

**ARBITRATION DECISION NO.:**

441a

**UNION:**

OCSEA, Local 11, AFSCME, AFL-CIO

**EMPLOYER:**

Department of Transportation

**DATE OF ARBITRATION:**

August 27, 1992

**DATE OF DECISION:**

September 6, 1992

**GRIEVANT:**

Roger Napier

**OCB GRIEVANCE NO.:**

31-08-(91-11-26)-0067-01-06

**ARBITRATOR:**

Marvin J. Feldman

**FOR THE UNION:**

Mike Muenchen

**FOR THE EMPLOYER:**

Carl C. Best

**KEY WORDS:**

Removal

Suspension of

Driver's License

DUI

Clarification of

Arbitrator's Award

Failure to Comply With

Arbitrator's Award

**ARTICLES:**

Article 2 - Non-Discrimination

§2.01-Non-Discrimination

Article 9 - Employee

Assistance Program

Article 24 - Discipline

§24.01-Standard

§24.02-Progressive

Discipline

§24.03-Supervisory

**Intimidation**

§24.04-Pre-Discipline

§24.08-Employee

**Assistance Program****FACTS:**

The grievant, a Highway Maintenance Worker II, lost his driver's license due to violations of Ohio drunk driving laws. The grievant's position required him to operate motorized equipment which he was unable to do after he lost his license; therefore, the grievant was removed. The grievance was arbitrated and on June 5, 1992, Arbitrator Feldman formulated a last chance agreement. The agreement stated that if the grievant obtained a valid modification order and attended regular alcoholic rehabilitation sessions, the Employer had to reinstate the grievant on July 1, 1992 without back pay and with no loss of seniority. Moreover, the award stated that in the event the grievant failed to comply with the award, the Employer had just cause to immediately remove the grievant.

On June 30, 1992 the Employer obtained an abstract of the grievant's driving record which revealed that the grievant's driver's license had expired on February 6, 1992 and had not been renewed. In addition, on July 1 the grievant was unable to produce a court order granting him the right to drive. The grievant did obtain a valid driver's license on July 17; however, the Employer had already reinstated his removal on July 2.

**EMPLOYER'S POSITION:**

Arbitrator Feldman's award stated that "provided the grievant has a valid modification order, the grievant shall be reinstated on July 1, 1992". Because the grievant failed to fulfill the terms of the arbitration award by producing a modification order, the Employer was not obligated to reinstate him.

**UNION'S POSITION:**

The Employer was not prejudiced by having to wait 17 days for the grievant to renew his driver's license; therefore, the Employer should have reinstated the grievant without loss of seniority pursuant to the June 5 arbitration award.

**ARBITRATOR'S OPINION:**

The grievant did not fulfill the conditions of the reinstatement award. On July 1, 1992, the grievant did not possess a modification order. Moreover, the grievant was unable to obtain a modification order because his driver's license had expired. The grievant acted in total disregard of the reinstatement award in failing to obtain the document necessary for him to perform the duties of his job, namely the operation of heavy, motorized equipment. The grievant failed to protect his employment by complying with mandates of the original arbitration award.

**AWARD:**

The grievance was denied.

**TEXT OF THE OPINION:**

VOLUNTARY ARBITRATION PROCEEDINGS  
CASE NO. 31-08(11-26-91)67-01-06 (ROGER NAPIER)

**THE STATE OF OHIO**

The Employer

-and-

**OHIO CIVIL SERVICE EMPLOYEES  
ASSOCIATION, LOCAL 11  
A.F.S.C.M.E., AFL-CIO  
The Union**

**OPINION AND AWARD  
(SUPPLEMENTAL)**

**APPEARANCES**

**For the Employer:**

Carl C. Best, Advocate  
Ron Kilburn,  
Acting Superintendent

**For the Union:**

Mike Muenchen, Advocate  
John Porter,  
Assistant Director of Arbitration  
Roger Napier, Grievant  
Bobby Bunch, Steward

MARVIN J. FELDMAN  
Attorney-Arbitrator  
1104 The Superior Building  
815 Superior Avenue, N.E.  
Cleveland, Ohio 44114  
216/781-6100

**I. SUBMISSION**

This matter came before this arbitrator pursuant to the terms of the collective bargaining agreement by and between the parties and pursuant to the special jurisdiction conferred by the parties subsequent to a prior award concerning the same individual. The hearing was scheduled and conducted on August 27, 1992. The parties stipulated and agreed therefore that this matter was properly before this arbitrator; that the witnesses should be sworn but not sequestered and that post hearing briefs would not be filed. The supplemental hearing was scheduled and conducted at the conference facility of the union in Columbus, Ohio, whereat the parties presented their evidence in both witness and document form. It was upon the evidence and argument therefore that this matter was heard and submitted and that this opinion and award was thereafter rendered.

**II. STATEMENT OF FACTS**

A brief history of this case is important to the matter at hand. The grievant herein had been terminated from his seniority at the facility because he could not accomplish driving motorized vehicles for his employer due to the fact that his driver's license had been suspended. That suspension was due to the fact that he was in violation of the motor vehicle law. The matter finally concluded in the grievant's termination. A protest was filed by the union, the hearing of arbitration was had and that award revealed the following:

**"IV. AWARD**

Provided the grievant has a valid modification order, the grievant shall be reinstated July 1, 1992, subject to the terms of the contract, without back pay but without loss of seniority. He shall receive a last chance to preserve and protect his employment. The grievant shall provide to his employer on a weekly basis for a period of six months commencing July 10, 1992, proof of attendance at some recognized alcoholic rehabilitation session for at least three times per week. Failure to attend or further substandard conduct of any nature may trigger an immediate just cause discharge by the employer."

The award became effective June 5, 1992 and the grievant received notification of that award. Thereafter the grievant visited the office of his employer on July 1, 1992, pursuant to a June 25, 1992, correspondence from the employer. That correspondence revealed the following:

"In accordance with the decision in your recent arbitration case, you are to be conditionally re-instated to your former position with the Ohio Department of Transportation effective, Wednesday, July 1, 1992.

Please be advised, you are to report to the personnel office at 7:00 AM on Wednesday, July 1, 1992 for processing.

Please report prepared for work immediately following your processing through personnel."

On the night before the grievant was to report to work an abstract driving record of the grievant was taken from the State of Ohio Bureau of Motor Vehicles files and it was determined that the grievant had an expired driver's license, the expiration having occurred on February 6, 1992. The only thing that the grievant could produce at the July 1, 1992, meeting was a court order revealing that he could drive but he did not have that either because he said he lost that court order copy in the laundry. On the next day, July 2, 1992, the employer reiterated its termination activity and denied the conditional reinstatement pursuant to a letter which revealed the following:

"On June 5, 1992, Arbitrator Marvin J. Feldman issued an opinion which granted you a provisional reinstatement on July 1, 1992. The primary consideration in that award was that you were able to perform your job due to a modification order and that you be reinstated on July 1, 1992 'provided the grievant has a valid modification order.'

The District was prepared to reinstate you on July 1, 1992 but could not because you did not comply with the provision. Your modifying order was not valid on that date and according to the Bureau of Motor Vehicles, you could not legally drive. The District met its obligation under the award but you did not. The District is under no further obligation. You remain terminated from employment and will not be reinstated based upon this award after July 1, 1992."

It was not until July 17, 1992, that the grievant finally obtained his driver's license which would make him available to accomplish his duties at the facility. There was no indication in the record by the grievant that he could not have obtained his driver's license on a timely basis or that he even attempted to.

The parties stipulated an issue and that may be fairly stated as follows:

"Did the Employer violate the Arbitrator's award by failing to reinstate the Grievant, Roger Napier, on July 1, 1992, without back pay, but without loss of seniority? If so, what is the remedy?"

The record in this particular case further reveals that the grievant had two years of seniority at the time of the first incident of termination; that he was employed as a highway maintenance worker II and that his duties revealed that he must have a valid Ohio driver's license in order to operate motorized equipment, snow plows, mobile mowers, salt spreaders, etc., all belonging to his employer. In other words, the grievant was a driver of heavy motorized equipment for the employer.

The union argued that the grievant was ordered reinstated without back pay and that the employer should carry out the June 5, 1992, award of the arbitrator since the period of seventeen days from July 1, 1992, to July 17, 1992, did not cause harm to the employer herein. The employer on the other hand revealed that the grievant was not able to work on July 1, 1992, as revealed by the arbitral order of June 5, 1992 and that the grievant being in violation of that order, the grievant should therefore not be placed into his job as previously ordered because the condition precedent was not fulfilled. It was upon those facts, statements, denials, allegations and arguments that this matter rose to arbitration for opinion and award.

### III. OPINION AND DISCUSSION

The order that was rendered in this particular matter by the arbitrator on June 5, 1992, revealed that the grievant should obtain his employment on a reinstatement basis provided he was able to have in his possession a valid modification order on that date. The grievant did not have such order with him nor was he able to obtain such order because his driver's license expired in February of 1992. The grievant did not see fit to obtain his renewal license and therefore a valid modification order, until July 17, 1992, or some seventeen days after the grievant would have been reinstated had he complied with the arbitrator's order of July 5, 1992. In other words, the grievant acted in total disregard of the reinstatement order of the arbitrator which was conditioned upon the grievant providing a document needed in order for him to complete his work duties.

The reinstatement of the grievant was not unconditional. It was predicated upon having a valid driver's license and thereafter a valid modification order in order for him to have the legal ability to drive the employer's vehicles. Simply put, the grievant did not protect his employment at the facility by obtaining a valid order for the July 1, 1992, reinstatement date.

The union has asked the question of why this was so important. It is important because the order says so. There must be some order out of this chaos. The grievant does not determine what his schedule will be. The grievant must merely follow his schedule. The grievant's schedule was to return to work on July 1, 1992, with a valid order of modification. Such was not accomplished. The grievant testified that he believed that the modification order of December 27, 1991, and the court order of October 3, 1991, were valid substitutes for his driver's license. That can hardly be the case. The court order of October 3, 1991, revealed the driver's license expiration date of February 6, 1992. The letter of December 27, 1991, was predicated upon a valid driving privilege.

From all of the evidence in the case it is apparent that the grievant did not protect his employment and apparently was not interested in his employment. He danced his own tune to his own schedule without regard to his employer's needs and schedule and without regard to the arbitral award in his particular matter. The grievant has had sufficient chance, but sought not to take advantage of it. Based upon all of the evidence in the case and the grievant's behavior, this grievance must be denied.

### IV. SUPPLEMENTAL AWARD

Grievance denied.

MARVIN J. FELDMAN,  
Arbitrator

Made and entered  
this 6th day  
of September, 1992.