IN THE MATTER OF THE ARBITRATION	)	ARBITRATOR'S
	)	
BETWEEN	)	OPINION
	)	
MULTNOMAH COUNTY, OREGON	)	AND
	)	
"MULTNOMAH COUNTY" OR "THE COUNTY"	)	AWARD
	)	
AND	)	
	)	
OREGON AFSCME COUNCIL 75 LOCAL 88	)	
	)	
"LOCAL 88" OR "THE UNION"	)	Gary Adams Grievance

HEARING: December 16, 2003

BRIEFS: Employer's received: January 15, 2004
Union's received: January 17, 2004

HEARING CLOSED: January 17, 2004

ARBITRATOR: Timothy D.W. Williams
213 SW Ash Street, Suite 202
Portland, OR 97204

REPRESENTING THE EMPLOYER:
Kathryn A. Short, Attorney
Leila Wrathall, HR Manager

REPRESENTING THE UNION:
Allison Hassler, Legal Counsel
Becky Steward, Local 88 Steward
Gary Adams, Grievant

APPEARING AS WITNESSES FOR THE EMPLOYER:
Michele Gardner, County Manager
Dwight Wallis, County Supervisor
Gail Parnell, Human Resource Manager
Tom Guiney, Program Manager
Leila Wrathall, HR Manager
Carol Hasler, Captain, Sheriff's Office

APPEARING AS WITNESSES FOR THE UNION:

Gary Adams, Grievant
John Nelson, Driver Distribution for the County
John Haase, County Corrections Sergeant
Becky Steward, AFSCME Shop Steward

EXHIBITS

Joint

1. Collective Bargaining Agreement,2001-2004

County

1. Memo from Michele Gardner to Gary Adams, March 20, 1997
2. Letter from Michele Gardner to Gary Adams, July 2, 1997
3. Notice of Proposed Dismissal, November 19, 2002
4. Dismissal Letter, December 10, 2002
5. Step 2 Grievance Response, February 19, 2003
6. Gary Adams' DMV Record
7. Letter from Allison Hassler
8. Special Order, 02-02
9. Command Review of IAU

Union

1. Grievance Documents
2. RSK-14
3. EMP-9, Drug & Alcohol Policy
4. FLT-3
5. Performance Evaluation
6. Job Description – Driver 3
7. Class Specification – Animal Control Aide 3
8. Class Specification – Corrections Counselor 4
9. Class Specification – Corrections Officer 3
10. Class Specification – Corrections Sergeant 4
11. Letters of Support
12. Completion Certificate

13. Approved Hardship Permit
14. E-mail from Mary Boyer to Gail Parnell, October 17, 2002
15. Interlock Device Memo
16. Memo to Becky Steward from James Opoko, January 16, 2003
17. Driving Record
18. Cahill Disciplines
19. Schwarz Disciplines
20. Memorandum to Becky Steward, April 29, 2003
21. 2001 Sheriff's Agency Manual
22. Memo to Carol Brown, January 2, 2003
23. History of Prior County Discipline Related to Driving Offenses (Includes Appendix A through O)

BACKGROUND

Multnomah County (hereafter "Multnomah County" or "the County") and Oregon AFSCME Council 75, Local 88 (hereafter "Local 88" or "the Union") agreed to submit a dispute to arbitration. A hearing was held before Arbitrator Timothy D.W. Williams in Portland, Oregon on December 16, 2003. The parties stipulated that the grievance was properly before the Arbitrator to be heard and decided on its merits.

At the hearing the parties had full opportunity to make opening statements, examine and cross examine sworn witnesses, introduce documents, and make arguments in support of their positions. The Arbitrator made an audio tape of the hearing, but informed the parties that the tape was intended as a part of his personal notes and should not be considered an official transcript of the proceedings.

At the close of the hearing the parties were offered an opportunity to file post-hearing briefs. Both parties accepted and the briefs were timely received by the Arbitrator. Thus the award, in this case, is based on the evidence and argument presented during the hearing and on the arguments found in the written briefs.

SUMMARY OF THE FACTS

Multnomah County (hereafter "the County" or "Multnomah County") and Oregon AFSCME Council 75, Local 88 (hereafter "Local 88" or "the Union") are parties to a collective bargaining agreement effective from 2001 through 2004. The grievance, in the instant dispute, arose under and is subject to that agreement.

Gary Adams, the Grievant, began working for Multnomah County as a temporary employee in 1992. On January 19, 1994 he was moved to a permanent position of Driver. His primary duties included delivering mail, office and medical supplies, pharmacy drugs, furniture, etc. to County offices and clinics. The majority of the Grievant's time at work was spent driving.

On March 7, 1997, while off duty, the Grievant received a citation for Driving Under the Influence of Intoxicants (DUII). Due to this citation, the Grievant received a one-year suspension of his driver's license on June 30, 1997. The Grievant applied to the DMV for a hardship permit which would allow him to

continue performing his job duties for the County. The County supported his application for the hardship permit. On September 17, 1997, the DMV granted the Grievant a hardship permit and the Grievant continued with his job.

On September 22, 2002, the Grievant received another DUII citation while off duty. The Grievant notified his manager of this citation and pending suspension of his driver's license the next day, as required by the parties' collective bargaining agreement (Joint #1, Page 157).

On October 21, 2002, the Grievant's driver's license was suspended. Due to his inability to perform the basic functions of his job, the County re-assigned the Grievant to non-driving duties while they reviewed the situation. On November 19, 2002, the Grievant was issued a notice of proposed dismissal. A pre-dismissal meeting was held on December 4, 2002 and the Grievant was dismissed from employment on December 11, 2002. In the letter of dismissal, the County states the reasons for dismissal as:

> The issues raised in your letter and during pre-dismissal meeting do not alter your inability to perform your job duties due to the fact that you do not currently have a valid driver's license. Because of this you are dismissed from employment with Multnomah County effective the close of business on December 11, 2002. You shall remain on administrative leave until then. (Employer Exhibit #4)

A grievance was filed on December 20, 2002 contesting the discharge. The grievance claims that the termination of the

Grievant's employment violated the just cause standard of the Article 17 and outlined the pertinent facts as follows:

1. Management did not adequately warn Gary (the ee) of the consequence of his conduct.

2. Rules and penalties were not equally administered, there is disparate treatment, other employees have been afforded a last chance agreement.

3. The penalty is too severe.

(Union Exhibit #1)

The grievance was processed through the steps of the grievance procedure. The parties were unable to come to an agreement on the points in dispute and so the grievance was set for arbitration.

STATEMENT OF THE ISSUE

The parties stipulated to the following issue statement:

1. Did the County have just cause to discharge Gary Adams?

2. If not, what is the appropriate remedy?

APPLICABLE CONTRACT LANGUAGE

Article 4 – Management Rights

The County shall retain the exclusive right to exercise the customary functions of management, including, but not limited to, directing the activities of the departments, determining the levels of service and methods of operation and the introduction of new equipment; the right to hire, layoff, transfer and promote; to discipline or discharge for cause, the exclusive right to determine staffing, to establish work schedules and to assign work, and any other such rights not specifically referred to in this Agreement. Management rights, except where abridged by specific provisions of this Agreement or general law, are not subject to the grievance procedure.

Article 17 – Disciplinary Action

17.1 – Forms of Discipline for Case and Notice Requirements
Employees may, in good faith for cause, be subjected to disciplinary action by oral or written reprimand, demotion, reduction in pay, suspension, dismissal, or any combination of the above; provided, however, that such action shall take effect only after the supervisor gives written notice of the action and cause to the employee and mails written notice to the Union, Oral or written reprimands do not require prior written notice.

17.2 – Definition of Cause
Cause shall include misconduct, inefficiency, incompetence, insubordination, indolence, malfeasance, or failing to fulfill responsibilities as an employee.

Article 18 – Settlement of Disputes

18.3 – The Steps of the Grievance Procedure
Step 4. Arbitration: If the grievance has not been answered or resolved at Step 3, the Union may within fifteen days after the expiration of the time limit specified in Step 3, request arbitration by written notice to the County.

After the grievance has been submitted to arbitration, the Union shall request a list of the names of seven (7) arbitrators from the State of Oregon Mediation and Conciliation Service. The Union and the County shall select an arbitrator from the list by mutual agreement. If they are unable to agree on a method, the arbitrator will be chosen by the method of alternate striking of names, the order of striking to be determined by lot. One day shall be allowed for the striking of each name. the final name left on the list shall be the arbitrator. Nothing in this section shall prohibit the Union and the County from agreeing upon a permanent arbitrator or a permanent list.

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The arbitrator's decision shall be final and binding, but he or she shall have not power to alter, modify, amend, add to, or detract from the terms of this Agreement. The arbitrator's decision shall be within the scope and terms of the Agreement and in writing. Any decision of the Arbitrator may provide for retroactivity not exceeding sixty (60) days prior to the date the grievance was first filed, and it shall state the effective date of the award.

Expenses for the arbitration shall be borne by the losing party. Each party shall be responsible for compensating its own

representatives and witnesses. If either party desires a verbatim recording of the proceedings, it may cause such record to be made, on the condition that it pays for the record and makes copies available without charge to the other party and/or the arbitrator.

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POSITION OF THE COUNTY

The Employer presents its case, in support of its decision to terminate the Grievant, with six arguments.

First, the County argues that there is no contract provision that requires the County to continue the employment of an employee, whose job requires them to drive and who loses their license; therefore the County had just cause to discharge the Grievant.

The County contends that when the Grievant's driver's license was suspended for the second time, he was no longer qualified to perform an essential tenant of his job. The county dismisses the Grievant's argument that it should have assigned him to another position by pointing out that the contract provision that governs his position does not require such an action.

Second, the County points out that the Grievant knew that a valid driver's license was a requirement of his job and that the County would not change his job duties again. The County contends that the Grievant's argument that he did not know he would lose his job if he failed to maintain a valid driver's

license is without merit. The County claims that the Grievant was notified, by way of a memo and a letter, that he needed to maintain a satisfactory driving record in order to keep his job.

Third, the County contends that even if they were required to continue to employ the Grievant, there were no other positions available for reassignment.

To support this argument, the County turns to the testimony of Dwight Wallis, Multnomah County Records and Distribution manager, who stated that all distribution positions require driving and that even employees who did not drive as a regular part of their job were required to fill in for drivers if needed. Based on this testimony, the County argues that there was no position that they could have reassigned to the Grievant.

Fourth, the County objects to the testimony of Becky Steward because, contends the County, she had no personal knowledge of the facts contained in the exhibits. The County also disagrees with the Grievant's argument that he was treated less favorably than other employees. The County claims that there was absolutely no evidence that any employee, similarly situated to the Grievant, was treated differently.

Fifth, the County asserts that if they did not have just cause to terminate the Grievant, then there is no remedy available. The County points out that the Grievant still does not have a valid driver's license and therefore could not be reinstated as a driver. He also could not be reinstated in a

different position, claims the County, because he would not be able to fulfill all the functions of his job, one of which is to provide back up driving.

Sixth, the County contends that the Grievant does not recognize the seriousness of his offense. The County points out that the Grievant is a repeat offender and that there is no evidence that suggests he has changed his ways. The County argues that it would place its employees and the citizens of the County at risk by allowing the Grievant to drive a County vehicle.

Based on the above six arguments, the County urges the Arbitrator to deny the grievance and to find that the County had just cause, under the collective bargaining agreement, to terminate the Grievant.

POSITION OF THE UNION

The Union advances four primary arguments in support of its basic position that the grievance should be sustained and that the Arbitrator should award an appropriate remedy.

First, the Union contends that there were several due process violations committed by the County. These violations are as follows:

1. The Union claims that the County utilized documents to support its dismissal of the Grievant that were prohibited by the collective bargaining agreement.

2. The Union also argues that the discipline of the Grievant was not timely. By allowing three months to pass before terminating the Grievant, the Union asserts that the Grievant was denied his right to timely discipline.

3. Finally, the Union contends that they were denied important information. The Union claims that they requested documents on more than one occasion and were denied that request by the County. They further point out that it wasn't until the Arbitrator ordered the County to produce these documents that the Union received them. Furthermore, the Union claims it did not receive some of the documents until the day of the hearing and that these were incomplete.

The Union's second primary argument focuses on its belief that the Grievant was not on notice of the potential consequences of his actions. The Union turns to the circumstances of the 1997 DUII charge against the Grievant. At that time, the County was able to accommodate him until he was able to get his driving privileges reinstated by way of a hardship permit. Due to this fact, argues the Union, the Grievant had no reason to believe that this DUII would be treated any differently.

The Union also points out that the Grievant did not know about RSK-14, which was implemented in 2002. Since the Grievant did not know of this policy, he had no way of knowing that it could lead to a review of his driving record which could, in turn, lead to his dismissal.

The Union's third argument is that the Grievant was treated disparately. The Union advances three points in support of this contention, as follows:

1. The Union argues that the County could have supported the Grievant in applying for his hardship permit, and has in fact supported others in this respect, but refused to do so in the instant case.

2. The Union argues that the County's Drug and Alcohol Policy was not applied as it should have been. The Union points out that in most cases the County uses the Drug and Alcohol policy to retain productive employees. The Grievant was a productive, experienced employee, asserts the Union, so the County should have done so in this case. Instead, argues the Union, the County treated the Grievant differently than most other employees in this situation and chose to terminate him.

3. The Union claims that RSK-14 was arbitrarily applied. The Union points out that this policy does not require the termination of an employee who receives a DUII. The fact that the County took 13 years of the Grievant's driving record into consideration when making the decision to terminate him, is just not rational, contends the Union.

Finally, the Union argues that the Grievant could have been accommodated. The Union points out that one of the County's reasons for terminating the Grievant was that it was short handed and could not spare someone to drive for the Grievant while he waited to see if he would receive his hardship permit, but it took the County a year to fill his position after he was gone. If the County could leave his position open for a year, contends the Union, they should have been able to accommodate the Grievant for six weeks.

Based on the above arguments the Union urges the Arbitrator to sustain the grievance and grant the Union's requested remedy.

ANALYSIS

The Arbitrator's authority to resolve a grievance is derived from the issue(s) that is presented to him and from the parties' collective bargaining agreement (CBA). The stipulated issue is the matter of whether the Grievant, Gary Adams, was discharged

for just cause per the requirements of the collective bargaining agreement (CBA). Thus the pertinent language of the CBA is found in Article 17 and it reads:

> 17.1 Employees may, in good faith for cause, be subjected to disciplinary action by oral or written reprimand, demotion, reduction in pay, suspension, dismissal, or any combination of the above; . . .

The Arbitrator notes that in a grievance arbitration proceeding, the Employer is generally assigned the burden of proof in any matter involving the discipline or discharge of an employee. In all other matters the Union is assigned the burden of proof. The instant grievance involves a dispute over the question of the termination of the Grievant's employment. Thus the Employer carries the burden on this matter and, to sustain the discharge, must establish by clear and convincing evidence that it had sufficient cause, as required by Article 17, to terminate the Grievant's employment.

Cause is defined in Article 17.2 and it includes "failing to fulfill responsibilities as an employee." The Employer contends that it had adequate cause for the discharge because the Grievant, without a license to drive, could not fulfill his responsibilities as an employee. For a number of reasons, the Union contends that the Employer's case for discharge falls woefully short of the just cause standard.

A careful review of the parties' arguments clearly shows that there are four primary areas of dispute. The first involves the application of RSK-14, a County procedure that covers the use

of County vehicles. The second area focuses on the process by which the Grievant was ultimately discharged, including differences over how the grievance was processed through the steps of the grievance procedure. The third area concerns the allegation of disparate treatment with the Union alleging that other County employees where treated much less harshly. The fourth area centers on disagreements over the proper application of the Drug and Alcohol Policy to include Appendix H (Drug and Alcohol Policy) of the parties' CBA.

This analysis continues by looking at each of these areas in some detail.

Application of RSK-14

RSK-14 is a County administrative procedure that covers the use of County vehicles. Section II, C, paragraph 2 provides that:

> Risk Management may disqualify drivers from driving vehicles on County business when deemed appropriate and necessary. Employees will be eligible to drive vehicles on County business once their DMV records are cleared and Risk Management has approved. (Union Ex. #2, Page 5)

It is the County's position that the Grievant's third DUII created a situation where it was "appropriate and necessary" for the Risk Manager to disqualify him from driving County vehicles. Specifically, the County, in its pre-dismissal letter, makes the following assertions related to RSK-14:

> After reviewing your situation, the County Central Human Resource Manager, acting as the County Risk Manager and in consultation with Risk Management and myself, determined that the county will not support the application for a hardship license in response to your current license suspension due to the liability presented to the county and its citizens by the repeat nature of the offense.
>
> Because of this, your license suspension has made you unable to fulfill a critical duty of you position: the ability to drive a motor vehicle. (County Ex. #3)

The Union disagrees and takes the position that RSK-14 was newly implemented, unknown to the Grievant and therefore the just cause standard barred the County from using it as the basis of terminating his employment.

The County strongly disagrees with the Union and contends that the Grievant had more than adequate warning about the possible consequences of his repeat DUIIs. Specifically, in the Step 2 Grievance Response the County provides that:

> There are adequate warnings throughout society about the dangers of driving while drunk. It is not Multnomah County management's responsibility to warn each employee that drinking and driving is illegal. If the actual complaint is that Mr. Adams did not know that the consequences of being arrested again may mean the forfeit of his license and the loss of his job as a driver, then I echo the statement made by Mr. Guiney in his previous response to this grievance, "Management does not have a responsibility or ability to warn the employees of all actions that they take that may render them unable to perform the duties of their position." (County Ex. #5, Page 3)

Did the Grievant have adequate forewarning of the possible negative impact on his employment from receiving a third DUII? Did the County act contrary to the just cause standard when it

chose not to support an application for a hardship driving permit, thus helping to insure that the Grievant would be unable to fulfill his driving duties? Having carefully reviewed the evidence and arguments, I have arrived at the conclusion that the Grievant had adequate warning to meet the just cause standard and that the County did not act contrary to the just cause standard when it chose to use the provisions of RSK-14 as the basis for refusing to support the Grievant's application for the hardship driving permit. The reasoning behind this conclusion is found below.

First, the pre-dismissal letter makes it clear that the Grievant is at risk of having his employment terminated because he does not have a valid driver's license. The evidence establishes that the Grievant could have had a valid driver's license in a very short period of time had the County supported an application for a hardship driving permit. It is my conclusion that when an employer takes an action or refuses to take an action that ultimately puts at risk an employee's job, the just cause standard works to insure that the actions taken are not taken without good reason or cause. The County, in the instant case, knew when it decided not to support the application for a hardship permit that it was placing the Grievant's employment at risk. Therefore, this action was subject to the just cause standard.

Second, I find nothing in the just cause standard nor do I find anything in arbitral precedent that imposes an affirmative responsibility on the County requiring support for a hardship permit application. Furthermore, I can find nothing in the CBA, RSK-14 or the County's Drug and Alcohol Policy that requires the County to support a hardship permit application. The just cause standard does, however, impose the requirement that the County not act arbitrarily and capriciously in making the decision not to support the hardship permit application. And, since the Grievant's employment was in jeopardy, the just cause standard, in my view, requires the County to base the decision not to support the hardship application on good business reasons.

Third, the just cause standard does require that the employee have adequate notice that specific actions could lead to a loss of County driving privileges. Did the Grievant have adequate notice? I have concluded that he did. For one thing, as the County emphasized in its formal written responses to the Grievant, the seriousness of repeated DUII convictions is widely known and the Grievant ought to have been aware that repeat DUII violations would put his right to drive in jeopardy. Additionally, the County's Drug and Alcohol Policy (Union Ex. #3) and Appendix H of the CBA (Joint Ex. #1) require immediate notification of one's supervisor following either a DUII citation (Appendix H) or a DUII conviction (policy). This fact in and of itself indicates the seriousness with which the County views a

DUII. Moreover, the Grievant knew of this requirement because he had previously been in the position of having to inform his supervisor that he had received a DUII citation. This was clearly not new territory for the Grievant. And, most importantly, he promptly complied with it.

The Union does, in my view, raise a valid concern over the possibility that the County's decision to support the Grievant's application for a hardship permit for his 1997 DUII falsely misled the Grievant into believing that the County would again support an application for a hardship permit. Ultimately, however, I am not persuaded by this line of reasoning. The Grievant should have been aware that piling one DUII on top of another would ultimately lead to increasingly severe consequences. I simply do not believe that the Grievant was so naïve as to believe that the consequences for a new DUII would be no more severe than the consequences for the prior ones.

Also, with regard to the Grievant's specific knowledge about RSK-14, the Union points to a prior decision by this Arbitrator where I refused to enforce a DUII policy of an employer because the employer had not communicated the policy to its employees. While there may be some similarities between that case and the instant case, there are substantial differences that distinguish the two. For one, the DUII in question was the employee's first. For a second, the employer claimed to have a policy but it had never been written down and its own management staff did not know

about it. I found it difficult to enforce a policy that has never been written down and where management and employees are unaware of it.

Additionally, while the Union raises issues over the extent to which the Grievant could have had knowledge about RSK-14, I am not persuaded that the Grievant's specific knowledge about RSK-14 has much bearing on this case. Yes, RSK-14 permits Risk Management to disqualify employees from driving County vehicles. According to the first page of the document, RSK-14 was implemented January of 2002 (Union Ex. #2, Page 1). Does that mean that prior to January of 2002 an employee could not be disqualified from driving vehicles on County business? I find absolutely nothing on the record that suggests that the right of the County to disqualify employees from driving County vehicles was newly implemented in 2002. It appears that RSK-14 is, in those parts pertinent to the instant case, simply a re-quantification of existing practice. As related to the grievance, RSK-14 does not change anything of significance. Had RSK-14 implemented some new standard (example would be removing driving privileges for a second DUII) that was violated by the Grievant at his ignorance, then the fact that it had been newly implemented and not adequately communicated would have raised just cause issues. But that is not the case, and thus I do not find a just cause issue in the application of RSK-14 in the Grievant's situation.

Fourth, as to the question of whether the County acted arbitrarily and capriciously in deciding that it would not support the application for a hardship driving permit, I find that its concerns over a third DUII fully set aside any questions of arbitrariness and capriciousness. It was not a first DUII, it was not a second DUII, it was a third DUII. While I have some misgivings about the County's decision not to support the application for a hardship permit, given some of the extenuating facts, I cannot find that the County's decision was arbitrary and capricious.

Moreover, substantial support for the County's decision can be found in House Bill 2885[1] which was approved by the Governor on June 13, 2003. House Bill 2885 changes the law with regard to a DUII by providing permanent revocation of license for a third DUII. While this statute took effect after the Grievant's third DUII, the fact that the legislature saw fit to impose a permanent revocation of license following a third DUII gives weight to the County's similar reasoning in finding that the Grievant's third DUII was sufficient reason to refuse to support his application for a hardship driving permit.

Fifth, the Union points to the fact that automobile insurance companies are statutorily limited to a driver's last three years of their driving record when determining eligibility for auto insurance. This raises the question why the County

[1] A copy of this Bill was attached to the County's Brief.

should be allowed to go back far beyond the past three years when assessing liability vis-à-vis the Grievant's driving record.

Basically, I did not find this argument at all persuasive. Simply put, the County's liability is not limited to the past three year's of driving history. Plaintiff's attorney, in an action against the County, should the Grievant have gotten into a chargeable accident, is not restricted to three years. Thus, the County rightly considered all three DUIIs in assessing its risk.

Finally, the Union takes issue with the County's position that it had legitimate concerns about liability which were sufficient to justify its refusal to support the application for a hardship driving permit. The Union finds this a somewhat specious claim since the County permitted the Grievant to continue to drive a County vehicle up until the time that his license was suspended (September 22, 2002 until October 22, 2002).

Frankly, I share the Union's concerns on this point. If the County is so concerned about liability, why does it allow the Grievant to keep right on driving after receiving notification of his third DUII? Appendix H of the CBA specifically requires employees to properly and fully disclose (the next working day) all "drug or alcohol-related arrests, citations, convictions, guilty pleas, . . . " (Joint Ex. #1, Page 157). The Grievant provided such notice. There is extensive testimony on the record from County witnesses concerning issues of liability around

DUIIs. It seems to me that the window of maximum liability is the period of time immediately following the issuance of the citation for the DUII. I would suggest that at least a temporary suspension of driving privileges, while the County conducted an investigation to determine the facts and to have the employee complete the Drug and Alcohol Notification Form as required by the Drug and Alcohol Policy, would be in order. Moreover, had the County taken such an action, it certainly would have made more persuasive its arguments related to potential liability. Ultimately, however, I cannot find this deficiency offsets the obvious continuing liability of a third DUII.

Discharge Process

The Union raised a series of issues related to the dismissal process, the grievance procedure and ultimately these arbitration proceedings. The Union emphasizes concerns with what it viewed as obstructive, non-cooperative and inappropriate tactics it believes the County used to interfere with the Union's ability to legitimately represent the interests of the Grievant. These tactics, in the Union's view, created due process and just cause violations. The County, not surprisingly, disagrees with the Union's interpretation. My analysis continues by examining the issues raised by the Union.

First, the Union raises a number of questions with regard to County Exhibits #1 and #2. These two documents were purportedly sent to the Grievant after his 1997 DUII conviction. Of specific

concern to the Union is the language found in Article 23 of the CBA which provides for the removal of disciplinary documents either after two years or five years depending on the severity of the discipline. The Union also questions why the County was able to produce these documents, when they were not in the Grievant's personnel file at the time that the Grievant and his shop steward reviewed the file. Additionally, there is the potential issue raised by the Grievant's testimony that he does not ever recall seeing Employer Exhibits #1 and #2.

My response to the Union's allegations begins by emphasizing that I concur with the position that the two documents should have been in the Grievant's personnel file. The reading of these two documents clearly establishes that the tone and tenor is consistent with that of a written warning, including the notice of additional disciplinary consequences in the event that the Grievant did not comply with expected behavior. Moreover, the March 20, 1997 memo calls into questioned the Grievant's "employable status" (County Ex. #1). The July 2nd memo specifically warns of disciplinary action in the event that the Grievant fails to meet the expectations that are outlined in the document (County Ex. #2). There are simply no questions in my mind that these two documents constitute discipline.

As such, the Grievant had the right under the CBA to request their removal after two years. There is no indication that the Grievant ever made such a request. Thus, they should properly

have been found in the Grievant's personnel file. Therefore, I am not giving these two documents any consideration when determining whether or not the termination of the Grievant's employment violated the just cause standard of the CBA.

Additionally, the Union points to what it believes to have been foot dragging tactics in providing information it had requested. Having reviewed the evidence, I conclude that while the County could have undoubtedly exhibited a higher level of cooperation, its actions were basically taken in good faith and reflected the current state of the County's disciplinary action data collection.

I have no reason to doubt County witnesses who testified that the there is not central collection of information that would have made it easy to provide the information requested by the Union. Moreover, this fact helps to establish why it was necessary for the County to provide the Union the information in anecdotal fashion. It would also explain how it would be easy for the County to have missed one or two former disciplinary matters involving employees and DUII citations. A system that relies on the memories of managers and supervisors will over time have substantial gaps. Supervisors/managers retire, change positions, and/or are promoted.

As to the County's refusal to provide information from the Sheriff's Department, I agreed with the Union's reasoning for why it should be produced and ordered the County to provide the

information. But, I consider the County's objections to be a good faith legitimate point of view. I disagreed with it because, as the Union noted, since RSK-14 applies equally to the Sheriff's department, there seemed to me to be a very good reason for the County to produce the information.

The bottom line is that while I find that the County did not properly maintain the Grievant's personnel file and thus have exclude Employer exhibits #1 and #2, ultimately I cannot find any procedural errors sufficient to raise any additional just cause questions.

Disparate Treatment

The Union raises significant issues around disparate treatment arguing that other County employees who had serious problems with their driving record, including DUIIs, were afforded either lesser discipline or a Last Chance Agreement in lieu of termination. The Union was unable to find any incident where the County refused to support the application for a hardship permit and then discharged the employee because he or she was not qualified to drive.

The county's defense is that there are no similar situations to that of the Grievant; both in the sense that he had received a third DUII and in the sense that the essential tenet of his work was driving a County vehicle.

The analysis of this issue begins by noting that the Union provided solid evidence that there are County employees with very

bad driving records who have not lost their employment. This fact, by itself, however, does not prove the charge of disparate treatment. I find myself in agreement with the County that to prove disparate treatment there needs to be evidence that similarly situated employees with similar offenses were treated differently.

By similarly situated employees, I am referencing a position that has a core duty necessitating a valid driver's license. The Grievant's primary duty was to drive a County vehicle. In my view, this is similar to being a bus driver for Tri-Met. Or, for another example, I would consider a patrol officer in the Sheriff's department to be similarly situated to the Grievant with regard to the requirement of driving a County vehicle. I do not consider similar a sergeant in the Sheriff's department where the primary function is that of supervision.

I carefully reviewed Union Ex. #23 which is a list of employees with history on their driving. I cannot find any position on that list similar to that held by the Grievant. I do not consider, for example, a corrections officer who works inside a jail facility to be similarly situated.

Moreover, I am unable to get by the basic issue that the Grievant incurred his <u>third</u> DUII. A third strike is not just a baseball concept. Obviously the legislature validated this point when it made the third strike an out by passing House Bill 2885 (see page 21). In reviewing the Union's evidence, I cannot find

examples of employees who had received three DUIIs and had received lesser discipline. This is true with the one exception involving Sergeant Peterson who allegedly had three off the job DUII convictions. Of course driving was not his core responsibility and, more importantly, there is no specific evidence on the record with regard to his case. My understanding is that none of the exhibits provided by the Union relate to his case and I am, therefore, reluctant to give it much weight.

In summary, the evidence of disparate treatment is deficient in that the examples are either of employees not similarly situated and/or employees who have not encountered a third DUII.

Drug and Alcohol Policy

The Union's position is that the County failed to comply with its own Alcohol and Drug Policy. Had it done so, it should have and could have found an alternative to terminating the Grievant's employment. Specifically, the Union focuses on the fact that the County chose not to have the Grievant evaluated by a drug and alcohol professional and ignored the fact that the Policy provides for the use of a Last Chance Agreement.

The County's response to the Union's position is found both in the written response at Step 2 of the Grievance Procedure and the written response at Step 3. Those two responses are provided as follows:

Step 2 Response:

> Third, Ms. Steward raised the applicability of County policies to this situation. She brought up not only the Alcohol and Drug Policy but also the risk policy RSK-14. The Alcohol and Drug Policy does not apply in this situation because we are not dealing with an employee who came to work drunk. The offense occurred off-duty.

Step 3 Response:

> Fitness for duty under the County's drug and alcohol policy is normally considered to mean that there is a health related or psychological reason why the employee is unable to perform his/her job duties. He was not terminated because he was not fit for duty, he was terminated because he could not legally drive as required by his position. No one I have talked to has indicated that he came to work under the influence of alcohol. A review of his attendance record does not indicate obsessive absenteeism or patterning, e.g. calling in sick the day before or after the weekend. These are all signs of a substance abuse problem. For these reasons the drug and alcohol policy was not applied to his case.
>
> (Union Exhibit #1)

At the outset of this section of the analysis, I want to emphasize that there are two documents, pertinent to the instant dispute, related to drug and alcohol abuse. First is the County's Drug and Alcohol Policy which is on the record as Union Exhibit #3. The second is found in Appendix H of the parties' collective bargaining agreement (Joint Exhibit #1). I have carefully reviewed both of these documents to determine whether the County or the Union is correct. I find myself completely agreeing with the Union. Both Appendix H and the Policy clearly establish that they apply for situations similar to that of the Grievant. Starting with Appendix H, I found in III, B, 4 that

employees must disclose promptly "all drug or alcohol-related arrests, citations, convictions, guilty pleas, no contest pleas . . . " (Joint Ex. #1, Page 157). Additionally I find at III, D, 1 that "employees who are disciplined for conduct which is related to the use of alcohol or drugs may be required to undergo assessment and to complete a program of education or treatment prescribed by a substance abuse professional selected by the County" (Joint Ex. #1, Page 158). Clearly, the County does discipline employees for off-duty DUIIs. Off-duty DUIIs are certainly alcohol-related. Moreover, it would seem to me that the Grievant's case is a classic example which cries out for professional assessment. Three DUIIs constitute, in my view, a prima facie case of alcohol abuse.

Likewise, under Section V,A,2 of the Drug and Alcohol Policy, an employee has a notification responsibility if he or she loses their driving privileges as a result of an alcohol-related conviction and his or her job requires a valid driver's license. This perfectly fits the Grievant's situation. The Policy goes on at V,B,2 to indicate that when the employee has provided his or her supervisor notification, as per the requirement of V,A,2, then the supervisor shall immediately provide a copy of the "Drug and Alcohol Policy Notification Form." This was not done in the Grievant's case and the Employer's case for discharge suffers as a result.

Most important, at V,B,4 the County is required, once it has the completed Drug and Alcohol Policy Notification Form to either promptly implement discipline or refer the employee for drug and alcohol assessment. The County delayed discipline for almost three months and there never was an assessment. Frankly this case (three DUIIs) cries out for assessment.

Obviously, any statement about what a drug professional would have determined had there been a timely assessment of the Grievant is purely conjecture. One might suppose, however, that the involvement of a professional could have opened a door other than that of termination. Thus, I could have found that the above violations were sufficient to justify setting aside the Grievant's discharge.

However, what holds me back from that conclusion is the language found at III,C,2 of Appendix H which reads, "Employees will be held fully accountable for their behavior" (Joint Ex. #1, Page 157). Further, the last chance agreement that is set forth in both Appendix H and in the Policy is clearly granted by the County <u>at its discretion</u>. For example, the Policy specifically provides, under Section VII,A "that last chance agreements <u>may</u>, at the County's option, be used in the following circumstances: . . . " (Union Ex. #3, Page 8).

I have always contended that to set aside a discharge on the basis of a procedural defect, one must be able to reasonably conclude that but for the defect the outcome would have been

different. It might have been different, in this case, but probably would not have been. Thus, given the seriousness of a third DUII, the fact that the policy emphasizes personal accountability and the fact that a last chance agreement is purely optional to the County, I find by a very narrow margin that the County's failure to properly apply its own policy is not a sufficient basis to set aside the termination.

CONCLUSION

For a number of significant reasons, this decision was not easy to reach. The record clearly establishes that the Grievant was a desirable, effective employee. His performance evaluations which are on the record as Union Exhibit #5 are very positive. Also, there are a significant number of positive letters regarding the Grievant's employment (Union Ex. #11). Additionally, County witnesses candidly testified to his positive qualities as an employee. Simply put, the facts on the record from this proceeding suggest that the Grievant might be an ideal candidate for re-employment by the County in a new position that does not involve driving a County vehicle.

This was also a difficult decision because, in my view, the County made some mistakes both in the maintenance of the Grievant's personnel file and with the administration of its Alcohol and Drug Policy.

The task for the Arbitrator, however, goes beyond the Grievant's qualities as an employee and the issues related to the application of policies and procedures. The issue before the Arbitrator is whether or not the decision by the County to terminate the Grievant's employment violated Article 17.1 of the CBA. For all the reasons cited above, I conclude that the County did not violate Article 17.1 of the agreement and thus must deny the grievance. The Grievant's affirmative qualities as an employee and any difficulties that the County had in implementing its policies and procedures do not offset the fundamental problems created by acquiring a third DUII when one's primary duties are driving a vehicle.

Article 18.3 of the CBA provides that the Arbitrator will assign his fees to the losing party. While the Union is clearly the primary losing party, the finding that I have made with regard to the maintenance of the personnel file and to the application of the Drug and Alcohol Policy lead me to the conclusion that the Union should be found to be the 80% loser and the County a 20% loser. The award will so indicate and my fees will be appropriately divided.

In summary, the conclusion of this arbitration decision is that a third DUII creates a serious enough liability issue for the County as to provide just cause to terminate the Grievant's employment. An award will be entered consistent with this basic conclusion.

IN THE MATTER OF THE ARBITRATION	)	ARBITRATOR'S
	)	
BETWEEN	)	OPINION
	)	
MULTNOMAH COUNTY, OREGON	)	AND
	)	
"MULTNOMAH COUNTY" OR "THE COUNTY"	)	AWARD
	)	
AND	)	
	)	
OREGON AFSCME COUNCIL 75 LOCAL 88	)	
	)	
"LOCAL 88" OR "THE UNION"	)	Gary Adams Discharge Grievance

After careful consideration of all oral and written arguments and evidence, and for the reasons set forth in the Opinion that accompanies this Award, it is awarded that:

1. The County did have just cause to discharge Gary Adams.
2. The grievance is denied.
3. Per article 18.3, ("Expenses for the arbitration shall be borne by the losing party.") and as explained in the Analysis, I designate the Union as the 80% losing party and the County as the 20% losing party and assign my fees per this designation.

Respectfully submitted on this the 5th day of March, 2004, by,

Timothy D.W. Williams
Arbitrator