IN THE MATTER OF GRIEVANCE ARBITRATION BETWEEN

Minnesota Teamsters Public & Law Enforcement Employees
Union, Local No. 320,
Union

and **BMS Case No. 08 PA0886**

ISD 138, North Branch, Minnesota,
Employer

NAME OF ARBITRATOR:	George Latimer Assistant Faith Latimer
DATE AND PLACE OF HEARING:	June 30, 2008 North Branch, Minnesota
BRIEFS RECEIVED:	July 18, August 11 & 24, 2008
DATE OF AWARD:	August 28, 2008

APPEARANCES

FOR THE UNION:	**Paula Johnston, General Counsel Local 320** **Brian Aldes, Business Agent and Vice President Local 320** **Kay Bowers, Grievant**
FOR THE EMPLOYER:	**Joseph E Flynn, Attorney** **Randi Johnson, Director of Personnel and Finance, ISD 138** **Bill Burton, Director of Transportation and Grounds** **Deborah Henton, Superintendent**

INTRODUCTION

This is a grievance arbitration between Teamsters Local 320 (Union) and Independent School District #138, North Branch (Employer or District). The Union filed a grievance on behalf of Grievant Kay Bowers, on August 14, 2007. The parties proceeded through the grievance procedure set forth in the collective bargaining agreement and the grievance was appealed to Arbitration. The Arbitration hearing was held June 30, 2008 in North Branch, Minnesota. There were no jurisdictional disputes. Both parties had full opportunity to present evidence and examine witnesses. The parties submitted post-hearing briefs, the last of which was received on August 24th, 2008 and the hearing was closed.

BACKGROUND

The Grievant, Kay Bowers has been employed by the Employer as a school bus driver for about 10 years, with a very good work record.
On January 9, 2007 Ms. Bowers experienced syncope (a fainting spell or blacking out) while driving her route. The bus veered across the other lane and into a ditch, where the Grievant stopped the bus. Riding on the bus were three children and one adult aide. There was no collision and no injuries. After determining there were no injuries, the Grievant drove the bus back on to the road. She filed an incident report with the District's Director of Transportation. She was placed on sick leave pending medical examination. (Union Exhibit 2, Joint Exhibits 3 & 6)

Mr. Bowers' drivers license and school bus driver's endorsement were cancelled by the State of Minnesota in February and March 2007. (Union Ex 5 &6) In late April or early May, after exhausting her regular sick leave, she

was placed on a medical leave pursuant to Section 6 of Article VIII of the contract. (Jt. Ex 6)

During the next several months the Grievant underwent a series of medical tests and examinations. All of these tests showed normal/unremarkable results. (Jt Ex 5B-G, Union Ex 3, Jt Ex 7) On March 23, 2007 a doctor at the Minnesota Heart Clinic wrote a letter stating in part:

> I had the pleasure of evaluating Mrs. Kay Bowers…for an isolated episode of syncope while driving. The etiology appears unclear at this point. A comprehensive cardiac evaluation, including holter, stress test and electrophysiologic study were unremarkable. About a third of the time the cause of syncope remains unknown. Prognosis is somewhat benign in patients with syncope of unclear etiology.
>
> Mrs. Bowers had not had recurrence of syncope since her first episode occurred three months ago. It is quite difficult to determine if, or when she may have another episode. Therefore, I recommend reinstating her driver's license. As far as commercial driving, it will be at the discretion of her employer." (Jt. Ex I)

On April 6, 2007 the State of Minnesota reinstated her drivers license. During the summer of 2007 Ms. Bowers was in contact with the State Department of Public Safety and her medical providers, in an effort to have her school bus drivers endorsement reinstated. (Union Ex 10, Jt K)

In July 2007 District Director of Personnel and Finance Randi Johnson told the Grievant that her 12-week medical leave was expiring. Ms. Bowers requested an extension of that leave. On August 10, 2007 the North Branch School Board denied her request for an extension and terminated her employment. (Testimony of Ms. Johnson and Ms. Bowers, Jt Exs 5J and 6)

APPICABLE CONTRACT LANGUAGE

FROM THE PARTIES' COLLECTIVE BARGAINING AGREEMENT DATED JULY1, 2006 THROUGH JUNE 30, 2008

ARTICLE VIII LEAVES OF ABSENCE

SECTION 1. Sick Leave:

Subd. 1. All eligible employees shall earn sick leave at the rate of one (1) day for each month of service in the employ of the School District (9 days per annum) for the regular school year. An employee with summer duties shall accrue one additional sick leave date for each block of 20 days worked during the summer period.

Subd. 2. Sick leave shall be limited to a total accumulation of ninety (90) days. Effective July 1, 2004, the total accumulation is increased to one hundred (100) days.

Subd. 3. Sick leave with pay shall be allowed by the School District whenever an employee's absence is found to have been due to illness which prevented his/her attendance and performance of duties on that day or days…

Subd. 7. Sick leave allowed shall be deducted from the accrued sick leave days earned by the employee.

SECTION 6. Medical Leave of Absence

Subd. 1. An employee who has completed his/her probationary period and who is unable to work because of illness or injury, and has exhausted all sick leave credit available, shall, upon request, be granted a medical leave of absence, without pay up to 12 weeks. The School District may, in its discretion, renew such a leave.

Subd. 2. A request for leave of absence, or renewal thereof, under this section shall be accompanied by a written doctor's statement outlining the condition of health and estimated time at which the employee is expected to be able to assume his/her normal responsibilities.

SECTION 11 Eligibility

The benefits of this Article are designed only for eligible employees defined as those employees regularly employed at least nine months per year and at least 32.5 hours per week…

ARTICLE XI DISCIPLINE DISCHARGE AND PROBATIONARY PERIOD

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

ARTICLE XIV PHYSICAL EXAMINATIONS

SECTION 1. Physical Examination. Any employee whose condition of physical or mental health is thought to be adverse to the welfare of pupils or other employees, may be required to undergo a health examination by a licensed physician, at the expense of the School District. The School

District reserves the right to choose the physician or clinic when such examination is required by the School District.
SECTION 2. Other Physical Examinations. The School District shall pay the cost of any bus driver's physical examination as required by the State of Minnesota or the School District. Such physical shall be taken at a physician or clinic as designated by the School District and in such scope and form as prescribed by the School District.

STATEMENT OF THE ISSUES

1. **Did the Employer violate Article VIII Section 6 of the collective bargaining agreement by requiring the Grievant to apply for an extension of her medical leave of absence, in July 2007?**
2. **If yes, did the Employer have just cause to discharge the Grievant in August 2007?**
3. **If not, what shall the remedy be?**

UNION ARGUMENTS

The Union argues first that the District violated Article VIII Section 6 of the contract when it informed the Grievant in July 2007 that her medical leave of absence was expiring. This provision calls for 12 weeks of medical leave. Ms. Bower's leave began in early May, 2007. At the conclusion of the 2006-07 school year, she had used about four weeks of her medical leave, and she was entitled to eight weeks more. Since the Grievant works a nine month year and is not on duty during the summer, the Union maintains it was improper for the Employer to claim she had 'used up' several weeks of leave during the summer. Union Business Agent Brian Aldes testified that when the leave language was bargained in the first contract between the parties, it was never intended that leave time would be deducted from an employee during the season s/he is not on duty. Mr. Aldes stated he has never heard of the language being interpreted as the District now claims to,

and that the Union would have filed a grievance if such a situation had occurred.

Therefore, the Union argues Ms. Bowers should not have been required to request an 'extension' to her leave, since the original leave should have been in effect until late October.

The Union characterizes the District's action in this case as a discharge, not as declining to extend a medical leave. As such, the Employer must show just cause.

The record shows the Grievant sought medical evaluation as required by her employer, and as set forth in Article XIV Section 1 of the contract. She underwent extensive testing including a CT scan, stress echo, Holter monitor, and electrophysiologic study. Medical providers found no significant health problems, and concluded that the syncope has no known cause, as is true in about one third of such occurrences. The Union points out that for the Employer to require a doctor's guarantee that any medical problem could never occur in the future, is an impossible standard. No doctor could ever make such a guarantee.

The Grievant has had no reoccurrence of the problem, and her doctor ultimately concluded as follows:

"A comprehensive cardiac evaluation including Holter monitoring, stress test and electrophysiologic study were unremarkable. Unfortunately, up to a third of the time the cause of syncope remains unknown. It is very likely that she had a typical, vasovagal syncope, as it is the most common cause. Prognosis is considered benign in patients with either syncope of unclear etiology or vasovagal mechanism.
Mrs. Bowers has not experienced any syncope over the past six months. She is physically qualified to drive a commercial vehicle and receive a Class A school bus endorsement." (Jt. Ex K)

The State of Minnesota reinstated her school bus driver endorsement (Joint Ex 5K and Union Ex 11) Since the Grievant fulfilled everything required of her by her employer, and is fit to perform her duties, there is no just cause to terminate her.

EMPLOYER ARGUMENTS

The Employer argues first that since the Grievant's medical leave had expired, the decision whether to extend the leave was discretionary under the contract. Ms. Johnson testified that the District always counted leaves in terms of calendar weeks, regardless of employees' duty calendar. The District argues a plain reading of the language at issue favors this interpretation. The language in Section 6 is clear that a decision to extend a medical leave beyond the 12 weeks provided, is at the District's discretion. It further argues that since no discipline of any kind took place, the just cause language does not apply here. (Employer brief)

The District argues that under the circumstances, it made a reasonable decision not to extend the Grievant's medical leave. At the time of her application for a leave extension, Ms. Bowers still lacked the required school bus driver's endorsement. Even after this endorsement was reinstated, this is only a licensing decision by the State. The Employer points out that neither medical providers nor the State Department of Public Safety have the authority to make employment decisions for the School District:

> "The existence of a license issued by the State constitutes exactly what it says; namely, that the grievant is qualified to be issued a license. However, it is the employer who decides and is ultimately responsible for the decision to entrust the driver with the health and safety of the passengers of the bus, in this case, the students of the School District." (Emp. Brief)

The Employer points out that examinations by several doctors failed to determine a definite cause for the Grievant's fainting spell. Therefore, there was no medical treatment recommended to prevent its reoccurrence. Ms. Johnson testified that given the inability of medical providers to assure the District this event would not happen again, the School Board decided to deny the Grievant's request for a leave extension.

The Employer also cites letters written by doctors in March 2007. (Joint Exs H & I) These recommend reinstating Mr. Bowers' drivers license, but explicitly recognize that the decision concerning whether she will drive a school bus lies with the District.

Ultimately the District maintains its concern and obligation for the safety of the children outweighed the Grievant's right to maintain her employment.

ARBITRATOR ANALYSIS

The Arbitrator must first address the dispute regarding the language in Article VIII Section 6, Medical Leave of Absence. The language simply states that an employee who has exhausted paid leave "shall, upon request, be granted a medical leave of absence, without pay, up to 12 weeks." The phrase '12 weeks' is not defined as referring to the employee's normal work year, nor is it defined as 'calendar weeks'. The language is ambiguous with respect to the disputed issue. District Director of Personnel and Finance Randi Johnson testified the District interprets all language regarding leaves of absence in terms of calendar weeks, rather than counting an employee's duty weeks. However, she did not recall ever having another occasion when an employee used this provision of the contract. Therefore the Union is correct in describing this as a case of first impression. Clearly the Employer

does not have an established practice or routine regarding administration of this leave. Mr. Aldes testified that he bargained for the Union when this language entered the contract. He stated it was not the intent that leave time would be used during periods when an employee was not working (such as the summer). He also testified the District had never administered the language in that manner, and that if it had, the Union would have grieved it.

In examining other contract language relating to this question, the Arbitrator notes the following: 1. Eligibility for all provisions of the leave article is defined as "those employees regularly employed at least 9 months per year and at least 32.5 hours per week"; 2. employees earn sick leave only during the 9-month year "9 days per annum for the regular school year"; 3. Those employees who bid on and receive summer work earn more than the regular sick leave; 4. employees do not receive paychecks during the summer.

The above details make it clear that these are seasonal employees, who normally work a 9 month year. As the Union points out, the contract language granting medical leave to an employee "unable to work because of illness or injury…" would be meaningless, if the employee is not normally expected to work on the days or weeks in question. The language in Section 1 Subd 3 reinforces this:

"Sick leave with pay shall be allowed by the School District whenever an employee's absence is found to have been due to illness which prevented his/her attendance and performance of duties on **that day or days**"

Therefore the most logical plain reading of the language supports the Union's interpretation. In addition Mr. Aldes' testimony regarding intent at the bargaining table was unrebutted.

For the reasons stated above, the Arbitrator finds the Employer violated Article VIII Section 6 when it required the Grievant to apply for an extension of her medical leave of absence in July, 2007. Since the Employer lacked contractual grounds to require Grievant's application, the Arbitrator finds that the termination constitutes constructive discharge of the Grievant. Accordingly, the Arbitrator finds the District does have the burden of proof in this case.

Moreover, the Employer argues that its decision to terminate Ms. Bowers' employment was not dependent on the expiration of her leave. The Employer's concerns about safety and its judgment to not risk Grievant operating busses, would presumably have been the same had she requested a return to work three weeks earlier, or three weeks later. As pointed out by District counsel, the State's decision to reinstate Ms. Bowers' school bus endorsement does not substitute for the District's decision: " it is the employer who decides and is ultimately responsible for the decision to entrust the driver with the health and safety of the passengers of the bus…" This clearly indicates that the timing of the Grievant's request to return to work, and/or the reinstatement of her endorsement, did not control the Employer's decision.

The Grievant is an "employee who has completed the probationary period" and may be discharged only for just cause. (Article XI Section 3). The record shows the Grievant sought medical attention as required by the District, and diligently pursued all medical tests which her providers recommended. The results of these tests qualified her to receive the school bus driver endorsement issued by the State. She has experienced no reoccurrence of the syncope. It would be impossible for a doctor to assure the District that any given employee will not experience a medical episode

in the future (for instance a heart attack or stroke). However Ms. Bowers has been assessed for risk factors more thoroughly than are most employees.

The Employer made a decision based on a genuine and understandable concern that a medical event could occur in the future. The record shows the likelihood of such an event is remote. However the potential consequences are dire.

Clearly the seven traditional tests of just cause do not apply to this situation. However, just cause is intended and understood to be a substantial standard. In this case, the medical evidence was strongly against a reoccurrence of syncope. Employment was terminated based on a sincere fear of a possible, but unlikely safety hazard. The Union is persuasive in arguing that if the Employer is permitted to discharge employees based on such possible future safety concerns, the just cause provision of the contract would have no meaning.

The Arbitrator finds the District did not meet its burden of proving just cause to terminate the Grievant's employment. The Employer, however, retains its management right to direct employees as found in Article IV and in PELRA. It has the right to implement its decision that Ms. Bowers not be assigned to drive a school bus.

There was no bad faith on either side in this matter, and the Employer's termination decision was not punitive. Under these unusual circumstances, the Arbitrator orders that back pay be computed by the parties based on the pay Grievant would have received in the job classification she is assigned to pursuant to this award. The Arbitrator specifically retains jurisdiction in this matter until the parties have reached an agreement on the reinstatement and back pay.

AWARD

Ms. Bowers will be offered reinstatement to employment with North Branch School District. Her work assignment remains a management prerogative. If the District chooses not to assign Ms. Bowers bus driving duties, she must be reinstated to a position in an equivalent or lesser job classification with the District. The Grievant should be reimbursed for lost wages based on the compensation described above minus any unemployment compensation or other earnings received by the Grievant since the starting date of the 2007-2008 school year.

_____ August 28, 2008

George Latimer, Arbitrator Dated