ARBITRATION DECISION NO.:
184

UNION:
OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:
Department of Transportation,
District 8

DATE OF ARBITRATION:
March 22, 1989

DATE OF DECISION:
June 6, 1989

GRIEVANT:
Gary Redding

OCB GRIEVANCE NO.:
31-08-(89-08-07)-0067-01-06

ARBITRATOR:
David M. Pincus

FOR THE UNION:
Linda Fiely

FOR THE EMPLOYER:
Carl C. Best

KEY WORDS:
Just Cause
Multiple Violations
Progressive Discipline
Mitigation
EAP
ODOT
Traffic Accidents

ARTICLES:
Article 5 - Management Rights
Article 24 - Discipline
    §24.01-Standard
    §24.02-Progressive
Discipline

§24.04-Pre-Discipline
§24.05-Imposition of Discipline
Article 25 - Grievance Procedure
§25.03-Arbitration Procedures
§25.04-Arbitration Panel

FACTS:

Grievant was an employee of ODOT and was removed after being involved in three traffic accidents in a period of 2 1/2 months.

The first accident occurred at an intersection where another vehicle struck the rear of the state's van. In the police report, Grievant was cited for failure to yield, although he never received a formal citation for the accident. The State's Safety Supervisor investigated the accident and determined that it was preventable since the grievant failed to yield to through traffic. This was the grievant's fourth accident within a period of two years each of which had been determined to be preventable. The District Deputy Director recommended that an A-302 meeting be convened and that grievant receive a ten day suspension.

Before the grievant was notified of the pending meeting, he was involved in another accident. As grievant turned right out of a parking lot, another driver allegedly squeezed her vehicle next to his van, which precipitated a scraping of the two vehicles. After speaking with the other driver, the grievant left the scene of the accident without reporting it to the police. Grievant did not report the accident to the employer who learned about it from other sources. The Safety Supervisor discussed the accident with the grievant and determined that grievant had made an improper turn and that the accident was preventable. The District Deputy Director recommended that the grievant be removed.

An A-302 hearing was held and the Impartial Administrator agreed with the proposed discipline. The matter was held in abeyance when grievant was involved in a third accident. Backing up in a parking lot between two illegally parked vehicles he struck the tail light assembly of a parked truck. The Safety inspector determined that the accident was preventable. The A302 hearing was reconvened and the Impartial Administrator determined that the charges against the grievant were true. The grievant was then removed. The removal was not based upon grievant's failure to properly report his accidents.

The grievant had received two prior disciplines. He received a written reprimand for not reporting a speeding ticket and for backing into a dumpster. He had also received a suspension for speeding in a state vehicle, and unexcused tardiness, negligently damaging a state vehicle when removing snow and ice from the vehicle.

MANAGEMENT'S POSITION

The severity of the discipline was justified on the basis of grievant's work record. The grievant had forewarning of the probable consequences of his conduct and the principle of progressive discipline had been followed. The grievant's actions indicated that he was unable to modify his poor driving. Furthermore, there is substantial evidence that the grievant was guilty as charged.

The hazard at the intersection where the first accident occurred had already been greatly reduced. The grievant used the intersection often and should have known to use extra care. Using extra care would have prevented the accident. The second accident was caused by an improper

right turn from a left lane. While there were illegally parked vehicles at the site of the third accident, that accident was still avoidable. The grievant could have waited for the vehicles to be moved or he could have found the drivers to move them.

UNION'S POSITION:

The employer lacked just cause for the removal. The employer did not obtain substantial evidence that the grievant was involved in preventable accidents. Progressive discipline principles were violated by not imposing a more severe suspension before removing the grievant. The grievant lacked notice that preventable accidents, and failure to report accidents could lead to his dismissal.

ARBITRATOR'S OPINION:

The employer had just cause for removing the grievant. Any of the violations taken alone may not have justified removal but the many violations within such a short period, and the grievant's failure to improve his conduct after previous disciplines justifies the removal. Failure to administer a more severe suspension prior to removal did not violate progressive discipline in this instance. The grievant's collection of violations had reached a critical mass, making him a liability which the employer cannot be expected to sustain infinitely.

The grievant had notice of the probable consequences of his conduct. This was provided by his previous disciplines which dealt with closely related infractions.

All of the accidents were properly investigated and the employer had obtained substantial evidence that the grievant was guilty as charged. With regard to the first accident, the grievant failed to yield to through traffic. Persons familiar with a hazardous intersection should use caution. The fact that the grievant did not receive a formal citation for the accident is irrelevant. With regard to the second accident it is virtually impossible that grievant could have been in the right hand turn lane. At any rate, grievant should have observed the other car and avoided it. Grievant's failure to report the accident lessens his credibility. Whether the civilian was interested in reporting the incident is irrelevant with regard to determining whether grievant violated the employer's rule requiring reporting of accidents. Likewise, with regard to the third accident, that the other vehicles were illegally parked does not excuse grievant. The accident was still preventable.

Failure of the employer to pursue the EAP program with the defendant does not mitigate the removal. It is the grievant's responsibility to pursue the program.

ARBITRATOR'S AWARD:

The grievance was denied and dismissed.

TEXT OF THE OPINION:

STATE OF OHIO AND OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION LABOR ARBITRATION PROCEEDING

IN THE MATTER OF THE
ARBITRATION BETWEEN

THE STATE OF OHIO, THE OHIO DEPARTMENT OF TRANSPORTATION, DISTRICT 8

-and-

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

GRIEVANCE:
Gary Redding (Discharge)

CASE NUMBERS:
31-08-07-22-89-67-01-06

ARBITRATOR'S OPINION AND AWARD

Arbitrator:
David M. Pincus

Date:
June 6, 1989

APPEARANCES

For the Employer
James Fyfe, Safety Supervisor
Don Banks,
Equipment Superintendent
Mary Abee, ODOT-Deputy
Director of Labor Relations
Carl C. Best, Advocate

For the Union
Gary Redding, Grievant
Steven L. DeHart,
Planner, District 8
Mike Muenchen,
Staff Representative
Linda Fiely,
Associate General Counsel

INTRODUCTION

This is a proceeding under Article 25, Section 25.03 and 25.04 entitled Arbitration Procedures and Arbitration Panel of the Agreement between the State of Ohio, Department of Transportation, District 8, hereinafter referred to as the Employer, and the Ohio Civil Service Employees Association, Local 11, AFSCME, AFL-CIO, hereinafter referred to as the Union for July 1, 1986 - July 1, 1989 (Joint Exhibit 1).

The arbitration hearing was held on March 22, 1989 at the Office of Collective Bargaining, Columbus, Ohio. The Parties had selected Dr. David M. Pincus as the Arbitrator.

At the hearing the Parties were given the opportunity to present their respective positions on the grievance, to offer evidence, to present witnesses and to cross examine witnesses. At the conclusion of the hearing, the Parties were asked by the Arbitrator if they planned to submit post hearing briefs. Both Parties indicated that they would not submit briefs.

STIPULATED ISSUES

Was the Grievant terminated for just cause? If not, what shall the remedy be? (Joint Exhibit 2)

JOINT STIPULATIONS OF FACT

FACTS:

1) The issue is properly before the Arbitrator.
2) State vehicles T 8-691 and T 8-825 were illegally parked near the loading dock at the time of the May 4, 1988 incident in question.
3) The drivers of these vehicles, ODOT employees, were not disciplined concerning the May 4, 1988 incident.

PERTINENT CONTRACT PROVISIONS

ARTICLE 5 - MANAGEMENT RIGHTS

"Except to the extent expressly abridged only by the specific articles and sections of this Agreement, the Employer reserves, retains and possesses, solely and exclusively, all the inherent rights and authority to manage and operate its facilities and programs. Such rights shall be exercised in a manner which is not inconsistent with this Agreement. The sole and exclusive rights and authority of the Employer include specifically, but are not limited to, the rights listed in ORC Section 4117.08 (A) numbers 1-9."

(Joint Exhibit 27, Pg. 7)

ARTICLE 24 - DISCIPLINE

Section 24.01 - Standard

"Disciplinary action shall not be imposed upon an employee except for just cause. The Employer has the burden of proof to establish just cause for any disciplinary action. In cases involving termination, if the arbitrator finds that there has been an abuse of a patient or another in the care or custody of the State of Ohio, the arbitrator does not have authority to modify the termination of an employee committing such abuse."

Section 24.02 - Progressive Discipline

"The Employer will follow the principles of progressive discipline. Disciplinary action shall be commensurate with the offense. Disciplinary action shall include:

A. Verbal reprimand (with appropriate notation in employee's file)
B. Written reprimand;
C. Suspension;

D. Termination.

Disciplinary action taken may not be referred to in an employee's performance evaluation report. The event or action giving rise to the disciplinary action may be referred to in an employee's performance evaluation report without indicating the fact that disciplinary action was taken.

Disciplinary action shall be initiated as soon as reasonably possible consistent with the requirements of the other provisions of this Article. An arbitrator deciding a discipline grievance must consider the timeliness of the Employer's decision to begin the disciplinary process."

. . .

Section 24.04 - Pre-Discipline

"An employee shall be entitled to the presence of a union steward at an investigatory interview upon request and if he/she has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.

An employee has the right to a meeting prior to the imposition of a suspension or termination. Prior to the meeting, the employee and his/her representative shall be informed in writing of the reasons for the contemplated discipline and the possible form of discipline. No later than at the meeting, the Employer will provide a list of witnesses to the event or act known of at that time and documents known of at that 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. The employer representative recommending discipline shall be present at the meeting unless inappropriate or if he/she is legitimately unable to attend. The Appointing Authority's designee shall conduct the meeting. The Union and/or the employee shall be given the opportunity to comment, refute or rebut.

At the discretion of the Employer, in cases where a criminal investigation may occur, the pre-discipline meeting may be delayed until after disposition of the criminal charges."

. . .

(Joint Exhibit 27, Pgs. 34-37)

Section 24.05 - Imposition of Discipline

"The Agency Head or, in the absence of the Agency Head, the Acting Agency Head shall make a final decision on the recommended disciplinary action as soon as reasonably possible but no more than forty-five (45) days after the conclusion of the pre-disciplinary meeting. At the discretion of the Employer, the forty-five (45) days requirement will not apply in cases where a criminal investigation may occur and the Employer decides not to make a decision on the discipline until after disposition of the criminal charges.

The employee and/or union representative may submit a written presentation to the Agency head or Acting Agency Head.

If a final decision is made to impose discipline, the employee and Union shall be notified in writing. Once the employee has received written notification of the final decision to impose discipline, the disciplinary action shall not be increased.

Disciplinary measures imposed shall be reasonable and commensurate with the offense and shall not be used solely for punishment.

The Employer will not impose discipline in the presence of other employees, clients, residents, inmates or the public except in extraordinary situations which pose a serious, immediate threat to the safety, health or well-being of others.

An employee may be placed on administrative leave or reassigned while an investigation is being conducted, except in cases of alleged abuse of patients or others in the care or custody of the State of Ohio the employee may be reassigned only if he/she agrees to the reassignment."
(Joint Exhibit 27, Pgs. 34-37)

CASE HISTORY

Gary Redding, the Grievant, was originally hired by the Ohio Department of Transportation, the Employer, on November 10, 1980 as an Auto Service Worker. He was eventually promoted into the Delivery Worker I job classification on June 14, 1981, and he held this position until July 15, 1988 when he was removed. As a Delivery Worker I, the Grievant was involved in short-distance delivery runs which typically consisted of transporting small parcels from the ODOT District 8 headquarters in Lebanon, Ohio to and from the Central office ODOT facilities in Columbus, Ohio. The Grievant stated that these daily runs normally required two hundred miles of travel per day.

Justification for the Grievant's removal was based upon three separate vehicle accidents that the Grievant was involved in during the period of February 18, 1988 to May 4, 1988. Each of these incidents will be reviewed below prior to a determination on the merits.

On February 18, 1988, the Grievant stopped at a flashing red light at the intersection of S.R. 741 and S.R. 63. He then proceeded to motion to an oncoming car to make a left-hand turn in front of him before he proceeded through the intersection. As the Grievant traveled through the intersection, another vehicle traveling eastbound on S.R. 63 struck the rear passenger side of the State's van. As a consequence of this collision two other vehicles were also struck and damaged. The State Highway Patrol arrived on the scene and conducted an investigation. The Patrol's report cited the Grievant with a violation of ORC Section 4511.43 or failure to yield. It should be noted, however, that the Grievant was never formally charged with this violation.

On February 18, 1988, James A Fyfe, the Safety Supervisor, was notified by the District garage about the above incident. He, in turn, conducted an investigation of the incident on February 25, 1988. His review of the various Patrol reports and his discussion with the Grievant indicated that the accident was preventable because the Grievant failed to yield to through traffic.

On March 7, 1988, the District Deputy Director, Lloyd Wallace, recommended that an A-302 meeting be convened to deal with the above matter. He based this recommendation on the four preventable accidents/incidents engaged in by the Grievant in less than a two year period. Wallace, moreover, recommended that a ten day suspension should be imposed against the Grievant.

Prior to official notification concerning an upcoming A-302 hearing, the Grievant was engaged in an additional accident. On Tuesday, March 8, 1988, the Grievant was pulling out of the driveway of an auto parts store in Columbus, Ohio. As the grievant was engaging in a right hand turn out of the parking lot, a private citizen allegedly "squeezed" next to his van which precipitated a scraping of the two vehicles. The grievant stated that he completed his turn and then stopped to see what had transpired.

Upon exiting from his vehicle the Grievant spoke to the civilian who seemed upset and was crying. After jointly reviewing the damage, the Grievant acknowledged that he had recently been involved in an accident, that he did not need any additional problems, and that he could handle the scratch on his van. The civilian purportedly remarked that she did not own the vehicle, have a driver's license or insurance, and that she could not afford to reimburse the owner for any of the damage.

The civilian eventually called the owner of the vehicle and relayed the circumstances surrounding the incident. After the telephone conversation, the civilian allegedly noted that since

the Grievant worked for the State and the State had insurance, the State could readily pay for the damage. The Grievant balked at this suggestion and asked the civilian what she wanted to do and whether she wanted to call the local police. The civilian allegedly failed to respond to this query. After a short period of time, with no resolution in sight, the Grievant left the scene and returned to Lebanon, Ohio.

Although the Grievant left the scene of the accident without reporting the incident to the Columbus Police Department or his supervisor, the Employer eventually became aware of the matter. It appears that the civilian involved in the incident subsequently contacted the police department. She described the van and gave a detailed description of the driver. The police department then called the Central Office ODOT facilities in Columbus, Ohio in an attempt to determine the identity of the driver.

Fyfe testified that Central Office contacted him on March 23, 1988 regarding the police department's inquiry. Fyfe investigated the matter by checking the van, determining the damage, and checking the schedule to determine which driver was assigned to the van on the day in question. This research prompted a meeting with the Grievant on or about March 24, 1988.

After reviewing the incident, Fyfe concluded that the accident was preventable because the Grievant engaged in an improper turn. On April 1, 1988, Wallace referred the matter to an A-302 hearing. He, moreover, recommended that the Grievant should be removed for all of his most recent violations.

On April 11, 1988, the Grievant was informed of a forthcoming A-302 hearing scheduled for April 15, 1988. A hearing was held on this date to review a proposed disciplinary removal. Louis F. Agoston, the Impartial Administrator, reviewed the disciplinary action and on April 18, 1988 authored a recommendation. In his opinion, the Employer had reasonable grounds to believe that the Grievant was negligent and did violate the work rules. He, therefore, supported the proposed discipline.

The above matter was held in abeyance as a consequence of an additional incident which took place on May 4, 1988. The Grievant testified that he was backing out of the loading dock area while attempting to avoid two illegally parked vehicles. Unfortunately, his van struck the right taillight assembly of a parked truck. The accident resulted in a broken lease and dented the right side of the vehicle.

Fyfe, again, investigated this matter and determined that the accident was preventable because of improper backing. On May 13, 1988, Wallace recommended that this particular violation should be incorporated and reviewed in conjunction with other incidents discussed in the A-302 hearing initially held on April 15, 1988. Wallace, moreover, recommended that the Grievant should be removed from employment with the Employer.

On May 17, 1988, the Union contacted the Employer and requested that the Parties reconvene the A-302 hearing held on April 15, 1988. This request was based upon additional violations of Directive A-301. The Parties mutually agreed to an additional meeting which was held on May 25, 1988. Again, Agoston maintained that the charges against the Grievant were true and should become part of the evidence previously presented to determine the proposed discipline.

On June 29, 1988, the Employer removed the Grievant from employment as a Delivery Worker I. The following pertinent particulars were contained in the removal order:

". . .
The charges you have been found in violation of include:

Directive A-301, Item #1(b) - Neglect of duty (minor).
Directive A-301, Item #2(c) - Insubordination, failure to follow the written policies of the Director,

District, or office.
Directive A-301, Item #18 - Misuse of a State vehicle, violation of a traffic code or for personal use.
Directive A-301, Item #19 - Damage to a State vehicle as a result of failure to operate vehicle in a safe manner.
Directive A-301, Item #27 - Failure to report accidents as enumerated in Directive A-3 6.
Directive A-301, Item #33 - Violation of one or more of the statements embodied in Section III of Directive A-306.
. . ."

(Joint Exhibit 2)

On July 20, 1988, the Grievant contested the above disciplinary action by filing a grievance. The Grievance Form included the following critical accusations:

". . .
Contract Article(s)/Section(s) Allegedly Violated:

Article 24 and/or any other article, directive related to this grievance

Statement of Facts (for example, Who? What? When? Where? etc.):

On July 14, 1988 I was given notice that effective July 15, 1988 I was removed from employment as a Delivery Worker 1 with O.D.O.T. I feel the State did not prove beyond reasonable doubt that I was guilty of the facts I was charged with. Nor that the disipline (sic) imposed was reasonable and commensurate with the supposed offense.

Names of Witnesses:

Remedy Sought:

The (sic) I be reinstated in the position I was removed from, that all leave balances be restored and all monies lost due to this disipline (sic) be returned or any other negotiated settlement. That I be made whole.
. . ."

(Joint Exhibit 2)

A Level III Grievance Meeting was held on August 18, 1988 to review the above grievance. The Employer denied the grievance for a number of reasons. First, the violations dealing with Sections 24.01, 24.02, and 24.05 were alleged but not supported by the Union. Second, the Grievant left the scene of an accident on March 8, 1988. Third, the Grievant allegedly admitted to occasional drug use which makes him a questionable employee and a threat to public safety.

The Parties were unable to resolve the above grievance. No objection being raised by the Parties as to arbitrability, either on procedural or substantive grounds, the matter is before the Arbitrator for a final and binding decision.

THE MERITS OF THE CASE

The Position of the Employer

It is the position of the Employer that it had just cause to discharge the Grievant. The removal decision was based upon the activities engaged in by the Grievant on February 18, 1988, March 8, 1988, and May 4, 1988. The severity of the penalty, moreover, was viewed as justified on the basis of the Grievant's previous work record.

The Employer alleged that it gave the Grievant forewarning or foreknowledge of the possible or probable consequences of his disciplinary conduct. Fyfe testified that various directives were often reviewed in periodic safety meetings. Some of the most pertinent directives involving the present matter include: Directive No. A-305 which deals with the vehicle accident reporting procedure (Joint Exhibit 5(B)); Directive No. A-306 which discusses the subject of vehicle/equipment accident review procedures (Joint Exhibit 6); and Directive No. A-301 dealing with disciplinary actions (Joint Exhibit 4). He, moreover, noted that each vehicle contains an accident report kit which includes a PS6 document. Each employee is required to fill out one of these reports when he/she is involved in an altercation.

An Inter-Office Communication inquiry initiated by the Grievant on August 26, 1986 (Employer Exhibit 6, Pg. 2) also purportedly evidenced the Grievant's awareness concerning directive requirements. The Grievant in this document asked Fyfe who ordered the search of his record and the consequent discovery of two speeding tickets in 1984. On September 10, 1986 Nancy Fisher, and Administrator in the Bureau of Health, Safety, and Claims, responded to the above inquiry. Her response, in part, directed the Grievant to ODOT Directive A-305 which requires employees to promptly report any motor vehicle related citation to his/her immediate supervisor.

The Employer maintained that it obtained substantial evidence or proof that the Grievant was guilty as charged. The Employer, more specifically, alleged that each of the incidents in dispute were clearly within the Grievant's individual control. Outside or extraneous circumstances, moreover, did not contribute to any of the problems experienced by the Grievant.

Fyfe investigated the February 18, 1988 incident and determined that it was preventable because the Grievant failed to yield to through traffic (Joint Exhibit 7). This conclusion was based on an interview with the Grievant, an evaluation of the police department's report, a subsequent discussion with one of the investigating officers, and an analysis of the witness statements. He, moreover, emphasized that the officers cited the Grievant with an offense dealing with ORC Section 4511.43. When the police officers were asked by Fyfe about the citation, they allegedly responded that the citation was not formally served because they could not locate the Grievant within the legal time limits.

Testimony provided by Steven DeHart, a District 6 Planner, was also hotly contested by the Employer. The Employer attempted to rebut DeHart's analysis of the Safety Review Team Approval document (Union Exhibit 1) with data dealing with traffic and accident at the junction of S.R. 63 and S.R. 741 (Employer Exhibit 8). In the Employer's opinion, the hazard at this intersection has been reduced dramatically. The traffic flow, moreover, has doubled since the original study was undertaken by the State of Ohio. In terms of the multiple accident history at this intersection, the Employer claimed that those involved in these accident had to be unaware of the existing hazards. The Grievant, however, passed through this intersection during the course of his daily work routine; because he had to leave or return to the office through this intersection. Thus, the Grievant should have been highly sensitized to the existing condition which should have resulted in the exercise of considerable caution.

The Employer asserted that the March 8, 1988 incident was also preventable because the Grievant engaged in an improper right hand turn from a left hand lane, while a civilian attempted to turn right from a right hand turning lane. The Grievant, moreover, violated several other policies by leaving the scene of an accident without exchanging information and failing to notify the police department and his supervisor about the accident (Joint Exhibit 8, Joint Exhibit 6). Again, Fyfe

was involved in the investigation which determined that the Grievant violated the above policies. For the most part, he relied on the initial investigations conducted by the police department because he was not notified about the incident until March 23, 1988; approximately fifteen days after the incident. He also interviewed the Grievant but did not know why the Grievant was not cited with a formal citation.

Even if the Arbitrator believed that the Grievant stayed at the scene for a half hour, and that he asked the civilian if she wanted to call the police department, these actions did not relieve the Grievant of his responsibility. The Grievant, more specifically, was obligated to contact the police department and his supervisor, and to exchange information with his civilian counterpart. Admissions by the Grievant after being confronted by Fyfe did not mitigate his previous negligent activities.

Similarly, Fyfe also determined that the May 4, 1988 incident was preventable (Joint Exhibit 9). Fyfe acknowledged that some of the other vehicles were indeed illegally parked but that the accident was still avoidable. After reviewing the scene of the accident and interviewing the Grievant, Fyfe determined that the Grievant could have conducted himself differently. The Grievant could have waited for the vehicle to be moved out of their perilous state or searched for the drivers and asked them to move their vehicles.

The Employer claimed that the degree of discipline administered was reasonably related to the seriousness of the Grievant's proven offense and the record of the Grievant's service with Employer. With respect to the Grievant's work history, the Employer noted that his record was checkered with previous disciplines. A written reprimand was issued on July 22, 1986 for failure to report a speeding ticket citation to his supervisor and striking a dumpster while backing a State vehicle (Joint Exhibit 14). On April 20, 1987, the Grievant was suspended for three separate violations of Directive A 301 (Joint Exhibit 4). The specific violations included the following offenses: misuse of a state vehicle because of a speeding violation; several unexcused tardiness incidents; and damage to a state vehicle caused by negligently removing ice and snow from the vehicle (Joint Exhibit 13).

The Employer maintained that these previous disciplines served as valid progressive discipline attempts. The removal decision was therefore justly deserved because the Grievant's actions clearly indicated that the Grievant was unable to modify his derelict behavioral tendencies.

Further evidence of the Grievant's inability to correct his behavior was offered in the discussion of the Grievant's failed Employee Assistance Program (EAP) attempt. Fyfe testified that on or about March 24, 1988 the Grievant approached him to discuss potential EAP alternatives. A referral was arranged for assessment purposes on March 26, 1988 and the Grievant eventually met with the counselor on April 18, 1988 (Employer Exhibit 7). It was Fyfe's opinion that the Grievant was not truly interested in any additional follow-up interventions.

The Position of the Union

It is the position of the Union that the Employer did not have just cause to remove the Grievant. The Union maintained that the Employer failed to establish just cause because it did not obtain substantial evidence that the Grievant was involved in preventable accidents and that progressive discipline principles were violated.

Lack of notice concerning the Employer's policies and procedures was raised as a threshold issue. The Grievant purportedly was not aware that vehicle accidents and failure to report accidents could lead to his dismissal.

With respect to the February 18, 1988 incident Fyfe noted that he partially relied on outside expertise. Yet, the State Highway Patrol failed to cite the Grievant for failing to yield to oncoming

traffic. Fyfe, moreover, conducted an investigation without actually visiting the scene of the accident. If he had properly investigated the scene, Fyfe would have realized that the intersection was extremely hazardous. These conditions, in the Union's opinion, precipitated the accident and rendered the incident as unpreventable.

The Union claimed that DeHart's testimony corroborated the external circumstance justification. DeHart alleged that the State realized that this intersection was hazardous as far back as 1973. Some structural changes had been initiated but the entire program had not been completed by February 18, 1988. As of the date of the incident in question, the hill on the western approach had not been corrected and the dip in the eastern approach had not been modified. DeHart claimed that these problems generated sight distance difficulties for those drivers traveling north and south on S.R. 741.

The circumstances surrounding the March 8, 1988 incident were not viewed as sufficiently grave to justify the removal. The Union again asserted that the Grievant was not charged by the police department for leaving the scene of the accident. Donald Banks, the Equipment Superintendent and the Grievant's supervisor, moreover, testified that he did not consider leaving the scene of the accident as part of the administered discipline. This admission was viewed as extremely important because Directive No. A-306 (Joint Exhibit 6) specifies that leaving the scene of an accident may result in an employee's removal if the incident takes place on more than three occasions. Yet, Banks admitted that this offense was not factored into the evaluation when the Employer considered the appropriate penalty.

A Court of Appeals decision[1] was submitted in an attempt to discredit the Employer's leaving the scene theory. The requirements of ORC Section 4549.02 were reviewed by the Court of Appeals. It was determined that this section does not require that the driver or an operator give his name or address or identify himself where no request is made.[2]

By applying the above analysis to the present situation, the Union contended that the Grievant could not be legally charged with leaving the scene of an accident. It was asserted that the civilian involved in the altercation never specifically requested any further information, other than raising queries dealing with the Grievant's employment with the State of Ohio. The Grievant, more specifically, stopped, diagnosed the situation, and conversed with his civilian counterpart; he did not flee from the accident and additional specific information was never requested.

The May 4, 1988 incident should have been evaluated more critically in terms of a pertinent mitigating factor. The Union, more specifically, alleged that statements (Joint Exhibit 3) provided by Amos DeHart, Bridge Superintendent, and Allen A. Bolling, Storekeeper Supervisor, clearly indicated that contributing factors resulted in the loading dock accident. They noted that the other two trucks involved in the altercation were not parked in a designated parking area in direct violation of an I.O.C. dated December 9, 1986, and issued by Wallace. This I.O.C. specified that drivers who illegally parked could be subject to disciplinary action. Both statements indicated that one vehicle was parked on the loading dock ramp near the top of the incline on an angle and was left unattended. Another vehicle, moreover, was parked at the head of the walkway; was unattended, and at a different angle, which made the Grievant's attempt to maneuver his vehicle extremely difficult. The Union also emphasized that neither of these drivers were disciplined for their negligent activities.

A number of general progressive discipline issues were also raised by the Union. First, three accidents within three-and-one-half months should not render the progressive discipline process moot. The Employer, more specifically, was obligated to impose a lesser form of discipline prior to administering a removal decision. Corrective action should have been imposed so that the Grievant had an opportunity to improve his driving record. Second, the Employer should have

continued to abide by its previous progressive discipline policies. In the past, the Employer merged several offenses and administered a reasonable penalty. For example, a written reprimand was issued on July 22, 1986 for speeding, failing to notify his supervisor of the citation, and improper backing of his vehicle (Joint Exhibit 14). A similar procedure was followed on April 20, 1987 when the Employer issued a three day suspension (Joint Exhibit 13). This penalty was based upon a speeding violation, damage to a State of Ohio vehicle, and a series of tardiness occurrences. With respect to the present matter, the Employer again merged a series of offenses but the discipline penalty assessed was too severe.

Proper consideration of mitigating circumstances should have resulted in a less severe penalty. At the time of the second incident the Grievant was experiencing tremendous stress as a consequence of the initial disciplinary action and marital problems. The Employer's EAP arguments were also discounted by the Union. The Grievant, more specifically, maintained that the Employer did not assert itself sufficiently in terms of helping him obtain appropriate counseling services. Also, the Grievant's performance evaluations (Joint Exhibit 10) and statements provided by his supervisor at the hearing indicated that he had been a good employee for eight years.

THE ARBITRATOR'S OPINION AND AWARD

From the evidence and testimony introduced at the hearing, it is the Arbitrator's judgment that the Employer had just cause to remove the Grievant. If this Arbitrator was merely considering each of the violations as independent events an alternate outcome might have readily resulted. Unfortunately, the totality of the Grievant's conduct over an approximate three month period, and his inability to correct egregiously similar behavior, leave this Arbitrator with no other alternative but to uphold the Employer's decision.

The Grievant was provided with proper notice of the probable consequences associated with his conduct. Both prior warnings and suspensions serve as important cornerstones in the progressive discipline process because they serve as formal reprimands and provide an employee with notice. Warnings have two closely related functions. A reprimand may become a part of an employee's total disciplinary record which may eventually be used to justify a more severe future penalty. Reprimands, moreover, not only indicate to an employee that his/her conduct is unacceptable; it also places the employee on notice that he can no longer count on a clean disciplinary record if the employee commits another act of misconduct, and that more severe discipline is likely to follow.[3] Suspensions, moreover, serve as a critical aspect in the progressive discipline process because loss of wages is a more effective form of notice than a simple warning.[4]

When one applies the above principles to the present situation it becomes clearly obvious that the Grievant was provided with proper notice. The Grievant's prior warning (Joint Exhibit 13) and suspension (Joint Exhibit 14) fulfilled the notice requirement. These prior disciplines, moreover, dealt with some infractions which closely approximated those engaged in by the Grievant during the period February 18, 1988 to May 4, 1988. The inquiry initiated by the Grievant on August 26, 1986 concerning the search of his driving record (Employer Exhibit 6) also evidences a sufficient notice condition.

Each of the three incidents were properly investigated by the Employer and substantial evidence of proof was obtained proving that the Grievant was guilty as charged. All three accidents were preventable and the associated charges were also substantiated.

With respect to the February 18, 1988 incident the Grievant clearly failed to yield to through traffic. Evidence and testimony indicate that the grievant stopped at the intersection of S.R. 741 as he traveled in a southerly direction. As he edged away from the stop sign he was struck by a

vehicle traveling in an easterly direction on S.R. 63 although this intersection has flashing caution lights. The vehicle traveling in an easterly direction clearly had the right of way. It appears quite probable that the Grievant's vision was impaired by the vehicle he allowed to turn west on S.R. 63 prior to his entrance into the intersection. Nonetheless, the Grievant's failure to yield was the primary cause of the accident.

Dehart's testimony regarding the hazardous state of this intersection does not mitigate the Grievant's behavior. The Grievant was not totally unfamiliar with this intersection and associated hazards. His daily work routine required frequent travel through this intersection which should have sensitized the Grievant to these hazards. DeHart supported this premise under cross examination. He noted that he frequently confronted this intersection as he traveled to and from work. DeHart claimed that those individuals that frequent this intersection should be aware of the hazards, and thus, should exercise caution.

Whether the Grievant received or did not receive a formal citation by the State Highway Patrol is viewed as irrelevant by Arbitrator. The documents introduced at the hearing and Fyfe's testimony indicate that the incident was preventable. It should be noted, moreover, that the original police report does specify a violation of O.R.C. Section 4511.43. This notation lends partial support to the Employer's contention that the Grievant was not formally cited because the police department was unable to locate him after the accident.

In a similar manner, the auto parts store accident was also preventable. A review of the Employee Vehicle Accident Report (Joint Exhibit 8) and the Grievant's own testimony clearly evidence that the Grievant did indeed make an illegal right hand turn. It appears virtually improbable that the Grievant was properly in the right hand turning lane prior to the accident. He had to be in the left hand turning lane, engaging in a wide turn onto West Broad Street, which caused the contact with the civilian's vehicle. Even if his testimony was accurate, the Grievant should have observed the civilian's vehicle squeezing next to him prior to the turn. Such a lapse in driving protocol is viewed as an equally negligent act.

The additional charges were also clearly established by the Employer. The Grievant did not follow the existing vehicle accident reporting procedure, failed to notify his supervisor and the police department about the accident. The civilian's lack of cooperation and her alleged decision not to contact the police department do not absolve the Grievant of his responsibilities per the various directives promulgated by the Employer. The previous accident should not have impacted the Grievant's thought process regarding this incident. If in fact he was in the right, he should not have hesitated to file the appropriate reports and initiate the appropriate contacts. His actions, or lack thereof, taint his version of the events and dramatically dampen his credibility.

The primary defense offered by the Union regarding the last incident dealt with the impact of the two illegally parked vehicles. Once again, in this Arbitrator's judgment, this accident was obviously preventable. Even though these vehicles were illegally parked, the Grievant's attempt to maneuver his vehicle under these circumstances clearly evidenced bad judgment on his part. He should have attempted other more reasonable options such as waiting for the drivers or soliciting their assistance prior to the maneuver.

The series of events culminating in the removal and Grievant's prior record indicate that an additional suspension was not required. The Employer's failure to administer a more severe suspension prior to removal did not, in this instance, violate progressive discipline principles. In this Arbitrator's opinion, the penalty was within the range of reasonableness and neither arbitrary nor capricious.[5] Cause for discharge, more specifically, is not necessarily found in the Grievant's final act of misconduct. The Grievant's conduct in its totality has reached a critical mass where he has made himself a liability; a liability which the Arbitrator cannot expect the Employer infinitely to

sustain.[6]

The mitigation arguments proposed by the Union are not viewed as persuasive by the Arbitrator. Participation in an EAP program is a voluntary undertaking and it was made available to the Grievant after an initial discussion with Fyfe. Once the Employer facilitated the referral process its obligation was completed; it was then the Grievant's responsibility to follow-up with additional intervention efforts. It does not appear that the Agreement (Joint Exhibit 1) places any additional requirements on the Employer. In a similar fashion, the Grievant's performance record (Joint Exhibit 18) does not serve as a sufficient mitigating factor to justify a penalty modification.

AWARD

The grievance is denied and dismissed.

David M. Pincus
Arbitrator

June 6, 1989

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[1] The State of Ohio v. Caruso, 122 N.E. 2d. 210 (1963).

[2] Id at 211.

[3] Armco Steel Corp., 52 LA 101 (1969).

[4] Rochester Telephone Corp., 45 LA 538 (1965).

[5] Grand Haven Brass Foundry, 68 LA 41 (1977); Jackson County Medical Care Facility, 65 LA 389 (1975).

[6] Ampex Corp., 44 LA 412 (1965); Friden, Inc., 52 LA 448 (1969); Arden Forms Co., 45 LA 1124 (1965).