

ARBITRATION DECISION

IN RE

Independent School District # 2859
Glencoe-Silver Lake, Minnesota

and

BMS #07-PA-1071

School Service Employees Local 284, South St. Paul

DISPUTE:

Whether grievant Gary Frahm was wrongfully discharged or quit?

Arbitrator:
Daniel G. Jacobowski, Esq.
March 27, 2008

ARBITRATION DECISION

BMS # 07-PA-1071

March 27, 2008

Independent School District # 2859
Glencoe-Silver Lake, Minnesota

and

School Service Employees Local 284,
South St. Paul

ARBITRATOR: Daniel G. Jacobowski, Esq.

DISPUTE: Whether grievant Gary Frahm was wrongfully discharged or quit?

JURISDICTION

APPEARANCES: Union: Minneapolis Attorney Bruce P. Grostephan of Peterson,
Engberg and Peterson
School District: St. Paul Attorney Patrick J. Flynn of Knutson, Flynn
and Deans
(with attorney Jeffery E. VanOverbeke on brief)

HEARINGS: Conducted on November 13, 2007 and January 9, 2008 at the school district office in Glencoe, on this grievance dispute, pursuant to the procedures and stipulations of the parties under their collective bargaining agreement. Briefs were received by February 1, 2008. Reply briefs were received March 3, 2008.

DISPUTE

ISSUES:

#1: Primary: Was the grievant wrongfully terminated or discharged, or instead did he quit?

#2: Jurisdictional: The district challenges the jurisdiction of the grievance and arbitrator on several grounds, that the grievance is untimely, beyond the 20 days and that the claims of vets preference and the relationship with the managing subcontractor are inapplicable.

CASE SYNOPSIS: In February and March 2007 the grievant, the school bus driver with the district, requested some vacation days off in March. Both requests were denied by the district. On March 16 he stated it was his last day of work and that he was leaving for his vacation anyway. When he returned on April 2, 2007 and wanted his job back, it was denied on the grounds that he had quit. He claims that his supervisor had earlier approved his requests. On April 10 and again April 19 the union submitted his grievances, essentially protesting his discharge, and loss of his job. The district denied his grievances and the claims on his behalf made by the union in this arbitration.

CONTRACT PROVISIONS cited:

Art. IV-School District Rights

"Section 3. Effect of Laws, Rules, and Regulations: The exclusive representative recognizes that all employees covered by this Agreement shall perform the services prescribed by the School Board and shall be governed by the laws of the State of Minnesota..."

Art. X-Leaves of Absence

"Section 13. Unpaid Leave of Absence: Short Term: An employee who is not eligible for vacation leave may apply for an unpaid short term leave of absence up to five (5) days per year, non-accumulative, with the approval of the School District."

Art. XIII-Vacations

"Section 1. Eligibility: Subd. 2. Employees working less than 2,080 hours per year, but at least 6 hours a day, for 10 months or more shall receive five (5) days of vacation per year."

Art. XIV-Discipline, Discharge...

"Section 3. Completion of Probationary Period: An employee who has completed the probationary period may be suspended without pay or discharged only for cause..."

Art. XVII-Grievance Procedure

"Section 1. Grievance Definition: A "grievance" shall mean an allegation by an employee resulting in a dispute or disagreement between the employee and the School district as to the interpretation or application of terms and conditions contained in this Agreement."

Section 3. Definitions...Subd.2 Days: "Reference to days regarding time periods in this procedure shall refer to working days..."

Section 4. Time Limitation and Waiver: "A grievance shall not be valid for consideration unless the grievance is submitted in writing...within twenty (20) days after the date of the first event giving rise to the grievance occurred. Failure to file any grievance within such period shall be deemed a waiver thereof..."

Section 9. Arbitration Procedures...Subd. 7. Jurisdiction: "In considering any issue in dispute, the arbitrator's order shall give due consideration to the statutory rights and obligations of the School District to efficiently manage and conduct its operation within the legal limitations surrounding the financing of such operations."

(Note: Underlining of certain words are by the arbitrator)

BACKGROUND-FACTS

This dispute is over the failure of the District to re-employ grievant Gary Frahm on the grounds that he quit when he took off on an unauthorized vacation after his requests had been denied. The grievant was a school bus driver, working less than full time hours and had been an employee for 13 years. The contract between the parties' covers the bus drivers, and other groups such as paraprofessionals, secretaries, and others. At the time and for two years the district had subcontracted the management and operation of the school bus system to an outside contractor, commonly known as 4.0 school services. They supervise the district drivers, but within the terms of the union contract, which covered the grievant.

The School District Case. Contractor 4.0 services six school districts, including this one. Becker, the manager of the buses and drivers for this district related that in September 2006, the grievant mentioned that he wanted to take some vacation time in the winter. He again raised the matter several times in the ensuing months, indicating his wish for a couple of weeks in March. According to Becker, each time he told the grievant that he would have to fill out a vacation request, which then had to be approved by the district since he worked for them. In early February he received from the district a copy of a February 2 request for some 13 days of in March, 2007 that the grievant had submitted to the district but was denied by the superintendent on February 5. Becker gave a copy to the grievant. On March 7, the grievant submitted to Becker another request for 11 days of vacation starting in March with some dates different. Becker states that he did not have a problem with it but it had to go through the superintendent for approval. It was then returned from the district with the superintendents' denial again dated March 8. He gave a copy to the grievant who was not happy about the denial. Becker related that on March 16, the grievant told him that since he was not allowed to take a vacation that he was going to take it anyway and that March 16 was his last day. Becker clearly understood that the grievant was quitting. Becker made a memo of the fact and so advised the superintendent.

Later, upon his return in early April, the grievant asked if he could go to work for 4.0. Becker regarded him as a very good driver and started him back on the same routes on April 10. However, on April 11, the district superintendent demanded that the grievant not be allowed to drive on the district routes. He gave no reason. 4.0 then removed the grievant from the routes. At the hearing, the union attempted to examine Becker further on the details of the contract relationship with the district, but district counsel vigorously objected on the grounds that the matter was the subject of a separate grievance and not before this arbitrator.

The owner of contractor 4.0, Hennek, clarified that in March of 2007 they serviced four school districts, but that since then two more have been added. He related that in September of 2006 the grievant had approached him about taking some vacation time off later. Similar conversations took several times since. Each time Hennek related that the grievant would have to follow the district guidelines as their employee. After the March

denial by the district the grievant expressed being upset by it. Hennek admitted that his own company policy is to try to accommodate drivers who request time off. However, if a request was denied and the employee left anyway, he would be terminated. In April, after we hired him on his same routes, we honored the demand of the superintendent that the grievant not be allowed to drive on any district routes. Hennek explained that it was their policy to honor such requests of a school district. Clause 2.5.4 was of the subcontract was introduced which provided that the contract would be required to utilize only those drivers who "are acceptable to the school district."

School Superintendent Hornung was the person who denied the February and March requests of the grievant for his vacation leave. He has since retired as of June 2007. He stated his reasons for the denial because such an extended time off was inconsistent with the need to have regularity and continuity among the bus drivers with the parents and children. Further, bus drivers were getting increasingly hard to recruit. He stated that bus drivers were not entitled to vacations, with emphasis on the extended amount of time requested by the grievant. He was satisfied from the information from supervisor Becker that the grievant had actually quit and that his last day of employment was March 16. Further, he noted that taking such an unauthorized leave after denial would constitute grounds for termination itself. He admitted telling 4.0 that the grievant would not be allowed to drive for the district upon his return.

Under cross by the union when shown that he had approved in the prior year of January 2006 a vacation leave request for at least 10 days, Hornung was unable to recall the circumstances but noted that in the current year drivers were getting increasingly hard to recruit. He admitted telling the union representative that since the grievant had quit he was no longer an employee and the matter was not grievable. Later after the union's grievance he acknowledged receiving an April 24 letter from the union requesting a hearing on the grievants discharge as provided by the law under the Veterans Preference Act, MSA 197.46. He admitted not responding to it and could not recall what happened on it thereafter. The district counsel strongly objected to pursuing the Vets Preference matter further on the grounds that it was not included within the contract nor the grievance and was beyond the jurisdiction of the arbitrator.

The union case. The grievant thus testified that in September 2006 when informed that the buses had been sold to 4.0 he requested or told owner Hennek that he would want some vacation time off during the winter and Hennek replied that it would be no problem and that they could work it out. Later, when the superintendent denied his February request he spoke with him and wondered if it was because of difficulty in getting subs and that Hornung affirmed that was the case. The grievant then made contact with subs who had driven for him before and then submitted his second request to Becker who ok'd it but then submitted it to the superintendent who then denied it. The grievant denied that he told Becker that he was quitting on March 16, but only that it was his last day before leaving for vacation. He felt it entitled to it because of the September approval by the owner and the more recent ok from Becker, and that a sub could be available. He felt the denial of his vacation request was unfair and submitted a district record showing that he had worked 1,597.25 hours in the prior year and 1,077 hours in the current year until

March. On April 11, he submitted an application for retirement to the district dated March 16. He admitted backdating it since he was not acquainted with retirement procedures. He admitted that he and the drivers were never given any vacation, though he now thought that they were entitled to it under the contract. In denying that he quit he admitted the only person that he told he was quitting to was Gruenhagen, a member of the school board, who talked to the superintendent a couple of times but to no avail. He noted that after the district refusal to re-hire him upon his return, Becker was willing to hire him with 4.0, until the superintendent refused him on district routes.

Union representative Twiss related her handling of the grievance on behalf of the grievant. She submitted the first grievance of April 10 to the superintendent. It denied that he was quitting his job and requested that he be re-hired by the district after being fired. However, the superintendent denied the grievance saying that since he quit the matter was not grievable. Since he refused and failed to process the grievance further, she submitted it with a second grievance to the school board chair on April 19, citing that he was discharged, and requesting his reinstatement with full benefits and back wages. Upon school board denial of the grievance the union then submitted the matter for arbitration. After the second April 19 grievance she also submitted an April 24 letter to the superintendent requesting a veteran's preference hearing as provided by the law, MSA 197.46. She claimed receiving a letter from district attorney Flynn that there would be a hearing scheduled per the Veterans Preference Act, but that no such hearing was scheduled and that the grievant never received any interim pay according to the act. The union then pointed to the language in Article IV, Section 3 which makes reference to the laws of this state of Minnesota.

ARGUMENT

THE SCHOOL DISTRICT: In brief summary, the district argued the following main points:

1. The issues raised in the grievance are not subject to arbitration according to the terms of the collective bargaining agreement.

2. The grievances are beyond the jurisdiction of the arbitrator.

3. The grievances are untimely and beyond the 20 days required in the contract. The grievances should properly date from the district denial of the request on February 5 and March 8, 2007. The grievance was not submitted until April 10 and the second April 19. The arbitrator must abide by the contract times.

4. Veterans Preference issues are not properly before the arbitrator. The union did not give notice that the Veterans Preference was part of the grievance and it was only first raised at the arbitration hearing. There was no agreement to arbitrate that matter. MSA 197.46 provides a separate remedy.

5. The agreement only provides for arbitration on matters related to the interpretation of terms of the agreement, not to matters related to external law. The agreement does not contractually bind the school district to comply with external law. A reference to statutes in the contract does not provide such a right and the arbitrator has no jurisdiction to extend it.
6. The subcontracting issues are not properly before the arbitrator and are the subject of a separate grievance before another arbitrator.
7. The employment contract with 4.0 contractor is not before the arbitrator. It is not within the provisions of the agreement.
8. The grievance must be denied on its merits as there had been no violation of the agreement terms.
9. The grievant is not entitled to vacation pay and he does not work at least 6 hours a day for 10 months of the year. The grievant never received any paid vacation nor did other drivers, nor was he entitled to any unpaid leave which under the contract requires the approval of the district.
10. The grievant voluntarily resigned his position with the school district. The grievant clearly indicated a quit when he told Becker that March 16 would be his last day and that he was going to take his vacation.
11. Further, the district had cause to terminate the grievant since he abandoned his job without authorization and was absent for the vacation days. Such actions by the grievant are grounds for immediate termination even consistent with progressive discipline. Further, progressive discipline is not required in the contract.
12. The union claim of an unfair labor practice by the demand of the district to 4.0 that the grievant not drive for the school district is without merit.
13. The district cited numerous cases claimed as support of its case.

Respectfully the claims of the grievant and the union should be denied.

THE UNION: In brief summary, the union argued the following main points:

1. The grievant was entitled to the rights of the Veterans Preference Act, MSA 197.46. The union cited the statute and requested a hearing on the matter. No hearing was held. The act also provides for his salary to be paid until such a hearing occurred. The employer failed to schedule such a hearing and failed to pay him his salary.
2. The evidence supports the grievance that the grievant was terminated without just cause.
3. The school district delegated authority to manage the bus service to 4.0. In September the owner told the grievant they would be able to work out his vacation.
4. The grievant applications for vacations support his understanding of the authority of 4.0. He was told that his vacation applications had to be turned into Becker first. When the district denied his first February request for not enough drivers, the grievant found two other drivers who were available who did drive his route. Becker indicated he had no problem with the grievant taking a vacation. Hornung's reasoning for denying the vacation is unreasonable, that the drivers get no vacation. The grievant also had three personal days of leave coming. As per the contract, he worked sufficient hours to qualify for the vacation. Hornung approved the vacation for the grievant in the prior year.
5. It is bad faith to punish the grievant because the union opposed the privatization to the contractor.
6. The superintendent was punitive and failed to consider the record of the grievant as a good employee.
7. The district committed an unfair labor practice in violation of MSA 179A.13 subd. 2 when Hornung had the grievant terminated from 4.0.
8. The district is in error to claim that the grievant resigned. His only intent was to take a vacation which he had been entitled. He gave no intent nor desire to sever the employment.

9. The district conduct constituted a matter of estoppel. The superintendent refusal to meet and discuss the grievance violated a covenant of good faith and fair dealing.
10. The grievant was entitled to a vacation under provisions of the contract.
11. The employer had an obligation to consider progressive discipline which was denied.
12. The union cited numerous cases claimed as support of its case.

The grievances request the rehire and reinstatement of the grievant with back pay and restoration of benefits.

DISCUSSION-ANAYLSIS

A. The Arbitability Timeliness Issue

I reject the district claim that the grievances were untimely beyond the required 20 days and beyond the jurisdiction of the arbitrator. The district claim that the time starts with the denial of the vacation requests in February and March is wrong. The precise point of the grievances is the fact that he was not re-hired or given his job back upon his April 2 return. While the grievant felt the denial of his vacation was unfair, the thrust of the grievance was over the failure of the district to re-employee after his return on April 2. Further, it appears that the district did not raise this issue until the arbitration hearing itself, which is valid argument that it waived the matter. It did not participate in the earlier steps of the grievance process. I determine that the timeliness issue fails, and that the grievances are arbitable.

B. The case merits and other claims

Upon full review of the evidence and submissions, I conclude in favor of the district, that the evidence sustains its position, and that the union failed to prove a wrongful termination or discharge of the grievant. I so conclude based upon the following factors and reasons.

1. The best evidence sustained that the grievant did actually quit on March 16 when he left for his vacation leave. Supervisor Becker is credible in his belief that the grievant actually quit in his denial of the vacation requests and stated that March 16 was his last day of work and that he was going to leave for his vacation. The tenor and circumstances support Becker that it was a quit. Becker regarded the

grievant as a good driver, ok'd his March request for vacation and initially hired him for 4.0 after his return. Becker is credible. Based on the information from Becker and the grievants unauthorized absence during his vacation supported the district conclusion that the grievant quit. He was not terminated or discharged by the district as such upon his later return and quest for re-employment.

2. The claim of the grievant that he had prior approval from 4.0 supervision for a vacation has no merit and is not convincing. It conflicts with the testimony of both Becker and the owner that the grievant raised the matter several times. He was told each time his requests would have to be approved by the district. The fact that the grievant kept raising the matter during ensuing months is inconsistent with his claim of his approval. Further, the vacation denial in no way justified his leaving anyway and unauthorized absence.
3. The claim of the union that the denial of the vacation was unfair is not convincing and does not constitute justification for his departure. The grievances were not over the denial over the vacation as such, but rather over the denial of his job upon his return. There is argument over whether he worked sufficient hours and days for a vacation, but that is countered by the tradition no vacation as such had formally been given to the grievant and other drivers over the years. The vacation leave he had been given in the prior year, which the superintendent did not recall, did not justify his action in this instance, and when the superintendent explained that the recruitment of drivers was becoming increasingly difficult, along with the need for continuity and the regularity of the drivers on their routes.
4. The union attempt to enter the subcontracting matter with 4.0 is not germane. I upheld the district objection that the matter is a subject of another grievance before another arbitrator and not a subject for this arbitration. There was no evidence that the failure to re-employee was in retaliation.
5. Even aside from the determination that the grievant quit, his action readily constituted cause for a discharge, if in fact the district had done so instead of regarding his action as a quit. Both the district and 4.0 regarded such action as a clear cause for a discharge. Even under the concept of progressive discipline such is commonly the case as a serious matter. There is no contract requirement of progressive discipline which the union argued, and even so such an unauthorized conduct would be regarded as a serious matter justifying a discharge.
6. Regarding 4.0, its internal policy and its contract provision with the district properly provides that it defer to the district the approval of drivers. It acted in good faith and initially hiring the grievant after his return but also properly

accepted the district demand that he not drive on their routes. His quit and unauthorized leave provided justification to the district. It did not constitute an unfair labor practice as the union argued.

7. On the vets preference matter, I reject the claim of the union that its provisions are applicable in this arbitration. I concur with the district that the matter is not a subject for this arbitration and is beyond the jurisdiction of the arbitrator to consider. Among my reasons for rejection of the union, the grievant himself quit and was not discharged by the district. He was no longer an employee at the time of his return, nor was he entitled to re-employment on his return. Also, union April 24 letter to the district about vets preference requested an hearing in accord with the law. Under the act, a specific hearing body is provided. The union letter indicated it regarded the vets preference as a separate matter and did not request it as part of its grievances nor the arbitration.

8. In conclusion, I conclude that the district properly regarded the status of the grievant as a quit rather than a termination or discharge by the district. The union grievance of a discharge and for reinstatement of the grievant is denied.

DECISION:

- 1: The grievances were timely and are arbitrable.

- 2: On the merits and the other claims of the union, the union grievance is denied.

Dated: March 27, 2008

Submitted by:

Daniel G. Jacobowski, Esq.
Arbitrator