

IN THE MATTER OF ARBITRATION BETWEEN

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| CITY OF MINNEAPOLIS, PUBLIC |) | |
| WORKS DEPARTMENT, |) | ARBITRATION |
| |) | AWARD |
| Employer, |) | |
| |) | |
| and |) | |
| |) | |
| |) | DISCHARGE GRIEVANCE |
| |) | |
| IBEW LOCAL 292, |) | |
| |) | |
| Union. |) | |
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Arbitrator: Stephen F. Befort

Hearing Date: June 17, 2008

Post-hearing briefs received: July 1, 2008

Date of decision: July 24, 2007

APPEARANCES

For the Union: Gregg Corwin

For the Employer: Trina Chernos

INTRODUCTION

IBEW Local 292 (Union) is the exclusive representative of a unit of electricians employed by the City of Minneapolis (Employer). The Union brings this grievance claiming that the Employer violated the parties' collective bargaining agreement by discharging the grievant without just cause. The grievance proceeded to an arbitration

hearing at which the parties were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

ISSUES

- 1) Is the grievance arbitrable?
- 2) Did the Employer discharge the grievant for just cause?
- 3) If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 4 **SETTLEMENT OF DISPUTES**

Section 4.01 – Grievance Procedure

This grievance procedure has been established to resolve any specific dispute arising between the employee(s) covered by this Agreement and the Employer concerning, and limited to, the proper interpretation and application of the express terms and provisions of this Agreement. Such a dispute shall hereinafter be referred to as a *grievance* which shall be resolved in accordance with the provisions of this article. The Parties agree that this procedure is the sole and exclusive means of resolving all grievances arising under this Agreement. Grievances shall be resolved in the following manner:

Subd. 1. Step 1 (Informal)

Any employee who believes the provisions of this Agreement have been violated may discuss the matter with his/her immediate supervisor as designated by the Employer in an effort to avoid a grievance and/or resolve any dispute. While employees are encouraged to utilize the provisions of this subdivision nothing herein shall be construed as a limitation upon an employee or the employee's Union representative respecting the filing of grievances at Subd. 2 (Step 2) of the grievance procedure.

Subd. 2. Step 2 (Formal)

If the grievance has not been avoided or resolved by the operation of Step 1 and the employee or the Union wishes to file a formal grievance, the employee, or the employee's Union representative on behalf of the employee, shall file a written grievance which has been signed by the employee with the employee's department head or with his/her designee. The grievance must be filed within twenty-one (21) calendar days of the event which gave rise to the grievance or

within fourteen (14) calendar days of the time the employee reasonably should have knowledge of the occurrence of the event, whichever is later. At the time the grievance is served upon the employee's department head, the Union shall provide the Employer's Director of Employee Services with an informational copy thereof.

The department head shall respond in writing to the Union, the employee and the Employer's Director of Employee Services within thirty (30) calendar days after receipt of the grievance.

Section 4.02 – Selection of the Arbitrator

Within seven (7) calendar days of the date of the step 3 decision, the Union shall have the right to submit the matter to arbitration

Section 4.03 – Authority of the Arbitrator

The Arbitrator shall have no authority to amend, modify, nullify, ignore, add to or subtract from the provisions of this Agreement. He/she shall be limited to only the specific written grievance submitted by the Employer and the Union, and shall have no authority to make a decision on any issue not so submitted. . . . The decision, opinion and/or award shall be based solely upon the arbitrator's interpretation of the meaning or application of the express terms of this Agreement as applied to the facts of the grievance presented. . . .

ARTICLE 5
EMPLOYEE DISCIPLINE AND DISCHARGE

Section 5.01 – Just Cause

Disciplinary action may be imposed upon an employee who has satisfactorily completed the initial probationary period only for just cause. Discipline shall be imposed in a timely manner.

ARTICLE 19
DISCRIMINATION PROHIBITED

In the application of this Agreement's terms and provisions, no employee shall be discriminated against in an unlawful manner as defined by the applicable City, state and/or federal law or because of an employee's political affiliation. The Parties recognize *sexual harassment* as defined by City, state and/or federal regulations to be unlawful discrimination within the meaning of this article.

Additionally, in recognition of the Union's commitment to support a work environment that is hospitable to all employees, the Union and Employer agree to support training, policies, and work rules that promote and sustain an positive

work environment and prohibit abuse and harassment in the work place by an employee, manager, or supervisor.

FACTUAL BACKGROUND

The grievant has worked for the Employer as an electrician since 1993. The parties agree that the grievant is a qualified electrician, but they dispute whether he possesses the physical capabilities to perform the essential functions of the job going into the future.

As an electrician assigned to the Traffic Division of the Employer's Public Works Department, the grievant is responsible for performing electrical maintenance and repair work on traffic signals and street lights. He also is responsible for a variety of related tasks such as setting up temporary stop signs during periods in which the electrical signals are being repaired. Some of the tasks performed by electricians entail the lifting of heavy equipment.

The grievant injured his back in a work-related incident on November 28, 2006. His treating physician initially imposed a 30-pound lifting restriction on the grievant, and the Employer determined that this restriction prevented the grievant from returning to his pre-injury electrician position. Instead, as a workers compensation injury, the Employer placed the grievant in its Return to Work Program which consists of three phases:

- 1) Transitional or temporary work at the employee's pre-injury job title and rate of pay;
- 2) Transitional or temporary work with a job title reflective of the employee's actual work assignment with the new rate of pay supplemented, as appropriate, by workers compensation benefits; and
- 3) Placement in the Job Bank.

Mr. Ouelette progressed through all three phases. On December 1, 2006, the grievant was released with restrictions and assigned to light-duty clerical work at his regular rate of pay. Phase 2 began on January 15, 2007 when the Employer assigned the grievant to an Office Support Specialist I position, with the resulting lower pay scale supplemented by workers compensation benefits. During the summer of 2007, the grievant reached the point of maximum medical improvement and his treating physician modified his work restriction to that of a 50 pound lifting restriction. The Employer then placed the grievant in the Job Bank beginning on August 15, 2007.

The Employer established the Job Bank program through the promulgation of a city ordinance in 1995. The ordinance provisions were not subject to negotiation and are not incorporated in the parties' collective bargaining agreement. A letter sent to the grievant on August 10, 2007 described the operation of the Job Bank program as follows:

The purpose of this meeting is to discuss your employment situation, now that you have permanent restrictions and/or have reached Maximum Medical Improvement that do not allow you to perform the essential function of your pre-injury position of Electrician.

* * *

During the next 120 days, the City will assist you in making a smooth transition into another City position if possible, and if necessary, assistance will be given during the course of the program to help you secure employment outside the City.

During the following four months, the Employer provided the grievant with information concerning a number of available City jobs. The grievant did not apply for any of these vacancies, primarily because of his desire to return to electrician work.

While in the Job Bank, the grievant continued to press for a return to his pre-injury electrician position. He claimed that electricians seldom lift objects weighing more than 50 pounds without the assistance of mechanized lifting equipment, and that his

restriction could be accommodated on the rare occasions where such lifting may be necessary. The Employer, however, relied on a 2004 job task analysis which concluded that electricians working in the Traffic Division were “occasionally” required to lift objects weighing between 50 and 75 pounds. The study defined “occasionally” as consisting of “up to 33% of time on shift.” In November 2007, the Employer contracted with Don Ostenson, a qualified rehabilitation consultant, to undertake a new job analysis. Ostenson’s report, which was dated November 27, 2007, but not submitted in finalized form until March 4, 2008, concluded that electricians “occasionally” (same definition) are required to lift more than 51 pounds while performing the following three job duties: assembling traffic signals, installing traffic signals, and maintaining traffic signals, street light hardware and equipment.

The Employer terminated the grievant’s employment on December 12, 2007. This step was based on section 20.860 of the Job Bank ordinance which states: “If during this one hundred twenty (120) day period the injured employee has not been placed in another city position, the employee shall be separated from city service.”

The Union filed a grievance challenging the termination on December 14, 2007, and the dispute wound its way through the grievance procedure and advanced to arbitration. The Union also filed an appeal with the Civil Service Commission concerning the City’s administration of the Job Bank ordinance, but the Commission declined to hear the appeal because of the pending grievance. At the arbitration hearing, two Employer witnesses – Foreman Electrician Dave Prehill and Engineer Steven Mosing – testified that the ability to lift more than 50 pounds is an important part of an electrician’s job. The Union, in turn, presented the testimony of Tom Thomson, a retired

foreman electrician who prepared the 2004 job task analysis, who agreed with the grievant that heavy lifting was now rare due to the availability of mechanical lifting devices.

POSITIONS OF THE PARTIES

Employer:

The Employer maintains that this grievance is not arbitrable for two reasons. First, the Employer contends that the grievance is not timely because the Union did not file it within 21 days of the grievant's placement in the Job Bank program. Second, the Employer argues that the employment separation required by the Job Bank ordinance is not governed by the parties' collective bargaining agreement and does not constitute discipline for purposes of that agreement. The Employer alternatively asserts that even if the grievance is arbitrable, the Employer had just cause to remove the grievant due to the fact that he no longer is capable of performing the essential functions of the electrician position. In this regard, the Employer additionally claims that it has no obligation to provide a reasonable accommodation for the grievant's performance deficiencies.

Union:

The Union contends that its grievance is arbitrable. The Union maintains that the action being grieved is not the Employer's placement of the grievant in the Job Bank program but his separation from employment, and that the Union did file a grievance in a timely fashion from the date of the latter occurrence. The Union also argues that this matter is arbitrable because the Employer's involuntary termination of the grievant's employment operates as a disciplinary discharge subject to the just cause standard of the parties' agreement. Turning to the merits, the Union claims that lifting is not a

significant component of the electrician job and that the grievant is capable of performing the essential function of that position. The Union finally argues that, even if the grievant has some limitations in his ability to perform the job, the Employer is obligated to provide reasonable accommodations to assist the grievant in overcoming these limitations.

DISCUSSION AND OPINION

A. Arbitrability

1. Timeliness

The parties' collective bargaining agreement states that a "grievance must be filed within twenty-one (21) calendar days of the event which gave rise to the grievance." The Union's grievance was filed on December 14, 2007. The Employer claims that the event giving rise to the grievance was the Employer's placement of the grievant in the Job Bank program on August 15, 2007, while the Union claims that the challenged event is the grievant's involuntary separation from employment on December 12, 2007. Thus, the grievance is untimely from the Employer's perspective, but timely from the Union's perspective.

I believe that the Union's perspective is the more accurate characterization of this dispute. On the face of the grievance, the Union claims a violation of the discipline and discharge provisions of Article 5. Such a claim plausibly challenges an involuntary termination of employment, but seems far removed from the Job Bank placement. While it is true that placement in the Job Bank program potentially could lead to a loss of employment, other outcomes, such as a return to a prior position or a reassignment to a different position, also are possible. What is at stake in this case is the grievant's loss of

employment. It would elevate form over substance to bar this grievance due to the Union's failure to challenge a contingent outcome four months prior to the operative event.

2. Searching for an Alleged Contract Violation

The Employer additionally contends that this grievance is not arbitrable in that it does not allege a violation of the parties' collective bargaining agreement. The Employer's rationale proceeds as follows: Section 4.01 of the parties' agreement limits actionable grievances to disputes that concern "the proper interpretation and application of the express terms and provisions of this Agreement." Section 4.03 also prohibits an arbitrator from amending, modifying, or adding to the provisions of the agreement. What the Union is challenging in this matter, however, is the grievant's separation from service pursuant to the Job Bank program, a policy established by ordinance that is not incorporated into the parties' contract. Since the Union's grievance raises a dispute concerning an ordinance rather than the parties' agreement, the Employer concludes it is not arbitrable under the terms of the agreement.

The Union's response is that the Employer's termination of the grievant operates as a discharge which implicates the just cause provisions of Article 5 of the parties' agreement. The resolution of this arbitrability issue, accordingly, turns on whether the grievant's separation from service is disciplinary in nature.

The Employer claims that the separation was not affected for disciplinary purposes, but because the grievant could no longer perform his prior job as required by the Job Bank ordinance. This argument misses the mark for at least two reasons. First, the essence of a discharge is the involuntary severance of the employment, relationship,

which is precisely what occurred in this instance. Red Cross Blood Services, 90 LA 393, 397 (Dworkin, 1988); DISCIPLINE AND DISCHARGE IN ARBITRATION 67 (BNA, Norman Brand, ed., 1998). As documented by a recent empirical analysis of Minnesota labor arbitration decisions, job performance considerations constitute a well-recognized basis for discipline and discharge actions. Laura J. Cooper, Mario F. Bognanno, & Stephen F. Befort, *How and Why Labor Arbitrators Decide Discipline and Discharge Cases: An Empirical Examination*, PROCEEDINGS OF THE SIXTIETH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 420 (BNA 2008) Second, the fact that a city ordinance authorizes such an involuntary termination does not insulate such action from the terms of a collective bargaining agreement. Minnesota's Public Employment Labor Relations Act provides that a unilaterally promulgated city ordinance may not defeat or trump the collective bargaining process. See Minn. Stat. § 179A.07, subd. 2(a) (2006); Somers v. City of Minneapolis, 245 F.3d 782 (2001).

For these reasons, the forced separation of the grievant under the ordinance is the equivalent of a de facto discharge, and the Union's grievance challenging that action is arbitrable under the parties' contract.

B. The Merits

As noted above, an employee's inability to perform the job is a legitimate basis for disciplinary action. In this instance, the Employer - the party with the burden of persuasion - maintains that the grievant is unable to perform the essential functions of the electrician position due to his lifting restriction. The Union counters that heavy lifting is not a common requirement of the job and that any limitations could be eliminated by the Employer's provision of a reasonable accommodation.

The reasonable accommodation issue provides a useful starting point. The Union claims that the anti-discrimination provisions of Article 19 of the parties' agreement incorporates the terms of the Americans with Disabilities Act (ADA) and obligates the Employer to reasonably accommodate the grievant's disability. Even assuming that the agreement incorporates the requirements of the ADA, federal court precedents make it clear that the grievant is not an individual with a disability for ADA purposes. An individual has a covered disability under the ADA if he has an impairment that substantially limits a major life activity or if he is regarded as having such a limitation. 42 U.S.C. § 12102(2). While courts recognize lifting as a major life activity, lifting restrictions of twenty-five pounds or more have not been deemed to be "significant" limitations. *See, e.g., McKay v. Toyota Mfg. Co.*, 110 F.3d 369 (6th Cir. 1997); *Aucutt v. Six Flags Over Mid-America*, 85 F.3d 1311 (8th Cir. 1996). In addition, the fact that an Employer perceives an employee as unable to perform a particular job does not satisfy the "regarded as" prong of the ADA's disability definition. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999). While there is considerable policy debate about whether decisions such as these have unduly restricted the scope of the ADA, the existing case law clearly fails to give the grievant standing under the ADA, and the Employer is not obligated to provide a reasonable accommodation for his impairment.

That conclusion means that the grievant's ability to perform the job must be assessed in his present condition and without consideration of possible accommodations. Both parties introduced evidence on this issue. The Employer presented the testimony of Foreman Electrician Dave Prehill who stated that electricians occasionally must lift items weighing more than 50 pounds (e.g., signal bases, signal cabinets, sandbags, and some

spools of wire) when mechanical lift devices are not available. He further testified that lift assists are not available on the signal trucks used by many electricians. Engineer Steven Mosing, in his testimony, expressed the concern that an electrician's inability to lift heavy objects when necessary could endanger public safety. Finally, the Employer submitted two job analysis documents which concluded that lifting more than 50 pounds was an "occasional" requirement of the electrician position.

The Union elicited testimony from two witnesses in response. The grievant testified that electricians seldom lift objects weighing more than 50 pounds without the assistance of either co-workers or mechanical equipment. Retired Foreman Electrician Tom Thomson corroborated the grievant's testimony and stated that the department increasingly has encouraged employees to use alternative means of lifting heavy objects so as to avoid injuries.

The most persuasive evidence on this issue is the job analysis report prepared by Don Ostenson, a qualified rehabilitation consultant. In November 2007, he undertook an examination of the job functions of the electrician position. Although he did not observe electrician work in the field, he interviewed several electricians and their supervisors concerning necessary job tasks. Based on this examination, Mr. Ostenson prepared a report which found that the lifting of objects weighing in excess of 50 pounds was occasionally necessary (up to 33% of time on shift) in order to perform three essential job functions. The opinion of this neutral expert is entitled to considerable weight. Based on Mr. Ostenson's findings and other supporting evidence, the Employer has carried its burden of showing that the grievant is not capable of performing all of the functions of the electrician position and that its termination decision is supported by just cause.

AWARD

The grievance is sustained in part and denied in part. The grievance is sustained as arbitrable in that it timely challenged an employment action in the nature of a discharge. The grievance is denied on the merits due to the grievant's inability to perform the essential functions of the electrician position.

Dated: July 24, 2008

Stephen F. Befort
Arbitrator