

IN THE MATTER OF ARBITRATION BETWEEN

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AFSCME COUNCIL 5,)	
)	ARBITRATION
Union,)	AWARD
)	
and)	
)	KASTNER DISCHARGE
)	GRIEVANCE
)	
COMMUNITY ACTION PROGRAMS)	
OF RAMSEY & WASHINGTON)	
COUNTIES,)	
)	
Employer.)	BMS CASE NO. 08-PA-0806
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Arbitrator:	Stephen F. Befort
Hearing Date:	February 10, 2009
Date post-hearing briefs received:	N/A
Date of decision:	March 6, 2009
	APPEARANCES
For the Union:	Tom Burke
For the Employer:	Michelle Soldo

INTRODUCTION

AFSCME Council 5 (Union) is the exclusive representative of a unit of non-supervisory employees employed by the Community Action Program of Ramsey & Washington Counties (Employer). The Union claims that the Employer violated the parties' collective bargaining agreement by discharging Laura Kastner 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

Did the Employer have just cause to discharge the grievant? If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE XII – DISCIPLINARY PROCEDURE

12.4 **DISCHARGE:** Discharge can be used for some first offenses of a serious nature and otherwise only after the EMPLOYEE has received at least one written reprimand. The EMPLOYEE shall be advised of discharge action by interview and/or by certified mail, return receipt requested. Any notice of discharge shall state specifically all grounds for discharge. Discharges are subject to grievance procedure.

FACTUAL BACKGROUND

The Employer is a private non-profit agency that provides social and educational services to low-income clients in Ramsey and Washington Counties of Minnesota. One of the services sponsored by the Employer is the Head Start program which provides pre-school education to three to five year old students. The Employer operates a number of facilities throughout the two counties.

Laura Kastner has worked for the Employer for a little more than ten years as a bus driver. Her principal duties are to transport Head Start pupils from home to school and back. She works out of the Swede Hollow Center located on the east side of St. Paul. During her years of employment, Ms. Kastner has received satisfactory evaluations and has no prior disciplinary record.

This grievance arose out of an accident that occurred on March 6, 2008. On that day, Ms. Kastner drove one of four buses transporting Head Start students on a field trip to a bowling alley on the east side of St. Paul. After the bowling activities were finished, fifteen students and six adults boarded bus # 46 with Ms. Kastner as the driver. The other adults in addition to Kastner included two parents, two teachers, and a bus monitor assistant. Kastner drove the bus to the McKnight Road entrance to Interstate Highway 94 and then headed west bound for the Swede Hollow Center.

According to Ms. Kastner's testimony, she was driving in the right lane of Highway 94 at about 3:45 pm when she observed two vehicles stalled in that lane near the intersection with White Bear Avenue. She then pulled over into the right center lane of the highway in order to avoid the blocking vehicles. Shortly thereafter, a vehicle entered the highway from the White Bear Avenue entrance, and, upon observing the two stalled vehicles, also attempted to move into the right center lane. The second vehicle crashed into the school bus and then fled the scene. The collision took place 2.8 miles from the Swede Hollow Center.

Ms. Kastner testified that the first thing she did following the impact was to ask if everyone was okay. Some of the adults on the bus surveyed the passengers and responded in the affirmative. Kastner testified that she knew that the protocol was to pull the bus over to the shoulder or to stop at the next exit. In her opinion, however, it was too dangerous to pull over immediately to the shoulder in light of the chaos accompanying the collision. She also testified that the traffic was too heavy to permit her to change lanes and take the Highway 61 exit which was .4 miles beyond the point of the accident. Meanwhile, Kastner attempted to contact the Employer's dispatch center by

radio, but she claimed that she was unable to obtain any response. With some of the adults on the bus urging her to keep going until they reached the safety of the Swede Hollow Center, Kastner continued to drive the bus another 1.5 miles to the next exit, which was the Mounds Boulevard exit situated approximately .9 miles from the Swede Hollow Center. At this point, Kastner pulled the bus over and succeeded in reporting the accident to Julie Reeves at dispatch with her radio. She then drove to the Swede Hollow Center and dropped off the passengers.

After receiving Ms. Kastner's message, Ms. Reeves contacted Transportation Coordinator Kevin Oswald who instructed Reeves to report the accident to the police. In accordance with Oswald's instructions, Reeves asked another bus driver, Morris McKee, to drive bus # 46 and Ms. Kastner back to the scene of the accident. McKee testified that while driving the bus he was unable to get through on the radio for some time because other calls were jamming the system. McKee also testified that since he found no other vehicles on the shoulder at the scene of the accident, he returned to the Swede Hollow Center. Once back at the center, the police interviewed Ms. Kastner by telephone. The police did not issue any citations as a result of the traffic accident.

Mr. Oswald, Ms. Kastner's direct supervisor, undertook an investigation into the incident. As an initial step, Mr. Oswald reviewed the Employer's policies on how bus drivers are expected to handle accident situations. In this regard, the Employer's Accident and Emergency Procedures Policy states that a driver is to stop and "stay at the scene It doesn't matter how minor the accident or unless directed by your supervisor or law enforcement personnel." The policy also requires drivers to contact dispatch or supervisors in the event of an accident. Mr. Oswald testified that state law

additionally provides that a school bus driver is not to drive a bus following an accident involving more than \$4,400 in damages unless given permission to do so following inspection by the Minnesota State Patrol.

As part of the investigation, Mr. Oswald interviewed Ms. Kastner and other eyewitnesses. He testified that during his interview with Ms. Kastner, she told him that she had handled the incident correctly and that she would act in the same manner in the event of a similar future accident.

Mr. Oswald also visited the accident scene, reviewed radio communications logs, observed the route from White Bear Avenue back to the Swede Hollow Center, and obtained an estimate of the damage to the bus. Mr. Oswald testified that he found the traffic flow generally to be light going in a westerly direction at the accident scene during the time of day in question. He also testified that bus # 46 had radio contact with dispatch on a number of occasions on the day in question, which made him doubt the accuracy of Ms. Kastner's claim that she was unable to reach dispatch shortly after the accident. Mr. Oswald further identified five locations on Highway 94 between White Bear Avenue and the Mounds Boulevard exit where he believed that Ms. Kastner had adequate room to pull off onto the road's shoulder. He testified that each of these spots had a ten-foot shoulder width which he thought was sufficient to accommodate the eight-foot width of bus # 46. Finally, he obtained an estimate indicating that it would cost approximately \$7,500 to repair the damage to bus # 46.

Based on this investigation, Mr. Oswald decided to recommend Ms. Kastner's discharge. He testified that he reached this decision for two reasons. First, Ms. Kastner's decision to drive the bus following the accident put the passengers in danger because the

accident may have rendered the bus unsafe. Second, Ms. Kastner's failure to pull over and stop at the scene of the accident violated the requirements of both Employer policy and state law. Mr. Oswald discounted Ms. Kastner's purported reasons for not stopping, finding that neither traffic nor radio problems impeded her ability to pull over and stop the vehicle following the accident.

The Employer's Executive Director and the agency's Policy Council concurred in Mr. Oswald's recommendation. On March 26, 2008, the Employer presented Ms. Kastner with a formal discharge letter. The Union grieved that decision, and the grievance has proceeded to arbitration. At the arbitration hearing, Ms. Kastner testified that she would pull over and stop if confronted with the same circumstances in the future.

POSITIONS OF THE PARTIES

Employer:

The Employer contends that it had just cause to discharge the grievant. The Employer initially points out that Ms. Kastner violated both Employer policy and state law by failing to pull over and stop the bus following the accident on March 6, 2008. The Employer further argues that discharge is the appropriate sanction for this misconduct. In this regard, the Employer relies on two principal arguments. First, the Employer stresses that the accident endangered the safety of the passengers because it potentially rendered the bus unsafe. This is a very serious offense which does not require prior resort to progressive discipline. Second, by stating during the investigation that she would handle any future incident in the same manner, Ms. Kastner illustrated that any lesser form of discipline will not serve to correct her behavior.

Union:

The Union acknowledges that Ms. Kastner did not pull over and stop the bus as directed by Employer policy, but it maintains that discharge is too severe of a penalty under the circumstances. The Union initially argues that Ms. Kastner did not have sufficient time to change lanes in a crowded and chaotic traffic environment so as to pull off safely either before or at the next (Highway 61) freeway exit. Given that she had missed the first exit and that the other vehicle had fled the scene, the Union contends that it was not unreasonable for Ms. Kastner to conclude that the best course of action was to take the second (Mounds Boulevard) exit and return the passengers to the safety of the Swede Hollow Center. The Union further maintains, in any event, that discharge is not appropriate in light of her ten-year work record with no history of prior discipline.

DISCUSSION AND OPINION

In accordance with the terms of the parties' collective bargaining agreement, the Employer bears the burden of establishing that it had just cause to support its disciplinary decision. This inquiry typically involves two distinct steps. The first step concerns whether the Employer has submitted sufficient proof that the employee actually engaged in the alleged misconduct or other behavior warranting discipline. If that proof is established, the remaining question is whether the level of discipline imposed is appropriate in light of all of the relevant circumstances. *See Elkouri & Elkouri, HOW ARBITRATION WORKS* 948 (6th ed. 2003).

A. The Alleged Misconduct

The parties do not dispute that Ms. Kastner did not pull over and stop bus # 46 following the accident that took place on March 6, 2008. The parties similarly do not dispute the fact that this conduct violated the Employer's Accident and Emergency Procedures Policy. That policy states that a driver involved in an accident is to "stay at the scene. . . . It doesn't matter how minor the accident or unless directed to by your supervisor or law enforcement personnel." In addition, although Ms. Kastner had no objective basis for knowing so at the time, it appears that her failure to stop also violated state law which prohibits the driving of a school bus following an accident involving more than \$4,400 in property damage. Under these circumstances, the Employer has carried its burden of establishing that the grievant engaged in the conduct alleged as the basis for discipline.

B. The Appropriate Remedy

The principal issue in this case is whether the Employer's discharge decision is an appropriate sanction. The Employer argues that it is for two reasons. First, the Employer maintains that Ms. Kastner placed the passengers of her bus in danger by failing to follow the pull over and stop policy. As witnesses called by the Employer testified, this policy serves three important objectives. First, pulling over and stopping after an accident enables a driver to determine whether her passengers have suffered any injuries. Second, compliance with the pull over and stop policy provides a driver with the opportunity to determine if the bus has suffered any damage that might compromise the continued safe transportation of passengers. Finally, the policy affords the Highway Patrol an opportunity to make objective determinations as to such law enforcement concerns as

passenger safety, negligent operation, and compliance with legal requirements. By failing to follow the pull over and stop policy, the Employer contends that Ms. Kastner jeopardized passenger safety in each of these three respects.

Second, the Employer asserts that Ms. Kastner has failed to comprehend the importance of her misstep. On several occasions during the investigation, Ms. Kastner insisted that she handled the May 6 situation correctly, and that she would follow the same course of conduct again if confronted with similar circumstances. Transportation Manager Oswald testified at the hearing that Ms. Kastner did not grasp the gravity of her failure to follow Employer policy and that no discipline short of discharge is likely to correct her behavior.

While the Employer certainly has made out a basis for a significant disciplinary response, the Union also has pointed out a number of ameliorating circumstances. First, it is not clear that it was safe for Ms. Kastner to pull over and stop either before or at the Highway 61 exit. This particular exit was situated .4 miles west of where the accident occurred. This meant that the grievant had less than 30 seconds to respond to the impact, change lanes, and then pull off the freeway. Ms. Kastner testified that she did not think it was safe to rapidly pull off the freeway due to congested traffic, the volatility of the accident traffic flow, and the paramount concern of ascertaining the well-being of her passengers.

Second, while Ms. Kastner could have pulled off on the shoulder during the 1.5 mile stretch remaining until the Mounds Boulevard exit, it does not appear that Ms. Kastner unreasonably jeopardized passenger safety by deciding at this point to continue driving the bus to the next exit. By this time, the adults on the bus had assured her that

no one had been injured as a result of the collision, and several adults urged her to continue on to the center. Ms. Kastner testified that, in her opinion, the bus was not operating in a manner that appeared to pose any safety problem. And, finally, the other vehicle had fled the scene, meaning that a full face-to-face investigation by the State Highway Patrol no longer was possible.

In hindsight, the safest course of action consistent with Employer policy would have been for Ms. Kastner to pull over and stop the bus somewhere between the Highway 61 and Mounds Boulevard exits. But, Ms. Kastner's decision to proceed to the Mounds Boulevard exit is understandable given the pressures of the moment. In addition, even though Ms. Kastner previously stated during the investigation that she would perform in a similar fashion if confronted with a similar event in the future, she testified at the hearing that she would pull over and stop were she face with similar circumstances.

Finally, it is important to recognize Ms. Kastner's good work record. She has worked for the Employer for more than ten years. During that period, she received good performance evaluations and no discipline. From her testimony at the hearing, it is clear that Ms. Kastner is dedicated to her job and genuinely is concerned with student safety. I believe that she can be a productive employee going into the future, particularly if appropriate steps are taken to facilitate her re-entry into the Employer's workforce.

In the end, I believe that Ms. Kastner's conduct was not so egregious as to warrant her dismissal without progressive discipline. But, since the grievant engaged in a serious breach of Employer policy and refused for a substantial period of time to acknowledge that she should change her behavior, I do not think the Employer should be responsible for a back pay award. Although I generally am reticent to split the outcome

in such a fashion, I believe that this is one of those rare instances in which reinstatement without back pay is the most appropriate remedy.

AWARD

The grievance is sustained in part and denied in part. The Employer had just cause to discipline the grievant, but the sanction is reduced to a reinstatement without back pay. The Employer is directed to reinstate the grievant and to correct her personnel files to reflect this determination.

Dated: March 6, 2009

Stephen F. Befort
Arbitrator