

IN THE MATTER OF ARBITRATION) GRIEVANCE ARBITRATION
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 between)
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) Mark Johnson - Discharge
)
 State of Minnesota, Department)
 of Military Affairs) Employer Case No. 08-213
) Union Case No. 08-M-16-
) 2829-14141
)
 -and-)

AFSCME Council 5, Local 2829) August 3, 2009
))))))))) BMS Case # 09PA0224

APPEARANCES

For State of Minnesota, Department of Military Affairs

Carolyn J. Trevis, Assistant State Negotiator
Lt. Colonel Lowell Kruse, Director of Public Safety, Camp Ripley
Misty Coleman, Personnel Officer Principal
Vernon Hintz, Security Shift Supervisor, Camp Ripley

For AFSCME Council 5, Local 2829

Christi H. Nelson, Business Representative
Blair Francis, Steward
Judy Stavich, Security Guard, Camp Ripley
Mike Hines, Security Guard, Camp Ripley
Ed Partich, Security Guard, Camp Ripley
Mark Johnson, Grievant

JURISDICTION OF ARBITRATOR

Article 17, Grievance Procedure, Section 2(D), Steps, Step 4 of the Collective Bargaining Agreement (Joint Exhibit #1) between State of Minnesota, Department of Military Affairs (hereinafter referred to as "State", "Employer" or "Camp Ripley") and AFSCME Council 5, Local 2829 (hereinafter referred to as the "Union") provides for an appeal to arbitration of disputes that are properly processed through the grievance procedure.

The Arbitrator, Richard J. Miller, was mutually selected by the State and the Union (collectively referred to as the "Parties"). A hearing in the matter convened on February 2, 2009, at 1:30 p.m. (via telephone conference call) to take the testimony of Lt. Colonel Lowell Kruse before his overseas deployment. An additional day of hearing occurred on May 13, 2009, at 9:00 a.m. at the Union Offices, 300 Hardman Avenue, South St. Paul, Minnesota. The hearing was tape recorded with the Arbitrator retaining the tapes for his personal records. The Parties were afforded full and ample opportunity to present evidence and arguments in support of their respective positions. The Parties filed post hearing briefs, with an agreed-upon postmark date of July 10, 2009. The Union's brief was received by e-mail attachment on July 10, 2009. The Employer's brief was mailed and received by the Arbitrator on July 13, 2009, after which the record was considered closed.

The Parties agreed that the grievance is a decorous matter within the purview of the Arbitrator, and made no procedural or substantive arbitrability claims.

ISSUES AS DETERMINED BY THE ARBITRATOR

1. Did the Employer have just cause to terminate the Grievant?
2. If not, what shall be the remedy?

STATEMENT OF THE FACTS

The facts are not in serious dispute. The Grievant, Mark Johnson, was employed on or about March 3, 2005, by the State of Minnesota, Department of Military Affairs, as a Security Guard at Camp Ripley, Little Falls, Minnesota.

The position description signed by the Grievant on March 16, 2006, describes the purpose of the Security Guard position to include:

This position exists to provide the Post Commander with personnel for surveillance of electronic systems to monitor security, communications, intrusion detection and environmental systems from a control monitor station. Additionally, this position provides security, safety and enforcement patrolling of the Camp Ripley Training Center. The employee will also maintain continuous communications and will conduct emergency operations to include notifications, alerts, coordinating emergency assets and rendering emergency assistance and initial area security and investigation. This position will also provide emergency environmental control support and customer service support and visitor assistance on a 24 hour basis.

(Employer Exhibit #2; Union Exhibit #2). This position purpose establishes that it is a critical position, requiring the employee to assist and respond to emergency situations (Employer Exhibit #15) and patrol the expansive grounds (Employer Exhibit #14).

Both Lt. Colonel ("LTC") Lowell Kruse, Director of Public Safety, Camp Ripley, and Vernon Hintz, Security Shift Supervisor, Camp Ripley, testified that at least 50% of the job requires the

Security Guard to drive a motor vehicle. The Knowledge, Skills and Abilities section of the position description also stated that a Security Guard must "possess a valid Minnesota Driver's License. Loss of driver's license will restrict ability to perform assigned duties." (Employer Exhibit #2; Union Exhibit #2).

Misty Coleman, Personnel Officer Principal, for the Department of Military Affairs, testified that possessing a valid driver's license is also included in the job posting for Security Guards. As the Grievant acknowledged in his testimony, the Camp Ripley regulations also require that anyone driving a motor vehicle on the base must have a valid driver's license. (Employer Exhibit #3, Section 6-3(d), Traffic Regulations). This requirement includes the use of ATV's at Camp Ripley. (Employer Exhibit #11). Without a valid driver's license, Security Guards cannot effectively perform all of their required duties of this position.

Prior to be employed by the State as a Security Guard at Camp Ripley the Grievant received a DWI on November 25, 2004. (Employer Exhibit #5).

While employed as a Security Guard the Grievant received a disorderly conduct charge on April 9, 2006. (Employer Exhibit #5). This occurred while off-duty.

On June 9, 2006, the Grievant received a second DWI and lost his driver's license to operate a motor vehicle. (Employer Exhibit #5). This resulted in the Grievant receiving a verbal reprimand on June 12, 2006. (Employer Exhibit #4; Union Exhibit #4). The Employer also changed his duties at Camp Ripley so as to facilitate him not driving while at work. (Id.) This accommodation lasted for approximately six months until the Grievant got his driver's license reinstated from the State of Minnesota. He then resumed his driving duties at Camp Ripley.

On November 4, 2006, the Grievant received a domestic assault charge. This occurred off-duty. This resulted in the Employer preparing a written reprimand on December 5, 2006. (Employer Exhibit #5; Union Exhibit #4). The written reprimand stated that "[f]urther incidents of this type will not be tolerated, and continued similar actions will result in increased disciplinary action, up to and including discharge." (Id.) The Grievant claims that he never saw or received this letter of reprimand. In any event, after the reprimand was prepared this charge was not proven in court but was reduced to disorderly conduct.

On June 7, 2007, the Grievant was given a Letter of Expectations dated June 6, 2007, from Supervisor Hintz which is not considered to be discipline but rather an effort to improve

upon his job performance. (Employer Exhibit #6; Union Exhibit #4).

The Grievant received a written reprimand on July 10, 2007, for missing a scheduled work shift on July 8, 2007. (Employer Exhibit #7).

On December 1, 2007, the Grievant informed the Employer that he was in jail in Todd County for DWI and was unable to work his scheduled shifts. (Employer Exhibit #8). This is the standard method to notify the Employer when an employee is going to be absence from work.

On December 2, 2007, the Grievant received a third DWI and lost his driver's license for a period of six months. The Employer then began an extensive investigation of this incident prior to discussing it with the Grievant. (Union Exhibit #15). LTC Kruse stated in his e-mail to Ms. Coleman and Mr. Hintz on December 4, 2007, that he would be pursuing the Grievant's termination "based on the requirement that he needs a valid drivers license to be an employee." (Id.)

On December 11, 2007, there was a meeting between the Grievant and LTC Kruse. The Grievant waived Union representation during the meeting. (Employer Exhibit #16). The Grievant stated that his next court date was December 17, 2007, and his driver's license was suspended for 180 days. LTC Kruse stated that the

Grievant was being placed in a Leave Without Pay status until this matter could be adjudicated in the courts. He also told the Grievant that as long as his driver's license was canceled he would be unable to perform his patrol duties as a Camp Ripley Security Guard. (Employer Exhibit #8).

The Grievant's court date was moved to January 14, 2008. (Employer Exhibit #9). On January 17 or 18, 2008, the Grievant informed LTC Kruse that he would not be eligible to get his driver's license back for a period of six months. (Employer Exhibit #10).

As a result, on January 18, 2008, LTC Kruse informed the Grievant by letter that he was being discharged effective January 28, 2008, from his Security Guard position for failure to possess a valid driver's license, a requirement of his position. (Employer Exhibit #10).

The Union responded by filing a written grievance on behalf of the Grievant on February 1, 2008. (Employer Exhibit #12). The grievance was denied by the Employer throughout the processing of the grievance through the steps contained in the contractual grievance procedure. (Employer Exhibit #12; Union Exhibit 5). The Union ultimately appealed the grievance to final and binding arbitration, the last step in the contractual grievance procedure. (Id.)

Subsequent to the Grievant's discharge he successfully completed outpatient and inpatient alcohol treatment. (Union Exhibits #12-14). The Grievant testified that he has been sober for many months and has not received any further driving violations related to alcohol. He has changed his life around and has pledged that he will never drink again. The Grievant, however, has not had his driver's license reinstated at the time of the last arbitration hearing.

UNION POSITION

The Grievant was given no warning that he would be terminated from his job, if he received another DWI violation. The Employer has made work assignment accommodations for the Grievant when he received a DWI previously and is still doing so for other Camp Ripley employees.

LTC Kruse had obviously already made up his mind that he was going to terminate the Grievant before he had even met with him on December 11, 2007, to discuss this issue.

LTC Kruse used an alleged domestic abuse charge as part of the reason for the Grievant's termination. However, this charge was not proven in court and reduced to disorderly conduct.

LTC Kruse and Mr. Hintz used items from a file that Mr. Hintz kept on the Grievant as evidence that the Grievant had previous discipline incidents. These items were not in the

Grievant's official personnel file, which by the Contract is the only file that can be used to discipline an employee. The only items in the Grievant's official personnel file kept at Military Affairs personnel office in St. Paul was the Letter of Expectations dated June 6, 2007, and the written reprimand dated July 10, 2007. Therefore, none of the other incidents used by the Military Affairs in this case should be included.

Although the Union requested a complete copy of the Grievant's personnel file, including all supervisory and investigative files on February 1, 2008, this was not provided to Union representatives until after the third step grievance meeting had been held.

Ms. Coleman changed the description position for Security Guard after the Grievant's termination by removing the phrase "loss of drivers license will restrict ability to perform assigned duties." This shows Ms. Coleman's recognition that the Grievant expected he would have certain job duties restricted if he lost his driver's license, but had no expectation of termination. The unaltered job description would lead any employee to believe that if they lost their driver's license they would only have certain job duties restricted.

The Grievant told LTC Kruse and Mr. Hintz that he wanted to keep his job before he was terminated. The Grievant professed

his regret for what had happen and said he would do anything to keep his job, even scrub toilets.

The Grievant is a young man that was going through a very stressful divorce at the time that this DWI happened. He has since then gone through two alcohol treatment programs, an outpatient and an inpatient and completed them successfully. He has been sober for many months and has not received any further violations related to alcohol. The Grievant has changed his life around and has pledged that he will never drink alcohol again. He was a good employee and brings many assets to the Security Guard position.

The Grievant was terminated without just cause. As a result, the Union requests that the grievance be sustained and the Grievant be returned to his Security Guard position with full back pay and benefits and be made whole in all ways.

STATE POSITION

The State has just cause to discharge the Grievant. The Grievant was discharged for failing to possess a valid Minnesota driver's license, causing him to be unable to perform all of the duties of his job at Camp Ripley.

Given all of the facts, it was reasonable for the State to impose the penalty of discharge. First, the Grievant had fair notice that he was required to have a valid driver's license.

Second, the Grievant was given fair warning of the possible consequences of losing his driver's license. Third, the evidence showed that the Employer acted reasonably in dealing with the Grievant's legal troubles and 2007 loss of the driver's license. They gave the Grievant a second chance by accommodating him after the 2007 loss of his driver's license. It was clearly within management's inherent managerial right to decide to discharge the Grievant's employment after he received his third DWI since he was not able to efficiently perform his job any longer. Finally, additional factors support the Grievant's discharge.

The Grievant was not treated disparately. The evidence shows that the Grievant was treated equitably and reasonably, given the total circumstances. In addition, other arbitrators have found that loss of a driver's license, when it is a job requirement, supports the penalty of discharge.

Based upon the foregoing evidence, the Grievant's discharge should be sustained and the grievance and all requested remedies should be denied by the Arbitrator.

ANALYSIS OF THE EVIDENCE

Article 16, Discipline and Discharge, Section 1, Purpose, of the Collective Bargaining Agreement provides that "[d]isciplinary action may be imposed upon an employee only for just cause."

This "just cause" requirement means that the Employer must act in

a reasonable, fair manner and cannot act in an arbitrary or capricious manner. The Employer's discharge of the Grievant must therefore meet the standard of reasonableness.

Termination from employment is, to use a common expression, "capital punishment" for the Grievant, as it involves his livelihood, reputation, employee rights and future job opportunities. In this discharge case, therefore, a significant quantum of proof is required to show not only that the Grievant did the act alleged, but also that the act justifies the "extreme industrial penalty" of discharge. In other words, if actual wrongdoing by the Grievant is established by the evidence, is the propriety of the discharge penalty assessed by the Employer fair and equitable under the circumstances of this case. A heavy burden is clearly on the Employer to support its action in this case.

The issue before the Arbitrator is whether the Employer had just cause to discharge the Grievant from his employment as a Security Guard at Camp Ripley after receiving his third DWI, two of which occurred after the Grievant had been employed by the State.

It is undisputed that the Grievant has failed to possess a valid driver's license since December 2007, when the State revoked his license for six months as a result of his third DWI.

Even though the revocation period has expired, the Grievant has not taken the necessary steps to reinstate his driver's license.

The fact that the Grievant does not possess a valid driver's license to date is significant since from the position description and the unrefuted testimony of LTC Kruse, Mr. Hintz and Ms. Coleman all mandate that the Grievant is required to have a valid driver's license in order to perform all of the duties, including patrolling in a motor vehicle, as a Security Guard at Camp Ripley. It was undisputed that at least 50% of the job requires the Security Guard to drive a motor vehicle while patrolling the base.

The Union alleges that the Grievant was given no warning that he would be terminated from his job if he received another DWI. This argument is rejected for several reasons. First, the Grievant was put on notice that he was required to have a valid driver's license. On March 16, 2006, the Grievant signed and was provided with a copy of his position description which states under the Knowledge, Skills and Abilities section that a Security Guard must "possess a valid Minnesota Driver's License." Second, the Grievant admits that he knew about and had to be familiar with the Camp Ripley regulations which require that all drivers on the base possess a valid driver's license while operating a motor vehicle. Third, in the interview process, the

applicants for Security Guard positions are told that having a valid driver's license is a requirement of the job. (Union Exhibit #5). The Grievant never claimed that he was unaware of this requirement after his interview for the job. Fourth, this requirement is included in the job posting for Security Guards. Fifth, when the Grievant lost his driver's license after getting his second DWI in June, 2006, he was given a verbal reprimand and stripped of his driving duties for a period of about six months. While this verbal warning may not have been in the Grievant's official personnel file, the Grievant admits that he saw or was given a copy by Mr. Hintz. Finally, there is no question that as a result of responding to emergency calls, including medical calls, and patrolling the base on a regular basis, the Grievant knew that having a driver's license was required of the Security Guards in order to perform all of the required duties.

The fact that after the Grievant was terminated the Employer removed the phrase "loss of driver's license will restrict ability to perform assigned duties" from the position description is noteworthy but not persuasive. "Restriction" of duties is only one option available to the Employer for employees who have lost their driver's licenses. There was no evidence that it was meant to be exclusive. Moreover, even though the Grievant testified that he did not know he could be terminated for losing

his driver's license, the foregoing evidence patently establishes that he certainly knew that possessing a valid driver's license was a job requirement.

The Union further alleges that the Grievant is a victim of disparate treatment as other employees who lost their driver's licenses were allowed to continue to work under restricted duty until their licenses were reinstated by the State.

In order to prove disparate treatment, the Union must confirm both parts of the equation. It is not enough that the Grievant was treated differently than other employees; it must also be established that the circumstances surrounding the Grievant's situation were substantively similar to those employees who received more moderate penalties. The evidence establishes that the Grievant was treated fairly by the State as they acted reasonably in dealing with his legal troubles and 2007 loss of his driver's license. He is not a victim of disparate treatment.

Rather than discharging the Grievant immediately upon knowledge of his June, 2006 second DWI and loss of his driver's license for six months, the Employer chose to accommodate him and in essence, the State "gave him a second chance to remain sober." The Grievant was a satisfactory employee (Union Exhibits #9, 10), and as LTC Kruse testified, he wanted to see if the Grievant

could correct his behavior and "clean up his act." The goal was to give the Grievant an opportunity to change his irrational off-duty conduct.

LTC Kruse and Mr. Hintz testified that they decided to allow the Grievant to continue working at the main gate, after he had lost his driving privileges in 2006, in part because other security guards in similar circumstances were also accommodated in that manner. The evidence showed that Judy Stavish, a 20-year employee, was allowed by LTC Dale Slimmer to work at the main gate only after she briefly lost her driver's license in August, 2002 for about three weeks. She testified that during that time she could not respond to medical emergencies. Similarly, Ed Partich, an 8-year employee, testified that he was allowed this same accommodation in 2004 for 90 days. Unlike the Grievant, however, both testified that they did not have any further instances of DWI's and did not again lose their driver's licenses. In the Grievant's case he had three DWIs on his record and he still does not have his driver's license reinstated by the State.

Thus, when the Grievant lost his driver's license for the second time in less than two years, it was reasonable and fair for the Employer to no longer tolerate the Grievant's conduct. The loss of his driver's license was too disruptive and too risky

to the operations at Camp Ripley to allow the Grievant to work the main gate only. A good portion of his job duties required him to patrol and also respond to emergency situations which he could not do without a valid driver's license.

The Union presented two arbitration cases that they allege prove that the Grievant is a victim of disparate treatment. Those cases, however, are readily distinguishable from the Grievant's situation.

In the William Smith grievance, decided by Arbitrator Thomas Gallagher on January 31, 1999, the discharge reasons included failure to obey no-smoking policy, failure to obey traffic laws on base and failure to practice appropriate interpersonal and oral communications skills. (Union Exhibit #6). While Arbitrator Gallagher decided to reinstate Mr. Smith without back pay, his discharge was not caused by his failure to possess a driver's license, the issue here. Further, that case involved different management and the incidents occurred at the Minneapolis-St. Paul Air Base, not at Camp Ripley.

The second award, rendered by Arbitrator John Remington on November 14, 1996, also is not persuasive. (Union Exhibit #7). There the grievant, Joseph Vonitter, was a general repair worker, and had worked at Camp Ripley for over 14 years. After he lost his driver's license, the Employer agreed to pair him up with

another worker so that he would not be required to drive. This arrangement lasted for over seven months. After a new supervisor was hired, and faced with the need to layoff two employees, Mr. Vonitter was discharged. The reason stated for the discharge was "failure to possess a valid driver's license, a requirement of your position." The arbitrator noted that the "Grievant's driving problems were again ignored in 1995, and he was permitted to continue working for at least seven (7) months after his license had been revoked." (Id., p. 10). Given this fact, as well as the fact that the Employer was eliminating positions and going through the layoff process, the arbitrator believed that the termination was "a thinly disguised attempt to lay him off." (Id.) The arbitrator converted Mr. Vonitter's discharge to a layoff.

Unlike the Vonitter situation, the Grievant's second loss of his driver's license, after his third DWI, was dealt with immediately and was not ignored by the Employer. He was placed on an unpaid leave of absence during the pending legal proceedings, and as soon as the Employer determined that the Grievant would be without a driver's license for an extended period of time (at least 6 months, possibly longer), they discharged him. Further, unlike Vonitter, the Grievant could not be paired up with another Security Guard. On each shift in 2007

and early 2008, there were only two Security Guards. One was posted at the main gate to control access to the base; the other had patrolling duties. The Security Guards work 24/7 and are required to patrol and respond to emergency situations at all times of the day. Thus, the ability to accommodate the Grievant was much less because the risk to the base was much greater.

The Employer also provide evidence that the Grievant's termination was consistent with that of another Camp Ripley employee who also lost his driving privileges. David Thompson, a plumber on the base, lost his driver's license in 2005. It appears that this was the first time he lost his driver's license. He was given two extensions of time to allow him to acquire a valid driver's license or work permit; in the meantime, he was permitted to pair up with another employee so that he did not need to drive on the base. After six months, he had not obtained the required driver's license or work permit, and he was summarily discharged in January, 2006. (Employer Exhibit #13; Union Exhibit #8). Although the Union initially grieved the discipline, it ultimately withdrew the grievance. The Thompson matter is clearly more similar to the situation here than the arbitration cases cited by the Union.

Other arbitrators in the State of Minnesota have found that loss of a driver's license, when it is a job requirement,

supports the penalty of discharge. In Teamsters Local 160 and City of Winona, (BMS Case No. 99-PA-1391, July 8, 1999), Arbitrator Cathryn Towley Olson stated that it was reasonable for the City of Winona to require that a waste operator possess a commercial driver's license. The arbitrator further noted that "[b]y driving while under the influence, the grievant ignored the possible penalties and put the responsibility for those penalties squarely on his own shoulders." (Id., p. 8) As a result, the grievant's discharge was sustained by the arbitrator.

Similarly, Arbitrator Daniel Jacobowski upheld the discharge of a meter installer after a DWI revocation of his driver's license. Minnegasco and Gas Workers Union Local 340, 109 LA 220, 223-224 (1997). The employee had been employed by the company for 18 years, the last 15 as a meter installer. After losing his driver's license, the company allowed the meter installer to return to work as a second man on a crew for three months, with the understanding that if he did not obtain his driver's license during that time, he would be discharged. In his ruling denying the grievance, Arbitrator Jacobowski reasoned that "[t]here was validity to the company's argument that productivity would be decreased and that its flexibility would be more limited in retaining the grievant for two-person crew work without his ability to drive." (Id., p. 224) Since there was evidence that

the company was striving to increase efficiency in its operations, the "company had the right to exercise a valid business judgment" and discharge the grievant. (Id.)

A factor traditionally considered by arbitrators when determining whether just cause exists is whether the penalty is reasonably related to the employee's record and the gravity of the alleged offense. Enterprise Wire Co., 46 LA 359 (1966); IBEW, Local 97 v. Niagara Mohawk Power Corp., 143 F.3d 704, 710 (1998) (citing Elkouri & Elkouri, How Arbitration Works, 670-86 (4th ed. 1985)). "Some consideration generally is given to the past record of any disciplined or discharged employee. An offense may be mitigated by a good past record and it may be aggravated by a poor one. Indeed, the employee's past record often is a major factor in the determination of the proper penalty for the offense." Elkouri & Elkouri, How Arbitration Works, 983 (6th ed. 2003).

The Grievant was not a long-term employee with a spotless work record; he had worked as a Security Guard at Camp Ripley for less than three years with some discipline. Although the Grievant was viewed by supervision as being a "good" employee when present for work, his off-duty conduct throughout his short tenure of employment at Camp Ripley damaged the image of the security force both within the base's security force and in the

area's law enforcement community. The Grievant was continually being arrested by area law enforcement community which was offensive to at least one of the Grievant's co-workers. It was also "hypocritical" in LTC Kruse's mind to allow the Grievant to continue to work and stop others on the base for suspicion of driving under the influence of alcohol, when the Grievant had lost his driver's license for the second time.

In addition, the Grievant's off-duty conduct was disruptive to the operations at Camp Ripley. While sitting in jail for a week after his third DWI offense, the Grievant was obviously unable to do his job, leading to disruption in the employees' schedules and resulting in forced overtime having to be paid by the Employer. Although not a stated reason for the Grievant's discharge, it is a factor that cannot be simply ignored.

Based upon the foregoing, the Employer had just cause to discharge the Grievant pursuant to Article 16, Section 1 of the Contract.

AWARD

Based upon the foregoing and the entire record, the grievance is denied.



Richard John Miller

Dated August 3, 2009, at Maple Grove, Minnesota.