

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF OSHKOSH

and

OSHKOSH CITY EMPLOYEE UNION, LOCAL NO. 796, AFSCME, AFL-CIO

Case 337
No. 61791
MA-12064

Appearances:

Mr. Richard C. Badger, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 2825, Appleton, WI 54913, on behalf of the Local Union.

Davis & Kuelthau, S.C., **Mr. William G. Bracken**, Employment Relations Services Coordinator, 219 Washington Avenue, P.O. Box 1278, Oshkosh, WI 54903-1278, on behalf of the City.

ARBITRATION AWARD

City of Oshkosh (City) and Oshkosh City Employee Union, Local No. 796, AFSCME, AFL-CIO (Union) are parties to a collective bargaining agreement covering 2001-03, which provides for final and binding arbitration of grievances. Pursuant to a joint request of the parties to the Wisconsin Employment Relations Commission, Sharon A. Gallagher was requested to hear and decide a dispute regarding the discharge of employee R.D. 1/ Hearing in the matter was held on November 21, 2002, at Oshkosh, Wisconsin. A stenographic transcript of the proceedings was made and received by December 10, 2002. The parties agreed to submit their initial post-hearing briefs directly to each other with a copy to the Arbitrator postmarked January 10, 2003. The parties reserved the right to file reply briefs and did so by February 24, 2003. The record was then closed.

1/ The initials of the Grievant will be used in this Award.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUES

The parties were unable to stipulate to an issue or issues before the Arbitrator. The City suggested the following issue:

Did the City discharge the Grievant, R.D., for cause when he had the passenger endorsement to his driving license revoked as a result of being convicted of driving under the influence of alcohol? If not, what is the remedy?

The Union suggested the following issues for determination:

1. Did the City violate the collective bargaining agreement when it terminated the Grievant? If so, what is the remedy?

2. Did the City violate the collective bargaining agreement when it refused to recognize the Grievant's bargaining unit seniority for the purpose of applying for vacant bargaining unit positions? If so, what is the remedy?

The parties stipulated that the Arbitrator could frame the issues based upon the relevant evidence and argument as well as their suggested issues. Based upon the above, the Arbitrator finds that the Union's issues more reasonably describe the dispute between the parties and they shall be determined herein.

RELEVANT CONTRACT PROVISIONS

ARTICLE VIII **SUSPENSION - DEMOTION - DISCHARGE**

Dismissal: No employee shall be discharged except for cause. An employee who is dismissed, except probationary and temporary employees, shall be given a written notice of the reasons for the action and a copy of the notice shall be made a part of the employees [sic] personal history record, and a copy sent to the Union. An employee who has been discharged may use the grievance procedure by giving written notice to the steward and the department head within five working days after dismissal. Such appeal will go directly to the appropriate step of the grievance procedure.

Usual Disciplinary Procedure: The progression of disciplinary action shall be oral reprimand, written reprimand, suspension, demotion and dismissal. The union shall also be furnished a copy of any written notice or reprimand, suspension or discharge. A written reprimand sustained in the grievance procedure or not contested shall be considered a valid warning. A warning shall be valid for a two (2) year period, provided no additional infractions occur. In the event additional infractions occur that violation and the original violation are in effect for three (3) years from the date of the second warning. After the above time periods have been met, evidence of the discipline shall be removed from all records. The employee and steward shall have the right to witness such removal.

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RELEVANT RULES AND REGULATIONS

SECTION 2

GENERAL RULES, REGULATIONS AND PROCEDURES

<u>Item #</u>	<u>Subject</u>
2.01	Personal Status
2.02	Licenses
2.03	Laws and Ordinances

...

2.01 PERSONAL STATUS

All employees must supply the office with their current address and telephone number. Any change in address or telephone number must be reported as soon as the change is made.

2.02 LICENSES

All operators must carry a valid commercial drivers license (CDL), with class b, c, d and p endorsements, while on duty.

It is the employee's responsibility to renew his/her commercial driver's license when due.

When a commercial driver's license has been refused, revoked, suspended, or lost, it must be reported to the Director immediately.

2.03 LAWS AND ORDINANCES

The operation of OTS equipment is governed by all traffic laws and regulations of the State of Wisconsin and all municipalities in which the OTS operates.

Employees are required to cooperate with law enforcement agencies and fire departments at all times.

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Violations which will subject employee to discipline procedures:

- 1) Valid customer complaints.
- 2) Improper operation of bus.
- 3) Cutting trips.
- 4) Absent without leave.
- 5) Voluntary neglect to collect fares.
- 6) Excessive absenteeism.
- 7) Passing up passengers.
- 8) Running off the fixed route.
- 9) Exchanging work without authorization.
- 10) Smoking on vehicles.
- 11) Littering.
- 12) Failure to turn in lost articles.
- 13) Running ahead of schedule.
- 14) Failure to notify the office of an accident.
- 15) Failure to make complete stop at railroad crossings.

Severe violations requiring special discipline:

- 1) Rear-end preventable accident.
- 2) Insubordination.
- 3) Conduct unbecoming a city employee.
- 4) Fighting on city property.
- 5) Stealing fares.
- 6) Padding overtime.
- 7) Stealing city property.
- 8) Physical aggression towards the public.
- 9) Allowing unauthorized person to drive OTS vehicle.

- 10) Driving without a proper license.
- 11) Failure to make an accident report/incident report.
- 12) Off route for personal business.
- 13) Sleeping while on duty.
- 14) Taking drugs or alcohol while on duty.
- 15) Reporting to duty under the influence of alcohol or illegal drugs.
- 16) Refusing to promptly take a drug and/or alcohol test when directed to do so by a supervisor.
- 17) Tampering with results of any drug and/or alcohol test.
- 18) Failure to cooperate with lab or medical personnel while undergoing drug or alcohol tests.

Because of the seriousness of some rule and conduct offenses, the four step procedure of discipline will not necessarily be followed. The degree of seriousness of each violation and the operator's past work record and years of service will have an effect on disciplinary action taken.

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FACTS

The Grievant, R.D., was employed by the City as a Transit Operator from October 12, 1999, until his discharge on June 24, 2002. R.D. did not have any prior disciplinary actions on his work record before he was discharged on June 24th. City officials stated herein that R.D. was a good Transit Operator prior to his discharge. The position description for the position R.D. held prior to his discharge reads in relevant part as follows:

TRANSIT OPERATOR

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GENERAL PURPOSE

Operates a public bus in the transportation of persons according to a predetermined route and timetable.

SUPERVISION RECEIVED

Works under close supervision of the Transportation Supervisor and Transit Coordinator.

SUPERVISION EXERCISED

Maintains order on board city bus.

ESSENTIAL DUTIES AND RESPONSIBILITIES

The following duties are normal for this position. These are not to be construed as exclusive or all inclusive. Other duties may be required and assigned.

Operates a large passenger vehicle in moderate to heavy traffic.

Collects fares.

Issues and collects transfers.

Boards and discharges passengers at established stops.

Loads and secures wheelchair bound passengers at established stops.

Gives clear and detailed directions to passengers in response to questions.

Maintains order in the vehicle and at the transit center.

Prepares clear and detailed written reports.

Follows all safety practices and standards.

Performs related work as required.

PERIPHERAL DUTIES

May serve as member of various employee committees.

DESIRED MINIMUM QUALIFICATIONS

Education and Experience:

- (A) Graduation from high school diploma or GED equivalent.
- (B) Previous driving experience with buses or trucks.
- (C) Any equivalent combination of education and experience.
- (D) Ability to work flexible work schedules involving split shifts.
- (E) Successful completion of bus operator exams.

NECESSARY KNOWLEDGE, SKILLS AND ABILITIES

Working knowledge of public bus operations and minor maintenance repairs.

Working knowledge of defensive driving techniques.

Working knowledge of motor vehicle laws.

Knowledge in the use and operation of radio communications systems.

Working knowledge of work hazards and safe driving techniques.

Working knowledge of first aid techniques.

Ability to operate a large transit vehicle on schedule and in all weather conditions.

Ability to cope with stress, make independent decisions and exercise sound judgement in stressful or emergency situations.

Ability to withstand local weather conditions.

Ability to pass the pre-employment physical and drug screen.

Ability to maintain effective relationships with other employees and the public and to deal with the public in a courteous and tactful manner.

Ability to comply with the City Drug and Alcohol Policy.

Ability to effectively deal with ADA service requirements in a safe effective manner.

Reliability in attendance and promptness in reporting to work.

Ability to follow oral and written instructions.

SPECIAL REQUIREMENTS

Valid Commercial Drivers License, (Class BDC), with passenger and air brake endorsements.

Good driving record.

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The other Transit Division positions, Transit Mechanic, Service Technician and Transit Operator/Mechanic all require a valid CDL with passenger and air brake endorsements and a good driving record. 2/

2/ The City's Transportation Department includes the Transit Division, Sign Division, Electric Division and also a Street Lighting Division, all under the direction of Transportation Director Mark Huddleston, who has been Director of this department for past 25 years.

Prior to his hire in October of 1999, R.D. was arrested for Operating While Intoxicated (OWI) on December 5, 1992. He was convicted of this offense on January 16, 1993, and his license was suspended for seven months. On October 2, 1993, R.D. was again arrested for OWI. He was convicted and sentenced on November 9, 1993, for this incident. R.D. appears to have paid only a \$500 fine and to have spent ten days in jail for this second OWI.

On his City employment application, question 15 asked R.D. "have you ever had your license suspended?" to which R.D. responded "yes." In response to the question "when and for what reason?" R.D. responded "OWI-1994." At the instant hearing, R.D. stated that he had been mistaken about the date in writing the 1994 reference on his employment application, that the suspension had occurred in 1993.

Transit Supervisor Thomas Hansen stated that as is his normal procedure, in late November of 2000, he requested that the Department of Transportation run a license check on R.D., as well as all other City Bus drivers and that this check indicated the above-described two prior OWI's. At that time, the City did not counsel or discipline R.D. concerning his driving record or his failure to disclose his complete driving record on his employment application. The City merely put a copy of the DOT document in his personnel file.

On November 29, 2001, R.D. was arrested for OWI. That morning, after his arrest, R.D. called Supervisor Hansen and told Hansen he had been arrested for OWI that night and that he could not drive his normal p.m. route that day. 3/ At this time, Hansen asked R.D. if he was going to resign because R.D. would be terminated following his conviction. R.D. did not respond.

3/ During his employment with the City, R.D. drove a City Bus Monday through Saturday, 12:15 p.m. to 6:24 p.m. each work day.

On November 30, 2001, R.D. had procured a 30-day temporary license (with a passenger endorsement) under which he could drive a City Bus. That license was to expire on December 28, 2001. R.D. drove a City Bus on his regular work schedule from October 30 until December 29, at which time he took a sick day. Between December 31, 2001, and January 15, 2002, R.D. took either sick leave, floating holiday or vacation time off and did not drive a City Bus.

On January 16, 2002, R.D. took leave without pay and went to the Department of Motor Vehicles where he procured an Occupational License which included a passenger endorsement and which was good from January 16 through July 2, 2002. Between January 16 and June 9, 2002, R.D. drove his regular bus routes for the City.

On June 10, 2002, R.D. was scheduled in court on his OWI charge for the incident which had occurred November 29, 2001. On June 10th, R.D. took a floating holiday to be present in court. That day, R.D. was represented by Attorney Robert Vander Loop at his hearing before Judge Carver. At this time, R.D. did not contest his third conviction for OWI. Although R.D. was convicted on June 10th, all parties agreed that R.D.'s license revocation would not be reported out by the State until June 21, 2002. Attorney Vander Loop submitted a written statement by stipulation herein in which he confirmed that license revocation was withheld in R.D.'s case,

. . . to allow time for D. to secure an occupational license on his CDL and also to find another job at the City of Oshkosh where the P endorsement would not be necessary. This was done because the State of Wisconsin has been telling us up until June 10th that D. would be able to continue with this P endorsement, but then suddenly indicated there was federal law recently passed that would not allow this to happen. . . .

Immediately following his court proceedings on June 10th, R.D. received a "Court Order of Revocation/Suspension" signed by the Clerk of Court, which indicated that R.D.'s license was revoked effective June 10, 2002 for a two year period. This document also indicated that R.D. would have to serve a 45-day jail term in connection with his OWI conviction; that he had been advised of and had waived his rights regarding his conviction; that he had been convicted of OWI; and that he had to pay \$1,184 in fines and costs. The document also showed that he would have to go to AODA assessment and treatment as well as counseling and that an ignition interlock would be placed on his vehicle. The document also stated that R.D.'s conviction report would be "withheld" until June 21, 2002. On June 10th, R.D. was also issued a document entitled "Judgment of Conviction and Sentence to the County Jail/Fine/Forfeiture" which essentially confirmed the above information.

It should be noted that R.D. worked for the City as a Bus Driver from June 11 through June 22, 2002, without speaking to any of his supervisors concerning his OWI conviction. Indeed, R.D. admitted that he never tried to contact City supervisors and made no effort to contact the Department after he received his Court Order of Revocation/Suspension from the Clerk of Courts indicating that this license would be revoked for two years effective June 10, 2002, but that his conviction would be withheld until June 21st.

On Monday, June 24, 2002, Supervisor Hansen heard rumors that R.D.'s license had been revoked and that he was driving without proper endorsements or a proper license. Hansen then called the City Attorney's office and spoke with an Assistant City Attorney asking her to get information regarding the status of R.D.'s license. The Assistant City Attorney checked R.D.'s license and told Hansen that R.D.'s license had been revoked on June 10, 2002. Hansen asked the Assistant City Attorney to fax him documentary proof of this fact. The Assistant City Attorney then sent Hansen a copy of the Consolidated Court Automation

Program (CCAP) Circuit Court Report regarding the status of R.D.'s license, which showed that he had had a third incident of OWI on November 29, 2001, and that he had been sentenced and convicted on June 10, 2002, having plead guilty/no contest before Judge Carver on June 10th when he received a sentence of 45 days in jail, an ignition interlock and a license revocation for a two-year period from the sentence date, June 10, 2002, as well as a fine of \$1,184. Nowhere on this CCAP did it indicate that R.D.'s license revocation had been withheld until June 21, 2002, by agreement.

Later on the morning of June 24th, R.D. called Hansen and told him he could not drive for the City. Hansen said that he had already found out that R.D. did not have a valid driver's license and that the City was terminating R.D. from his employment. R.D. responded, "Okay." Hansen then asked R.D. to turn in his gear. R.D. stated herein that after this conversation with Hansen, he went down to the Department of Motor Vehicles and applied for an occupational license. He received an occupational license on June 24th but it did not have a passenger endorsement. That license was valid for the period June 24, 2002, through January 2, 2003.

R.D. stated herein that he received the following formal notice of his license revocation from the Wisconsin Department of Transportation by regular mail (which arrives at his home in the afternoon) on Saturday, June 22, 2002, after he drove his regular City bus route, 12:15 to 6:24 p.m. that day:

. . .

Your privilege to drive a motor vehicle is revoked.

- Effective June 10, 2002
- Time Period: 2 Years reduced to 567 day(s) for the time already served
- Reason: Operating while intoxicated
- Convicting Court: Winnebago County Circuit Court Br 5
- Court Telephone No: (920)236-4855

If you have any questions about the violation, contact the convicting court.

You may be eligible for reinstatement on December 30, 2003.

If you have other revocations or suspensions, your actual reinstatement date may be later.

Please see the back of this letter for reinstatement requirements and other licensing information.

Important Information For You

Do not drive until you reinstate and you have a valid license in your possession.

A court order which vacates, appeals or reopens the conviction(s) referred to in this letter may change the status of this withdrawal.

The penalty for driving while suspended or revoked may include jail time and a fine up to \$5000.

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Occupational License Information

You may be eligible for an occupational license. Complete an application at any DMV Service Center, except express offices. If your operating privilege is also revoked as a Habitual Traffic Offender, file a petition with a circuit court in your county of residence. A \$40 nonrefundable fee and SR22 insurance certificate are required. Applying does not guarantee issuance of an occupational license.

R.D. stated herein that he believed his license was not revoked until he received the above document and that he had the right to drive a City Bus until he received the above document. R.D. admitted, however, that on June 10th he knew that the above-quoted DOT document was going to be sent to him, yet he continued to work for the City and said nothing to City supervisors about the fact that his license would be revoked; and that because his sentence had been withheld until June 21, he knew that he would not be able to drive a City Bus after sentence was imposed by his receipt of the above DOT document.

On June 25, 2002, Transportation Supervisor Hansen sent the following letter of termination to R.D.:

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It has come to my attention that your commercial drivers license (CDL) with passenger endorsement has been revoked on 6-10-2002 for a period of two years (Wisconsin Circuit Court Case 01CT001160, filed 12-28-2001).

One of the conditions of your employment as a Transit Operator is that you must carry a valid CDL, with class b, d [sic], d, and p endorsements (Rule #2.02). Therefore, you are terminated from employment with Oshkosh Transit.

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Hansen stated herein that the reason he terminated R.D. was because R.D. should have notified him on June 10th when his license was revoked and because R.D. violated Section 2.02, paragraphs 1 and 3 of the Rules and Regulations of the Transit Division.

stated herein that he was unaware that R.D.'s license revocation and conviction had been withheld until June 21, 2002, when he terminated R.D. Transportation Director Huddleston admitted he had never heard of withholding a conviction report as was done in R.D.'s OWI case, which would allow the convicted person to continue operating motor vehicles prior to the imposition of their sentence.

The Union asserted herein that R.D. had been treated unfairly compared to prior cases of the same type and that based on past practice, the City had an obligation to allow R.D. to use his City seniority to get a new City job after he had been terminated from City employment. On this point, the Union offered the following prior cases between the Union and the City. The first case concerned a prior Transit Operator J.S. 4/ J.S. had his license revoked after an OWI incident in 1997. J.S. went to the City before his license was revoked and requested leave without pay as well as an accommodation by the City to apply for other City jobs where he would not need a driver's license with a passenger endorsement. The City agreed to this approach and entered into two written agreements with J.S., both of which contained the following language:

It is further agreed between the parties that this action is in no way meant to establish a precedent to be used for this or other positions in the future.

In these agreements, the City agreed to place J.S. on leave without pay status for a period of up to six months, during which time J.S. would have the right apply for other positions in the City for which he was qualified. J.S. was also responsible to pay for the cost of continuing any benefits during his leave without pay. Also, the City agreed to allow J.S. to work as a seasonal employee and receive the same hourly rate and benefits as other seasonal employees as of April 2, 1997.

4/ The City employees described in this section will not be named, although their initials will be used herein.

The City argued that in the case of J.S., the agreement regarding his treatment by the City following his OWI conviction and license revocation were not precedent setting and should not be allowed into the record in this case nor should they be considered as a part of any "past practice" argued by the Union. The City also stated that J.S. approached City Managers before his license was revoked and requested accommodation.

Another case concerned Transit Operator R.M. and occurred between eight and ten years ago. Union President Vienola stated that he believed that R.M. had been involved in a Worker's Compensation case, that R.M. lost his driver's license and could no longer drive a bus and that the City had accommodated R.M. by allowing him to use his seniority to get a

position in the Sign Division of the Transportation Department where he would no longer need a license with a passenger endorsement. The City provided evidence to show that R.M. had had no passenger endorsement problems. Rather, the City had encouraged R.M. to take the Sign Division position because he was having problems interacting with bus passengers. R.M. met the qualifications for the Sign Division job, used his seniority and transferred to the Sign Division job.

Employee J.G. had posted into an Operator III position in the Streets Department and had worked in that position for between one and two years, certainly longer than his probationary period in that job. The Union stated herein that the City decided to demote J.G. to his prior position of Operator II and that J.G. did not resist this action by the City. The Union asserted that J.G. lost no seniority after his demotion. City witness Yvonne Molinski, a personnel assistant for the past 21 years at the City, stated that J.G. had himself decided that he could not handle the Equipment Operator III position and that the City had allowed him to return to his Equipment Operator II job even though he had already completed his probationary period in the Operator III job and would have had no right to return to his prior position. J.G. had had no problems with his CDL.

Employee J.K. was a Transit Mechanic with the City when he had an incident of OWI approximately three years ago and lost his passenger endorsement. The Union asserted that the City accommodated J.K. by allowing him to keep his Transit Mechanic position and that he in fact drove buses from time to time even after his license and passenger endorsement were revoked. The City stated herein that regarding the Transit Mechanic position, driving a bus is a non-essential part of this job and when J.K. lost his passenger endorsement for two years, it was not a problem for him to continue doing his mechanic work, as he merely had to road test buses after he fixed them. The City did admit that J.K. occasionally drove a City bus route in emergency situations when there was no one else to perform the work. The City stated that J.K. drove passenger buses for the City during the two-year period of his license revocation perhaps for about 1% of his work time.

Approximately two years ago, employee D.V. was arrested for OWI and lost his license for at least 60 days. He was then an Electrician for the City. The Union stated that the City accommodated D.V. by having another employee drive him around and that D.V. was allowed to keep his job without any penalty. City witnesses indicated that D.V. lost his license for 30 days; that D.V. did not need a passenger endorsement on his CDL; and that he normally worked with a partner who was able to drive D.V. whenever the need arose during his City employment.

The last case concerned employee C.B., a Transit Operator who is still employed by the City. In May of 2002, upon arrival at work, C.B. underwent random drug testing under the City's drug and alcohol policy and tested positive for one of the prohibited drugs. The Oshkosh Transit System Drug and Alcohol testing policy was placed into effect on May 8, 2001. It provides as follows when an employee tests positive for a first incident:

VI. REQUIRED TESTING SITUATIONS AND PROCEDURES

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C. **Random Testing** - All employees in safety-sensitive positions will be subject to random testing. The testing may be conducted immediately before, during or immediately after the performing of the employee's safety-sensitive duties. Employees of Oshkosh Transit and other employers who contract with Oshkosh Transit will be placed in a pool of employees subject to testing. The individuals who will be tested will be selected from a pool of employees subject to testing. The testing dates and times will be unannounced and will occur with random frequency throughout the year. Random alcohol tests will equal 25 percent of all employees in the testing pool; drug tests will be 50 percent of employees in the pool. These testing levels are base upon Federal Transit Administration requirements. Testing levels will change if required Federal Transit Administration Testing levels change.

Occupational Health Systems will select employees for random testing using a scientifically valid method of random number generation. The method will consist of computer based random number generation which will match with individual's Social Security numbers. **All employees will have an equal possibility of being selected on each occasion that selections are made.** Hence, some employees will be required to take more than one test during a year, while others will not be tested at all during a year.

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VIII. DRUG TESTING PROCEDURES

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C. RESULTS OF A POSITIVE DRUG TEST

This procedure applies only for the first positive alcohol or drug test within a thirty six-month period. If a drug test is determined to be positive and the split test process has been completed or waived, the following actions will occur.

1. The employee will be immediately removed from any safety-sensitive position pending the determination of the Medical Review Officer regarding the drug test results.
2. The employee will be directed to meet with a Medical Review Officer to determine if the positive test resulted from the authorized use of a controlled

- substance. If the Medical Review Officer determines that the positive test result occurred as a result of authorized use of a controlled substance, the results of the test will be cancelled. A determination that the positive test result is not the result of an authorized use of a controlled substance will fully validate the results of the positive test and further action will proceed.
3. The employee will be subject to immediate termination **UNLESS** he/she agrees to enter into a last chance agreement involving mandatory completion of a Substance Abuse Treatment Program as deemed appropriate for the individual by the Substance Abuse Professional (SAP). A referral to the SAP will take place regardless of disciplinary action brought against the employee.
 4. The Substance Abuse Professional will develop the appropriate treatment program. The employee will be required to fully follow the designated treatment program.
 5. The Substance Abuse Professional will determine when the employee is ready to return to work. They will forward that written authorization to the Medical Review Officer and the Oshkosh Transit Drug/Alcohol Coordinator.
 6. The employee will be able to return to work after receipt by the employer and Medical Review Officer of a negative drug and alcohol test result in their return to work tests. They will be subject to a minimum of six random follow-up drug and alcohol tests in the next twelve months.

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Following this employees' first positive test, the Union and the City entered into an agreement whereby the employee was suspended for 30 days without pay and returned to work after having signed a last-chance agreement and having received AODA treatment at the employee's cost. No grievance was filed regarding this incident.

Union President Keith Vienola, who provided the past practice evidence from the Union perspective, has worked for the City for the past 30 years and has held union office for approximately 12 of those years, the last 6 years as Union President. Mr. Vienola asserted herein that the City has always accommodated employees who have drivers licensing problems prior to the R.D. case. Vienola stated that R.D. was treated differently from the beginning of his case; that R.D. was not provided a pre-disciplinary meeting with the City in order to determine whether his behavior could be corrected by discipline; and that the City violated its own personnel policy manual by its treatment of R.D. at Chapter 1, Section 3, which reads as follows:

SECTION 3. AFFIRMATIVE ACTION.

In order to implement the aforementioned policy of Equal Opportunity, and to correct effects of past inequalities, the City reaffirms its commitment to Affirmative Action.

The goal of the Affirmative Action plan for the City is to establish the necessary steps for insuring equal employment opportunity for all persons. It is further recognized that implementation of this policy is the active responsibility of managerial personnel to assure everyone is afforded equal treatment regardless of race, creed, color, sex, national origin, economic status, age, handicap or marital status, or other criteria protected by equal opportunity laws.

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POSITIONS OF THE PARTIES

The City

The City argued that it did not violate the labor agreement when it discharged the Grievant. In this regard, the City noted that the contract requires just cause for discharge, but that just cause is not defined in the labor agreement. Under the facts of this case, there is no question that R.D. was convicted and lost his "P" endorsement for a period of two years and there is no question that he therefore could not perform the necessary job duties of a Transit Operator after his license was revoked. The City noted further that City Policy 2.2 required R.D. to have a commercial drivers license (CDL) with a "P" endorsement and that when an employee's "CDL has been refused, revoked, suspended or lost, it must be reported to the Director (of the transit division) immediately." Furthermore, the City argued that the Grievant misled the City on his employment application when he failed to disclose two OWI's prior to his hire by the City as a Transit Operator. This alone, the City argued, would have given it just cause to discharge the Grievant. In addition, the City argued that because the Grievant's convictions substantially relate to his position as a Transit Operator, it is not unreasonable to conclude that R.D. might drive a bus under the influence of alcohol and put the City at additional risk for liability. The City urged that it should not have to bear such heavy risks of loss.

The City argued that the Grievant failed to timely notify it of the revocation of his license/P endorsement after his conviction on June 10, 2002. In this regard, the City noted that on June 10th, R.D. received a paper essentially saying that his CDL was revoked as of that date. Yet, R.D. did not notify the City or even attempt to notify the City of this circumstance. Rather, R.D. drove his City bus between June 10th and through Saturday, June 22nd. Had any accidents occurred during this period of time, the City pointed out, that it would have been

liable because R.D. had already lost his P endorsement and his CDL on June 10th. Thus, the Grievant's actions in continuing to drive and failing to notify the City of the loss of his license further support the City's decision to discharge him.

The City argued that the Arbitrator should not substitute her judgment regarding the penalty in this case for that of the employer, where as here the City was not arbitrary, capricious, discriminatory or unfair in imposing the discharge penalty upon the Grievant. In this regard, the City noted that R.D.'s conduct was extremely serious and that it had in fact previously terminated a Fire Department employee because he could not perform the essential duties of his job due to his becoming sick from the motion of the emergency vehicle each time he went to work.

Furthermore, the City argued that it has not violated the contract by refusing to give R.D. preferential treatment for vacant City positions. On this point, the City argued that the Union had failed to prove a clear past practice of allowing employees who lose the qualifications for their positions to gain preferential treatment for other vacant positions in the City. Regarding the J.S. case, the City urged that the fact situation and the settlement in that case cannot be used in any way as a precedent in any other case due to the specific language of the documents which the parties signed in support of that settlement.

In regard to the other cases, the City urged that these involved distinct factual situations that were not applicable to this case. In regard to Transit Operator R.M., the City noted that R.M. had had problems with job performance, specifically passenger interaction, and that the City encouraged him to post into another position. Concerning J.G.'s case, the City noted that J.G. did not lose his P endorsement and that he was essentially demoted from an Operator III to an Operator II job for job performance problems. Concerning the J.K. situation, although J.K. was a mechanic in the Transit Division and lost his P endorsement for two years due to an OWI, driving a bus was not an essential function of his mechanic position and he was allowed to remain in his mechanic position because of this fact. Concerning the D.V. case, the City noted that D.V. was an Electrician who lost his license for an OWI off-duty and that again, D.V.'s position did not require him to drive as an essential function of his position and that D.V. did not need a P endorsement to retain his position at the City.

The City argued that even if the Arbitrator finds that a past practice of accommodation exists, the City is not responsible to extend that past practice to the Grievant given the facts of his case. Furthermore, no contract language supports the Union regarding its argument that R.D. should have been allowed to use his seniority, despite his termination, to post into open City positions. In all the circumstances, the City urged that the grievance be denied and dismissed in its entirety.

The Union

The Union argued that the City had treated R.D. unfairly in terminating him and that it also treated him unfairly by refusing to accommodate him as the City had done with other employees in similar situations who had drug and alcohol problems. In this regard, the Union

urged that R.D. should not have been terminated because his off-duty problems did not affect his work performance. The Union urged that R.D. did keep the City abreast of his driver licensing problem and that he did not hide his situation. However, R.D. did base his actions on what his attorney, the Judge and the Court told him. Indeed, R.D. believed that his license would not be revoked until he received the DOT Letter of Revocation (Joint Exhibit 21) and the Union noted that R.D. did not drive a bus after he received that document. In these circumstances, the Union urged that the City had acted arbitrarily and capriciously in discharging R.D.

The Union contended that other employees, including one who had reported to work on drugs, had received less severe punishments than R.D. In this regard, the Union noted that in the past, the Employer has accommodated “drug addicts, alcoholics and even employees who could not handle critical parts of their job.” In these circumstances, the Union urged that the City has given its employees the “realistic expectation” that the City will work with the Union and employees to find an accommodation in these kinds of situations.

The Union noted particularly the C.B. case, which it felt demonstrated that R.D. was treated disparately. In C.B.’s case, C.B. reported to work as a Transit Operator under the influence of drugs and only because the City conducted a random drug test on C.B. did the City find out that C.B. was then under the influence. In that case, the City allowed C.B. to take a suspension, to enter into a last chance agreement and to attend drug counseling in order to retain City employment. The Union noted that the City did not offer R.D. such accommodations.

If the Arbitrator finds that the loss of R.D.’s P endorsement is cause for his discharge, the Union urged that R.D.’s “seniority should not have been discounted.” In this regard, the Union noted that R.D. should have been allowed to take one of the ten openings that were available during the Summer of 2002 after his discharge, if he proved qualified, and that R.D. would have likely received a position had the City allowed him to use his seniority to gain such a position. Therefore, the Union asked that R.D. receive back pay from the date a job he is found qualified for was filled from the outside and that the Arbitrator place R.D. in that job.

In sum, the Union urged that other City employees were offered accommodations and were “not expected to grovel for their jobs.” Here, the City treated R.D. differently and made no offer of accommodation and gave him no pre-disciplinary hearing, as was the Personnel Director’s practice. In these circumstances, the Union urged that the grievance be sustained and the Grievant be made whole.

Reply Briefs

The City

The City argued that there was no dispute that R.D. lost his license and “p” endorsement and therefore no longer had the necessary qualifications to be employed as a Transit Operator by the City, giving the City no alternative but to discharge him. The City

noted that it had made an error in stating that R.D. had been convicted of OWI three times in the past five years, noting that R.D.'s convictions were three OWI convictions since 1993. The City resisted the Union's arguments that R.D. should be given preferential treatment for any openings at the City by allowing him to use his seniority to apply for these, as follows. The examples cited by the Union of transfers and reassignments, the City noted, all occurred by mutual agreement of the employee, Union and City prior to the discharge or any adverse action against the employee. In addition, the City argued that the Union's examples of a "past practice" were distinguishable on their facts, showing that there was no proven practice to guarantee employment to employees in a situation like R.D.'s. In all the circumstances, the City urged the Arbitrator to deny the grievance in its entirety.

The Union

The Union argued that the facts clearly showed the R.D. kept his supervisors informed of his driver license status; that he did not drive a bus after revocation; that R.D. had a good work record at the City; and that the City hired R.D. knowing he had an OWI in 1993. Thus, the Union urged that the Grievant had been straight forward with the City in all respects. The fact that the Grievant did not tell the City that he could not drive until June 24th was because the Grievant had been misled to believe that he could get a license with a "p" endorsement on June 24th. The Union noted that R.D. notified the City immediately when he discovered that he could not get a license with a "p" endorsement on June 24th.

The Union urged the Arbitrator to look at R.D.'s testimony and his employment application and she would conclude that the Grievant had not misled the City on his employment application regarding his OWI in 1993. In this regard, the Union noted that the application did not ask the appropriate question to get the answer that the City was looking for. In any event, the City was aware of R.D.'s OWI conviction and it was not prejudiced thereby.

The Union argued that the Grievant's conduct does not warrant discharge. On this point, the Union noted that R.D. only received official notice of the revocation of his license on Saturday, June 22nd, and that he did not drive a City Bus thereafter. The City's claim that it was subjected to additional legal liability is therefore not supported by the record. The Union found inapposite the Fire Department employee case noted by the City at hearing. In this regard, the Union noted there was no evidence in the record to show that the Fire Department employee had just cause in his labor agreement. The Union also argued that there were no jobs in the Fire Department where motion sickness would be allowable for a line employee. In this bargaining unit, however, there are 100+ positions and many of these positions do not require a "p" endorsement. Therefore, the City had alternatives and did not have to terminate R.D.

The City violated the contract and past practice when it denied R.D. preferential treatment for job openings. In this regard, the Union noted that prior cases show that the City went to great lengths to retain employees who were in similar or worse situations than R.D.

Thus, the Union urged that the City abused its discretion by treating R.D. worse than others the City had accommodated in the past and the Arbitrator should step in in this case to remedy the situation. In addition, the Union noted that the City gave no examples of employees who had been treated as harshly as R.D. was treated. Thus, the Union queried if the “p” endorsement is a requirement, why would the City allow a mechanic to keep his job and terminate R.D.; why would the City discharge R.D. for off-duty conduct and retain an employee that reported to work high on drugs; how can the City justify driving an employee who lost his license around for over one month and encouraging another Transit Operator to post into another position because he had problems being polite to passengers and yet terminate R.D.

As there was no just cause for the termination of R.D., the Union sought reinstatement for R.D. but noted that if the Arbitrator finds that the loss of R.D.’s license and “p” endorsement requires his termination, that R.D. should be allowed to use his seniority to apply “retroactively” for vacant positions for which he is qualified.

DISCUSSION

The record in this case demonstrates that from October, 1999, when he was hired as a City Transit Operator until his discharge in June, 2002, R.D. had never been disciplined by the City. R.D. had a good work record. R.D.’s discharge was essentially caused by his own off-duty conduct which resulted in the loss of the “p” endorsement on his CDL. However, the facts of this case do not support a conclusion that because of his alcohol problem, R.D. was likely to or had ever in fact driven a City Bus under the influence. On this point, I note that no evidence was presented to show that R.D. ever drove his bus under the influence while employed by the City.

Also, although R.D. waived all rights and accepted his conviction for his third OWI on June 10, 2002, sentencing was clearly withheld by the Court until June 21, 2002. This fact is supported by evidence that showed that R.D. was unable to get a replacement license until after June 22nd, as his original license had not been revoked. In addition, the formal notice from the Wisconsin Department of Transportation was dated June 21, 2002, and was effective upon receipt. The fact that this notice indicated that R.D.’s license had been revoked “effective June 10, 2002,” does not necessarily mean that R.D. drove without a license between June 10th and June 22nd. Rather, the effective date of revocation appears to have been important for purposes of calculating when R.D. could re-apply for a new (unrestricted) license. Thus, although R.D. drove his regular City Bus route from June 10th through June 22nd, he neither intended nor did he drive that bus without a valid license and “p” endorsement.

It is also absolutely clear that R.D.’s Transit Operator position required him to maintain a valid driver’s license with a “p” endorsement. As of June 22, 2002, when he received the DOT notice of revocation, R.D. no longer had a valid driver’s license with a passenger endorsement. Thus, whether R.D. had a good work record or not, the question arises whether

the City had any responsibility to continue to employ him after R.D. lost his driver's license and "p" endorsement as of June 22nd. In addition, another question remains whether the City had any responsibility to transfer R.D. or allow him to use his City seniority to post into vacant City positions, following his discharge for his failure to maintain a valid license and "p" endorsement.

Initially, I note that in regard to the latter question, there are no provisions of the labor agreement which require the City to give R.D. any such preferential treatment. The Union has argued in this case that there is a long-standing past practice whereby the City has consistently accommodated employees who have had alcohol and drug related problems by allowing them to transfer out of their positions or post into other City jobs using their seniority in order to avoid a discharge. In regard to Transit Operator J.S.'s case, I note that the documents surrounding the settlement of that case clearly indicate that the parties intended the settlement therein not to set a precedent "to be used for this or other positions in the future." Therefore, the J.S. example cannot be used in this case as a basis for an alleged past practice and I have disregarded it.

In to regard the other examples of accommodations which the Union submitted, I note that these cases were distinguishable on their facts. For example, the case of Operator III, J.G., did not involve any problems with J.G.'s CDL. Rather, the City either accommodated J.G.'s request to return to his former position of Equipment Operator II after he had passed his probationary period in an Operator III position or it demoted J.G. 5/ In regard to Electrician D.V., although D.V. was arrested for OWI and lost his license for at least 60 days, as an Electrician, he did not need a passenger endorsement to perform his electrician duties and he worked with a partner who could drive him while he was on duty for the City. Thus, D.V. did not become disqualified to perform his City position by being convicted of OWI. In regard to Transit Mechanic J.K., I note that although he had one incident of OWI and lost his passenger endorsement, his job as a Mechanic did not require him to regularly drive a City Bus and driving a bus was a non-essential part of his mechanic job. In regard to Transit Operator R.M., R.M. was not shown to have had any difficulty with his passenger endorsement. The fact that the City encouraged R.M. to transfer to a Sign Division position because he could not properly interact with bus passengers, supports a conclusion that R.M.'s case is distinguishable from R.D.'s. Finally, the case of Transit Operator C.B. who tested positive for drugs in a random drug and alcohol test at work, is also distinguishable as C.B.'s situation was covered by the Drug and Alcohol Testing Policy, in effect in the City in May of 2001. There, according to Section VII, C3 of the Drug and Alcohol Policy, C.B. agreed to a last change agreement involving mandatory completion of substance abuse treatment as well as an unpaid suspension in order to retain her position.

5/ I need not determine the reason why J.G. returned to his Operator II position in this case.

Thus, the only case that would have truly supported the Union's past practice argument herein was the case of J.S., which the parties agreed should not set a precedent. One prior case is insufficient to establish a true past practice. In addition, I note that in each situation, the involved employees had asked City Managers for accommodations or assistance in dealing with their problems prior to their discharge or discipline. Significantly, R.D. did not approach either the Union or City supervision in advance of his license revocation in order to request any kind of special treatment or accommodation.

The bottom line in this case is that on June 24th, R.D. no longer had a valid driver's license with passenger endorsement and he was unable obtain a license with a passenger endorsement on or after June 24th. 6/ As the City's termination letter clearly stated that the reason for his termination was because R.D. lacked a necessary qualification for the job – a valid driver's license with passenger endorsement – the City had a valid basis to discharge R.D. 7/ Although R.D. was a good Transit Operator, he had a relatively short tenure with the City and he failed to go to his Union or to City Managers to request assistance with his driver's licensing problem prior to his discharge. There is simply no remedy that the Arbitrator could properly craft for R.D. in this situation because the contract is silent thereon and the Union failed to prove a clear, long-standing, mutually agreed-upon past practice to support the unusual remedy it has requested.

6/ The City argued that R.D. had lied on his employment application when he listed only one OWI in 1994. Technically speaking, R.D. had already received two OWI license revocations by 1994 and he should have revealed both of them on his application. However, I note that Transit Supervisor Hansen became aware of both prior OWI's in November, 2002, when he requested a routine Department of Transportation license check on R.D. As Hansen failed to take any action against R.D. regarding his failure to disclose both OWI's on his employment application following Hansen's discovery thereof and because the termination letter did not list R.D.'s failure to disclose full information on his employment application as a reason for discharge, I find this issue irrelevant to this proceeding.

7/ The fact that the City was wrong in its apparent assumption that R.D. had driven a City Bus after license revocation on June 10, 2002, does not detract from the above conclusion.

Union President Vienola stated that Chapter 1, Section 3 of the City's Personnel Policy should have protected R.D. The Arbitrator believes that there is absolutely no basis upon which to apply this provision of the City's Personnel Policy manual based on the facts of this case. Chapter 1, Section 3 of the City's Personnel Policy was intended to be applied to specific classes of people protected under "equal opportunity laws." R.D. was not a member of such a class based on the evidence proffered herein. Finally, the Union argued that R.D. should have been afforded a pre-disciplinary hearing with the City Personnel Director. I note that the labor agreement does not require such a hearing. In any event, R.D. had not engaged in any on-the-job misconduct and he could not have been disciplined with any hope of improving his behavior as he could no longer perform the essential functions of his job after he lost his "p" endorsement. Thus, the purpose for such a pre-disciplinary hearing was lacking.

Based upon all of the relevant evidence and argument in this case, I issue the following

AWARD

The City did not violate the collective bargaining agreement when it terminated the Grievant. The City did not violate the collective bargaining agreement when it refused to recognize the Grievant's bargaining unit seniority for purposes of applying for vacant bargaining unit positions after his termination. Therefore, the grievance is denied and dismissed in its entirety.

Dated at Oshkosh, Wisconsin, this 25th day of March, 2003.

Sharon A. Gallagher /s/

Sharon A. Gallagher, Arbitrator