

ARBITRATION DECISION NO.:

668

UNION:

OCSEA, Local 11, AFSCME, AFL-CIO

EMPLOYER:

Ohio Department of Rehabilitation and Correction's:
Correction Medical Center
Orient Correctional Institution

DATE OF ARBITRATION:

February 20, 1998

DATE OF DECISION:

April 16, 1998

GRIEVANT:

Raphael Turner

OCB GRIEVANCE NO.:

27-04-(97-06-25)-0195 -01-03

ARBITRATOR:

Frank Keenan

KEY WORDS:

Application for Promotion
Burden of Proof
Carelessness
Commensurate Discipline
Commercial Driver License
Due Process
Falsification of Job App.
Intent
Just Cause
Minimum Qualifications

ARTICLES:

Article 24 - Discipline
 §24.01 - Standard
 §24.02 - Progressive Discipline

FACTS:

The grievant was employed as a Storekeeper 2 at Orient Correctional Institution (Orient). On November 14, 1996, the grievant applied for a lateral transfer for a Storekeeper 2 position in another work area at Orient. This position required possession of a Commercial Driver License (CDL). The grievant subsequently bid on a Maintenance Repair Worker (MRW) 3 position. The MRW 3 position required twelve months training or experience in maintenance repair. During the selection process, the Employer determined that the

grievant had falsely claimed to possess a CDL. At the same time, the Employer also alleged that the grievant had falsified his application for the MRW 3 position because he did not possess the required experience in maintenance repair. As a result, on April 17, 1997, the Employer removed the grievant for violating the Standards of Employee Conduct by falsifying, altering, or removing an official document.

EMPLOYER'S POSITION:

The Employer asserted that the grievant's removal was justified because he had misrepresented his qualifications in both of his applications. When management confronted the grievant about the statement on his Storekeeper 2 application that he possessed a CDL, he fabricated a tale about a conversation he had with an employee named Gino at the Bureau of Motor Vehicles who told him that he did possess a CDL. Soon thereafter, the grievant knowingly included false information regarding his previous work experience in an attempt to appear qualified for the position of MRW 3. When management asked the grievant for statements from former employers verifying his claimed work experience, the grievant only submitted a statement he had signed himself. The Employer, therefore, took the position that the grievant's removal was warranted because he had attempted to gain a position through falsification and deceit whereby he would enjoy a monetary gain at the expense of other applicants who met the minimum qualifications.

UNION'S POSITION:

The Union took the position that the Employer did not have just cause to discharge the grievant. The Employer did not investigate the case thoroughly, and it presumed the grievant guilty, thus denying the grievant his due process rights and improperly forcing him to carry the burden of proving that he should not have been removed from his Storekeeper 2 position.

The Union also argued that the Employer did not demonstrate that the grievant intended to deceive in order for his removal to be upheld. The essential element of any offense of dishonesty or deception is to "knowingly" commit the act, and in this case the Employer has not shown that the grievant possessed the requisite intent.

It was the Union's position that the record reflected that the grievant did possess the minimum qualifications for the position of MRW 3, and had the Employer conducted an adequate investigation, it would have discovered that fact. As for the grievant's claim that he possessed a CDL, the grievant was confused as to what a CDL was. At one point, the grievant did possess a chauffeur's license, and he was uncertain as to whether a chauffeur's license was in fact a CDL. The Union asserted that such confusion was not justification for removal.

Finally, the Union pointed out that the Standards of Employee Conduct do not call for an automatic removal for a first offense like the charges against the grievant. Rather, the disciplinary grid calls for an oral reprimand up to removal. The removal should be reserved for the most flagrant violations, and the Employer has not shown any special circumstances necessitating removal of the grievant.

ARBITRATOR'S OPINION:

The Arbitrator held that discharge of the grievant was too severe. With respect to the allegation that the grievant was dishonest and therefore in violation of agency rules in connection with his application for the Storekeeper 2 position, and not simply confused with respect to whether he met the licensing requirement for the position, the Employer was not in a position to easily discount the grievant's contention that he was confused. The initial posting made no reference to the necessity of a CDL. When the omission was discovered, the Employer added a notice. The grievant's behavior, while careless, was somewhat less serious than perceived by management.

Similarly, with respect to his MRW 3 application, the grievant was careless in the matter, but the Arbitrator saw context to be critical. What was involved was a bid on a vacant position. Common sense and experience dictate that it was to be expected that, as most applicants, the grievant would "puff" his qualifications. Indeed, he did possess some experience in the matters included in his application, and therefore, the Arbitrator did not find that the grievant had "falsified" his past duties. The Arbitrator added that a finding that the grievant did not falsify the application was not a finding that he was qualified for the position of MRW 3.

As for the Union's claim that the Employer violated the grievant's due process rights, the Arbitrator found that the Employer was justified in putting him to the task of establishing that he in fact did perform the tasks he listed on his application.

AWARD:

The Arbitrator sustained the grievance In part and denied it In part. The grievant's discharge was not for just cause. He was to be reinstated to his former position of Storekeeper 2 without loss of seniority, but without backpay. The grievant's disciplinary record shall reflect a 10 day suspension for carelessness in connection with the applications he submitted for the two positions.

TEXT OF THE OPINION:

* * *

ARBITRATION

BETWEEN

STATE OF OHIO, DEPARTMENT OF REHABILITATION AND CORRECTIONS, CORRECTION MEDICAL
CENTER ORIENT CORRECTIONAL INSTITUTION

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and

GRV. No. 27 04(97 06 25) 0195 01 03
(Raphael Turner Discharge)

OHIO CIVIL SERVICE EMPLOYEES ASSOCIATION
LOCAL 11, AFL CIO

Appearances:

For the Department: Pat Mogan, Operations Team Leader
Office of Collective Bargaining
Columbus, Ohio

For the Union: George L. Yerkes
Staff Representative
OCSEA, Local 11
Columbus, Ohio

OPINION AND AWARD OF THE ARBITRATOR

Frank A. Keenan
Arbitrator

* * *

Statement of the Case:

This case, well presented by the parties' advocates, was heard in Columbus, Ohio, on February 20, 1998. A plenary record was made. Testifying on behalf of the Department were: Ted Dyrdek CRC Personnel officer; Shirri Wright Connor, CRC Deputy Warden of Administration; Dorothy Chaney, CMC Personnel Director; Carri Wiggins-Britford, Storekeeper Supervisor; Barbara Cotton, Warden's Administrative Assistant; and Rodney Lee Francis, CMC Warden. Testifying on behalf of the Union were: Pamela D. Bradley, former Sears Distribution Center Supervisor; Robert Butler, Superintendent of Buildings, Ohio State University; Tony Smith, CMC employee; Don Shockley, Corrections officer and Union Steward; Jeff Stevenson, Corrections officer and Steward; and Raphael Turner, Storekeeper and Grievant. Both parties introduced documentary evidence as well. Additionally, both parties made opening and closing statements at the arbitration hearing. I have looked to these statements to ascertain the parties, respective positions. Suffice it to say that a voluminous record was compiled.

The record reflects that the Grievant in the case, Raphael Turner, was terminated effective April 17, 1997, from his position as a Storekeeper 2 at the Department's Corrections Medical Center, (herein CMC), for violation of Department Rules 1 and 22. He had been employed by the Department slightly over three years at the time of his termination. The CMC is the institution where inmates from throughout the Department's facilities are transferred when they require specialized medical treatment. The Grievant's

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termination was related to two job bids he made shortly before his termination.

On November 14, 1996 the Grievant applied for a lateral transfer for a Storekeeper 2 position at the Corrective Reception Center, (herein CRC) The CRC received all newly convicted felons for evaluation and assignment to a particular institution within the Department's system. This position required possession of a Commercial Drivers License or CDL. The posting for the storekeeper job on which the Grievant had bid reads in pertinent part:

“Starting Date November 8, 1996
Closing Date November 18, 1996”

Minimum Qualifications Formal education in arithmetic that includes addition, subtraction, multiplication, division, fractions & percentages; 6 months training or 6 months experience in inventory control; 3 months training or 3 months experience in OSHA &/or other safety

standards & practices applicable to storeroom operations. Or alternative, equivalent evident of the minimum qualifications. Additional Position specific minimum qualifications High School Diploma or GED."

It is supplemented as follows:

"TO: ALL POSTING AREAS

FROM: TED DYRDEK, PERSONNEL OFFICER
CORRECTION RECEPTION CENTER

DATE: NOVEMBER 7, 1996

RE: STOREKEEPER POSTING

The Correction Reception Center has posted a Storekeeper 2, 14742, on the November 8, 1996 November 18, 1996 posting. Omitted from the Additional Position Specific Minimum Qualifications:

"CDL required"
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Please post this announcement with the appropriate posting. The Grievant subsequently bid on a Maintenance Repair Worker 3 position. The posting for the Maintenance Repair Worker 3 job on which the Grievant bid reads in pertinent part:

"Starting Date: December 2, 1996
Closing Date: December 12, 1996

MAINTENANCE REPAIR WORKER 3 Class #53113
Salary \$11.61 per hour PCN 4214.0

BARGAINING UNIT = 06

Under general supervision from Building Maintenance Supervisor. Perform semi skilled and skilled maintenance work. Supervise inmate work crews in maintenance repair work. Supervise work crews in correct use of hand and power tools.

Minimum Qualifications Formal education in arithmetic that includes addition & subtraction & in reading, writing & speaking common English vocabulary; 12 months training or 12 months experience in maintenance repair (e.g., basic electrical, plumbing, carpentry, masonry & use of associated hand & power tools & equipment). High School Diploma or GED. Or Alternative, equivalent evidence of the minimum qualifications."

Inasmuch as this position paid more than the Grievant was earning when he bid, this position constituted a promotion for the Grievant were he awarded it.

The Department's "Standards of Employee Conduct," effective February 18, 1996, provide in pertinent part as follows:

"Introduction The purpose of this document is to provide all Departments . . . employees with a clear understanding of the behavior expected of them, behavior which is prohibited, and the penalties that may be imposed for engaging in prohibited behavior. . . .

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Responsibility

It is the responsibility of all employees of the Department of Rehabilitation and Correction to familiarize themselves and adhere to the policies and procedures of the Department. . . .

It is the responsibility of each Appointing Authority to ensure that a fair and consistent investigation is conducted and that all employees are afforded due process prior to the recommendation or imposition of discipline

Progressive Discipline:

The purpose of the Standards of Employee Conduct, Rule violations and Penalties, is to provide for progressive discipline, provide a measure of consistency when imposing discipline and provide employees with the opportunity to correct inappropriate behavior. . . . Progressive discipline is intended to impose discipline at the level that is commensurate with the offense and progress through the disciplinary grid when further violations of the Standards of Employee Conduct are committed. . . .

Rule Violations and Penalties:

The proper application of the Standards of Employee Conduct, Rule violations and Penalties are intended to outline disciplinary penalties commensurate with the offense.

. . . [T]he Rule Violations and Penalties [are] commonly referred to as the disciplinary grid.

STANDARDS OF EMPLOYEE CONDUCT

RULE VIOLATIONS AND PENALTIES

1. Any violation of ORC 124.34 and . . . dishonesty. . . or any other failure of good behavior; first offense oral reprimand/ removal/ and offense written reprimand and three day suspension/ removal; 3rd offense 5 to 10 day suspension/removal; 4th offense removal.

. . .

22. Falsifying, altering, or removing any official document.
1st offense 3 to 5 day suspension/removal; 2nd offense 5 to 10 day

suspension/removal; 3rd offense removal.

The Grievant was perceived by Management as being dishonest in connection with his bid on the storekeeper position, in violation

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of Rule #1, and as having falsified his bid for the maintenance repair worker position, in violation of Rule #22. In this regard the Grievant stated on his maintenance repair worker bid that his work experience and job duties at Ohio State University at Central Building Services and OSU Hospital, where he held the classifications of maintenance and hospital aide, respectively, included: "basic repair in laying carpet, drywall, painting, etc. Basic care of patients walking, eating, bathing, etc." He indicated that his work experience and duties at Sears Distribution Center where he was classified as a porter, included: "basic work around warehouse area; minor repairs; some basic electrical work. Most work done with different types of power tools or hand tools." He indicated that his work experience and duties as a Janitor at East High School included: "basic work in cleaning up, replacing air filters, installing hot water heaters, minor help in repairing air conditioners." It is noted that prior to bidding the Grievant was provided a "Screening Criteria" Sheet utilized by Management for the maintenance repair worker position. That sheet noted various experience criteria which were "direct job related" and ascribing "points" for such experience. By way of example "experience . . . in electrical practices and procedures" and "use of hand and power tools" were set forth as criteria.

The Grievant claimed that in connection with his storekeeper bid, Dyrdek and Wright Connor only asked him, and repeatedly so, if he possessed a CDL, and since he'd had in the past a chauffeur's license, he was confused and indicated that he had. Both Dyrdek

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and Wright Connor testified that they had expressly asked the Grievant if he possessed a "commercial driver's license"; that the did not simply ask him if he possessed a "CDL." Dyrdek also testified that the Grievant told him to check with "Gino" at the BMV for clarification that he did possess a CDL. The Grievant both affirmed and denied that he told Dyrdek to check with "Gino" at the BMV. It appears there is no such employee at BMV. At the same time it also appears that the Grievant did have occasion to speak to someone at BMV about the status of his license. In any event it is clear that the Grievant did not have, nor did he ever have, a CDL; that the Grievant at one time did possess a chauffeur's license; and that for quite some time now the BMV has not issued any chauffeur's licenses, that category of license having been abolished by the Bureau.

When the Grievant's supervisor, Ms. Wiggins Britford and Personnel Director Chaney reviewed the application they perceived tension and incongruity between the work experience and duties the Grievant listed with former employers and his job title and classifications with these former employers. Ms. Wiggins Britford questioned the Grievant and her notes (as confirmed in her testimony) recite that Grievant's bid relates that while at OSU's Central Building Services he had

“. . . done basic repair in laying carpet, drywall, and painting. Raphael stated to me, that he had

not hung drywall while employed at Central Building Services, and he doesn't know why he wrote that on his application. . . . The painting consisted of painting a baseboard that they had scuffed up while working in the area. Raphael stated that he did not lay carpet while employed at central Building Services but had helped some guy on **6**

the outside [E]mployment at Sears, electrically, consisted of replacing electrical wall outlet plates. He only used a hand drill to repair a broken belt. He did not use any power tools. Due to findings noted above, recommend that further disciplinary action be taken."

Ms. Wiggins Britford and Ms. Chaney checked with OSU an Sears. At OSU it was Debbie Eskelson, Assistant Director, Building Services who was spoken with. Ms. Eskelson indicated that Grievant did general custodial duties (i.e., empty trash, waxing and mopping floors, vacuum, etc.) and that never did Grievant lay carpet, put up drywall, or paint. Others with skills and holding classifications in these areas did so. This was essentially confirmed in writing and the Grievant's job description was enclosed. Sears indicated they had records only back to 1989, and that a person in the position of porter/stock, such as the Grievant, would not have done any repairs or used any power tools. Ms. Wiggins Britford concluded that "from the information gathered [Grievant] does not meet the mini[mum] qual [ifications] of this [maintenance repair worker] position. In fact he has falsified a legal document." Thereafter a notice of allegations of misconduct and of a pre disciplinary hearing notice was prepared.

The Grievant's predisciplinary conference notice provided in pertinent part as follows:

"It is alleged you violated the Standards of Employee Conduct Rule #(s)

Rule #1 Failure of good behavior: dishonesty

Rule #22 Falsifying, altering or removing any official document

This allegation is supported by the following incident/facts:

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2. During a recent job inquiry for the Storekeeper II position at CRC, you stated that you had been tested and were a licensed commercial driver. However, when the Institutional Investigator, Mr. Dyrdek, attempted to verify this information, he was informed that you did not currently nor have you ever had a commercial driver's license. Your actions constitute violation of the Standards of Employee Conduct, Rule #1 Dishonesty.
3. Most recently, you submitted an application dated 12/10/96 for Maintenance Repair worker 3. Upon verifying your previous work history, Personnel discovered that you falsified your application by claiming to have performed specific duties which were disputed by your previous employers. Your actions

constitute violation of Rule #22 (falsifying an official document) of the Standards of Employee Conduct.

As stated on Page 1, a finding of just cause will be based upon the Standards of Employee Conduct. The degree of discipline for the alleged violations range from a five day suspension to removal."¹

Ms. Barbara Cotton conducted the predisciplinary hearing. The hearing was recorded and transcribed. Excerpts from that transcription follow, which excerpts portray the tenor of the entirety of the hearing:

Rt – Well, basically, what Miss Britford was telling you was first I worked Central Building Services. I did state to Miss Britford that what they were requiring on their criteria for maintenance repair worker, that no, I had done the job like I said, to an outside source. The only real reason I have ever done them while I was at the place it was a one time thing. I couldn't put it at well, this is my regular job description cause it's not. I was helping this guy lay some carpet done after he done cut it out and everything cause we were basically in charge of doing the floors there. That's all we did. Then we helped the guy lay out the carpet but he was going to do his own nailing and stuff. So we helped the guy put up some drywall but as far as that ever being in my job description, no, it was never in my job description. My thing was just strictly the floors. And like I told Ms. Britford, I did do them. We had to go back around the baseboards because one guy we were working with he wanted us to either get the paint off or we messed up his walls around the building so we had to do that. And whatever we were doing on the campus at that time that's what we did. But, no, Miss Eskelson up in Personnel, she don't know what was going on. Cause she never was there. And there was a big stink about that because I wasn't no carpet layer or anything like that.

¹ This document as received in evidence was blacked out with respect to the first allegation against the Grievant. At the hearing the Department attempted to raise issues apparently dealing with this charge as a collateral attack on the Grievant's credibility, which was disallowed. That ruling is affirmed, it being clear that the parties intended allegation #1 to be heard in a different forum.

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BC – Okay, so what you're saying is that you filled the application out and it wasn't the regular job duties. All those duties weren't your regular duties, but you did them on the side during the course of your employment.

RT – No, what I was talking about I experienced those where I worked at I did it once before, but basically my bulk experience came from the outside. I couldn't put the man's name down; he's dead and he didn't have a company. I just worked with him. But as far as having done it on an actual job site that was really going to count for something, I wrote that I had done it. But as my regular job description being in it, no, that wasn't my job description. But at that point and time we had to do that and it looked a one time thing though. We weren't always doing it, no, that wasn't it. Whatever Miss Eckelson told you about us doing trash and the floors, that's what our job description. But unfortunately we had to do that once or twice help lay out the carper which we had to do the floor but we just helped him lay it down. He had already done cut it out. And he did all the rest from there. That's what all we did, to help some guy with some dry wall, holding it up while he was putting it in. That was never in my job description or anything.

I just wrote it down because they asked me if there was kind of job related criteria, Had I ever did it , yes. I experienced it on the job as far as coming from??? But as far as big time experience, I know how to do it anything I wrote down here. I didn't write it down because that was totally on the outside. There wasn't any

way I could get ahold of the guy who was dead and on the outside.

BC – Okay, so what you are saying is that it wasn't your primary job duties, but from time to time you did these things on the job.

RT – I only did it like once, one time. And as far as with Sears, like I said I explained and told everything to Ms. Britford what I did which was in the break room I had to put the wall plates and stuff back on. All I really did was drill a hole through the top and put a shelf in my porter's closet which I had and all this and that. For any kind of power tool, hand tool I told then no I haven't used one. But then again I go on the outside I used it all. Being on the outside with someone who is not here is not going to help you. You know, so, I just wrote down everything that I was ever asked that I was ever used. Maybe what I did wrong was that I didn't explain it, that it's not my job description but I did go through that.

* * * *

RT – About the stuff at CRC? Okay, I did put in an application for a Storekeeper II position at CRC. Every time I dealt with Shirri, do you have a CDL? She kept asking me and I told her yea, I had a CDL, yea, I got them. I do have them. I do have them and I talked to the guy. I told him the same thing, that I've got a CDL. And then the guy the guy said, No, you couldn't have them, 'cause I called the people and they said they had expired. And they called the Bureau. And so I got on the phone and I called the Bureau. I am just going to make a long story short. And I called the Bureau and I said, There's is a guy that just called about my license about asking whether my CDL is current. You all told him no but when I call you you say yea. I brung up the question, I asked, I said, You tried to tell me my chauffer's driver license, are they expired. He said, no. He said, why do you keep telling this man that they are? She punched my name into the computer and he came back and he said, Mr. Turner, what's going on is there has been a misinterpretation. I said, well, tell me. He's talking about a commercial driver's license. I said, Oh man, I'm so ... that's exactly what I said... that's all my fault. Oh man I don't have those. I got a chauffer's driver's license. I'm thinking they were talking about that. Cause I was always asked if I had a CDL and everytime he asked it, I just told him yea. And when I found out, that's when I called Ms. Connor back and told her about the situation. I said I would go take the test then Saturday, which I didn't. But they were going to go ahead and repost the position back at CRC because they couldn't hold it out. When she told me I said I thought you were talking about CDL's and they're talking a Commercial Driver's License. That's why I got on the phone and talked to them when they told me. So it was a misunderstanding. ..

BC – You thought they were talking about a chauffer's driver's license

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RT – Yea, because I kept saying yea, I've got them. And when I called the Bureau and they told me they don't expire until 3/97, I said why do you all keep telling me they are expired then? I just dropped the subject as far as CDL, and I just started talking about that. I said I done told these people that under my social security number I ain't never used none. And when I called the two operators, which only one gave me their name, she checked for me and stated they are still active until 3/97, my birthday. And when he told me that I told him well, I've got to go take the road test as far as the CDL, which he wanted and I'm sure when I got the letter what they were talking about then, when he kept asking me CDL, CDL, and everything. I kept telling him Yea, I got mine. And when I showed my chauffer's driver's license to the lady, she said no, they were talking about a commercial driver's license at the Bureau, and I said OK, I don't have those. I didn't pursue it and marked it out after they told me what they had to do anyway.

BC – Okay, now, if I can get you guys to listen to this. The previous hearing today right now today you're saying that you talked to a guy from the Bureau of Motor Vehicles and the guy said you just did this you said, "There's no more chauffer's license. They did away with it. All there is is a regular operator's license." So you

understood that there was no such thing as a chauffer's license, anymore? Right, I'm asking you. I need to know.

RT - I know what you are saying.

BC – Did you understand that?

RT - Yea. I know exactly what you're saying.

BC – Let me finish. At the last hearing you said this is exactly what you said about this other at CRC. I did put in an application for a Storekeeper II position at CRC. Everytime I dealt with Shirri, so you have a CDL? She kept asking me and I told her yea, I had a CDL. Yea I got them. I do have them and I talked to this guy. I told him the same thing that I got a CDL. And then the guy said no, you couldn't have them 'cause I called the people and they said they had expired and they called the Bureau and so I got on the phone and I called the Bureau. I just want to make a long story short. And I called the Bureau and I said there's this guy that just called about my license about asking whether my CDL is current. You all told him no but when I call you you say yea. I brung up the question I asked I said you tried to tell me my chauffer's driver's license, are they expired? He said no. He said why do you keep telling this man that they are? He punched my name into the computer and he came back and he said Mr. Turner, what 's going on here is that there has been a misinterpretation. I said well tell me. He's talking about a commercial driver's license. I said oh man, I'm so that's exactly what I said. That's all my fault. So you said here someone from the Motor Bureau told you that you had to come up with a driver's license. At the last hearing you just said that.

RT – From what I told you at the last hearing, too I told you when I found out that they was talking about commercial driver's license I didn't have those. I thought they was talking about chauffer's driver's license when he kept asking me for CDL. That's when I kept saying, yea, I have them.

BC – My point is this; that there's no such thing as chauffer's license. Then why did you say you have a chauffer's license at the last hearing?

RT – Because when I called the guy like I told you again on the phone he said well, your stuff don't end until 3/97. I said now look. You told them my chauffer's license and I know I ain't take no test over again. He said yea the chauffer's driver's license I knew I didn't have those. And that's when I told you I must have misinterpreted when she kept saying, asking, CDL. And you heard when I just called them today. They said well it's just a regular operator's license. That's the same thing the man told me on the phone.

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BC – Okay. Anything else?

CWB - No, just a comment. On the job application, for the drywall and the painting, on the third or fourth page of the application. At the bottom where it asks "Education", at the very bottom it says in the area below, please describe briefly any additional information, listing qualifications you have for the position requested. Why didn't you put that down there instead of putting it into underneath the companies that you know you didn't do the work for? I mean they provided areas for you to write that in.

RT – It's just a small thing now.

TH – He didn't have no company.

RT – Well I didn't have the company. He was just somebody who was doing it on the side and I just , you know, worked with him as I told you that day in the office. I couldn't verify him because he's dead.

Ms. Cotton allowed the Grievant to submit documentation of his past work experience before she reached any conclusions. Grievant submitted a document purportedly from R. D. Butler, Superintendent of Buildings, OSU, for whom the Grievant had previously worked, and signed by the Grievant before a notary. In her Predisciplinary Conference Hearing Officer's Report, Ms. Cotton concluded as follows:

Incident #1

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. . . .

Mr. Turner contends that he did not purposefully provide Ms. Wright and Mr. Dyrdek with false information. He states that he was confused about the definition of CDL. He thought they were referring to a Chauffeurs License, which he claims he currently maintains, instead of a Commercial Drivers License. On the surface this appears to be a reasonable explanation, however a background check with the Bureau of Motor Vehicles revealed that Mr. Turner doe not have a Chauffeurs License either.

Incident #2

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. . . .

When comparing the duties listed under the Sears Distribution Center in this application with the one submitted above, it is interesting to note that the documented duties are completely different. Additionally, when completing a background check the Personnel Department discovered that Mr. Turner had not performed the job duties he listed on his application. Both, Central Building Services and the Sears Distribution Center disputed the information he offered on his application(s).

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Mr. Turner provided a variety of excuses for the inconsistencies between the two applications. The also provided a notarized statement from R. D. Butler, an employee for OSU Building Services. In this statement, Mr. Butler claims that Mr. Turner worked out of his job classification on several occasions performing carpentry duties and minimal painting. However, I question the authenticity of this statement because the notarized signature is not one of R. D. Butler, but rather Raphael Turner himself.

Decision:

The documentary evidence speaks for itself, as does the numerous contradictions Raphael Turner made during his testimony at the predisciplinary conference

There is just cause for discipline.

Warden Francis determines the level of discipline. Here, removal was the determination. Thus by letter dated March 26, 1997, from the appointing authority, Warden Francis, the Grievant was notified of his removal as follows:

Pursuant to the authority granted in the collective bargaining agreement between the State of Ohio and OCSEA/AFSCME

This letter is to advise you that you are to be Removed

From the position of Storekeeper effective:

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You are to be Removed for the following infractions:

You submitted an application for the position of Storekeeper 2 at the Correction Reception Center (CRC), which was signed and dated 11/24/96. You advised the Deputy Warden of Administration and the Personnel Director that you possessed a current and valid Commercial Drivers License (CDL). Which is a requirement for meeting the minimum qualifications. However, a background check with the Bureau of Motor Vehicles revealed that you do not have a CDL, nor have you ever possessed such a license.

Most recently, you submitted an application dated 12/10/96, for Maintenance Repair worker 3. Upon verifying your previous employment, the Personnel Office discovered that you falsified your application by claiming to have performed specific duties which were disputed by your former employers.

Your actions constitute violation of Rule#1 - Dishonesty and Rule #22 – Falsifying, altering, or removing any official document, of the Standards of Employee Conduct.

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Warden Francis testified that in imposing discharge he took into account the Grievant's past record; the investigation; the pre disciplinary hearing report; the severity of the issue; and the disciplinary grid. The Warden testified that he believed that discharge was warranted because of the severity of the Grievant's infraction, in that if the Grievant had been appointed to either position it would have served to put an unqualified candidate in place, and cheated someone who was capable of doing the work out of the job. The Warden indicated some falsifications are less serious, for example, a falsification in an incident report would impact only on an inmate, whereas here, the Grievant's conduct had the potential of impacting the livelihood of fellow employees.

At the hearing before the undersigned Ohio State University's Superintendent of Buildings Robert Butler testified that the memo purporting to be from him concerning the Grievant's job duties at OSU, and submitted at the pre disciplinary hearing was indeed his statement and in his writing. He indicated he was unaware that it was contemplated that it was to be notarized. He confirmed its content, namely, that "on several occasions the Grievant worked out of his job (custodial worker] description," such as assisting with carpentry; painting baseboards, changing light bulbs and fluorescent tubes. Butler further testified that Assistant Director of Building Services at OSU, Debbie Eskelson worked in the office and would not know what work Turner did out of his classification.

Pamela Bradley, a supervisor over the Grievant at the Sears Distribution Center when he worked there also testified at the hearing before the undersigned. It was her testimony that the

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Grievant worked out of his classification of porter/stock "all the time." It was Bradley's testimony that while at Sears the Grievant operated fork lifts and power jacks; built shelving; unjammed belt jams; utilized power pack screwdrivers and staple packs; and replaced electrical cords.

1. Grievant's date of hire was 01/24/94
2. Grievant was removed from his position as a Storekeeper 2 effective 04/17/97
3. The grievance is properly before the Arbitrator
4. The grievant received and signed for a copy of the Standards of Employee Conduct effective 02/18/96
5. The grievant did FAX a copy of his current driver's license to Sherrri Wright-Connor when requested
6. The grievant's drivers license noted in stipulation no. 5 indicated that he did not possess a commercial drivers license or a chauffeurs license
7. The grievant had no active discipline

The Department's Position:

The Department takes the position that the record amply demonstrates that the Grievant clearly violated Departmental rule #1 proscribing dishonesty. Thus it asserts that in applying for the storekeeper position at CRC, the Grievant misrepresented himself as possessing a CDL on multiple occasions to managers Wright Connor and Dyrdek. Both of these Managers explicitly enunciated that a Commercial Driver's License was necessary for the position and hence the Grievant could not have been confused about

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this requirement. At no time after these enunciations could the Grievant have thought that CDL meant a chauffeur's driver, license. Nonetheless the Grievant persisted in his contention that he did possess a CDL. When confronted with the lack of evidence that he did possess a CDL, the Grievant fabricated to Manage Dyrdek a tale about a conversation he claimed to have had with on "Gino" at the Bureau of Motor Vehicles and how as "Gino" would explain that the BMV had made a mistake and that he really did possess a CDL. The record reflects that the Grievant alternately affirms and denies knowledge of and conversation with "Gino." The only conclusion Management could make from its investigation and the pre disciplinary hearing was that the Grievant was lying about having spoken with Gino, which compounded his lie about possessing a CDL.

Thereafter on 12/10/96, the Grievant submitted an application for a promotion to a Maintenance Repair Worker 3 in which he knowingly included false information regarding his previous work experience in an attempt to appear qualified for the position. However, discrepancies between the Grievant's former employment position titles and the work experiences he reflected having on his application, triggered an investigation into just what were the Grievant's duties in these former positions. Documentation from former employers failed to confirm the Grievant's representations as to his former work experience. When at the

pre disciplinary hearing the Grievant indicated he could obtain corroborative documentation of his representations, he was given some three days to do so. However, asserts the Department, the Grievant only submitted a statement signed by himself. Such was "worthless" as

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corroboration, asserts the Department. Accordingly, the Grievant having submitted no corroborative documentation within the extended deadline granted to him to do so, Management was justified in finding a violation of Rule #22, falsifying an official document the Grievant's job bid. The Department further asserts that the pre disciplinary hearing was long and confusing due to the Grievant's rambling, non-sensical, and contradictory assertions. The Department contends that nothing was said by the Grievant at the pre disciplinary hearing which served to clear matters up, despite the fact that the Grievant was given ample opportunity to do so. This circumstance bolsters the justification for finding a violation of Rule #22. Likewise, so does the pattern of something less than the truth from the Grievant.

The Department takes the position that, as Warden Francis testified, the penalty of removal is warranted when, as here, an employee attempts to gain a position through falsification and deceit whereby they would enjoy a promotion and monetary gain, or other advantage, at the expense of other applicants who actually meet minimum qualifications. Also the Grievant's relatively short tenure does not serve to mitigate the discharge penalty. The Department's proof establishes that the Grievant did willfully deceive and falsify and was not a victim of his own eagerness or overzealousness. Even if the State were to accept that the Grievant was eager and overzealous (which it does not), these attributes would not: provide the Grievant with license to violate work rules.

The Department asserts that if, because of Union witness Bradley's testimony, the Arbitrator was inclined to modify the

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Grievant's discipline, no back pay up to the date of the hearing, herein ought to be due, since the Department was obliged to make a decision on the basis of the information it had in early 1997. Still further in this regard the Department points out that since Ms. Bradley has not changed her telephone number, the Grievant could have brought the substance of her testimony forward sooner.

So it is that the Department urges that the grievance be denied.

The Union's Position:

The Union takes the position that the Department has not proved just cause for the Grievant's discharge. In support of that position the Union contends that the Department did not investigate the case thoroughly enough to establish just cause. The Grievant was required to prove his innocence of the alleged rule violations. In this regard the union cites the decision of Arbitrator Rhonda Rivera in a Case with the Department of Commerce, Case No. 07 00 (12 27 89) 0059 01 09, decided April 30, 1990. The "Summary" of that case notes that Arbitrator Rivera found procedural error in the Department's investigation to wit: "The Employer has some duty to investigate before imposing discipline. Additionally, the Employer has more resources to investigate than the Union. The Employer cannot rely on the subjective judgment of its supervisors to impose discipline." In the actual decision, Arbitrator Rivera found as follows:

"Apparently, the Employer concluded from the moment the Grievant returned that she was a liar. No credence was given to her story, and no investigation undertaken. The Employer maintained that investigation was solely the Union's burden. This latter supposition flies in the face of labor management law. One test of just cause is that a full and fair investigation took place prior to **17**

discipline. The Grievant never had a fair chance because her supervisor stated that from the very first time she' heard the story she did not believe the Grievant. Yet, the Grievant was a 10 year employee, with an excellent work record. . . .

[T]he Employer witness . . . testified that no one in management sought to verify the police reports. Investigation is not the sole responsibility of the Union. The Employer has more resources to accomplish a thorough investigation, and to find just cause, the Employer cannot rely on the mere subjective feeling of supervisors. Thus the Grievant did not receive a full and fair investigation."

The Union also cites an Ohio Veteran's Home decision by Arbitrator David Pincus who stated as follows:

"Regardless of the type of misconduct that is involved, an investigation that satisfies the requirements of proof has three primary characteristics: all sides of the dispute have been considered, all relevant evidence has been obtained, and the investigation has been timely. The investigation used to impose discipline failed to provide the Grievant with due process because two characteristics were not present.

Proof of misconduct fell short in this instance because a more thorough effort by the Employer in questioning all relevant witnesses about the events in dispute failed to produce enough evidence by corroboration for the Employer to prevail

. . . The Employer was well aware that Farris might have been the initial perpetrator of the attack as evidenced by a memo written to Robert Day by Paul Bock on April 16, 1997. This memo documents admission by Farris that she initiated the attack. This admission was never properly rebutted nor investigate (sic) by the Employer to distinguish Farris' role in the disputed matter.

A thorough investigation requires that all documentary, physical, and medical evident (sic) must be obtained. when obvious evidence of this sort is overlooked, disregarded or perhaps consciously ignored, most arbitrators would conclude that the investigation was incomplete. Here, a faulty and inadequate investigation produced faulty and inadequate proofs. Forensic and other medical evidence and testimony might have bolstered the circumstantial aspects of the Employer's case in chief.

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Forensic testing could have swayed this Arbitrator's opinion, but this avenue was not explored by the Employer.

The Union takes the position that the Department prematurely ended their investigation. The Union

further asserts that the Department improperly shifted the burden of proof onto the Grievant. It asserts that, as in the Rivera Opinion noted hereinabove, the Department had the greater resources to conduct an investigation than did the Grievant or the Union. The Union takes the position that the Department must demonstrate that the Grievant intended to deceive the Department in order for his removal to be sustained, and that the Department has failed to do so. The Union asserts that the essential element of any offense of dishonesty or deception is to "knowingly" commit the act, and here the Department has not shown any circumstances from which it can reasonably be inferred that the Grievant intended to deceive the Department.

It is the Union's position that at the heart of the Department's case against the Grievant are two former jobs with other Employers and the duties performed there, which he listed on his bid for maintenance position, and the allegation that in fact said duties were never performed, as well as the allegation that the Grievant was deceptive about having a Commercial Driver's License. However, asserts the Union, the record reflects that the Grievant did perform the duties he listed in jobs for former employers, and, had the Department investigated further, it would have discovered that fact. As for the CDL situation, the Union contends that the Grievant was confused as to what a CDL was and

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that he has consistently so maintained. The Union asserts that such confusion is not justification for removal.

The Union points out that the Standards of Employee Conduct do not call for an automatic removal for a first offense of either Rule #1 or Rule #22. Rather, the disciplinary grid calls for an oral reprimand to removal for a Rule 1 violation, and a 3 5 day suspension to removal for a Rule 22 violation. The Department has not shown any special circumstances necessitating removal of the Grievant.

The Union takes the position that the only thing the Grievant is guilty of is confusion and uncertainty about jobs that he had years ago, and hence the grievance ought to be sustained. Assuming for the sake of argument that the Grievant has some culpability, at most a reprimand or a minor suspension would be in order; removal is too severe a penalty.

The Issue:

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The parties are agreed and have stipulated that the issue is:

"Was the Grievant removed for just cause; if not, what should the remedy be?"

Discussion and Opinion:

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Careful study of the entirety of the record evidence, and in particular the transcript of the pre disciplinary hearing, as well as the testimony given at the arbitration hearing, persuades me, for the reasons which follow, that discharge for the conduct the Grievant engaged in was too severe. Thus with respect to the allegation that the Grievant was "dishonest" and therefore in violation of Rule #1 in connection with his application for the storekeeper position at CRC, and not simply confused with respect

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to whether or not he met the automotive licensing requirement for the position, namely possession of a CDL license, the Department is not well positioned to facilely discount the Grievant's "confusion" contention. This is so because the initial posting made no reference to the necessity of a CDL. When the omission was discovered, it was directed that a notice in large bold letters "CDL Required" be posted "with the appropriate posting." Since the Grievant had in the past possessed a chauffeur's license, there is clearly some support for the inference that the Grievant, as he asserts, was simply confused or unclear as to whether he possessed the required license. In any event it is clear from the predisciplinary conference transcript that the Grievant cavalierly assumed and held the attitude that he could simply go ahead and obtain a CDL and therefore be in compliance with the job requirements. When one considers the fact that but for the CDL requirement, the position applied for was virtually the same position he held, only at a different location, it's difficult to conclude that given the Grievant's attitude the Grievant was being deliberately deceptive and dishonest in holding himself out as a qualified candidate. Further difficulty in so concluding is to be found in his production of his driving license for review by Management, and the common sense reality that inevitably the Bureau of Motor Vehicles would be the ultimate arbiter of whether he did or did not possess a CDL license. The Department relies heavily on the point that Dyrdek and Wright Connor, as they credibly testified, specifically questioned the Grievant as to whether he possessed a "commercial driver's license" (spelled out, and not just whether he possessed a ("CDL")), but in the absence of some **21**

further explanation to the Grievant of the terminology I find this circumstance to be simply too slim a reed upon which to infer the Grievant set about to deliberately deceive the Department. But just such deliberate and knowing deception is essentially what the Department is contending in this "dishonesty" allegation. In my view the Grievant's lackadaisical attitude in the matter would properly be characterized as a violation of Rule #5, i.e., a careless act . . . which result(ed) in . . . (e) delay in work production. Thus, as Ms. Wright Connor indicated the Grievant's persistence in his contention that he did in fact possess a CDL led to considerable delay in obtaining a qualified candidate, i.e., delay in work production. The point to be made, however, is that the record as a whole supports the conclusion that the Grievant's misconduct was somewhat less serious than perceived by Management. With respect to the alleged violations of Rule #22, "falsification" of his application for the promotional position of maintenance repair 3, in a strictly literal sense a case of such can perhaps be made. Thus, if the posting's requirement of "12 months experience in maintenance repair" in various trades is intended to mean twelve continuous months of performance of these trade type duties, then arguably there is a falsification, for the record shows no evidence of the Grievant having done so. Nor is there any specific evidence of masonry work experience. And if "basic" electrical, carpentry, etc., is intended to mean something more than bare bones basic, and the reasonable inference is that indeed such is intended, then arguably the Grievant did not possess the requisite level of experience. Additionally, the Grievant was, to be kind, cavalier, in ascribing to Sears and OSU duties and **22**

experience acquired other than at Sears and OSU, as well as Sears and OSU, all without explanation, as the predisciplinary transcript reveals. But "context" is critical here. What involved here is a bid or application for a vacant position. Common sense and experience dictates that it was to be expected that, as would most applicants, the Grievant would "puff" his experience. To be sure the Grievant availed himself of this expectation to the maximum. Significantly however the Grievant did establish at the hearing herein, through the testimony of witnesses Bradley and Butler, whom I credit, that he did have some experience in the

matters he listed on his application, such that it cannot truly be found at this juncture that the application's reference to past duties was "falsified." Once again, however, it must be found that the Grievant was especially careless in the entire matter. And of course a finding that the Grievant did not falsify his application is not a finding that he was qualified for the position.

As has been seen the Union contends that there is a due process failing here in that the Department improperly shifted the burden of proof to the Grievant. I disagree. Given the tension and conflict between his job titles and classifications with OSU and Sears, and the duties he related, the Department was justified in putting him to the task of establishing that he in fact did the listed tasks. This is especially so after the Department queried a most logical source other than the Grievant himself, namely, some managerial staff at Sears and OSU, and they failed to corroborate the Grievant. Nor is the Union's point that the Employer had the greater resources to investigate well taken here, where it was the

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Grievant who possessed the phone number and access, to those managers employed by his former employers who could explain that it was his "out of classification" assignments which gave him the experience he cited on his bid. Moreover as the Elkouris note in their learned arbitration treatise, How Arbitration works (5th edition) at page 905, footnote 3: "[T]he employee has the burden of proving the validity of the defense or excuse that the employee asserts in justification of his conduct." citing Mississippi Lime Co., 29 LA 559, 561 (Updergraff, 1957) ; Cleveland Cliffs Iron Co., 51 LA 174, 177 (Dunne, 1967) ; and George D. Ellis & Sons, 27 LA 562, 564 565. Additionally, contrary to the Union's contention, the Department did not prematurely end its investigatory duty. Rather, the Grievant simply failed to meet his burden of proof. The Grievant's explanations and assertions were garbled and unclear; his testimony before me was very much a replica of his confusing and almost incoherent at times predisciplinary hearing testimony, as the transcript of which excerpted hereinabove amply demonstrates. And as the Department properly characterizes it, the statement the Grievant submitted to Management, purportedly from Butler, but signed by the Grievant, was "worthless." This circumstance inevitably undermined Management's confidence in the Grievant's assertions.

Given the data available to it at the time it would be expected to, and in fact did, make its decision, it is understandable how as the Department concluded that the Grievant had falsified his application, albeit he has belatedly established before the undersigned that he did not. In this state of the matter, it remains to be determined, what discipline in lieu of

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discharge is called for here. In my view the record amply supports a finding of severe "carelessness" on the Grievant's part in both of his vacancy applications. Given that two instances of such carelessness are involved, and back to back, I believe that the permissible discipline of the disciplinary grid for a third offense of carelessness, namely, a 10 day disciplinary suspension, would reflect the seriousness of the matters at hand. Furthermore, an arbitral principle concerning "remedy" holds that where, as here, a Grievant is not forthright and fosters suspicion against, and contrary to, his contentions, no back pay can be awarded. Monarch Machine Tool Co., 51 LA 391, 396 (Sembower, 1968). Accordingly, the Grievant's official disciplinary record shall reflect a 10 day disciplinary suspension for carelessness in connection with applications for two vacant positions, and he shall be reinstated to his former position without loss of seniority but without back pay.

Award:

- For the reasons more fully set forth in the Discussion and opinion hereinabove, the grievance is sustained in part and denied in part. The Grievant's discharge was not for just cause. He is to be reinstated to his former position without loss of seniority, but without back pay, and his disciplinary record shall reflect a 10 day disciplinary layoff for carelessness in connection with applications for two vacant positions.

Dated: April 16, 1998

Frank A. Keenan
Arbitrator
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¹ This document as received in evidence was blacked out with respect to the first allegation against the Grievant. At the hearing the Department attempted to raise issues apparently dealing with this charge as a collateral attack on the Grievant's credibility, which was disallowed. That ruling is affirmed, it being clear that the parties intended allegation #1 to be heard in a different forum.