interviewed in 1999 by investigators. He did testify that he met her one year later by chance at a bar in Columbus called the Lobby, a bar where she was employed. Their story is simply unbelievable. Add to that her failure to follow her lawyer's instructions, not to talk about the charges with anyone, points to further conspiracy. Of all people, this poor innocent woman elects to discuss details of this case with the admitted criminal perpetrator, Gervase Flipping.

In the end it is simple, she knows all the main conspirators Flipping, Hairston, and Jones, she knows the CDL system, she had access to the documents and had the authority and know-how to authenticate them. Based on the sworn statement of Keith Jones and Grievant's admitted association with felons and criminal suspects, her involvement in this scam is not a shocking surprise. The shadowy world she has lived in outside of state employment has been exposed.

Grievant's boasting of financial reward arising from once again fooling the system should not come to pass. Such a result would be a blatant failure of the industrial justice system. Grievant should never again be placed in a position of public trust, to allow her return to public employment would assure future identity theft victims facilitated by inside access to protected information. Finally, public employees willing to facilitate the issuance of false documents of any type, but especially commercial driver's licenses, must not be retained. Our nation's public safety and security depends upon it.

Just cause for discipline has been established, the grievance must be denied in its entirety.

UNION'S POSITION

The Union's view of this case centers upon its assertion that the Employer failed to provide convincing evidence of the Grievant's guilt. It contends that Mr. Flipping did

not identify the Grievant as the person who sold him a CDL for $200 in a Columbus nightclub. Overall, the investigation conducted by the Employer was flawed, argues the Union. Furthermore, the Union rejects the Employer's after-discharge acquired evidence. It contends that such evidence should carry no weight with the Arbitrator.

In the words of the Union the following closing arguments were made:

Closing brief

The union showed through the testimony of Mr. Cole, a supervisor at the time, that before a CDL could be issued, the individual had to provide the deputy registrar a completed blue and white form. Completed meant signed and sealed by the Driver's Examiner (DX) along with a completed grandfather form **Management 2 / Joint 4** ***circle page 9***, or proof that they had passed the road test. He indicated that on the back of the blue and white form were the results of the required tests, i.e., air brake and general knowledge. He indicated that the red and white form **Management 1** was only a temporary permit; therefore it could not have been used to purchase a CDL.

Mr. Cole also testified that the grievant had only been at the Town and Country DX for less than year prior to the alleged event. He testified that she was not fully trained on issuing CDL's, but that she had read the manual as required. The greivant testified that she had only done one CDL since coming to the Town and Country DX and that another employee had to walk her through it.

Mr. Cole, Ms Henderson and the grievant all testified that the individual DX state seals were kept in a secured locker, but that all employees knew where to the find the key. They also testified that it was common practice for DX employees to use another DX employee's seal. They all testified that there was no stated policy against this practice.

It is the union's contention that another employee used the grievant's seal and forged her signature on the front of the blue and white form, **Joint 4-*circle page 3.*** This was easily accomplished because it clearly shows the grievant's unit number, **Joint 4-*circle page 5*** on the back of the form.

The union never saw an original copy of the blue and white form, **Joint 4-*circle page 5***, the back of the form or **Joint 4-*circle page 3*** the front of the form until after the arbitration hearing. However, **Joint 4-*circle pages 1 and 2*** clearly shows that management had concerns regarding the alleged signature of the grievant on **Joint 4 *circle page 3,*** so much so that they had the handwriting analyzed by the Columbus Police Department's Crime Laboratory. The results of this analysis **Joint 4-*circle page 1***, were inconclusive, and the report stated that it was "very unlikely she did the questioned writing." This was the recommendation from Det. Wm. Tom Bennett, Document Examiner, Columbus Police Department. Furthermore the grievant testified that she did not sign the front of the blue and white from, **Joint 4-*circle page 3.*** However, she did testify that she placed the scores for the air brake test on the back of the blue and white form **Joint 4-*circle page 5.***

Initially management claimed that the grievant was removed because she had signed the grandfather form **Joint 4-*circle 9***. However at the hearing they introduced a form **Management 2**

which had no signature on it. Mr. Mendenhall then testified that he signed the grievant's name on the form. That was the first time the union heard this admittance. However, even after management admitted that she did not sign this form **Joint 4-*circle 9* and Management 2,** management still alleged that the grievant met Mr. Flipping in a bar, offered to get him a CDL for $200, took his CDL paper work **Joint 4-*circled 5*** and **Management 1,** left the bar and completed **Joint 4-*circle 9* and Management 2.**, then returned to the bar and gave the completed paper work back to Mr. Flipping, which he ultimately used to acquire the invalid CDL.

The union proved through the testimony of Mr. Flipping that the grievant was not the female who sold him the CDL for $200. See **Joint 4-*page 6***. Mr. Flipping testified that he has since obtained his CDL legally and that the Highway Patrol is still seeking to charge him criminally for the illegal CDL. Mr. Flipping insisted through his testimony that he had never indicated to investigators at any time during both interviews with them, that the grievant was the female who completed the grandfather form, **Management 2/Joint 4-*circle page 9*** and brought it back to him at the bar. He testified that he had never seen the grievant in the Club One bar. The grievant also testified that she had never been in the Club One bar. It is clear to the union that Mr. Mendenhall for all intent and purpose took the grievant's statement see **Joint 4-*page 3*** out of context. He just assumed that when the grievant stated that people approached her in a nightclub, she meant the Club One bar. The grievant's testimony contradicts that assessment. She testified that she not only used the word "nightclubs," but that she mentioned food stores and the shopping centers. She also told him that she would make a list and give it to him, if it would help.

The union proved that the grievant is not easily forgettable. She has a skin condition that is impossible to cover up. If Mr. Flipping had truly purchased the Grandfather form "Verification Of Employment for Possible Exemption From Skill Test", **Management 2 and Joint 4-*circle page 9***, from this grievant. It is difficult for this advocate to believe that he would not have initially indicated her skin condition when he made the voluntary statement to the Ohio Highway Patrol investigators on June 15, 1999.

Mr. Mendenhall also testified that the grievant gave Mr. Flipping the written test on two separate occasions, **(see Joint 4-*circle 5*).** He indicated that on the April 6 date she gave him a passing score of 80, then signed and sealed the red and white form, **Management 1** which allowed him to purchased the invalid CDL. Mr. Mendenhall further testified that the tests were not kept, therefore he could not obtain a copy to verify his accusations. However Mr. Cole and Ms. Henderson contradicted that testimony when they both testified that the tests were in fact kept during that time period. Mr. Cole and Ms. Henderson both testified that the tests were scored via a scantron machine and that in most cases the same DX personnel did not necessarily give the applicants the test and then score the test. It was done on a first-come, first-serve basis and it depended on the availability of the DX personal. They also testified that the tests are multiple choice this meant that the tester had to select the answer by shading in the correct circle. They also indicated that it is impossible to cheat on this test.

Mr. Cole testified that it was not unusual for an individual seeking a CDL to take the general knowledge test first then take the air brake tests or vise versa. He also indicated that if the individual did not receive a passing score on either part of the test by the 3rd try then they would have to purchase another CDL packet. He also stated that there was no real time limit in taking the test.

Mr. Col, Ms. Henderson and the Grievant all testified that there was a sign in sheet kept for each day and that it was also kept during the time of the incident involving Mr. Flipping and the Grievant. But Mr. Mendenhall the state's investigator testified that no such document was available during his initial investigation. This is further indication that the investigation against the grievant was flawed.

Therefore the state's allegation that the greivant fraudulently gave Mr. Flipping the air brake test are unfounded. The union's assertion that Mr. Flipping passed the air brake test on his own abolition must carry substantial weight.

The union further showed through the testimony of Mr. Cole and Ms. Henderson and Mr. Mendenhall that the Grandfather form, **Joint 4-*circle 9*** was not a numbered form and was easily accessible to any individuals upon request.

Management asserts that the grievant through her own testimony had known Mr. Flipping for nearly 10 years. However, the union showed through the grievant's testimony that her definition of knowing someone is clearly different from what management would have you believe. She stated that she knew of him, but did not know him. She asserted that she had seen him out a few times and he looked familiar. She testified that she did not have a personal relationship with him, and that she did not even know where he lived. Mr. Cole also testified that he had never seen Mr. Flipping take the greivant to lunch. The union established that the grievant and Mr. Flipping were not friends at all, but she recognized his face from seeing him out about town. She knew nothing of Mr. Flipping's past or any of his family or friends

The assertion by management that the grievant had a relationship or business arrangement with Mr. Kenny Hairston was not proven. Mr. Kenny Hairston testified that the grievant had never been to his house, and that he only met her one time and that he had met her through his brother Terrence Hairston. Mr. Terrence Hairston testified that he introduced the grievant to his brother in 1998 when his brother drove him to the grievant's home to get his nails manicured. Mr. Kenny Hairston also testified that he had never taken her to lunch, and that she was not the individual he obtained the BMV documents from. It should also be noted that Mr. Cole testified that he never witnessed the greivant going to lunch with either Mr. Kenny Hairston or Mr. Flipping.

Management's attempt to prove that this grievant had ties to the criminal underworld is without merit and should carry very little weight, if any. Management's assertion that she was intimately involved in any criminal enterprises was not proven.

The after acquired evidence **Management 3** should carry no weight to this arbitrator. The disposition of Keith Jones was conducted, January 4, 2001. The incident in which this grievant was terminated occurred in April of 1999, **see Joint 3 *page B***. For management to now say that the information obtained from Mr. Jones is crucial in that it establishes the credibility of the grievant is also without merit. There is no way for the arbitrator to determine Mr. Jones's credibility merely from reading a deposition. Without getting into more detail about this deposition it is the union's position that Mr. Jones's statements are self-serving and hearsay at best, nothing he asserts has been proven. Furthermore Mr. Jones has been incarcerated since 1993 for insurance fraud, theft, burglary and a sundry of other charges. More importantly, no information obtained from Mr. Jones was used to terminate this grievant. The United States Court of Appeals for the Sixth Circuit stated in *McKennon v. Nashville Banner Pub. Co.*, 513 U.S. 352:

> Where an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge.

Furthermore the incidents that Mr. Jones are alleging occurred in 1993 and 1994. During that time period the grievant worked as a telephone operator. Ms. Camper, a telephone operator with the BMV since 1991, testified that back in 1993, 1994 customers were not allowed in the phone center, and that the telephone operators could not reinstate a Driver's License. All they could do was answer inquiries. She did testify that any employee back then could walk a reinstatement fee through. But that only consisted of paying the fee, (The union never received any information from management that this practice was in fact a violation of a policy). Ms.

Cooper testified that the reinstatement department was responsible for the reinstatement of licenses. This department processed all requests. Ms Carter also testified that during that period no pictures,were kept on file as they are now, making it impossible to produce a driver's license on the spot without the licensee being present. She also indicated that the confiscated driver's licenses where keep in another building for which the telephone operators had no access.

The union showed that the state in their zest and zeal to prove that this grievant was the Queen-pin/matriarch who orchestrated this major identify fraud thief ring, is simple not plausible. Common sense would indicate that it would have required a tremendous amount of inside assistance to maintain such a criminal empire. If these allegations were true, an investigation would have uncovered much more evidence than that presented my management. Instead they just implied that she had criminal ties. Mr. Arbitrator, it is simple not true, and is certainly not provable.

Management was able to stop the real thief ring the Farmer/ Taylor CDL scam. They made a mistake in trying to include the grievant in this ring.

Clearly the greivant married a loser and dated a loser but she cannot be tried and found guilty for dating what she thought were princes but in the end turned out to be ugly frogs. Management has in essence punished her for her selection of boy friends. That is not management's role or responsibility.

The unio1n proved that after more than two years of investigating this greivant management has failed to convict. The reason is clear; she is not guilty, and has never been guilty. She is innocent.

Mr. Arbitrator, the union is therefore requesting that you sustain this grievance and reinstate this grievant, Michelle Black-Hosan,g with full back pay and no loss of benefits and to make her whole.

DISCUSSION

The burden of proof the Employer carries in this type of case is to present clear and convincing evidence that the Grievant violated Rule 501.01 (C) (10) (d), *Failure of Good Behavior.*

The charge levied against the Grievant that she provided invalid commercial driving licenses is a serious matter of breaching the public trust. The danger involved in conspiring to allow unqualified people to drive massive vehicles on the road is great. When the events of September 11, 2001 are factored into the equation, the added implications for national security substantially magnify the possible consequences of such actions.

However, the charges levied against the Grievant and a finding of guilt by the Employer is to be judged by the "just cause" standard contained in Article 24 of the Collective Bargaining Agreement (CBA). A person who is falsely accused of such a charge is likely to suffer considerable damage to their reputation and to their ability to earn a living.

I find the evidence and testimony gathered by the Employer prior to Ms. Black-Hosang's discharge to fall short of being clear and convincing. The Grievant worked a short time at the Town and Country Driver's License Exam Station, according to the testimony of Sgt. Mendenhall. Sgt. Mendenhall also testified that other employees in the station *"...from the supervisor on down"* were arrested in connection with the sale of commercial drivers' licenses. It also seems apparent that Kenny Hairston, a key player in the conspiracy to issue illegal licenses would frequently visit the Town and Country site, and according to Sgt. Mendenhall, would talk to the employees.

The recipient of the false commercial driver's license in this case is Gervase Flipping. The evidence is clear that he fraudulently obtained a license at a price of $200. Evidence of Mr. Flipping's copy of his license application form (MX 1) was found in the residence of Kenny Hairston. The Grievant's seal (DX 565) and her signature appear on MX 1 and JX 4a (the copy of the form Mr. Flipping used to obtain his license in May of 1999. The Grievant administered the written portion of the commercial driving test to Mr. Flipping on March 27, 1999. He failed the test with a score of 57. On April 6, 1999 Mr. Flipping came back to the Town and Country Station and retook the written test. The Grievant once again administered it, and Mr. Flipping passed it with the minimum score of 80. The Grievant signed Mr. Flipping's application (MX 1).

Mr. Flipping was also able to avoid having to take the driving test for the commercial license with a farm exemption (MX 2). According to Sgt. Mendenhall, the Town and Country Station did not have a practice of verifying employment. Firefighters, former military drivers and farm employees can obtain an exemption from the driving test. Mr. Flipping fraudulently listed the M & W Farm as his previous employer, and claimed he drove a 26,000-pound single vehicle while working there. The fact is he never worked there and never drove a truck. Having to take the commercial driving test can cost a considerable sum of money, particularly if it entails having to rent a truck for the test.

I found Mr. Flipping's testimony to be evasive, inconsistent, and unconvincing. On the witness stand he vacillated as to the extent of when and how he knew the Grievant. However, he was consistent from his statement of 6/15/99 to the hearing on August 29, 2001 that he could not identify Ms. Black-Hosang. The Grievant testified she knew him for over ten years. The problem for the Employer is that Mr. Flipping is an unreliable witness in all regards. His testimony does not prove the Grievant was the person who approached him in the nightclub and sold him a fraudulent driver's license application form. By the same token, Mr. Flipping's testimony does not exonerate the Grievant. However, the Employer's case suffers more since it has the burden of proof. Without a positive identification of the Grievant, the extent of her illegal involvement in deliberately issuing fraudulent documents to Mr. Flipping is unclear. The only thing that is known is that the Grievant scored the written driving test results for Mr. Flipping. However, Chris Cole testified the tests are graded by machine. It is difficult to ascertain what opportunities were available to a Driver Examiner to tamper with the results of a

machine-graded test or whether such scores could simply be fraudulently recorded without detection. Mr. Cole testified that tests were routinely destroyed.

Union witness and the Grievant's former supervisor, Chris Cole, testified that he observed Mr. Flipping in conversation with other female employees (Teresa Taylor and Cathy Farmer) at the Town and Country Station, but he could not verify seeing Mr. Flipping talking to the Grievant. The involvement of these two employees in issuing fraudulent licenses is not known. However, it is noted that Cathy Farmer's seal number 7242 appears on Mr. Flipping's application of 3/24/99 under the general knowledge section. The evidence does not conclusively refute the Union's contention that another employee could have used the Grievant's seal an forged her signature. Mr. Cole also testified that the practice of securing employee seals was inconsistent. He stated that sometimes they were locked in his office, and other times they were not secured. The testimony of Driver Examiner, Francis Henderson, supported the fact that employee seals were often left unsecured. The testimony of Kenny Hairston and his brother, Terrance Hairston, was inconclusive. Both brothers indicated they had met the Grievant on one occasion two to three years ago.

The Employer also presented evidence it obtained prior to the Grievant's removal and acquired well after the discharge date occurs. The evidence acquired after the discharge, but occurring before the discharge is referred to as "after-acquired knowledge of pre-discharge conduct ("AKPDC")." It is distinct from post-discharge conduct, which has not yet occurred at the time of the discharge. The AKPDC was rejected by the Union as not admissible. There are differing opinions about this subject. Whether to consider it as evidence and/or what weight to assign is up to the discretion of the Arbitrator.

However, that discretion is shaped by well-accepted principles regarding such evidence.

First, such evidence is more likely to be admitted into the record if it is directly related to the dischargeable offense (Growmark, Inc., 100 LA 785 (VerPloeg, 1993). AKPDC evidence is unlikely to be admitted if it is intended to support an entirely new charge or the employee and union are not given an adequate opportunity to contest the evidence (Vermont Dep't of Soc. Welfare, 86 LA 324, 327 (Kemsley, Chair, 1986). The timing of such evidence may also impact its admissibility (Southern Minn Sugar Coop., 90 LA 243 (Flagler, 1987). In a more general sense, arbitrators are critical of inadequate investigations that contribute to the need for AKPDC evidence. AKPDC evidence may be used as supportive documentation in helping to fashion an appropriate remedy. Some arbitrators believe it can be used as additional support of the original charges.

The distinguished arbitrator, George Nicolau, summed up this issue as follows:

> *"An employee, it seems to me, may properly be held accountable for predischarge discharge conduct despite its discovery after the discharge, and an employer need not be required to go through a second proceeding so that misconduct may be judged. An employee as not right to escape the consequences of predischarge misconduct simply because it is discovered later... The key to deciding whether to take such evidence is or should be fair warning, elimination of the element of surprise... It makes little difference if that evidence is characterized as additional ground for discharge or as a barrier to reinstatement..."*(G. Nicolau, "The Arbitrator's Remedial Powers, " Proceedings of the Forty-third Annual Meeting Of the National Academy of Arbitrators, 73 (1990).

Prior decisions of arbitrators or their learned opinions are useful, but do not replace the intent of the parties. Guidance from the Collective Bargaining Agreement must first be considered in all matters of evidence. Article 24.02 requires discipline to be *"commensurate with the offense."* Article 24.04 states, *Prior to the meeting (Pre-D) the employee and his/her representative shall be informed in writing of the reasons for the discipline..."* Article 24.04 goes on to say in detail:

> *"...the Employer will provide a list of witnesses to the event or act known at the time and documents know of at the time used to support the possible disciplinary action. If the Employer becomes aware of additional witnesses or documents that will be relied upon in imposing discipline, they shall also be provided to the Union and the employee."*

Article 24.05 states *"Once the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased." (JX 1).* It also states, *"Disciplinary measures imposed shall be reasonable and commensurate with the offense."*

The Article 24 requirements for specific written charges, written reasons for discipline, and for discipline that is commensurate with an offense clearly indicate the parties' intent regarding the use of after-acquired evidence of previous wrong doing. When discipline is imposed, the reasoning used to make this judgment is to be based upon the evidence known at the time of the discharge. Certainly, any evidence of previous wrong doing that is discovered subsequent to discipline may subject an employee to separate action. For example, employees who have falsified their employment applications have been terminated from employment in separate actions when such falsification came to light.

I find the parties intended that the obligation of an arbitrator is to judge the merits of the discharge as of the date it took place, and on the basis of the specific charge(s) levied at the time. This is consistent with the general approach of well-respected arbitrators even absent specific contract provisions that required reasons to be given to an employee prior to discharge *(Dworkin 33 LA* 735, 740; *Kates 43 LA 1031, 1034; Gibson* 81 LA 365, 366). I find the provisions of Article 24 did not contemplate using after-acquired evidence of previous wrong doing to prove an employee's guilt in a matter that

has already been acted upon.

For the record, it should be noted that the evidence contained in MX 3, which was acquired after the Grievant's termination, is flawed due to the fact that Mr. Jones refused to verify his statements by signing the transcript of his deposition. This is an individual who already by virtue of his "social status" and past history has a reputation for being untruthful. There was no substantive collaborative evidence of Mr. Jones' testimony. It is also flawed based upon the timeframe involved, 1993 to 1994. The Grievant held a PIA position (answering telephone inquiries and assisting legal counsel of citizens with routine driver's license information) in 1993. There was no corroborative evidence that she violated any Department policy during that period.

From the review of all the evidence there is no doubt that the Grievant has regularly been associated with individuals who have been involved in criminal activities. Her husband is currently serving a sentence in a Federal penitentiary. In the past she has dated felons and has regularly associated with them in social settings. This activity certainly creates an air of suspicion regarding her own conduct.

However, the appearance of impropriety does not rise to the level of proof that the Grievant, who began work as a Drivers License Examiner in October of 1998 in the Town and Country Station, was involved in illegal activity some 6 months later. This was activity for which the supervisor and other employees were placed under arrest. The entire office appeared to be fraught with impropriety. As stated above, this activity is a very serious breach of the public's trust. However, there is insufficient evidence to prove the Grievant engaged in it regarding the issuance of Mr. Flipping's fraudulent CDL.

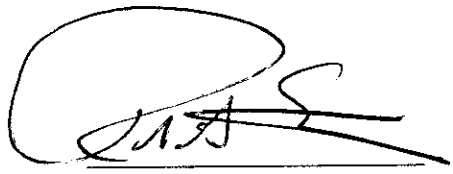
AWARD

The grievance is sustained.

The record of her discharge shall be removed from her personnel file. The Grievant shall be returned to work within two pay periods following the date of this Award. She shall be made whole for all seniority, back pay and benefits, minus any unemployment payments or W-2 income earned while she was discharged.

The Arbitrator shall maintain jurisdiction over the implementation of this Award in order to assist the parties in its implementation.

Respectfully submitted to the parties this 21st day of December, 2001.



Robert G. Stein, Arbitrator

Robert G. Stein
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Kent OH 44240-6554
Vm: 216 623 6751
Ph: 330 678 9210
E-mail: rgstein@en.com

INVOICE

DATE OF INVOICE: 12/21/01

SERVICE: 11/5/01 Arbitration/ with FOP Unit 2/Ohio Dept. of Taxation/Enforcement

DESCRIPTION: 3 day suspension: Kartina Miandi, Grievant,

PROFESSIONAL SERVICE		
$700.00 per day,	1 day(s) of hearing	700.00
350.00 travel		350.00
2 days study and writing		1400.00

MILEAGE	.45mi x---270 mi	n/a
PARKING		n/a
MEALS	10.60	n/a
LODGE		n/a
Air Fare		n/a
SECRETARIAL LD Calls, Postage, etc. 7hrs @14.00 hr		n/a

TOTAL EXPENSES	n/a	
TOTAL FOR PROFESSIONAL SERVICES AND EXPENSES		$2450.00

UNION SHARE **$1225.00**

MANAGEMENT SHARE **$1225.00**

THANK YOU! INVOICE # 7 H 0048
Robert G. Stein, SS # 282-46-0892

IN THE MATTER OF ARBITRATION

BETWEEN

THE OHIO DEPARTMENT OF TAXATION

AND

THE FRATERNAL ORDER OF POLICE/OLC INC. UNIT 2

Before: Robert G. Stein

PANEL APPOINTMENT

CASE # 30-1-001228-004-05-02
Katrina Miaudi, Grievant

Advocate(s) for the UNION:

Paul Cox, Esq., Chief Legal Counsel
Joel Barden, 2nd Chair
FOP/OLC
222 E. Town St.
Columbus OH 43213

Advocate for the EMPLOYER:

Tim Stauffer, Esq. Advocate, ODT
Shirley Turrell, OCB
Office of Collective Bargaining
107 N. High St., 7th Floor
Columbus OH 43215

INTRODUCTION

A hearing on the above referenced matter was held on November 5, 2001 in Columbus, Ohio. The parties stipulated to the fact that the issue was properly before the Arbitrator. During the hearing the parties were given a full opportunity to present evidence and testimony on behalf of their positions. The parties made closing arguments in lieu of submitting briefs. The hearing was closed on November 5, 2001. The Arbitrator's decision is to be issued within forty-five (45) calendar days or no later than December 21, 2001.

ISSUE

The parties agreed upon the following definition of the issues:

Was the Grievant, Katrina Miaudi, suspended for just cause? If not, what should be the remedy?

RELEVANT CONTRACT LANGUAGE

(Listed for reference, see Agreement for language)

ARTICLE 19.01, 19.05 DISCIPLINE

BACKGROUND

The Grievant in this matter is Katrina Miaudi who is an Agent in the Tax Enforcement Division of the Ohio Department of Taxation ("Employer" or "Department"). The case involves a suspension of three (3) days for violation of Department Work Rule #3D1. The suspension was issued from December 18, 2000 through December 20, 2000.

The Employer claims the Grievant was absent without leave on July 21, 2000 and July 27, 2000. The Grievant attended training courses during the weeks of July 21st and July 27th, and the courses ended at approximately 12:30 p.m. These ending times were prior to the normal ending of Ms. Miaudi's workday. Ms. Miaudi did not return from work after the courses ended, and according to the Employer, she did not request a leave of absence.

The Grievant had approximately two years of service at the time of her suspension. The Grievant also had prior discipline on her record. She received a three-(3) day suspension on August 1, 2000, for Making Abusive, Inflammatory, Obscene or Knowingly False Statements Toward or Concerning Another Employee, Supervisor or Member of the General Public. Additionally, she received a written warning on April 21, 2000, for Carelessness/Misuse of a State Vehicle, Neglect of Duty, Absent Without Leave, Violation of ORC 124.34 and Failure of Good Behavior.

Ms. Miaudi did not agree that she had violated Department rules. She first discussed her differences with her supervisor, Rick Shirk, and subsequently filed a formal grievance on December 28, 2000.

EMPLOYER'S POSITION

The Employer's position is straightforward. The Employer contends that both of the July seminars ended at approximately 12:30 p.m. and that the Grievant failed to report back to work or gain approval for approved leave time.

The Employer based its three- (3) day suspension upon these incidents and upon the Grievant's prior disciplinary record. The Employer points out that the Grievant's record indicates a pattern of behavior similar to the violations leading to the instant matter. According to the Employer, the Grievant was issued a written reprimand in April of 2000 for failing to report to her supervisor that her state vehicle was towed for being parked in a reserved parking spot. In September of 2000 the Grievant was issued a 3-day suspension (the discipline was modified to a paper suspension of 3 days, and she received 2 days of back pay) for falsely accusing her supervisor of making unwanted physical contact with her during an official Departmental operation.

Based upon the above, the Employer requests that the grievance be denied.

UNION'S POSITION

The Union argues that the Grievant spent hours outside of her normal work hours in transit between her home and the training sites during the weeks of July 21 and July 27, 2000. The Union does not disagree that the two seminars ended sometime around 12:30 p.m. each day. However, it argues that when other factors such as transportation and professional exchanges with seminar participants (following, 12/27/00 seminar, UX 4, 5) are factored into the situation the Grievant was not required to account for her time.

She had worked her forty hours during the week, asserts the Union. Moreover, if employees are required to work overtime they must gain the permission of their supervisor, argues the Union. The Union also contends that the Department of Taxation/Enforcement has no formal procedures requiring an employee to return to the office if a seminar ends early.

The Union also argues that the Grievant had prior managerial approval to attend the two seminars (one 5-day and one 3-day) by virtue of having them approved. The Union contends that common sense would dictate that an employee who gets out a few hours early should not be required to return to work or to get additional permission, beyond the period already granted to the Grievant.

Based upon the above, the Union requests the grievance be granted.

DISCUSSION

The Grievant is a short-term employee who appears to have had difficulty early in her tenure with the Department. In the year 2000, the instant suspension was her third discipline in approximately 9 months. It is clear that the Employer granted the Grievant permission to attend two seminars during the week of July 21st (5 days) and July 27th (3 days). I agree with the Union's contention that during those weeks the Employer expected the Grievant to be out of the office and in training for 40 hours and 24 hours respectively. In both cases, it appears that the seminars ended approximately 3 to 4 hours early.

As one who has attended numerous seminars, I am aware that it is not unusual for the last day of an extended seminar to be shortened. In many cases this is done to

accommodate people who must travel long distances. For example, the two Painesville police officers identified in UX 4 & 5 most likely had a good distance to travel from London, Ohio to Painesville, Ohio on July 21, 2000.

Given that the last day of a seminar commonly ends earlier than the usual workday, it is surprising there is no departmental policy regarding this issue. On July 24, Tax Enforcement Supervisor Richard T. Shirk recommended to Chuck Kumpar that the Grievant be disciplined for not informing supervision of her whereabouts and accounting for her time following the July 21st seminar. The Grievant's coworker, Agent Charles Marcum, called the office, requesting compensation time for the remainder of the workday that was granted. In contrast, the Grievant had not contacted Mr. Kumpar.

What I find inexplicable is that the Grievant was not informed of her error prior to the end of the second seminar. Supervisor Kumpar had a responsibility to inform Ms. Miaudi that she was violating departmental policy. When the second seminar ended early in the same fashion as the previous week's seminar, Ms. Miaudi conducted herself in the same fashion. The Employer argued vigorously that it is vital to know the whereabouts of its employees and to account for their time. Yet, when they had an opportunity to correct a situation that they reasonably should have known could happen again, they failed to correct it. If anything, the Employer enabled the Grievant's conduct by not informing her of the error of her ways. For this reason, I do not find the July 27th incident to be properly included in the reasons for suspension.

The Union argues that common sense should prevail in this matter. I agree with this assessment, but it applies to both the Grievant and the Employer. I find the argument of the Employer to be persuasive that it is the responsibility of the Grievant to inform her

supervisor of her whereabouts while she is working. Clearly, if she got hurt while in transit to or from a seminar, the Employer may be liable. If an emergency arose and the Grievant had to be contacted, she needed to keep her Employer informed as to her whereabouts. Furthermore, from an auditing point of view, the Employer is accountable for her paid time. I find the Grievant acted irresponsibly when she did not inform her supervisor that the seminar ended early and that she needed direction regarding the remainder of the day. It may have been impractical for her to come back to the office, given the need to travel from London to Columbus on a Friday afternoon. However, she was wrong in assuming she had the right to simply go home and not contact management while "on the clock."

The rationale provided by the Grievant that she had already worked 40 hours does not relieve her from her obligations to keep her Employer informed. The Grievant submitted evidence that she may have stayed for a considerable amount of time after the seminar on July 21st and discussed aspects of it with two police officers from Painesville. This was contradicted by the testimony of her coworker, Charles Marcum, who stated he saw her driving on I 70 at about 12:30 p.m. The Grievant's account of the facts is simply not credible and little weight is given to UX 4 & 5 because there was no ability to cross examine the officers who made these statements. Furthermore, I find it implausible that after five (5) days of a seminar, participants would spend an additional two (2) hours discussing its content on a Friday afternoon. It becomes even less plausible when two of the alleged discussants had to travel some three- (3) hours back to Painesville. If the Grievant was talking with the officers, there is no way to verify it was about work-related topics.

On the other hand, common sense would dictate that employees need to know what to do when the seminars end earlier. A policy that includes requirements of whom to contact should be clearly articulated to all employees and it should be uniformly enforced.

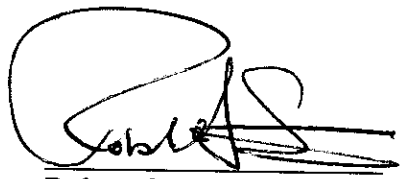
Unfortunately, it appears Ms. Miaudi is on a course to further discredit her career with the Department and possibly with future employers. Her work record indicates a lack of focus on professional responsibility, which is causing her to head in the wrong direction. Although I believe the Employer did not have just cause to sustain the level of discipline it issued in this case, for the reasons stated above, it had reason to take some action based upon Ms. Miaudi's pattern of discordant conduct. People who are serious about having successful law enforcement careers must consistently demonstrate that they have a high level of discipline and the respect for authority required of this profession.

AWARD

The grievance is denied in part and sustained in part.

The Grievant's 3-day suspension shall be reduced to a 1-day suspension for being absent without leave following an early end to her seminar on July 21, 2000. She shall be paid two days of back pay at the rate of pay deducted at the time of suspension. She shall also be made whole for any loss of seniority and benefits.

Respectfully submitted to the parties this 21st day of December, 2001.



Robert G. Stein, Arbitrator