

**IN THE MATTER OF ARBITRATION BETWEEN**

TEAMSTERS LOCAL NO. 320,	)	<b>ARBITRATION</b>
	)	<b>AWARD</b>
Union,	)	
	)	
and	)	
	)	<b>SCOTT SWENSON</b>
	)	<b>DISCHARGE GRIEVANCE</b>
CITY OF CHAMPLIN,	)	
	)	
Employer.	)	<b>BMS CASE NO. 10-PA-0029</b>

Arbitrator: Stephen F. Befort  
Hearing Date: January 12, 2010  
Post-hearing briefs received: January 22, 2010  
Date of decision: February 10, 2010

**APPEARANCES**

For the Union: Patrick J. Kelly  
Kevin M. Beck  
For the Employer: Joan M. Quade

**INTRODUCTION**

Teamsters Local No. 320 (Union), as exclusive representative, brings this grievance challenging the City of Champlin’s (City) decision to terminate the employment of Public Service Worker Scott Swenson for his alleged inability to meet essential job requirements. The Union contends that the City violated the parties’ collective bargaining agreement by discharging Mr. Swenson 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.

### **ISSUE**

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

### **RELEVANT CONTRACT LANGUAGE**

#### **ARTICLE XI. DISCIPLINE**

11.1 The Employer will discipline Employees for just cause only. Discipline will be in one or more of the following forms:

- a) Oral reprimand;
- b) Written reprimand
- c) Suspension;
- d) Demotion;
- e) or Discharge.

#### **ARTICLE XXXVI. LICENSING REUIREMENTS**

26.1 All Employees shall be required to hold any and all necessary licenses to perform their defined job duties.

26.2 A current Minnesota Commercial Driver's License shall be required of all bargaining unit Employees . . . .

### **FACTUAL BACKGROUND**

Scott Swenson has worked for the City of Champlin since 2001. In that year, the City hired Mr. Swenson into a full-time position in which his duties were split between that of a light equipment operator in the Public Works Department and a maintenance worker in the City's Ice Forum. In 2005, Mr. Swenson was promoted to the full-time

position of Public Service Worker – Parks and Recreation. He served in that position until his discharge in March 2009.

As described in the Public Service Worker job description, employees in this position “perform maintenance tasks and operate maintenance equipment used in the maintenance of streets, parks and other public facilities of the City.” Frequently performed duties include street maintenance, snow removal, grass and shrub trimming, and the transportation of various supplies and materials. Public Service Workers are expected to be able to operate a variety of equipment from large graders and snowplows to smaller mowers, forklifts and compressors.

Both the position job description and the parties’ collective bargaining agreement require that all Public Service Workers employed in the City’s Public Works Department must possess a valid Minnesota Class B Commercial Drivers License (CDL). Pursuant to Minnesota law, a CDL is required only for the operation of certain large vehicles. Testimony established that the Public Works Department owns five such vehicles and that the most senior of the department’s 12 employees generally are assigned to operate these vehicles. As an employee with lower seniority, Mr. Swenson typically was assigned to operate a one-ton pickup or a riding lawn mower, neither of which requires a CDL by state law. Public Works Superintendent Chris Rachner testified that a CDL is required of all unit Public Service Workers in order to maximize flexibility in making work assignments and to enhance the development of advanced skills.

The Union introduced copies of annual performance evaluations covering Mr. Swenson’s first five years of employment. Each of the evaluations found that Mr. Swenson met or exceeded expectations. The 2005 evaluation, however, noted that Mr.

Swenson sometimes made “poor work decisions.” No evaluations were undertaken for years subsequent to 2005.

In 2004, Mr. Swenson was elected to the Champlin City Council for a term. The record indicates that Mr. Swenson’s dual role as council member and employee led to some difficulties in his relationship with City administrators. The record, however, does not show that this dual role impeded his performance as a City employee.

The event giving rise to the grievance in question occurred on January 24, 2009, when Mr. Swenson was arrested for driving under the influence of alcohol. At around 1:00 a.m. on January 24, Officer Michael Antigua observed Mr. Swenson exit from a bar in downtown Anoka. Mr. Swenson was staggering and having difficulty unlocking his vehicle. According to his testimony at the arbitration hearing, Officer Antigua stated that he told Mr. Swenson that he should not be driving under the circumstances, and Mr. Swenson replied that he intended to walk home. A short while later, Officer Antigua observed Mr. Swenson driving his vehicle through a stop sign. Officer Antigua arrested Mr. Swenson, and a blood test revealed a .20 level of intoxication, more than twice the legal limit.

Mr. Swenson remained in jail for the three days following his arrest. Blaine Kalahar, a co-worker and Union steward, called Superintendent Rachner on January 25 and told him that Mr. Swenson was “out of town.” Mr. Swenson did not inform Mr. Rachner of the real reason for his work absence until Wednesday, January 28. The Employer issued reprimands to both Mr. Swenson and Mr. Kalahar for this conduct.

Mr. Rachner and Mr. Swenson met on January 30 to discuss the latter’s work situation. Mr. Rachner informed Mr. Swenson that he would not be permitted to operate

any City owned vehicles or equipment until such time as the status of Mr. Swenson's CDL was determined. For the next six weeks, Mr. Swenson performed lower priority work that did not involve the use of any vehicles or equipment.

On March 5, 2009, Mr. Swenson pled guilty to a misdemeanor offense. As a result, the court placed Mr. Swenson on probation subject to certain conditions, and, by operation of law, his CDL was revoked for a minimum of one year. The Champlin City Council terminated Mr. Swenson on March 9, 2009 for failure to meet essential job requirements.

Mr. Swenson completed an outpatient chemical dependency program in March 2009. He then entered a relapse program which he did not complete. As a result of not completing that program, the Anoka County Community Corrections Department recommended that Mr. Swenson's probation be revoked and that the stay of his ninety jail sentence be vacated. This issue is set for a court hearing on April 14, 2010. Mr. Swenson testified at the arbitration hearing that he is seeking funding that will enable him to complete the relapse program prior to the April 14 hearing. The parties disagree concerning whether this proceeding might impede the reinstatement of Mr. Swenson's CDL.

During the arbitration hearing, the Union introduced testimony to the effect that the City had accommodated two other public works employees during the early 1990s by permitting them to retain employment for a period of time in spite of the loss of a required driver's license. The parties dispute whether the City's termination of Mr. Swenson constitutes disparate treatment.

## POSITIONS OF THE PARTIES

### **Employer:**

The City contends that it had just cause to discharge the grievant. The City points out that the possession of a CDL is an essential requirement of the Public Service Worker job pursuant to both the City's job description and the parties' collective bargaining agreement, and that Mr. Swenson lost his CDL due to an off-duty drunk driving conviction. The City further argues that discharge is an appropriate remedy under these circumstances. The City maintains that it is not obligated to excuse the performance of essential job functions or to create a new job for an employee who no longer is able to perform his regular duties. The City also denies that there is a past practice of granting such accommodations to similarly situated employees.

### **Union:**

Although the Union acknowledges that Mr. Swenson's CDL has been temporarily suspended, it argues that discharge is too severe of a sanction for several reasons. First, the Union maintains that most of the work performed by Public Service Workers does not require a CDL and that Mr. Swenson performed adequately without a CDL during the six-week period following his arrest. Second, the Union contends that the discharge sanction violates the principle of progressive discipline and that the City could have resorted to lesser discipline, such as a demotion, in order to correct Mr. Swenson's behavior. Third, the Union argues that the City's failure to accommodate Mr. Swenson's license loss constitutes disparate treatment.

## **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 termination 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 (6<sup>th</sup> ed. 2003). Both of these issues are discussed below.

### **A. The Alleged Misconduct**

The parties have little disagreement as to the misconduct alleged by the City. Both parties agree that Mr. Swenson engaged in off-duty misconduct by driving a vehicle while significantly intoxicated and after being warned to the contrary by a police officer. This misconduct has a clear nexus to the job in that it resulted in Mr. Swenson's loss of a CDL which is a prerequisite to the operation of certain large vehicles in his department's arsenal. More specifically, both the City's job description and the parties' collective bargaining agreement make possession of a CDL a mandatory requirement of the Public Service Worker position. Thus, the parties agree that some disciplinary response is warranted. The only question is whether the ultimate sanction of discharge is appropriate under the circumstances.

### **B. The Appropriate Remedy**

The City contends that termination is an appropriate sanction in this case because of Mr. Swenson's inability to meet the essential qualifications of the Public Service

Worker position. According to the City, this disqualification is conclusively established by the parties' collective bargaining agreement which states as follows in Section 26.2:

A current Minnesota Commercial Driver's License shall be required of all bargaining unit Employees. . . .

The decisions of a number of labor and employment tribunals support the City's core proposition. In his treatise on discipline and discharge, for example, Norman Brand cites a number of decisions in which labor arbitrators have upheld the discharge of employees who have become unable to perform essential driving duties due to the loss of a driver's license. *See* DISCIPLINE AND DISCHARGE IN ARBITRATION 175-76 (Norman Brand ed., 2<sup>nd</sup> ed. 2008). Similarly, courts have ruled that just cause for termination exists where a teacher fails to maintain proper licensure or certification necessary to carry out public teaching duties. *See, e.g., Mitchell v. School Board*, 972 So.2d 900 (Fla. App. 2007).

The Union asserts three arguments in urging a lesser penalty in this case. Each of these arguments is discussed below.

**1. A CDL is not really required for successful performance in the Public Service Worker position**

The Union maintains that, as a practical matter, an employee who does not have a CDL nonetheless can adequately perform the functions of a Public Service Worker. Only five of the many vehicles and pieces of equipment utilized in the Public Works Department require a CDL for their operation by state law. Testimony elicited by the Union established that the department generally assigns these larger vehicles by seniority and that employees with lesser seniority, including Mr. Swenson, seldom operate these vehicles. In addition, the Union contends that the City suffered no harm during the six

weeks following Mr. Swenson's arrest in January 2009 when his work assignments did not include the operation of vehicles or equipment. As Superintendent Rachner acknowledged at the hearing, the department has so many tasks to accomplish that he easily could keep an employee busy with duties that do not require a CDL.

The crucial question posed in this case, however, is not whether the City can find some productive tasks for an employee to perform that do not involve the operation of large vehicles, but whether the City is obligated to excuse an employee's inability to perform an essential function of his position. The City's job description for the Public Service Worker position requires employees to maintain a valid CDL. Even more significantly, the parties' collective bargaining agreement requires that a CDL "shall be required of all bargaining unit Employees." Superintendent Rachner testified that this requirement facilitates flexibility in job assignments and ensures that all unit employees will develop the skills needed to be able to handle the department's most challenging vehicles. In the analogous world of disability discrimination, it is well-settled that an employer need not reallocate or excuse the performance of an essential job function. *See* 29 C.F.R. app. § 1630.2(o); Maziarka v. Mills Fleet Farm, Inc., 245 F.3d 675 (8<sup>th</sup> Cir. 2001). The same rule should apply in this context.

## **2. The Employer's Discharge Decision is Inconsistent with Notions of Progressive Discipline**

Another widely recognized arbitral principle is that an employer generally should utilize progressively more serious disciplinary steps before resorting to the ultimate sanction of discharge. The underlying notion of progressive discipline is that such lesser steps initially should be employed if they are likely to correct behavior while still

enabling the employee to retain employment. DISCIPLINE AND DISCHARGE IN ARBITRATION at 65-66. The Union argues that the City's decision to discharge Mr. Swenson without first resorting to lesser disciplinary steps violates this principle. In particular, the Union contends that the City could have demoted the grievant back to his prior Ice Forum maintenance worker position rather than immediately resort to termination.

Progressive discipline is most appropriately used to rectify relatively minor performance problems. It is often used, for example, to address problems with attendance or adherence to safety rules. In this instance, however, the grievant's performance problem is far more serious. The loss of his CDL does not merely impair performance, but it actually precludes the performance of an essential job function. Progressive discipline is not required for serious misconduct that is incompatible with successful job performance. In addition, the suggested demotion is an inapt accommodation since the combined Light Equipment Operator/Ice Forum Maintenance position that Mr. Swenson formerly held also required a CDL.

### **3. The City's Failure to Accommodate the Grievant Constitutes Disparate Treatment**

The Union further argues that the City engaged in disparate treatment by failing to accommodate Mr. Swenson's loss of licensure in the same manner that it previously had done for other employees. In this regard, the Union introduced evidence showing that during the early 1990s, the City on two occasions retained Public Works employees for a period of time even though they had lost their driver's licenses due to a driving while intoxicated conviction.

The Union's disparate treatment claim falls short for several reasons. First, the two comparator cases took place almost two decades ago and thus constitute weak evidence of a past practice. Second, the two accommodations took place at a time when a CDL was not required for all Public Works positions. The fact that a CDL is now required by the terms of parties' collective bargaining agreement is a changed circumstance of particular significance.

Since none of the Union's defenses are sufficient to rebut the City's showing as to remedy, the termination decision is upheld.

**AWARD**

The grievance is denied.

Dated: February 10, 2010

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Stephen F. Befort  
Arbitrator