

IN RE ARBITRATION BETWEEN:

MOORHEAD PUBLIC SERVICE COMMISSION

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, IBEW, LOCAL 1426

DECISION AND AWARD OF ARBITRATOR

BMS Case # 09-PA-0709

JEFFREY W. JACOBS

ARBITRATOR

May 20, 2009

IN RE ARBITRATION BETWEEN:

Moorhead Public Service Commission,

and

IBEW, Local #1426.

DECISION AND AWARD
BMS Case # 09-PA-0709
Dan Eli Grievance matter

APPEARANCES:

FOR THE EMPLOYER:

Ben Thomas, Wold & Johnson, P.C.
Guy Thoreson, Admin. & Finance Mgr.
Cindy Markey, Meter Reader

FOR THE UNION:

Seth Thompson, Business Manager, Local 1426
Dan Eli, grievant
Eric John, Union Steward

PRELIMINARY STATEMENT

The hearing in the above matter was held on May 8, 2009 at the Ramada Inn West Acres in Fargo, ND. The parties presented oral and documentary evidence at that time. The parties waived Post-Hearing Briefs and the record was closed.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from January 1, 2006 through December 31, 2008. Rule V provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the State of Minnesota Bureau of Mediation Services. At the hearing the parties stipulated that there were no procedural or substantive arbitrability issues and that the matter was properly before the arbitrator.

The relevant contractual provision is as follows: Rule XV Sec. 1 “Employees will be disciplined for just cause only.”

ISSUES PRESENTED

The parties agreed that the issue is as follows: Did the Employer have just cause to terminate the grievant? If not, what shall the remedy be?

PARTIES' POSITIONS

EMPLOYER'S POSITION

The Employer, Moorhead Public Service, MPS, took the position that there was just cause for the termination of the grievant. In support of this position, MPS made the following contentions:

1. The grievant has been a meter reader for more than 30 years with MPS and should know how to do his job. He is further well aware of the requirements of reading the requisite number of meters per day. He has had a chronic problem meeting these requirements for years resulting in numerous counseling sessions and discipline placed in his file all directly related to the grievant's inability or unwillingness to read the number of meters he is required to on an average basis per day.

2. In April 2004, the grievant's supervisor, Mr. Guy Thoreson, met with the grievant, another meter reader, Ms. Cynthia Markey, and the Union Steward to discuss the expectations for reading meters on a daily basis. At that time it was made clear that the meter readers were expected to read 607 meters per day on a monthly average basis. New equipment was made available at that time that made that a realistic expectation.

3. The expectations were raised to 660 reads per day in October 2006. See Employer Exhibit 7. Again, the grievant frequently failed to meet these expectations even though he always had an excuse. He never took responsibility for his deficiencies but rather blamed his inability to perform his job on the equipment, the weather or some other factor. These are outlined at Employer Exhibit 13.

4. Over the course of some 55 months, the grievant failed to meet the expectations for meter reads 17 times. At the same time, the other full time meter reader, Ms. Markey, was able to meet her expectations every single month despite the fact that she has the same job and is assigned the same sorts of routes as the grievant. She has also not been prodded or counseled to keep her performance up to par as the grievant has – she simply does her job and meets requirements. The Employer argued that these facts mean that the expectations are clearly enunciated and are reasonable since the other full time meter reader can and does perform them without difficulty.

5. The grievant was given a written warning for failure to meet required job standards in January 2005. See Employer Exhibit 3. That was not grieved. At that time Mr. Thoreson made it clear what the problem was and how the grievant needed to correct it. He was also given until the end of February 2005 to pick up the pace or face further discipline up to and including termination.

6. The grievant's performance did not improve appreciably and he was given further discipline in January 2006. At that time the stated discipline was a suspension pursuant to the Employer's progressive discipline policy, See Employer Exhibit 17, but due to a shortage of meter readers at the time, the suspension was stayed. Nonetheless, the grievant was well aware of his performance deficiencies and that this was a step three discipline. See Employer's Exhibit 4. Under the terms of the Policy, a step three discipline is the final step before termination.

7. Even though the last formal discipline he was issued was in January 2006, the grievant's supervisor met with him numerous times since then to advise him that he was still not consistently meeting expectations. There is no question, the Employer asserted, that the grievant was on notice of the problem.

8. The Employer further asserted that the supervisor made every effort to accommodate the grievant and give him whatever he needed in terms of equipment or help to get him to meet expectations. Mr. Thoreson made it clear that he was not concerned how he got the job done along as he made the requisite number of reads on an average basis per month. See Employer Exhibit 7.

9. The grievant's response to these efforts bordered on the insubordinate. At one point the grievant's response to yet another incident when he was confronted about his failure to meet the required average was to work overtime without authorization. See Employer Exhibit 4. Further, as noted above, the grievant always has some excuse for his problems and never takes responsibility for his failure to work fast enough, even though the other meter reader consistently meets her expectations. She works with the same equipment in the same weather and under the same set of expectations the grievant does and she meets the requirements all the time.

10. The grievant has also exhibited other inappropriate behavior that demonstrated his cavalier and disrespectful attitude toward the Employer and his co-workers. In June 2006 he acted inappropriately toward a co-worker when he threw his reports at her and simply said “oops” rather than apologize to her. See Employer Exhibit 5 & 6.

11. On another, he submitted a claim for overtime when it was apparent from the actual reports that he did not in fact work during the time he claimed for overtime. The Employer did not pay that overtime and the grievant never complained or grieved it. The Employer argued that this can only mean that he acknowledged that he was fraudulently submitting a claim for overtime. See Employer Exhibit 8.

12. The incident that was the straw that broke the camel’s back, as the Employer characterized it, occurred on January 27, 2009. The week before, the grievant approached Mr. Thoreson to request January 23rd off in order to take care of his mother, who was having major surgery. The Employer granted this request.

13. On Monday, January 26, 2009, the grievant called Mr. Thoreson to request both the 26th and 27th off, also to take care of his mother. That request was granted as well and the supervisor made arrangements for another reader to take the grievant’s routes. The other reader was able to take Route 48, a route that needed to be completed by the end of the day on January 27th and was able to complete 543 meters. That reader was able to complete 257 reads on January 26th, leaving 286 reads. At that time however the other reader felt that he could have completed the remaining 286 reads the next day.

14. Surprisingly, the grievant showed up on the 27th and wanted to work. He was given the 286 reads on Route 48. The grievant also filled out a FMLA leave request at that time. The Employer asserted that there was no agreement that this leave would be intermittent or that the grievant could simply take off a few hours as he needed it during the day.

15. Contrary to the assertion made by the grievant, the Employer argued that the understanding was that the grievant's sister was to take care of the grievant's mother and that the grievant would be able to work that day. The grievant also indicated that he needed the 28th and 29th off. That request was also granted. The Employer argued that it accommodated every request the grievant had and was more than willing to work with him to grant him the leave he needed to take care of his mother. The Employer did however assert that the understanding was that the grievant was to work full time on the 27th and that he was to complete the 286 reads on Route 48.

16. The grievant completed only 190 of those reads. By contrast, the alternate reader was able to complete that particular route of 543 reads in one day. The grievant was unable to complete 286 in an entire day. Upon closer examination, the Employer asserted that the grievant spent much of day not working and asserted that there was no excuse for his failure to complete the reads as directed.

17. The Employer argued that this incident when viewed in the context of the chronic problems he has had left the Employer no choice but to terminate him. The Employer argued that he was clearly on notice of the problems and of the need to complete his work as directed yet he consistently fails to do so. In response to the Union's due process arguments, the Employer argued that the grievant has had ample opportunity to present his side of the story, including the arbitration hearing itself. There was no need for a *Loudermill* hearing and no need under the just cause clause in the labor agreement to give him the reasons for his termination at the meeting held on January 30, 2009 wherein he was fired.

18. The Employer summarized its case and argued that the expectations were reasonable and clearly enunciated. There was thus notice of a reasonable rule and no question that he failed on numerous occasions, i.e. 17 out of 55 months, to meet the expectations. The Employer asserted that there was no need to conduct any more investigation than was done here due to the clear fact that the grievant simply failed to perform.

19. Finally, the Employer argued that it has tried everything to get the grievant to perform up to standards but nothing has worked and argued that it makes no sense to reinstate the grievant as he has simply not been able or willing to work as hard as he needs to in order to meet the Employer's expectations. Termination is thus the only option here.

20. The essence of the Employer's case is thus that the rule requiring monthly averages of 607 and later 660 reads per month were clearly enunciated and were reasonable. The other reader was always able to make this average without having to be goaded and cajoled into meeting them, while the grievant missed 17 months in a 55 month period – nearly 31% of the time. He has been repeatedly warned, counseled, disciplined and told in every conceivable way that he was not meeting required production standards and that he would be terminated if that trend continued. The January 27th incident was simply the last chapter in a long and chronic history of failure to meet standards and the Employer had had enough and terminated his employment.

The Employer seeks an award denying the grievance in its entirety and upholding the termination herein.

UNION'S POSITION

The Union took the position that there was no just cause for the grievant's termination. In support of this position the Union made the following contentions:

1. The Union noted that the grievant has been with MPS since 1974 and has been a meter reader since 1976. The grievant is well versed in the job and knows what impediments sometimes stand in the way of reading meters. Weather, faulty equipment, dogs, fences and other rules make it difficult at times to read meters and to simply impose an arbitrary number of reads is in many cases unfair and overly simplistic.

2. The Union also argued that the grievant rarely has any help from the part-time meter reader and that it is unfair at best to compare his performance to Ms. Markey. Further, the Union asserted that she is not an objective witness since she and the grievant have had a long running dispute about routes and the distribution of workload. Both have complained to their Union Steward about this and now they hardly even speak to each other.

3. The grievant asserted that there has been a longstanding dispute between him and Ms. Markey over the routes. He asserted that his routes are typically more difficult and time consuming so it stands to reason that she would achieve higher numbers.

4. Moreover, the grievant asserted that the supervisor has consistently indicated that the averages are to be achieved and that he did not care now that was achieved. If one looks at his overall numbers however, the figures show that he has in fact met the required averages, although not in every month. If one looks at the figures over the entire course of the past 5 years, he has read more than the original 607 and the later required 660 per day on a monthly average.

5. The main basis of the Union's argument however was based on a lack of due process. The Union first pointed out that the Employer never held a *Loudermill* hearing. They presented the grievant and his Union steward with a termination letter, Employer exhibit 14, which contained no stated grounds for the termination and told him he was fired. There was no opportunity to explain what happened on January 27, 2009 or give his side of the story.

6. Moreover, the Union pointed to the generally accepted standards for just cause and argued that the Employer made the decision to terminate the grievant well before ever meeting with him. It was thus clear that there was a lack of a full investigation since the Employer decided to terminate the grievant before ever talking to him.

7. The Union further argued that the FMLA leave was to be intermittent to allow the grievant time on an occasional basis, as he needed it, to attend to his mother's health care needs. The Employer was well aware of this and of the grievant's situation yet did not honor the agreement they made with the grievant to allow him intermittent FMLA time off. It was due to these issues that he was taken away from his job duties on January 27th and was in part one of the reasons he was not able to complete the reads that day.

8. The Union also raised the issue of the weather on the date in question. The Union introduced weather records indicating that the temperature was well below 0 that day with a significant wind chill. There was also very heavy snow on the ground, which impeded the grievant's progress. The route he was assigned required him to leave his vehicle and at times slog through deep snow in frigid temperatures to get the reading he needed.

9. The Union pointed to Article VII, section 1 of the labor agreement, which is the so-called inclement weather provision. That article provides that "Employees shall not be required to work out-of-doors continuously during heavy or continuous storms or weather that is more than ten (10) degrees below zero unless such work is necessary to protect life or property or maintain service to the public."

10. The Union asserted that the weather that day was lower than -10 degrees below zero and that there was no issue of the need to protect life or property. These were simple meter reads and the grievant was not required under the clear terms of this clause to work continuously outside. He was entitled to take appropriate breaks to warm up under these conditions.

11. The Union further argued that the route in question was not even necessary to read that day. The grievant testified that he was told that the route was to be estimated, thus obviating the need for an actual read at all. Thus, the Employer's assertion that these meters needed to be read by the end of the day on January 27th was simply untrue.

12. The Union further argued that the grievant was never placed on notice of the need to complete these reads or face the loss of his job. The Union's claim here was based on several arguments. First, there was no "last chance" given to the grievant as asserted by the Employer. He was never told that he needed to complete all 286 reads or be terminated. To the contrary, he was originally supposed to be off work that day and could if he had chosen to, taken sick leave and been paid for the day off. He was coming to work to demonstrate his commitment to getting work done and is now being punished for doing what was essentially a good deed.

13. Second, the Employer by terminating the grievant for allegedly failing to complete a daily set of meter reads, has now changed the standards. The Union noted that the Employer's requirements have always been based on a *monthly* set of averages and have never been based on a one-day set of figures. In other words, as the grievant's supervisor testified to several times at the hearing, the measure used was based on the *monthly* figures the grievant was required to meet. There has never been any requirement or measure based on a daily amount. The Union asserted that there was therefore not adequate notice to the grievant of the Draconian consequences of failing to read all 286 meters on January 27th.

14. Moreover, the Union argued, between the last formal discipline given to the grievant on January 3, 2006 and the termination on January 30, 2009 there were several; times when the grievant failed to meet his monthly figures. The Union argued that while there were legitimate reasons for this, the fact remains that he did not meet the monthly averages on several occasions in that 3-year period. Despite this, the grievant was never given any further discipline for those instances and had no reason to believe that he would be fired for failing to read the rest of route 48 on January 27, 2009. There was thus at the very least lax enforcement of the requirements

15. Finally, by the very terms of the Employer's Policies and Procedures, Employer Exhibit 17, discipline that is more than two years old cannot be used. That policy provides in relevant part as follows: "Records of verbal reprimands, written reprimands and written notices of suspensions are considered outdated after a period of two years and should be removed from an employee's personnel file." See Employer Exhibit 17 at page 6.

16. The Union argued that the notice of suspension must therefore not be considered and cannot be used to support a claim that the grievant was at the last step of the discipline process since more than two years had passed. The fact that he was counseled for failing to meet the averages does not meet the definition of progressive discipline under the terms of the Policy.

17. The essence of the Union's claim is that even though the grievant's monthly averages did not always meet the required level, the procedural defects in the Employer's case dictate that the grievant's termination be overturned.

The Union seeks an award sustaining the grievance, reinstating the grievant; expunging the grievant's record of all discipline herein and reinstating any lost back pay and accrued benefits as the result of the termination in this matter.

MEMORANDUM AND DISCUSSION

The Employer is a public utility providing various types of utility services to the public in the Moorhead Minnesota area. The Employer uses differing types of technologies to read the electric and water meters to determine usage and to bill for the services provided by the utility.

The grievant has been with MPS since 1974 and has been a meter reader since 1976. There is at least one other full time meter reader at the relevant times herein as well as some part-time meter readers as well. Ms. Cynthia Markey was also employed as a full time meter reader for the Employer at the relevant times herein as well.

As will be discussed below, there was a longstanding simmering dispute between her and the grievant over the routes assigned and the way in which work was distributed. Each felt that the other was doing less work or had easier routes. This dispute, while clearly evident, did not weigh heavily on the ultimate decision in this case however.

In 2004 the Employer instituted required numbers of meter reads for the full time readers, including the grievant. At that time the requirement was set at 607 reads per day to be averaged on a monthly basis. The evidence showed that these figures were kept on a monthly average and were how the readers were judged. There was no dispute that the grievant did not meet his required production quota on several occasions. See Employer Exhibit 3. From July 2004 through December 2004, the grievant's production fell short in 5 of those 6 months. Further, he was given notice on several occasions that he was not meeting required production quotas. See e.g. Employer Exhibit 2, which is a memo from Mr. Guy Thoreson, the grievant's immediate supervisor about this very topic.

In January 2005 the Employer issued a written warning to the grievant for failure to meet his performance standards because of the history set forth above. Employer Exhibit 3. He was given until the end of February 2005 to "show MPS that you can do it." He was further advised that the consequence of not meeting performance standards was the continuation of disciplinary steps up to and including termination. It was thus clear that the Employer was following its own progressive disciplinary steps pursuant to the Procedure and Policy, see Employer Exhibit 17.

It was also of some note that while the Employer apparently kept careful track of the daily meter reads, the standard was based on a monthly average. See, e.g. Employer Exhibit 4. The warnings, disciplines and counseling he received were all apparently based on the monthly figures even though there were days when he did not meet the required 607 or 660, depending on the date. It was also clear from the evidence that the Employer expected the monthly figures to be met and that it was not important how he was able to do that as long as the monthly figures were met or exceeded. See testimony of Mr. Thoreson.

In January 2006 the grievant was given a notice of suspension again for failure to meet production goals. This was stated as a step three notice of suspension but the suspension was not imposed due to a shortage of meter readers at the time. Despite that, the evidence showed that the grievant was again made aware that his monthly averages for reads was well below par and that he would need to step up the pace to avoid further discipline. The grievant was given the option of going to EAP for assistance or contacting Mr. Thoreson to get whatever help he felt he needed to perform up to standards. The Employer made a point of demonstrating that while the grievant's numbers were lagging behind in many months, Ms. Markey's numbers were consistently at or above expectations.

As noted above, there was some argument about whether her routes were truly comparable. There was no evidence to suggest any favoritism in the routes given to Ms. Markey or that her routes were significantly less difficult than the grievant's. Both were given some routes that required more work and walking and both were given a rotating level of routes to "even out" the workload. Obviously, they used the same equipment, the same sorts of vehicles and were subject to the same weather conditions yet Ms. Markey's performance was consistently better. This was a source of some frustration for the Employer and understandably so. There was no evidence as to why this was the case. The Union did not meet its burden of showing that the equipment was deficient or that there was some objective or tangible reason why the grievant's figures were so much lower on a consistent basis.

The evidence further showed that between January 3, 2006 and the date of the grievant's termination on January 30, 2009 there were no other instances of discipline. There were other instances where he was told of substandard performance. There were also several instances where the grievant again fell below performance standards but he was given no further discipline. See Employer Exhibit 10, which is a memo dated March 3, 2008 outlining 3 of 4 months that the grievant failed to meet production quotas. This memo is not disciplinary but again points out poor performance and failure to meet production quotas.

There was also some evidence that the Employer was well aware of the grievant's failure to work consistently on a daily basis. Employer Exhibit 11 shows that he worked only 5 hours and 34 minutes on July 24, 2008. The Employer introduced this exhibit as one example of the grievant's typical workday. He showed up at 10:30 that morning when his shift started at 8:00. Mr. Thoreson testified that he was Ok with this as long as the numbers were met. It was clear from the evidence that the average production numbers were paramount to the Employer though and that as long as those figures were met, the actual daily work routine was not all that important. See also, Employer Exhibit 12, which is again a recitation of the grievant's workday on October 24, 2008. He failed to meet his averages that day as well but no discipline was issued for that. There was no evidence that the grievant was aware that the Employer was auditing his work time in this manner. All he apparently knew was that he failed to meet the required number of reads on a monthly basis on multiple occasions. Thus, there was no question that the grievant's production numbers fell below standards several times, indeed, 17 out of 55 months, but that after January 2006 he was not issued any further discipline. It was also abundantly clear that the Employer was watching his figures carefully and on occasion even audited his daily work schedule and knew well before January 27, 2009 that the daily figures were below standards as well.

The Employer raised several other matters that will be dealt with here before getting to the incidents of January 27, 2009. On one occasion the grievant was accused of throwing papers at a co-workers and uttering "oops" under his breath in a way that was perceived as disrespectful to the co-workers. It was clear that this was not the main reason for the discharge but was rather something of an add-on to demonstrate the grievant's sometimes cavalier attitude toward the workplace and his co-workers. There was little evidence of what happened here and based on this record it cannot be said that the grievant violated any work rule or was guilty of anything other than bad manners. See Employer Exhibit 5 & 6.

Further, the Employer raised another instance where the grievant sought overtime in order to complete his route. See Employer Exhibit 8. Upon auditing the time it was discovered that the grievant may not have been working for all the time he claimed. Surprisingly, the Employer did not confront the grievant about this nor did it seek an explanation for the apparent discrepancy. Neither did the Employer discipline the grievant for what it now claims was an abuse of overtime. Rather, the Employer simply did not pay the overtime in the apparent hope that the grievant would not catch it.

Aside from the possible wage and hour law violations here, this was a curious way to handle that entire affair and was not helpful to the Employer's case. Indeed, the grievant did not "catch it" as his checks are direct deposited and he never made an issue of the claimed overtime. The evidence showed that the grievant was not even aware he was shorted overtime until well afterward, quite possibly until the hearing.

In any event, there was no notice given to the grievant that the Employer questioned or denied the overtime and no weight was given to this episode. This instance was apparently brought forward by the Employer in an attempt to demonstrate the grievant's lack of veracity or in some manner to demean his character. However, not only was there insufficient evidence on this record to support a claim that the grievant abused overtime or was attempting to defraud the Employer, the gambit may well have backfired for the reasons set forth above. On balance, the whole incident was given very little weight given the reasons for the termination.

The series of incidents that led to the grievant's discharge occurred between January 23 and 27, 2009. The evidence showed that the grievant approached Mr. Thoreson early in the week of January 19, 2009 to request time off to take care of his mother. Specifically, the grievant wanted to take January 23rd off to take care of his mother who was having major surgery. This request was granted and the grievant did not appear for work that day.

On January 26, 2009 the grievant contacted Mr. Thoreson to request the 26th and 27th off again to take care of his mother. Mr. Thoreson again granted this request and made arrangements to re-assign the grievant's routes to other personnel for those days. He assigned route 48 to a part-time reader. (That individual did not testify at the hearing.) The evidence showed that route 48 is a somewhat time consuming route with many stops that require the reader to exit their vehicle and walk up to the building to read the meter. The part-time person was able to read about half of the 543 meters on January 26th, which left 286 meters to read the following day. That person felt that they could read the meters the next day and finish the route.

The grievant testified that his mother recovered faster than expected and that he found he would be able to work on the 27th so he appeared for work that day. This was something of a surprise to Mr. Thoreson who had not expected the grievant there that day. He testified credibly that the grievant told him that the grievant's sister would be taking care of their mother and that he could work. He was then assigned to route 48 to finish the remainder of the reads left by the part-time person from the day before. There was no evidence to show that the grievant was placed on any special sort of notice at that time that he needed to finish the entire route or face possible discipline. Mr. Thoreson testified that he believed the route could be completed in one day but there was insufficient evidence to show that there was anything other than the assignment of the route to the grievant.

There was some discussion of needing additional time off during that week so Mr. Thoreson had the grievant fill out an FMLA form for the time off. See Union Exhibit 11. That form, dated January 27, 2009, shows a request for "intermittent FMLA leave dates (provide best estimate): from 1-23-09 to 3-1-09." The Employer granted the FMLA request.

The grievant testified that he believed that what “intermittent” meant was that he could take whatever time off he needed during the day to attend to his mother’s health care needs as they arose. Mr. Thoreson testified that, at least as far as January 27, 2009 was concerned, he was told that the grievant could work all day since his sister was covering the mother’s health needs. There was apparently no specific discussion of what “intermittent” meant under these circumstances. Under these circumstances though, the grievant’s claim that he was able to take a few hours here and there to take care of his mother was not founded. Further, intermittent as that term is used here would allow the grievant to take a day off here and there as he needed it but would not allow for him to decide in the middle of the day, when the Employer is presumably depending on the grievant to work, to suddenly take off. That claim was simply not reasonable.

Further, the evidence showed that the grievant had more than enough sick leave accumulated to have taken January 27th off with pay had he chosen to do that but decided instead to take FMLA leave. It was not explained how someone could be approved for FMLA leave and yet be held to a particular number of meter reads in that same month however.

The evidence showed that the grievant did not read all 286 meters on route 48 on January 27, 2009. His explanation was a bit evasive but was apparently related to having to take time away from work to deal with his mother. He also referred to weather and snow depth but it was not clear whether that was the reason, or even a substantial contributing reason, to his failure to get to all 286 meters.

When Mr. Thoreson discovered that the grievant had not read all the meters on route 48 he determined to terminate the grievant. The evidence showed that the grievant was not told of this decision on either the 28th or the 29th but was called into a meeting on January 30, 2009 with his Union steward and was given the form introduced as Employer Exhibit 14 terminating his employment. That form does not list the reasons for the termination but simply says, “On 1-30-2009 a decision was made to discharge Dan Eli from his employment with MPS.” At the same time, he was also presented with an option to resign and sign a waiver of claims against the Employer.

On these facts, it was abundantly apparent that the decision to terminate the grievant was made well prior to the meeting with him and that there was no opportunity to be heard or to explain what happened on the day in question. It is here that the flaws in the Employer's case rise to a fatal level.

There are several deficiencies in the way in which this was handled. Initially, there was some merit to the Union's claim that the standard by which the grievant's performance was measured suddenly changed. He had never been rated by the daily average but rather by a monthly average. Here, it was apparent that the grievant did not read all the meters on route 48. However, there was neither notice to him that this failure would result in his immediate discharge nor had a daily average ever been used to measure performance. While it is true that the monthly daily average were used the deficiencies in performance had always been measured by the month.

Moreover, contrary to the Employer's assertion that the grievant was on a last chance footing, the Employer's own discipline/progressive discipline Policy calls for warnings and suspension to be withdrawn after two years. See Employer Exhibit 17, set forth above. Thus, it was clear that the Employer could not rely on the assertion that the grievant was at a step three level in January of 2009 when the suspension he was given in January 2006 had long expired.

Further, there was some lax enforcement of the Employer's standards here with respect to the grievant. While this does not somehow excuse these deficiencies in performance, it was clear that the grievant had failed on several occasions since January 2006 to meet performance quotas yet he was neither discharged nor disciplined formally. This does not somehow make those deficiencies "go away" but there was nothing about the events of January 27, 2009 that would have told the grievant that his 32 year career with the Employer would come to a crashing halt if he did not read all 286 meters that day.

Finally, the Employer failed to hold a *Loudermill* hearing and made the decision to discharge him well prior to ever talking to him about what happened on the days in question that led to his termination. The Employer in fact conceded at the arbitration that no such hearing was ever held and that none was contemplated, as they did not think one was even necessary.

The Supreme Court in *Cleveland Board of Education v Loudermill*, 470 US 532, 105 S.Ct. 1487 84 L.Ed 2d 494 (1985) made it clear more than 20 years ago that due process requires an opportunity to be heard before the decision to terminate is made. The principle that under the Due Process Clause an individual must be given an opportunity for a hearing *before* he is deprived of any significant property interest requires "some kind of hearing" prior to the discharge of an employee. The need for some form of pre-termination hearing is evident from a balancing of the competing interests at stake: the private interest in retaining employment, the governmental interests in expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous termination. It is virtually black letter law that due process requires an opportunity to be heard prior to the decision to terminate a public employee. As will be discussed below, this principle has also long been an integral part of the notion of just cause as that term has evolved in the developing labor law as well.

Several well-respected commentators have discussed the *Loudermill* holding and its implications and meaning in the context of providing due process and just cause for terminations. Professor St. Antoine notes as follows: "It is generally accepted that some level of procedural due process is owed by employers to employees in the imposition of discipline and discharge. The scope of protection will usually be greater in the public sector than for employees in the private sector." See, *Common Law of the Workplace*, St. Antoine BNA Books, 2005, section 6.12 page 201 (Professor James Oldham).

He notes further “public sector employees often enjoy a heightened level of due process derived from federal or state constitutions. (Citations omitted) Procedural due process rights that have been identified by the Supreme Court as constitutionally mandated by the Fifth Amendment (which have been extended to public employees at the state level through the Fourteenth Amendment) include: a pretermination hearing giving the employee notice of charges lodged against the employee and an explanation of the employer’s evidence and an opportunity to be tell his or her side of the story.” (Citing *Cleveland Board of Education v Loudermill*.) *Common Law of the Workplace* at 203. See also, section 6.13, wherein Professors Oldham and St. Antoine note, “Just cause requires that an employee being disciplined or discharge be given notice of the charges against him or her and a meaningful opportunity to be heard.” The Employer simply failed to adhere to these well-known, longstanding and well-recognized standards of just cause here.

Second, as the *Loudermill* Court further noted, some opportunity for the employee to present his side of the case is of obvious value in reaching an accurate decision. Dismissals for cause will often involve factual disputes. Even where the facts are clear, the appropriateness or necessity of the discharge may not be. In such cases, the only meaningful opportunity to invoke the discretion of the decision maker is likely to be before the termination takes effect. See, *Goss v. Lopez*, 419 U.S., at 583-584; *Gagnon v. Scarpelli*, 411 U.S. 778, 784-786 (1973). These principles too have long been part and parcel of the notion of proper and just cause for termination.

More to the point, these principles are more than mere technicalities or procedural niceties that can be ignored where the Employer feels that the employee “knew this was coming” or was somehow “guilty beyond doubt.” While guilt or innocence of the stated charges are certainly integral to the determination of just cause; so too are the procedural protections afforded by the just case standard in order to preserve the process of determining that guilt or innocence and the appropriateness of an Employer’s action. Part of the concept of “just cause” means following the proper steps before firing someone.

Arbitrator Carroll Daugherty also long ago set forth a series of guiding principles to be used to aid in the determination of just cause. These tests were first articulated by Arbitrator Carroll Daugherty in *Grief Bros. Cooperage*, 42 LA 555, 558 (1964). See also, *Enterprise Wire Co.*, 46 LA 359 (Daugherty 1966). Professor Daugherty notes that a negative answer to any of these questions may well mean that there is insufficient cause for the discipline imposed. These tests are as follows:

1. Did the Company give to the employee forewarning or foreknowledge of the possible consequences of the employee's conduct?
2. Was the Company's rule or managerial order reasonably related to the orderly, efficient and safe operation of the Company's business?
3. Did the Company, before administering the discipline to the employee make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
4. Was the Company's investigation fair and objective?
5. At the investigation, did the "judge" obtain substantial evidence of proof that the employee was guilty as charged?
6. Has the Company applied its rules, orders and penalties evenhandedly and without discrimination to all employees?
7. Was the degree of discipline administered by the Company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the Company?

Professor Daugherty's commentary to the tests adds context and additional guidance to the determiner of just cause. He notes as follows: "Few if any Union-management agreements contain a definition of 'just cause.' Nevertheless, over the years the opinions of arbitrators in innumerable cases have developed a sort of 'common law' definition thereof. This definition consists of a set of guidelines or criteria that are to be applied to the facts of any one case, ... A 'no' answer to any one or more of the following questions normally signifies that just and proper cause did not exist."

As will be discussed below, most arbitrators today do not overturn an otherwise compelling case simply because of one minor transgression of these tests but rather apply a totality of the evidence standard. Still though, the more negative answers to these questions there are, and the more serious they are in terms of the procedural protections afforded the rights of Unionized employees, the more likely it is that the discipline decision will be overturned or amended. Here that proved to be the case.

Daugherty's commentary to the concept of a proper investigation is particularly germane here. With regard to the third test, Daugherty notes as follows: "The Company's investigation must normally be made *before* its disciplinary decision is made. If the Company fails to do so, its failure may not normally be excused on the ground that the employee will get his day in court through the grievance procedure after the exaction of discipline. By that time here has been too much hardening of positions." (Emphasis in original). This is almost verbatim what the Employer's witness testified to at the hearing and demonstrated a striking problem with the process by which this was handled. Note too that Daugherty's pronouncement was made nearly 20 years before the *Loudermill* decision. This requirement was thus long a part of the notion of just cause even before the Supreme Court took up the issue in the landmark decision in *Loudermill*.

Moreover, Daugherty notes with respect to the fourth of the tests, i.e. a fair and impartial investigation, that "at said investigation the management official may be both 'prosecutor' and 'judge' but he may not also be a witness against the employee." Here too there were problems in that regard.

While most cases do not involve the application of all of the so-called 7 tests of just cause almost every discipline or discharge dispute involves some of them and the resolution of that will in most cases determine the outcome. Over time, many arbitrators have applied these tests without listing them specifically but the notions underlying them remain as cogent and applicable today as they were when they were first written. There must be a framework to determine whether adequate and just cause exists to discipline or discharge an employee.

Here, as was the case in Daugherty's time, where these principles are ignored or trampled, arbitrators have little choice but to overturn disciplinary decisions even in those cases where the grievant's record is poor or they are in fact guilty of the transgression with which they are charged. As will be discussed below, there were a multitude of deficiencies in the way in which the Employer handled this matter, even though it was clear that the grievant's overall record of meeting production standards was poor.

More recently, studies have shown that not all arbitrators use the 7 tests all the time. Further, over time there has been a softening of the strict position seemingly taken by Daugherty and earlier arbitrators whereby a single “no” answer would undercut the entirety of an Employer’s case. That stringent position seems no longer to be the case. Arbitrators now use a somewhat more comprehensive approach and decide discipline and discharge cases on a case-by-case basis without a wooden adherence to a set of tests and do not usually apply them in checklist fashion. Most cases are more complicated than that and should be decided by the evidence as a whole. Here though, even that more expansive approach mitigates in favor of the Union despite the grievant’s work record.

The Employer relied primarily on the reasonableness of the rule and the fact that other meter readers can meet them. They further relied primarily on the “guilt” of the grievant given his poor numbers over time. There was also evidence to show that MPS has not fired anyone for similar behavior so there was no allegation of disparate treatment. The Employer finally relied heavily on the long and fairly disappointing record of the efforts made to get the grievant to conform his work habits to the Employer’s requirements and to meet standards on a consistent basis. These facts made this case all the more difficult to decide, especially given the grievant’s laggardly record vis-à-vis meeting performance standards.

Here though several of these tests created problems for the Employer. First, as noted above, there was not sufficient notice to the grievant of the possible dire consequences of failing to do all 286 reads on the route he was assigned. This was based on the lack of any such statement made to him as well as the notion that he was never previously measured by a daily amount like this. Further, there was the issue of lack of notice and lax enforcement of the rules in place for the required number of reads. The 2006 discipline cannot be used as the last step in the discipline process now because by the terms of the policy it lapsed in January 2008. Further, the Employer did not impose discipline on the grievant for any of the other times he failed to meet standards between January 2006 and January 2009.

This is an almost classic case as described in one of Professor St. Antoine's illustrations on the concept of adequate notice. He notes as follows: "An employee is entitled to be informed to or to have a sound basis for understanding, the disciplinary consequences that will result from violating policies or work rules in effect at the employee's place of employment. See, *Common Law of the Workplace* at section 6.17, p. 213. The Employer must make it known to the employee that certain conduct will result in discipline. As discussed herein, there was inadequate notice of the consequences, certainly not of the dire consequences with which the grievant was faced, for failure to read the 286 meters on January 27, 2009. Obviously, each case rises and falls on its own facts but given these circumstances the grievant's testimony that he was shocked when he was terminated was credible. He simply was not given any idea when he was sent out that day that his very job depended on completing that route.

In addition, several issues with the way in which this was done severely undercut the Employer's case. First, the lack of a *Loudermill* hearing was a glaring problem. It was clear from the evidence that the decision to terminate was made before talking to the grievant or getting his side of the story. While it is true that getting his side of the story may not have made a difference to the outcome in the Employer's eyes, but that is not the issue. The issue is that we will never know that now, since no opportunity to be heard was ever afforded the grievant before the decision was made.

In his seminal work *How Arbitration Works*, BNA 6th Ed, Professor Elkouri notes that procedural due process requirements are basic and fundamental parts of any just cause analysis and states as follows: "Discharge and disciplinary action by management has been reversed where the action was found to violate basic notions of fairness or due process. ... To satisfy industrial due process, an employee must be given an adequate opportunity to present his or her side of the case before being discharged by the employer. If the employee has not been given such an opportunity, arbitrators will often refuse to sustain the discharge or discipline assessed against the employee. ... Thus, consideration of industrial due process as a component of just cause is an integral part of the just cause analysis for many arbitrators." *Id.* at pages 967-968

Elkouri provides several examples of discipline that were overturned where the due process requirements were not met by the Employer. “In one case an employee’s discharge for pulling a knife on a co-worker was set aside where the employee had never been interviewed. Fairness dictated that the employee be given the opportunity to tell his side of the story. See Elkouri at p. 968, (Citing CR/PL Shipping Company, 107 LA 1084 (Fullmer 1996)). In a case where management failed to give an opportunity to be heard, an arbitrator refused to sustain the employee’s discharge, pointing out: ‘A just cause provision, standing alone, demands certain minimal essentials of due process be observed. One at least of those minimum essentials is that the accused have an opportunity, before sentence is carried out, to be heard in his own defense. ... It is the *process*, not the *result* which is at issue. Citing *McCartney’s Inc.*, 84 LA 799, 804 (Nelson 1985) (Emphasis in original). Id. at 968, FN 208.’”

Second, the Union was not provided with the reasons for the discharge at the discharge meeting held on January 30, 2009. The steward testified credibly that he was presented only with the form that stated the grievant was fired. He further was provided a copy of a proposed resignation and settlement agreement without any further explanation of the reasons for which the grievant was being discharged. It is simply not sufficient to say that the Union and the grievant will have an opportunity to be heard at the eventual arbitration hearing and leave it at that.

The Employer also raised a set of somewhat nebulous allegations about the grievant’s use of a Bluetooth phone device that he apparently frequently wears while working. The Employer argued at one point that customers have noticed that and raised it to the Employer. The evidence showed though that this was somewhat non-specific and there was no evidence that this was ever brought forward as a concern to the grievant and the grievant testified credibly that until the hearing in this matter he had never heard of this nor had he ever heard that the customers he frequents have referred to him as “Bluetooth.” At best, this was a matter of gossip.

More to the point, the Employer alleged in an obtuse way that the grievant may be conducting some other sort of business while working but never raised that as an allegation when he was terminated. It is axiomatic that an Employer must generally base the decision to discipline or discharge someone on what it knew when the decision to terminate was made. The Employer may not fire someone and then attempt to gather information necessary to support that decision later. There appeared to be an element of that in the matter and these allegations were therefore given little if any weight.

What remains now is the difficult call as to whether there was under these circumstances just cause for the termination based on the evidence as a whole. On these facts, it was clear there was not and that the grievant must be reinstated to his former position. This was, as noted, a difficult call here since the grievant's performance has not been good. Thus, despite his long record of service, his long record of *poor* service does not help him much. Still though, the procedural issues, the lack of notice, the clear terms of the Employer's policy and the facts of the case conspire to undercut the Employer's claim of just cause.

The Employer's policy does allow for the imposition of a written warning for the failure to meet standards on an ongoing basis. This too is part and parcel of the power to fashion a remedy expressly granted the arbitrator by the parties at the hearing. Based on the grievant's actions herein, including his actions on January 27, 2009, a written warning is appropriate.

Finally, having determined that the facts do not support the discharge the grievant should not regard this as some huge victory. It was clear that his performance had better get better – soon. Had the Employer followed proper procedure here, used its progressive disciplinary policy per its terms and assured proper due process, the result might well have been different. Obviously, future actions, if any, must await future facts, and no decision can be made on that now, but it was clear that the grievant must make a more concerted and diligent effort to meet the standards required by the Employer in order to retain his position and avoid further disciplinary actions.

AWARD

The grievance is SUSTAINED IN PART AND DENIED IN PART. The grievant shall be reinstated to his former position with the Employer within five (5) business days of this Award with full back pay and any accrued contractual benefits from the date of the termination herein. The grievant's record shall be amended to reflect a written warning under the terms of the Employer's progressive discipline Policy and Procedure.

Dated: May 20, 2009

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Jeffrey W. Jacobs, arbitrator