

In the Matter of Arbitration Between the	:	Grievance Number: DOT-2016-02750-7
STATE OF OHIO, DEPARTMENT OF	:	
TRANSPORTATION, DISTRICT 9,	:	
	:	
Employer	:	Grievant: Aaron D. Moran
	:	
and the	:	
	:	
OHIO CIVIL SERVICE EMPLOYEES	:	Date of Arbitration Hearing:
ASSOCIATION, AMERICAN	:	March 13, 2017
FEDERATION OF STATE, COUNTY	:	
AND MUNICIPAL EMPLOYEES,	:	
LOCAL 11, AFL-CIO,	:	
	:	Howard D. Silver, Esquire
	:	Arbitrator
Union	:	

#1160

DECISION AND AWARD OF THE ARBITRATOR

APPEARANCES

For: State of Ohio, Department of Transportation, District 9, Employer

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 Labor Relations Officer 3
 Ohio Department of Transportation
 District 9
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 Chillicothe, Ohio 45601
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For: Ohio Civil Service Employees Association, American Federation of State,
 County and Municipal Employees, Local 11, AFL-CIO, Union

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RECEIVED / REVIEWED
 MAY 15 2017
 OCSEA - OFFICE OF
 GENERAL COUNSEL

PROCEDURAL BACKGROUND

This matter came on for an arbitration hearing at 9:00 a.m. on March 13, 2017 in a conference room at the Ohio Department of Transportation's District 9 headquarters at 950 Eastern Avenue, Chillicothe, Ohio 45601. At the hearing both parties were afforded a full and fair opportunity to present evidence and arguments in support of their positions. The hearing concluded at 11:00 a.m. on March 13, 2017 and the hearing's evidentiary record was closed at that time.

Post-hearing briefs from the parties were submitted to the arbitrator by April 12, 2017 and exchanged between the parties by the arbitrator on April 13, 2017.

This matter proceeds under a collective bargaining agreement in effect between the parties from July 1, 2015 through June 30, 2018. The parties' collective bargaining agreement, Joint Exhibit 1, contains the parties' grievance procedure, Article 25, and contains an Article that addresses discipline, Article 24.

No issue as to the arbitrability of the grievance has been raised. Under the language of the parties' collective bargaining agreement, the arbitrator finds the grievance arbitrable and properly before the arbitrator for review and resolution.

STIPULATED ISSUE

Was the grievant terminated for just cause in violation of his Last Chance Agreement?

STATEMENT OF THE CASE

The parties to this arbitration proceeding, the State of Ohio, Department of Transportation, District 9, hereinafter the Employer, and the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, hereinafter the Union,

are parties to a collective bargaining agreement, Joint Exhibit 1, in effect from July 1, 2015 through June 30, 2018.

Within the parties' Agreement is an Article titled "Discipline," Article 24. Article 24, section 24.01 begins with the following: "Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action."

The grievant in this proceeding, Aaron D. Moran, was hired by the Ohio Department of Transportation on January 2, 2001. At all times relevant to this proceeding Mr. Moran was employed as a Highway Technician 2 working from District 9's Brown County Garage.

The classification series Highway Technician, series number 5377, is assigned exclusively to the Ohio Department of Transportation. The classification specification for Highway Technician 2, class number 53772, under minimum class qualifications for employment, presents the following:

Note: Applicant must have valid Commercial Driver's License at the appropriate level pursuant to approved position description on file to operate motorized equipment of size and type regulated by section 4506 of the Ohio Revised Code.

The position description under which Mr. Moran worked as a Highway Technician 2 appears in the hearing record as Joint Exhibit 4 and has on its face the following language: "Valid Class A Commercial Driver's License w/tanker endorsement without airbrake restriction."

The classification specification for Highway Technician, series number 5377, appears in the hearing record as Joint Exhibit 5. This classification series' specification presents a class concept for Highway Technician 2, class number 53772, that describes a second level full performance class requiring considerable knowledge of highway maintenance and maintenance

related inspection items in order to operate basic and standard equipment and perform related general highway maintenance duties that may include snow and ice control and related maintenance duties through the operation of a snowplow with spreader, brine dispensing equipment, dump truck with attachments, and acting as a lead worker in the absence of a lead worker. The classification specification for Highway Technician 2 begins with the language: "Operates basic & standard motorized equipment ..."

On January 27, 2015 the grievant received a five-day working suspension and signed a last chance agreement under which the Employer agreed to hold in abeyance the removal of Mr. Moran for a period of two years so long as no intervening discipline as specified in this last chance agreement were to occur. The last chance agreement signed by Mr. Moran, his Union representative, and a representative of the Employer, Joint Exhibit 3(E) provides that Mr. Moran agrees to: "Strictly adhere to ODOT policies and work rules in order to retain (his/her) position."

The January 27, 2015 last chance agreement entered into by the Employer, the Union, and Mr. Moran concludes with the following two paragraphs:

All parties agree that if the employee violates this Last Chance Agreement, or if there is any violation of the WORK RULES 101 the appropriate discipline shall be termination. Any grievance arising out of this discipline shall have the scope of the Arbitration of the grievance limited to the question of whether or not the grievant did indeed violate said rule violation. ODOT need only prove that the employee violated this agreement or the work rule. The Arbitrator shall have no authority to modify the discipline. All parties acknowledge the waiver of the contractual due process rights to the extent stated above.

The Last Chance Agreement is in full force and effect for a period of 2 years from the date of the employee's signature on this agreement. This two-year period may be extended by a period equal to the employee's leaves of fourteen consecutive days or longer.

The grievant's prior discipline includes a one day working suspension effective December 4, 2014 and a one day unpaid suspension effective February 28, 2014.

On June 4, 2016 at 1:49 a.m. Mr. Moran was off duty and operating his 2004 Chevrolet pick-up truck eastbound on South Street in the Village of Russellville, Ohio in Brown County. Mr. Moran was stopped by an Ohio State Highway Patrolman; Mr. Moran underwent a breathalyzer test that produced a test result of 0.140% BAC. The Highway Patrolman noticed a strong odor of alcohol about the person of Mr. Moran and Mr. Moran admitted to having consumed alcohol. The report of the Highway Patrolman to the Ohio Bureau of Motor Vehicles about Mr. Moran's traffic stop appears in the hearing record as Joint Exhibit 3(A).

The Report of Law Enforcement Officer Administrative License Suspension/Notice of Possible CDL Disqualification/Immobilization/Forfeiture, Joint Exhibit 3(A), the report submitted to the Ohio Bureau of Motor Vehicles by the Ohio State Highway Patrolman who arrested Mr. Moran on June 4, 2016 presents boxes that are checked by the arresting officer reflecting a 0.140% BAC test result, the nature of the test (breath), the fact that Mr. Moran's driver's license was placed under an administrative license suspension pursuant to Ohio Revised Code section 4511.191, the fact that Mr. Moran's license was seized, and the fact that Mr. Moran was provided a copy of this form at the time of the his arrest.

On June 7, 2016 Mr. Moran, through his legal counsel, filed a not guilty plea and a demand for a jury trial in the case of *State of Ohio v. Aaron Moran*, case number TRC 1602483 before the Municipal Court of Brown County, Ohio. Also included in this notice filed with the Brown County Municipal Court was the statement: "Defendant appeals the administrative license suspension."

On June 21, 2016 the Brown County Municipal Court in case numbers TRC 1602483(A) and TRC 1602483(B), through a journal entry, modified Mr. Moran's license suspension for the

purposes enumerated in this journal entry, Joint Exhibit 3(C). One of the reasons allowed for driving purposes appearing in this journal entry is: "(3) ODOT Employment (must carry schedule)."

On June 29, 2016 before the Brown County Municipal Court in Georgetown, Ohio in case number TRC 1602483 Mr. Moran, with the assistance of legal counsel, entered a plea of no contest to and was found guilty by the Court of the offense of "3rd Reckless" in violation of Ohio Revised Code section 4511.20, a misdemeanor of the third degree. The Court's June 29, 2016 Judgment Entry noted that the conviction of Mr. Moran under Ohio Revised Code section 4511.20 intends an amendment of the original charge, Ohio Revised Code section 4511.19(A)(1), and the Court specifically ordered the dismissal of charges under Ohio Revised Code sections 4511.191(D) and 4511.39. Mr. Moran was sentenced to the Brown County Adult Detention Center for a period of thirty days, with twenty-seven of these days of incarceration suspended. Mr. Moran was placed under community control (probation) for a period of one year and was required to serve three days at a residential drivers' intervention program. Mr. Moran was fined \$750 and assessed court costs.

On June 29, 2016 Mr. Moran's appeal of the administrative suspension of his driver's license was upheld upon a finding that: "The arresting law enforcement officer did not have reasonable ground to believe that an OVI violation or a violation of O.R.C. 4511.194 (physical control) was committed before the test." This ALS Court Disposition Notification form is signed by the Brown County Prosecuting Attorney and by the trial Judge.

On June 30, 2016 the Employer directed to Mr. Moran written notice that at the Union's request a pre-disciplinary hearing that was to address Mr. Moran would be rescheduled so as to occur at 10:00 a.m. on July 1, 2016 at the ODOT District 9 labor relations office. This notice, Joint Exhibit 3, pages 1-2, provided that Mr. Moran was being charged with a violation of Policy 17-

015(P), item #19. This notice also included the following:

The basis of the charge(s) is as follows:

- On June 4, 2016, you were arrested for OVI and lost your license.
- Additionally, this invalidation means that you have violated those terms of your last chance agreement, signed on January 27, 2015.

On July 1, 2016 a pre-disciplinary conference was convened and completed with Mr. Moran in attendance, as were Employer and Union representatives. The pre-disciplinary conference hearing officer was Sandi Stewart. At the conclusion of the July 1, 2016 pre-disciplinary conference, Hearing Officer Stewart found: "There is not just cause for discipline based on the documentation provided that Mr. Moran's license was never suspended."

On July 8, 2016 the Employer directed to Mr. Moran written notice that made reference to the "no just cause" finding by the pre-disciplinary conference hearing officer. This notice concluded with the following:

As the appointing authority I have reviewed the facts as established in the investigation into the incident and I reject the hearing officer's determination of no just cause. I do find that just cause does exist on the basis of your own admission you received an OVI charge and was issued an administrative license suspension. You provided a form from the Brown County Court stating you were given driving privileges as of June 21, 2016 that included your employment at ODOT. However, you were not able to provide documentation showing a valid CDL license for the time of June 4, 2016 through June 29, 2016 making you unavailable to perform your job duties. Therefore you violated Policy 17-015(P) Rule # 19 and your Last Chance Agreement you signed on January 27, 2015.

Respectfully,

Vaugh Wilson
Deputy Director
ODOT District 9

On July 11, 2016 written notice from the Director of the Ohio Department of Transportation was directed to Mr. Moran that read as follows:

This letter is to inform you that you are hereby terminated from employment as a Highway Technician 2 assigned to Brown County Garage effective July 12, 2016. You are found to have violated Policy 17-015(P), item: #19 Other actions which could compromise or impair the employee's ability to effectively carry out his or her duties as a public employee. You have violated the terms of your Last Chance Agreement signed on January 27, 2015.

Respectfully,

Jerry Wray
Director

On July 13, 2016 a grievance was filed on behalf of the Union and Mr. Moran, contesting the removal of Mr. Moran from his employment effective July 12, 2016 and alleging that the removal was without just cause. The grievance filed on behalf of Mr. Moran asked that the grievant be reinstated and be made whole.

The grievance filed on behalf of Mr. Moran moved through the parties' contractual grievance procedure but remained unresolved. The grievance was moved to final and binding arbitration at the direction of the Union. The arbitration hearing occurred on March 13, 2017. The parties submitted post-hearing briefs by April 12, 2017.

POSITIONS OF THE PARTIES

Position of the Employer

The Employer points out that the jointly stipulated issue in this case is: "Was the Grievant terminated for just cause in violation of his Last Chance Agreement?" The Employer notes that this Last Chance Agreement, Joint Exhibit 3(E), page 1 includes the following:

All parties agree that if the employee violates this Last Chance Agreement, or if there is any violation of the WORK RULES 101 the appropriate discipline shall be termination. Any grievance arising out this discipline shall have the scope of the Arbitration of the grievance limited to the question of whether or not the Grievant did indeed violate said rule violation. **ODOT need only prove that the employee violated this agreement or the work rule. The Arbitrator shall have no authority to modify the discipline ...**

(Emphasis added in Employer's brief)

The Employer notes that both parties and the grievant entered into the two-year Last Chance Agreement on January 27, 2015 and under this agreement the Employer agreed to hold Mr. Moran's removal in abeyance in consideration of which: "The Employee agrees to[:] 1. Strictly adhere to ODOT policies and work rules in order to retain (his/her) position."

The Employer notes that the grievant's employment was terminated effective July 12, 2016 based on a violation of Mr. Moran's January 27, 2015 Last Chance Agreement and ODOT Policy 17-015(P) Work Rules and Discipline, item #19 – "Other actions that could compromise or impair the ability of the employee to effectively carry out his/her duties as a public employee. See Joint Exhibit 6, page 9.

The Employer points out that a minimum qualification of the grievant's ODOT position, Highway Technician 2, was the maintenance of a valid Class A Commercial Driver's License (CDL), a requirement expressly presented in the grievant's position description and in the classification specification for Highway Technician 2.

The Employer points out that the grievant failed to maintain a valid CDL, a license necessary to the performance of duties assigned to the grievant's position. The Employer asserts that an employee who is unable to perform the duties he was hired to perform fractures the employment relationship. The failure by the grievant to maintain a valid CDL and the effect of that gap in licensure upon the grievant's ability to perform the duties of his position resulted in an

inability of the grievant to carry out his assigned duties. The Employer also contends that this inability to perform the duties assigned to his position comprises a violation of the grievant's Last Chance Agreement. The Employer reminds the arbitrator that the standard to be applied to the grievant under the Last Chance Agreement is "strict adherence" to work rules.

The Employer claims that there is just cause for discipline in this case and the termination of the grievant's ODOT employment is therefore appropriate. The Employer reminds the arbitrator that under the language of the Last Chance Agreement the arbitrator has no authority to modify the discipline. The Employer contends that a preponderance of the evidence admitted to the hearing record proves the grievant's work rule violation which substantiates the grievant's violation of the Last Chance Agreement. The grievance in this case, argues the Employer, should therefore be denied in its entirety.

The Employer points out that a preponderance of evidence in the hearing record establishes that the grievant's operator's license was seized on June 4, 2016 under a charge of operating a vehicle while intoxicated (OVI) and the seizure of Mr. Moran's operator's license remained in effect until June 30, 2016 when the grievant's Ohio operator's license was reinstated along with the Class A Commercial Driver's License endorsements. The Employer notes, however, that for the twenty-five (25) days from June 4, 2016 through June 29, 2016 the grievant had been unable to perform all of the duties of his position because he had not maintained a valid Commercial Driver's License, a minimum qualification for the grievant's position.

The Employer points out that on June 4, 2016 when the grievant was arrested for OVI and his Ohio operator's license seized and placed under an administrative suspension, Appendix Q, section Q attached to the parties' collective bargaining agreement became applicable. Upon the seizure of Mr. Moran's operator's license on June 4, 2016 the following language in Appendix Q,

section Q, an attachment to the parties' Agreement, was applied:

All employees who are required to maintain an Operator's license or a CDL pursuant to this contract, their position description, or classification specification are required to promptly notify the Employer of any current or pending invalid status of their Operator or CDL license. This includes, but is not limited to, the suspension, revocation, forfeiture, or disqualification of their Operator's or CDL license.

The Employer points out that Mr. Moran followed the above-cited language by informing his supervisor on June 5, 2016, the first work day following Mr. Moran's arrest for OVI and the suspension of Mr. Moran's operator's and CDL license, of the fact of the suspension of his operator's license and his CDL. The Employer argues that the grievant's actions under Appendix Q, section Q reflect an acknowledgment by the grievant of the suspension of his Commercial Driver's License.

The Employer notes that other language in Appendix Q, section Q reads as follows:

These employees who are not legally permitted to drive at work for thirty (30) calendar days or less will be required to use accrued vacation, personal, or compensatory leave, or will be placed on leave without pay upon exhaustion of vacation, personal or compensatory leave.

The Employer notes that Mr. Moran was placed on paid leave during the suspension of his driver's license and his CDL not as a result of the grievant's request but as result of the contractual language expressed in Appendix Q, section Q. The Employer argues that this language may not be used to avoid accountability for a suspended license. In this regard other language within Appendix Q, section Q is referenced by the Employer that reads: "Employees will automatically receive a three (3) day working (paper) suspension, and shall be required to enter into a two (2) year Last Chance Agreement for same or similar violations, without recourse to grieve."

The Employer notes that the parties' Agreement provides more severe discipline for longer CDL suspensions. The Employer claims that the contract language acknowledges that such a suspension of driving privileges provides just cause for discipline and presents a work rule violation when such a license, in this case a Commercial Driver's License, is required to perform the duties of one's position. The Employer notes that the events at issue in this case occurred in June, 2016 at a time when Mr. Moran was under an active, two-year Last Chance Agreement. The Employer contends that the grievant violated a work rule and violated his Last Chance Agreement when the grievant's Commercial Driver's License was suspended, and the grievance should be denied and the termination of the grievant's employment upheld.

The Employer argues that the documents that comprise Joint Exhibit 3(A) clearly indicate that the grievant's license was seized and suspended, and Mr. Moran signed the Report of the Law Enforcement Officer acknowledging that his license had been seized and his license was under an administrative license suspension (ALS). On the reverse side of this form it is stated that a person may appeal the suspension, but even in the event of an appeal the person's driving privileges remain suspended. The last section on this form indicates that under Ohio Revised Code section 4511.192: "... your commercial driver's license ... is now suspended. The suspension takes effect immediately. The suspension will last at least until your initial appearance on the charge ..."

The Employer claims that the documents presented are clear and unambiguous and show that the grievant's driver's license was suspended. This is a fundamental work rule violation, argues the Employer, a violation that was known by Mr. Moran when he signed the acknowledgement of his license suspension.

The Employer recalls the testimony of Carrie Glaeden, Assistant Legal Counsel to ODOT and a former Franklin County, Ohio Municipal Court Judge. Ms. Glaeden provided expert

testimony on the court documents admitted to the hearing record based on her first-hand knowledge of court processes among OVI arrests and infractions gained during her tenure as a Municipal Court Judge.

Ms. Glaeden testified that an administrative license suspension (ALS) occurs whenever an individual is arrested with a breath alcohol content of 0.08 or greater, or when an individual refuses to undergo the breath alcohol test. In either case the operator's license is seized and suspended. Ms. Glaeden noted that this is an administrative penalty and not a criminal penalty.

The grievant's breath alcohol test in this case resulted in a 0.14% BAC. Ms. Glaeden testified that the grievant was under a complete license suspension from the time of his arrest on June 4, 2016 until June 21, 2016 when the Brown Count Municipal Court granted to the grievant limited and specified driving privileges, driving privileges not possessed by the grievant following June 4, 2016 and prior to June 21, 2016. Included in the listing of driving privileges granted to Mr. Moran on June 21, 2016 through the Court's journal entry, Joint Exhibit 3(C), is for the purpose of "ODOT Employment (must carry schedule)." This document refers to the defendant's license suspension, and other than these specific driving allowances, the grievant's driver's license remained suspended. Ms. Glaeden testified that the Court does not have the authority to grant driving privileges under a CDL pursuant to specific language within the Ohio Revised Code. In this regard Ms. Glaeden referred to page 27 of the OVI Handbook, Joint Exhibit 7 that reads:

Division (A)(4) of R.C. section 4510.13 prohibits the courts from issuing driving privileges to operate a commercial motor vehicle (CMV) when the offender is under suspension for an OVI, refusal, or positive test. This includes a prohibition against granting privileges to drive a commercial motor vehicle in the course of employment.

(Emphasis in original)

Ms. Glaeden testified that the Court's June 29, 2016 Judgment Entry Finding indicates a

negotiated resolution of the case under which Mr. Moran entered a no contest plea to a reduced charge and the original charges were dismissed. The Employer points out that while the Court did grant the Administrative License Suspension (ALS) appeal filed on behalf of Mr. Moran, Ms. Glaeden testified that the granting of the ALS appeal had had no effect on and did not nullify the prior suspension of Mr. Moran's operator's license from June 4, 2016 through June 29, 2016.

The Employer points out that the administrative license suspension appeal having been granted, Mr. Moran's operator's license was reinstated effective June 29, 2016. The Employer notes that the grievant's operator's license was reissued on June 30, 2016.

The Employer argues that the stipulated exhibits in the hearing record reflect a suspended commercial driver's license from June 4, 2016 through June 29, 2016, separating Mr. Moran during those twenty-five (25) days from the ability to perform a number of duties assigned to and required of Mr. Moran's Highway Technician 2 position. The failure to maintain a valid, active commercial driver's license from June 4, 2016 through June 29, 2016 also presented a failure to maintain minimum qualifications for the position filled by the grievant during those twenty-five days.

The Employer contends that by failing to meet the minimum qualifications for his Highway Technician 2 position Mr. Moran violated a work rule by not being able to perform the duties of his position and violated his January 27, 2015 Last Chance Agreement by violating the work rule within the two-years following January 27, 2015. The Employer claims that the language of Appendix Q, section Q clearly contemplates disciplinary action grounded in just cause under these circumstances and prescribes disciplinary action in express language.

The Employer points out that while the Union contends that there is no record from the Ohio Bureau of Motor Vehicles indicating Mr. Moran's commercial driver's license had been

suspended, the Court documents presented determine what is to be provided to the Ohio BMV. The Employer argues that the report of the law enforcement officer and court documents clearly indicate that the grievant's operator's license had been suspended effective June 4, 2016, a notion supported by the grant by the Court of limited driving privileges to Mr. Moran beginning June 21, 2016.

The Employer claims that an ALS appeal, when successful, reinstates an operator's license but does not serve to nullify a prior suspension. As explained by Ms. Glaeden in her testimony at the hearing, the grant of the appeal stops the suspension; the grant of the appeal does not nullify the suspension.

As to the pre-disciplinary conference hearing officer's determination that there was not just cause for disciplinary action, the Employer notes that it is not bound by this finding by this hearing officer. The Deputy Director and administrative head of ODOT's District 9 found just cause for disciplinary action based upon the OVI charge and based on the administrative license suspension. The Employer claims that from June 4, 2016 through June 29, 2016 the grievant was not able to provide proof of a valid commercial driver's license, leaving Mr. Moran unavailable to perform the duties of his position. This inability to perform the duties of his position presents a violation of Policy 17-015 (P) Rule #19, and the violation of this work rule in June, 2016 presents a violation of Mr. Moran's January 27, 2015 Last Chance Agreement.

The appointing authority for ODOT accepted the recommendation from District 9's Deputy Director and issued a termination letter to Mr. Moran on July 11, 2016, ordering the removal of Mr. Moran from his employment with ODOT effective July 12, 2016.

As to the Union's argument that Mr. Moran had been on approved leave beginning on June 5, 2016, had not been on duty and not situated so as to have been unable to perform the duties of

his position, and therefore no grounds exist upon which to impose discipline upon the grievant, the Employer rejects this argument as flawed and self-serving. The Employer points to the language in Appendix Q, section Q that provides that employees who are not legally permitted to drive at work for thirty calendar days or less will be required to use accrued vacation, personal, or compensatory leave, or will be placed on leave without pay upon exhaustion of vacation, personal, and compensatory leave. The Employer notes that the grievant was placed on leave effective June 5, 2016 in accordance with the language of Appendix Q, section Q for the very reason that he was not able to perform the duties of his position or meet the minimum qualifications of his position.

The Employer argues that the grievant not only violated the terms of his employment relationship and engaged in actions that comprise just cause for the discipline imposed but the grievant knew that a valid driver's license was a requirement as a minimum qualification of his position and his position's classification, and the grievant had been fully aware of the seriousness of not maintaining a valid commercial driver's license.

The Employer notes that the express language of Appendix Q, section Q in the case of the suspension of a commercial driver's license refers to the enforced use of accrued leave, an automatic suspension, and imposition of a two-year last chance agreement. The Employer notes that the grievant in this case was already under a two-year Last Chance Agreement when his license was suspended on June 4, 2016, and it is the Employer's position that the language of the parties' Agreement in referring to an automatic suspension and a last chance agreement in the event of a suspended commercial driver's license makes plain, through this express language, that the suspension of the commercial driver's license of an employee who is required to maintain such a license comprises just cause for disciplinary action under Article 24, section 24.01 of the parties' Agreement.

The Employer contends that it has met its burden of proof in this case by establishing just cause for the discipline imposed upon the grievant. In support of this contention the Employer cites four separate arbitration decisions that refer to grievants who had lost their driver's licenses and became unable to perform the duties of their assigned positions. In each case cited by the Employer just cause for the removal of the grievant was found. The Employer contends that it has clearly shown through documents and testimony that the grievant was unable to perform the duties of his position for twenty-five days and that this inability to perform the duties of his position presented a violation of a work rule and thus violated the January 27, 2015 Last Chance Agreement under which the grievant was employed at the time of his driver's license suspension. The Employer contends that the work rule that was violated by the grievant in this case was a reasonable work rule and was well known to the grievant at the time of the rule's violation by the grievant.

In accordance with the Last Chance Agreement in effect during the two years following January 27, 2015, based on the fact that the level of discipline indicated by the Last Chance Agreement is to be termination of employment, based upon proof that just cause existed for the discipline imposed upon proof of a work rule violation, and based on the fact that the arbitrator has no authority to modify the level of discipline ordered by the Last Chance Agreement if a work rule violation is proven, the Employer urges that the grievance be denied in its entirety.

Position of the Union

It is the position of the Union that the Employer in this proceeding has failed to present sufficient evidence to prove that the Employer had just cause to terminate the employment of the grievant effective July 12, 2016. The Union contends that the grievant did not violate work rule 17-015(P), item #19 and therefore the grievant was not in violation of the January 27, 2015 Last Chance Agreement.

The Union notes that on June 4, 2016 the vehicle driven by Aaron Moran was stopped by a law enforcement officer who had not had a reasonable ground upon which to believe that an OVI violation had occurred and therefore the law enforcement officer had had no cause to make this traffic stop. Mr. Moran was administered a breathalyzer test and Mr. Moran's driver's license was seized. This traffic stop occurred during Mr. Moran's off duty hours during Mr. Moran's personal time when Mr. Moran was operating his personal vehicle.

On June 5, 2016 Mr. Moran contacted Transportation Manager Greg Stout and notified him of the traffic incident. Mr. Moran requested from Transportation Manager Stout several weeks of vacation to attend to personal matters and this request was approved for the period from June 6, 2016 through June 30, 2016.

The Union notes that on June 21, 2016 Mr. Moran received from the Brown County Municipal Court limited driving privileges under his driver's license which included the ability to drive for: "ODOT Employment." Mr. Moran filed an appeal of his operator's license administrative suspension with the Court and submitted to the Employer the Court's June 21, 2016 journal entry granting limited driving privileges to Mr. Moran. The Employer refused to allow Mr. Moran to return to work, contending that Mr. Moran's commercial driver's license had also been suspended.

The Union points out that on June 29, 2016 the Brown County Municipal Court granted the ALS appeal filed by Mr. Moran. The Court convicted Mr. Moran of a violation of Ohio Revised Code section 4511.20, Operation in willful or wanton disregard of the safety of persons or property, and the Court ordered a dismissal of the original OVI charge.

A pre-disciplinary hearing was conducted on July 1, 2016 and the hearing officer at the pre-disciplinary hearing found no just cause for disciplinary action. This finding was rejected by

the Deputy Director of ODOT's District 9 and Mr. Moran was thereafter separated from his employment with ODOT effective July 12, 2016.

The Union points out that Carrie Glaeden, Chief Legal Officer for ODOT testified that it was her supposition that Mr. Moran had entered into a plea agreement to resolve the traffic case lodged against him. The Union notes that there is no documentation in the hearing record showing Mr. Moran to have entered into a plea agreement to resolve his traffic case. The Union points out that there is documentation showing that the ALS appeal was granted by the Court. The Union claims that other laws referenced by Ms. Glaeden in her testimony pertain to incidents occurring while operating commercial motor vehicles or relate to being convicted of a specific OVI charge, neither of which, the Union points out, has occurred in this case.

The Union emphasizes that the documents admitted to the hearing record show only a driver's license suspension in Mr. Moran's driver's abstract maintained by the Ohio Bureau of Motor Vehicles, noting a "non-compliant suspension." The Union contends that this was based upon a failure to show proof of insurance during the June 4, 2016 traffic stop. Mr. Moran subsequently presented his insurance information to the Bureau of Motor Vehicles; this satisfied the requirements of the non-compliant suspension; the non-compliant suspension was removed from Mr. Moran's BMV driver's abstract.

The Union points out that other testimony and documents in the hearing record refer to obtaining copies of Mr. Moran's Ohio BMV driver's abstract on various dates. Each abstract shows Mr. Moran's driver's license to have been "valid" and shows his commercial driver's license as "valid." The Union notes that Ohio Administrative Code section 4501:1-10-01 requires the Registrar of Motor Vehicles to give written notice of any order revoking, cancelling, or suspending a driver's license or a commercial driver's license. The Union notes that Mr. Moran

testified that he has never received notification from the Registrar of Motor Vehicles that Mr. Moran's commercial driver's license had been suspended.

It is the position of the Union that the Employer has failed to present sufficient evidence to prove that Mr. Moran's commercial driver's license was at any time suspended and therefore invalid. The evidence presented shows Mr. Moran did not violate work rule #19 and therefore there has been no showing of a violation of Mr. Moran's January 27, 2015 Last Chance Agreement. The hearing record reflects that Mr. Moran was never convicted of an OVI offense and therefore there is nothing in the hearing record to support a finding that work rule #19 had been violated.

It is the position of the Union that without proof of Mr. Moran's violation of work rule #19 there has been no showing of a violation of Mr. Moran's Last Chance Agreement and therefore there is insufficient evidence in the hearing record to uphold the removal of Mr. Moran from his employment with ODOT.

The Union asks that the grievance be sustained, that Mr. Moran be reinstated to his employment with ODOT as a Highway Technician 2 effective July 12, 2016, that the grievant be awarded all back pay and have his seniority and leave balances restored so as to leave the grievant in the position he would have been in had the discipline not been imposed. In short, the Union urges the arbitrator to sustain the grievance and make the grievant whole.

DISCUSSION

The parties' collective bargaining agreement provides in Article 24, section 24.01 that discipline is not to be imposed upon an employee except for just cause. The parties' Agreement also places on the Employer the burden of proving just cause for any disciplinary action imposed.

The case herein includes the issue of just cause but is impacted by more than the language

of Article 24, section 24.01 cited above. Both parties to this arbitration proceeding, the Employer and the Union, and the grievant in this case, Mr. Moran, on January 27, 2015 entered into a written agreement, signed by representatives of the parties and signed by the grievant. This agreement through express terms described what each of the parties and the grievant were to receive under the January 27, 2015 agreement, and indicated what each party and the grievant were obligated to provide under this agreement. The consideration provided by the Employer under the January 27, 2015 agreement was the continuing employment of the grievant, Mr. Moran, following a five working day suspension. The Union and the grievant, in consideration for Mr. Moran's continuing employment by ODOT, District 9, promised that Mr. Moran would strictly adhere to ODOT policies and work rules during the two years following January 27, 2015. The agreement signed on January 27, 2015 specifically provided that if there were to be a violation of the work rules by Mr. Moran between January 27, 2015 and January 27, 2017 the appropriate discipline would be termination of employment. The January 27, 2015 agreement was therefore Mr. Moran's last chance to maintain his employment, a Last Chance Agreement.

The January 27, 2015 Last Chance Agreement provides that in the event Mr. Moran were to violate a work rule during the two-year term of the Last Chance Agreement, any grievance arising from the termination of the employment of Mr. Moran under the January 27, 2015 Last Chance Agreement because of a violation of a work rule would limit the arbitration of that grievance to the question of whether the grievant violated a work rule. If the Employer is able to prove a work rule violation by Mr. Moran, the arbitrator in such a case " ... shall have no authority to modify the discipline." Express language in the January 27, 2015 Last Chance Agreement provides that the parties acknowledge they are waiving their contractual due process rights to the extent specified in the language of the Last Chance Agreement.

There is express language attached to the parties' collective bargaining agreement, Appendix Q, Agency Specific Agreements, wherein agreed language specific to the Ohio Department of Transportation is presented. Section Q, among the specific Articles attaching to ODOT is subtitled: "Suspension/Disqualification of Operator's or CDL licenses" and specifies how bargaining unit members who have had their operator or CDL licenses suspended for less than thirty (30) calendar days are to be treated. Upon a first Operator's license or CDL license suspension of less than thirty calendar days the employee is to be placed on some form of accrued leave, if such leave is available to the employee, or the employee is to be placed on leave without pay if no accrued leave is available. Such employees are to automatically receive a three working day suspension and shall be required to enter into a two-year Last Chance Agreement prohibiting similar violations, without recourse to the parties' grievance procedure.

The grievant in this proceeding entered into a Last Chance Agreement on January 27, 2015 and during the two years following January 27, 2015, the period during which the January 27, 2015 Last Chance Agreement was in effect, the grievant was charged by the Employer with a violation of a work rule, a rule that prohibited Mr. Moran from engaging in actions that could compromise or impair the ability of Mr. Moran to effectively carry out his duties as a public employee. This work rule is designated Policy 17-015(P), item #19. See Joint Exhibit 6, page 9.

The arbitrator finds the grievant was under a Last Chance Agreement at the time of the alleged work rule violation. The arbitrator finds nothing in the language of Appendix Q or elsewhere in the parties' collective bargaining agreement that would require or contemplate a second Last Chance Agreement, an oxymoron.

The arbitrator finds himself constrained by the January 27, 2015 Last Chance Agreement that calls for the arbitrator in the case of Mr. Moran's termination of employment under the January

27, 2015 Last Chance Agreement to be limited to whether the grievant violated a work rule. If such a violation is found to have occurred the arbitrator is without authority to modify the discipline imposed, in this case the termination of the grievant's employment.

There is no question that the position filled by the grievant in District 9 of the Ohio Department of Transportation required Mr. Moran to maintain a commercial driver's license, a requirement expressed in the classification specification for Highway Technician 2, the classification of the grievant's position. The requirement of a valid, active commercial driver's license is also found in the position description that attached to the grievant's Highway Technician 2 position. There is no dispute that the duties assigned to the grievant's position required the position's incumbent to operate a variety of motorized equipment, some of which required a CDL to operate. Without a CDL the grievant was unable to perform all of the responsibilities of his position. Such a limitation calls into question whether the grievant was able to perform all of the duties of his position and therefore whether work rule 17-015(P), item #19 had been violated.

The traffic stop that occurred on June 4, 2016 that resulted in the arrest of Mr. Moran under a charge of Operating a vehicle under the influence of alcohol or drugs (OVI), Ohio Revised Code section 4511.19(A)(1)(a), is undisputed in terms of its occurrence in real time and there is no dispute that the result of this traffic stop and arrest was a Breathalyzer test by Mr. Moran that registered 0.14 which produced an administrative license suspension of Mr. Moran's operator's license beginning at the time of the arrest on June 4, 2016.

On the first work day following June 4, 2016, June 5, 2016, Mr. Moran did what he was required to do under the parties' collective bargaining agreement by notifying a supervisor of the suspension of Mr. Moran's operator's license. Mr. Moran was immediately placed on leave that Mr. Moran had accrued and his operator's license remained under an administrative license

suspension from June 4, 2016 through June 20, 2016, a period of time when Mr. Moran had had no driving privileges of any kind.

On June 21, 2016 Mr. Moran was granted limited driving privileges by the Brown County Municipal Court, including: "(3) ODOT Employment (must carry schedule)." See Joint Exhibit 3(C).

In coming to a decision on the grievance in this case the arbitrator begins with certain first principles. One of these starting points upon which the arbitrator relies is the view that a commercial driver's license is comprised of endorsements that attach to a valid, active operator's license. It is the arbitrator's understanding that either or both an operator's license and a commercial driver's license may be suspended under Ohio statutory law, and it is also the arbitrator's understanding that when an operator's license is suspended, any commercial driver license endorsements attached to that suspended operator's license lose their authority during the suspension because during the operator's license suspension the commercial driver's license endorsements do not attach to a valid, active operator's license.

The arbitrator also understands that there is a difference between a suspension of a license and a disqualification of a license. The administrative license suspension (ALS) imposed upon the grievant's operator's license beginning on June 4, 2016 and extending to June 29, 2016 is not a denial of driving privileges by a Court but an administrative action of the Executive through the Bureau of Motor Vehicles. The suspension was triggered by an arrest for OVI and such an arrest is to occur when the breath alcohol content is determined to be .08 or higher. In the case herein, Mr. Moran's breath alcohol content was .14.

Ohio Revised Code section 4511.191(D)(1) reads as follows:

A suspension of a person's driver's license or commercial driver's license or permit

or nonresident operating privilege under this section for the time described in division (B) and (C) of this section is effective immediately from the time at which the arresting officer serves the notice of suspension upon the arrested person. Any subsequent finding that the person is not guilty of the charge that resulted in the person being requested to take the chemical test or tests under division (A) of this section does not affect the suspension.

The arbitrator understands the arrest of the grievant on June 4, 2016 for OVI resulted in the administrative license suspension of Mr. Moran's operator's license and left Mr. Moran without any driving privileges, those under his operator's license or those under his commercial driver's license endorsements.

Ohio Revised Code section 4511.191(C) provides that upon receipt of the sworn report of the law enforcement officer who arrested a person for violation of Ohio Revised Code section 4511.19(A) that was completed and sent to the Registrar in reference to a person who's breath test resulted in a breath alcohol content of .08 or above, the Registrar is to enter into the Registrar's records the fact that the person's driver's license or commercial driver's license or permit or nonresident driving privileges were suspended by the arresting officer under this division.

Ohio Revised Code section 4510.13(A)(4) provides that no judge or mayor shall grant limited driving privileges for employment as a driver of commercial motor vehicles to an offender whose driver's license or commercial driver's license or permit or nonresident operating privilege has been suspended under division (C) of Ohio Revised Code section 4511.191.

There is no question that the OVI arrest and breathalyzer test administered to the grievant on June 4, 2016 resulted in a suspension of the grievant's driver's license and there is no question that this suspension withheld from Mr. Moran, during the length of this suspension, driving privileges that were only partially restored beginning on June 21, 2016. It is the arbitrator's understanding that from June 4, 2016 through June 20, 2016, the grievant possessed no driving

privileges of any kind under his suspended operator's license and under his commercial driver's license endorsements.

The Union emphasizes that Mr. Moran at the time of his OVI arrest, and within the time permitted, filed an appeal of the administrative suspension of his operator's license and the Union rightfully points out that that appeal was upheld by the Court with an order directed to the Bureau of Motor Vehicles to amend its records accordingly.

The administrative appeal successfully pursued by Mr. Moran was upheld by the Court upon a finding that the arresting officer did not have a reasonable ground to believe that an OVI violation or a violation of Ohio Revised Code section 4511.194(physical control) was committed before the test.

The dispute in this case lies in the difference between what had been ordered retroactively by the Court in reacting to what the Court found to have been error in the arrest of the grievant on June 4, 2016 and what actually occurred in real time prior to the action by the Court on June 29, 2016 upholding the administrative license suspension appeal. The action of the Court, as argued by the Union, wipes the slate clean, leaving nothing in the records of the Bureau of Motor Vehicles to indicate a suspension of any kind imposed upon the grievant and no record of a suspension of the grievant's commercial driver's license.

The arbitrator is not tasked with adjudging how or why the administrative license suspension appeal was upheld by the Court. The arbitrator understands the authority of the Court to take the action it did and makes no comment or evaluation of the Court's decision in that regard.

The arbitrator is left with the facts on the ground in real time from June 5, 2016 through June 29, 2016 when, prior to the Court's June 29, 2016 decision, Mr. Moran did not have an active, valid operator's license nor did Mr. Moran possess active, valid commercial driver's license

endorsements. The inability of the grievant to perform duties under a valid operator's license or a valid commercial driver's license prohibited the grievant from performing the duties of his position and this limitation violated Policy 17-015(P), item 19.

The parties have already agreed on the procedure to be followed under an initial suspension of driving privileges as expressed in Appendix Q, section Q, language that refers to a last chance agreement, a three working day suspension, and a last opportunity to retain employment through a non-violation of work rules for a period of two years.

The grievant in this case was already under a Last Chance Agreement during June, 2016 when he had his driving privileges suspended and he was separated from performing all of the duties of his position. There is no language in Appendix Q, section Q as to what is to occur when the Last Chance Agreement is violated within the two-year period provided. There is language in the Last Chance Agreement signed by the parties and the grievant on January 27, 2015 that limits the scope of the arbitration of the grievance arising from such a termination of employment to a determination of whether a work rule had been violated.

The arbitrator finds that the inability of the grievant to perform the duties of his position from June 5, 2016 through June 29, 2016 presents a violation of work rule 17-015(P), item 19 – actions that could compromise or impair the ability of the employee to effectively carry out his duties as a public employee. The violation of this work rule triggers the application of the Last Chance Agreement dated January 27, 2015. The arbitrator finds just cause for the discipline imposed based on the grievant's violation of a work rule in June, 2016. The arbitrator finds no violation by the Employer of the express language of the January 27, 2015 Last Chance Agreement as applied to the facts of this case.

Accordingly, the grievance is denied in its entirety.

AWARD

1. The grievance at issue in this case is arbitrable and properly before the arbitrator for review and resolution.
2. The grievant violated work rule 17-015(P), item #19 from June 5, 2016 through June 29, 2016.
3. The grievant's employment by the Employer was terminated effective July 12, 2016 for just cause, the violation of work rule 17-015(P), item #19 from June 5, 2016 through June 29, 2016.
4. The grievant's discharge did not violate the grievant's January 27, 2015 Last Chance Agreement.
5. The grievance is denied.

Howard D. Silver

Howard D. Silver, Esquire
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Columbus, Ohio
May 15, 2017

CERTIFICATE OF SERVICE

I hereby certify that the forgoing Decision and Award of the Arbitrator in the Matter of Arbitration Between the State of Ohio, Department of Transportation, District 9, Employer, and the Ohio Civil Service Employees Association, American Federation of State, County and Municipal Employees, Local 11, AFL-CIO, Union, grievance number DOT-2016-02750-7, Grievant: Aaron D. Moran, was served upon the following this 15th day May, 2017:

Janet Page
Labor Relations Officer 3
Ohio Department of Transportation
District 9
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Janet.Page@dot.state.oh.us

and

Chris Minney
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May 15, 2017

