

FEDERAL MEDIATION AND CONCILIATION SERVICE

DAVID A. PETERSEN, ARBITRATOR

In the Matter of Arbitration)	Arbitrator's Opinion
between)	and Award
)	
CUMBERLAND TRAIL JOINT FIRE)	
DISTRICT #4)	FMCS 04-03014-T
)	
and)	
)	Award Issued:
)	July 12, 2004
CUMBERLAND TRAIL CAREER FIRE)	
FIGHTERS, LOCAL 3667 OF THE)	
INTERNATIONAL ASSOCIATION OF)	
FIRE FIGHTERS)	

Subject: Article 23 - Discipline and Discharge - Suspension
Administrative Leave - Termination of Employment

Appearances of Counsel:

Gerald P. Duff, Esquire
On behalf of the Employer

Dennis Haines, Esquire
On behalf of the Union

In this case, arising under the January 1, 2003 through January 1, 2006 Agreement between Cumberland Trail Joint Fire District #4 and Cumberland Trail Career Fire Fighters, Local 3667 of the International Association of Fire Fighters, it is claimed that the Employer issued Grievant a one-day suspension, placed him on Administrative Leave and ultimately terminated his employment, all without just cause, in violation of Article 23.

Grievant, a Firefighter/Paramedic with a hire date of December 29, 1999, engaged in off duty conduct which resulted in him being cited by an Ohio Law Enforcement Officer at 2:31 a.m. on October 2, 2003 for driving in excess of the speed limit and driving under the influence of alcohol. Grievant was required to surrender his driver's license to the Officer at the time, and he was given a summons to appear in court. On October 8, 2003, the Belmont County Court - Northern Division accepted the State of Ohio's request to amend the charge against Grievant to Reckless Operation in violation of RC 4511.20 and Grievant entered a plea of guilty on the amended charge. Grievant paid a fine and court costs and his administrative license suspension was terminated. On October 9, 2003, the Employer issued Grievant a one-day suspension for having reported to work on October 2, 2003 without a valid Ohio driver's license and for having failed to immediately notify his immediate Supervisor or the Administration on October 2 that he lacked a valid driver's license. On October 13, 2003, the Employer placed Grievant on Administrative Leave, with pay, pending the Employer's receipt of notice from its Insurance Carrier whether Grievant remained insurable on its fleet vehicle insurance policy. The Employer learned later that Grievant was no longer insurable and had to be excluded from coverage under its fleet vehicle insurance policy.¹

¹ The Insurance Carrier notified the Employer of its decision that any vehicle being driven or operated by Grievant would not be a covered vehicle under the Employer's policy effective October 14, 2003. The Insurance Carrier's exclusion notice appears to have been dated October 31, 2003 and countersigned on November 7, 2003. There was documentary evidence that the Employer's counsel received this exclusion notice on November 12, 2003 and requested the Insurance Carrier to reconsider its decision to exclude Grievant from coverage. In response, by letter dated December 15, 2003, the Insurance Carrier confirmed its decision to exclude Grievant from coverage. Discussions by the Chief and Assistant Chief of the Fire District with the Insurance Agent, as well as discussions by the President of the Local Union with the Insurance Agent, failed to produce any workable solution to Grievant's insurability problem. The Insurance Agent testified that no viable option could be found, and that the Insurance Carrier could have cancelled the entire policy (which, at the time, was effective from March 14, 2003 to

Subsequently, by letter dated December 30, 2003, the Employer advised Grievant of its decision to terminate his employment based, initially, on its determination that his misconduct which lead to his exclusion from insurance coverage rendered him incapable of fulfilling his job duties.² Grievances were filed protesting the one-day suspension, the Administrative Leave and the termination.

March 14, 2004) if the Employer had not signed this exclusion endorsement. The Insurance Agent maintained that the typical period of exclusion for DUI or Reckless Operation is 3 to 5 years, although he acknowledged that the Insurance Carrier has published "criteria for a concession on a driver with a DUI" and, if those requirements are met by the driver, the Carrier "will approve the reinstatement of driving responsibilities and place the individual in question on a 'watch'" after a one year period. The Insurance Agent indicated that a similar concession would be available for a driver with a Reckless Operation, such as Grievant.

² In its December 30, 2003 letter the Employer cited, as requirements Grievant could not fulfill as an employee excluded from its policy, Firefighter/Paramedic Job Description Performance Responsibility #1 ("Must be able to drive and operate vehicles and equipment owned by the Fire District.") and Performance Responsibility #15 ("If a major emergency exists, the employee filling this position shall be responsible for any and all duties and responsibilities as assigned to them, whether or not such duties are within the scope of the employee's normal or expected employment."). The Employer also noted in its letter that Grievant's status as an excluded individual under the insurance policy would cause it to be in violation of Article 38 (which obligates the Employer to "provide liability coverage ... to cover liability which may arise as a result of [an employee's] duties with the Fire District"), and the Employer maintained that its action was further supported by Article 23.03 (which specifically defines "just cause for discharge" as encompassing "Inefficiency", "Neglect of duty" and "Misfeasance, malfeasance or nonfeasance of duty"), Article 23.04-e (that lists causes for which an employee "shall be subject to suspension or discharge from duty" as including "action bringing disrespect or discredit to the Fire District as a whole", "conviction of any crime, or misdemeanor, under the laws of the United States or the State of Ohio", "any neglect of duty" and "conduct subversive of the good order and discipline of the Fire District") and Article 23.04-f (which provides for punishment at the discretion of the Fire District for "conduct on the part of any Officer or member that would be prejudicial to the good order and discipline of the Fire District").

The Employer contends that it had just cause to suspend Grievant and to terminate his employment. The Employer insists that Grievant certainly merited discipline for reporting to work without a valid Ohio driver's license on October 2, 2003 and not immediately disclosing that fact to Management, given that his job performance responsibilities included driving Fire District vehicles as needed, and the Employer also insists that a one-day suspension neither violated the progressive discipline guidelines nor was disproportionate to his offense. The Employer denies that its decision to place Grievant on Administrative Leave with pay constituted discipline, or that it acted prematurely in doing so while it investigated the insurability issues that Grievant's misconduct presented as well as potential solutions to that problem. The Employer urges that Grievant's misconduct provided ample just cause for his discharge, too, under the express terms of the contract; it referred to Article 23.04-e-9, Article 23.03-B, Article 23.03-I, Article 23.04-e-15, Article 23.03-K, Article 23.04-e-6, Article 23.04-f and Article 23.04-e-17. The Employer further stresses that Grievant could not fulfill his job performance responsibilities once he was excluded as a covered person under the Fire District's fleet vehicle insurance policy, and that he was at fault for the conduct that prompted his exclusion from this necessary insurance coverage and would cause the Employer to be in violation of Article 38 if he was retained on the job without insurance. In its post-hearing brief the Employer cited arbitral authorities as well as Ohio statutes and numerous Ohio court opinions upholding employee discharges in arguably similar cases.

The Union maintains that the Employer lacked just cause to suspend Grievant, to place him on Administrative Leave or to terminate his employment. The Union insists that Grievant did not engage in neglect of duty on October 2, 2003; it claims that Grievant informed Management of the problem he had experienced with the Ohio Law Enforcement Officer earlier that same day promptly after he discussed the incident with the Local Union President and his personal attorney. He violated no rule or contract provision by informing the Fire Chief of the matter at 3:00 p.m. on October 2 rather than at some earlier time on October 2. The Union believes, too, that the Employer acted inconsistently with the contractual concept of progressive discipline by choosing to impose a one-day suspension on Grievant for this offense, rather than a written warning, in light of the fact that he had no prior disciplinary record. With regard to the Administrative Leave issue, the Union urges that such leave was similar to discipline and deprived Grievant of overtime opportunities and, in any event, should not have been imposed before the Employer conducted a full and complete inquiry. Finally, on the termination of Grievant's employment, the Union insists that the Employer must establish that it had just cause

under the contract for such action and that the Employer cannot simply rely on the Insurance Carrier's determination of Grievant's insurability status as justification for his termination. The Union stresses that there is no contract language that conditions an employee's continued employment on his/her insurability under the Employer's policy. The Union urges that it is the Employer's obligation, pursuant to Article 38, to provide insurance. It questions whether the Employer and/or the Insurance Agent did all that could be done to find a solution to Grievant's insurability problem, and it questions whether more than minimal concern over the insurance issue is warranted given the statutory immunity accorded the Fire District. The Union strenuously believes that the Employer owed Grievant greater consideration with respect to the insurability problem, and it urges that a reasonable accommodation short of termination was deserved and possible since the Insurance Carrier has concession criteria which would allow Grievant to resume his driving responsibilities with insurance coverage once his Reckless Operation offense is one year old (in October 2004).

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Grievant was issued a one-day suspension for having reported to work on October 2, 2003 without a valid Ohio driver's license and not immediately disclosing that fact to Management. It was established in evidence that, approximately five and one-half hours before Grievant reported to work on October 2, he was stopped by an Ohio Law Enforcement Officer and cited and his license was taken pending resolution of the charge(s) against him. It also was established that Grievant's Firefighter/Paramedic Job Description Performance Responsibility #1 required that he: "Must be able to drive and operate vehicles and equipment owned by the Fire District." Grievant did not advise the Fire Chief of his encounter with this Law Enforcement Officer until approximately seven hours after he reported for work on October 2. While Grievant offered an explanation for this delay in notifying Management of his encounter with the Officer, he is not found to have had justification for failing to more timely give such notice. And the hard fact remains that Grievant did not have a valid driver's license when he reported to work on October 2 and thus he could not legally "drive and operate" Fire District vehicles if needed that day. Grievant's misconduct in this regard was not insignificant, and the Employer's decision to give him a one-day suspension rather than some lesser measure of discipline is not found to have lacked just cause or to otherwise have violated Article 23. The grievance protesting Grievant's one-day suspension will be denied.

Grievant was placed on Administrative Leave, with pay, on October 13, 2003 while the Employer awaited notice from its Insurance Carrier as to whether Grievant's Reckless Operation offense -- to which Grievant entered a plea of guilty in court on October 8, 2003 -- would allow him to remain insurable under its fleet vehicle insurance policy. Assuming without deciding that Grievant's placement on Administrative Leave with pay should be viewed as disciplinary in nature, the Employer is determined to have had just cause to relieve Grievant from active duty on October 13 based on the facts and circumstances of this case. The Employer cannot be expected to allow its vehicles to be driven and operated by an individual who is excluded from coverage under its fleet vehicle insurance policy. And that determination stands, as a reasonable and practical matter, regardless of the fact that this contract does not contain express language requiring that an employee who must be able to drive and operate vehicles on his/her job must also be insurable for their performance of those duties. The Employer acted prudently and is found to have exhibited its good faith by paying Grievant while he was on this leave pending a final determination on his insurability. Notably, the Insurance Carrier did exclude Grievant from coverage effective October 14, 2003, and the Insurance Carrier retained this exclusion despite repeated efforts by the Employer and the Union to have it removed. The grievance protesting Grievant's placement on Administrative Leave with pay will be denied.

Grievant's employment was terminated on December 30, 2003. It seems clear on this record that the Employer was prompted to take this action by the Insurance Carrier's refusal to reconsider and change its decision to exclude Grievant from coverage under the Employer's fleet vehicle insurance policy. Had the Employer intended to discharge Grievant for his October 2003 Reckless Operation offense it presumably would not have waited until December 2003. Moreover, the Employer effectively disciplined Grievant for his October 2003 misconduct with the previous one-day suspension and, in this case, the Employer could not legitimately discipline him again for the same misconduct. The Employer understandably felt compelled to act in December 2003, though, because Grievant's misconduct had resulted in him becoming uninsurable to drive and operate its vehicles and there was no indication at the time that Grievant's exclusion would not remain in effect for 3 to 5 years. The Employer could not rationally permit Grievant to function as a Firefighter/Paramedic and be uninsured when driving and operating its vehicles, and there were no non-driving jobs to which Grievant could be demoted or reassigned. The Employer seems to have resisted taking the termination action against Grievant until it appeared to be the only option available. It is not clear, though, that the

Employer was aware until shortly before or at the arbitration hearing that the Insurance Carrier had "criteria for a concession" on a driver with a Reckless Operation that would allow insurance coverage for Grievant after his offense was one year old (assuming he fulfilled the other requirements for such a concession). And it was not established that the Employer would have been unwilling to accord Grievant this opportunity to satisfy the criteria for a concession and to make the termination decision contingent on his failure to meet the requirements for such a concession by October 14, 2004.

On the total record, it is found that just cause did not exist as of December 30, 2003 for the termination of Grievant's employment. The grievance protesting Grievant's termination will, therefore, be sustained to the following extent: The Employer will be directed to amend Grievant's records to reflect that he was relieved from duty pursuant to Article 23.04-a and placed on unpaid leave, rather than terminated, as of December 30, 2003 for misconduct that rendered him incapable of fulfilling a critical duty of his job, and that his employment status with the Fire District beyond October 14, 2004 was made contingent on him meeting the Insurance Carrier's criteria for a concession on a driver with a Reckless Operation offense by that date. If Grievant satisfies the Insurance Carrier's criteria for a concession on a driver who entered a guilty plea on a Reckless Operation charge and can then be approved for reinstatement under the Employer's insurance policy by October 15, 2004, the Employer is to reinstate Grievant to active employment with full seniority but without back pay or back benefits; however, if Grievant fails to satisfy the Insurance Carrier's criteria for such a concession and cannot be approved for reinstatement under the Employer's insurance policy by October 15, 2004, Grievant's employment status will be considered to have been terminated for just cause as of that date. The arbitrator will retain jurisdiction for the limited purpose of resolving any remedy-related issue(s) that the parties may be unable to settle.

AWARD

The case is resolved as set forth in the Opinion.


David A. Petersen, Arbitrator