

STATE OF MINNESOTA
MINNESOTA BUREAU OF MEDIATION SERVICES
IN THE MATTER OF GRIEVANCE ARBITRATION

METROPOLITAN COUNCIL,

EMPLOYER

-and-

ARBITRATOR'S AWARD

BMS Case No. 10-PA-1284

AMALGAMATED TRANSIT UNION,

Employee Discharge

UNION.

ARBITRATOR:

Rolland C. Toenges

GRIEVANT:

Joseph Lester

DATE OF GRIEVANCE:

December 18, 2009

DATE OF ARBITRATOR SELECTION:

May 12, 2010

DATE OF HEARING:

August 26, 2010

DATE OF AWARD:

September 17, 2010

ADVOCATES

FOR THE EMPLOYER:

Diane M. Cornell, Assoc. General Counsel
Metropolitan Council

FOR THE UNION:

Roger A. Jensen, Attorney
Miller, O'Brien, Cummins, PLLP

WITNESSES

Donathan Brown, Asst. Garage Manager

Joseph Lester, Operator

Jeffery P. Wostrel, Garage Operations Mgr.

ALSO PRESENT

Steve McLaird, Asst. Dir., Bus Operations

Sara Lester, Daughter of Grievant

Marcia Keown, Labor Relations

Dan Abramowicz, ATU, 1005

ISSUE¹

Whether the Grievant violated the “Last Chance Agreement” of July 27, 2007?

JURISDICTION

The matter at issue, regarding discharge of the grievant, came on for hearing pursuant to the grievance procedure of the Collective Bargaining Agreement (CBA) between the Parties. The Grievance Procedure, Article 5, in relevant provisions provides as follows:

“Section 1. Metro Transit reserves to itself, and this Agreement shall not be construed as in any way interfering with or limiting, its right to discipline its employees, but Metro Transit agrees that such discipline shall be just and merited.”

“Section 2. . . . When contemplating disciplinary action, Metro Transit shall not give consideration to adverse entries on an employee’s disciplinary record involving incidents occurring more than thirty-six (36) months prior to the date of the incident which gives rise to the contemplated discipline. . . . If a case of discipline involves suspension or discharge of an employee, and such employee is not found sufficiently at fault to warrant such suspension or discharge, the employee shall then be restored to their former place in the service of Metro Transit with continuous seniority rights and shall be paid for lost time at the regular rate of pay.”

“Section 3. Any dispute or controversy, between Metro Transit and an employee covered by this Agreement, or between Metro Transit and the ATU, regarding the application, interpretation or enforcement of any of the provisions of this Agreement, shall constitute a grievance.”

The Arbitration Procedures, Article 13, in relevant part provides as follows:

“In the event a dispute or controversy arises under this Agreement which cannot be settled by the parties within thirty (30) days after the dispute or controversy first

¹ The Issue Statement advanced by the Union was: Was the discharge of the Grievant for just cause?

arises, then Metro Transit or the ATU, whichever is applicable, in accordance with Article 2 or 5 hereof, may request in writing that the dispute or controversy be submitted to arbitration. . . “

“In making such submission the issue to be arbitrated shall be clearly set forth in writing. The Board so constituted shall weigh all evidence and arguments on the points in dispute, and the written decision of a majority of the members of the Board of Arbitration shall be final, binding and conclusive and shall be rendered with forty-five (45) days from the date the arbitrations hearing is completed.”

“The parties thereto shall each pay the arbitrator of its own selection, and they shall jointly pay the third arbitrator. In any matter submitted to the Board of Arbitration, a stenographic record shall be made of the proceedings unless both parties otherwise agree and the cost of the record shall be divided equally between Metro Transit and the ATU.”

The Parties selected Rolland C. Toenges as the Arbitrator to hear and render a decision in the interest of resolving the disputed matter.

The arbitration hearing was conducted as provided by the terms and conditions of the CBA and the Public Employment Relations Act (MS 179A.01 - .30). The Parties were afforded full opportunity to present evidence, testimony and argument bearing on the matter in dispute. Witnesses were sworn under oath and were subject to examination and cross-examination.

The Parties stipulated that the matter in dispute is arbitrable and was properly before the Arbitrator. There was no request for a stenograph record of the hearing.

The Parties presented closing arguments in lieu of post hearing briefs.

BACKGROUND

The Employer operates and maintains a vast fleet of passenger buses and a light rail system used in public transportation throughout the Metropolitan Twin City area. The Amalgamated Transit Union, Local 1005 (Union) represent some 1550 employees who operate equipment, maintain equipment and perform administrative support functions.

The Grievant was employed as a Bus Operator by Metro Transit on September 14, 1987. The Grievant discharged was effective on December 2, 2009.

The instant dispute involves discharge of the Grievant based on a “Last Chance Agreement,” dated July 27, 2007². The “Last Chance Agreement” came about as an alternative to

² Employer Exhibit #2.

discharge when the Grievant violated the Employer's attendance policy, which allows no more than two (2) "no shows" within a rolling calendar year.

The "Last Chance Agreement" of July 25, 2007, followed an earlier "Last Chance Agreement," dated May 11, 2006. The latter agreement, in effect, afforded the Grievant another chance to continue as an employee, even though he was in violation of the earlier agreement.

The July 27, 2007 "Last Chance Agreement" provided that:

"Mr. Lester wishes to remain employed with Metro Transit and Metro Transit is willing to allow Mr. Lester a last chance opportunity to continue as an employee with Metro Transit so long as he agrees to and complies with all of the following conditions:"

The Agreement provided some 14 conditions, including the following, which are relevant to the instant dispute:

"5. Mr. Lester agrees that within a rolling calendar year, effective with his reinstatement, he cannot:

- Exceed five (5) occurrences of absenteeism;
- Have any "no shows" as defined in the Bus Operator Absenteeism Policy;
- Receive a Class A violation;
- Receive more than one (1) Class b violation."

"8. Failure of Mr. Lester to comply with any terms of the Agreement shall result in his immediate termination. Such termination will be deemed just and merited as interpreted in Article 5, Section 1, of the Labor Agreement between the parties;"

"10. Metro Transit may or may not invoke immediate discharge as provided in this Agreement at its sole discretion for future violation. If the employer decides to punish a future violation with less severe disciplinary penalty other than immediate discharge, such a decision by the employer shall not in any way diminish its right to impose immediate discharge for any subsequent violation or violations."

"11. In the event Mr. Lester is discharged pursuant to the Agreement, he may file a grievance only to challenge whether his conduct constituted a violation of any employer rules or regulations as stipulated in the Agreement. Mr. Lester specifically agrees that he may not challenge the propriety of the discharge in any stage of the grievance procedure."

"12. If Mr. Lester's grievance is submitted to arbitration, the jurisdiction of the Arbitrator is limited to determining whether Mr. Lester was in violation of the

Agreement. All Parties agree that the arbitrator shall not have jurisdiction to modify the discharge penalty in the event such a violation is found;”

“13. Mr. Lester declares and represents that he has carefully read the Agreement, understands its terms and conditions, has been advised regarding its meaning and effect prior to executing the Agreement, and has voluntarily and freely entered into the Agreement. Further, Mr. Lester declares and represents that no promise, inducement, or agreement, other than those expressly set forth in this Agreement, has been make [made] to him by any Council Employee or Council Member;”

“14. In case any or more of the provisions of this Agreement shall be invalid, illegal, or unenforceable in any respect, the validity, legality, and enforceability of the remaining provisions contained in the Agreement will not in any way be affected or impaired thereby.”

On October 30, 2009, the Employer notified the Grievant that he was in violation of the “Last Chance Agreement” (LCA) by exceeding five (5) occurrences of absenteeism in a rolling year as noted in Section 10, and had exhausted his 480 hour bank of Family Medical Leave (FML). The Grievant was warned that another chargeable occurrence prior to July 27, 2010 would place him in violation of Section 5 of the LCA.

On November 20, 2009, a hearing was held with the Grievant and a Union representative regarding further violation of the LCA on November 13, 2009. On November 25, 2009, a Loudermill hearing was held with the Grievant regarding the violation. The Grievant was also provided notice of his rights under the Veterans Preference Act, 197.46 and 297.481. The Grievant was placed on administrative leave from November 26 through November 30, 2009.

On December 1, 2009 another hearing was held with the Grievant and he was later notified that he was being discharged effective December 2, 2009.

Thereafter, the Grievant filed a grievance on December 18, 2009, citing a violation of Article 5, Sections 1-3 of the CBA. The remedy requested was reinstatement under the terms and conditions of the “Last Chance Agreement” of July 27, 2009.

The grievance was processed through the CBA Grievance Procedure without resolution. The matter now comes before this arbitration proceeding for a final determination.

JOINT EXHIBITS

J-1. Collective Bargaining Agreement between Metro Transit & ATU 1005, August 1, 2008 to July 31, 2010.

EMPLOYER EXHIBITS

- E-1. Notice of Discharge.
- E-2. Last Chance Agreement (7/27/09).
- E-3. Grievance
- E-4. Notice of Hearing (10/30/09).
- E-5. Memo re: Violation of Last Chance Agreement (10/30/09)
- E-6. Work History (12/02/09).
- E-7. FMLA History (11/11/09).
- E-8. Notice of Hearing (11/17/09).
- E-9. Hearing Summary (11/20/09).
- E-10. Notice of Loudermill Hearing (11/17/09).
- E-11. Notice of Loudermill Hearing to be held 11/30/09 (11/25/09).
- E-12. Notice of Hearing (11/30/09).
- E-13. Notice of Hearing (12/01/09).
- E-14. Request for Administrative Leave (11/26/09).
- E-15. Summary of Loudermill Hearing (12/09/09).
- E-16. First Step Grievance.
- E-17. Second Step Grievance.
- E-18. Third Step Grievance.
- E-19. FMLA Policy and Signed Verification.
- E-20. Absenteeism Policy and Signed Verification.

POSTIONS OF THE PARTIES

THE EMPLOYER SUPPORTS ITS POSITION WITH THE FOLLOWING:

- Although Metro Transit feels sympathy for the Grievant, it must have reliable bus operators, as many people depend on public transportation.
- Metro Transit has shown remarkable tolerance with the Grievant's attendance record
- The sole issue before the Arbitrator is whether the Grievant has violated the "Last Chance Agreement," particularly paragraphs 11 and 12.
- The Arbitrator's authority is limited to whether the "Last Chance Agreement" was violated.
- The "Last Chance Agreement" establishes what is "just cause" for the Grievant's discharge.
- If the Arbitrator finds the "Last Chance Agreement" was violated, then there is "just cause" for discharge.
- The Grievant was given and used all his "Family Medical Leave Act" (FMLA) benefits and additionally was allowed to violate his "Last Chance Agreement" conditions four (4) times.
- The Grievant's FMLA covered leave is well documented, including when absences are no longer covered by FMLA.
- On October 30, 2009, the Grievant was reminded of his obligations under the "Last Chance Agreement" and acknowledged this with his signature.
- Under the "Last Chance Agreement," the Arbitrator has no authority to modify the conditions set forth therein.
- The Arbitrator must determine if the "Last Chance Agreement" was violated.
- If the Arbitrator finds the "Last Chance Agreement" was violated, the Grievant's discharge must be upheld.

THE UNION SUPPORTS ITS POSITION WITH THE FOLLOWING:

- The Union understands the purpose and conditions of the "Last Chance Agreement" and the Arbitrator's authority to determine if it was violated.
- However, if the Grievant was misled that he had FMLA leave available, when he did not, it should not be a violation of the "Last Chance Agreement."

- The Grievant believed, based on his supervisors statement, that he would qualify for two more days of FMLA leave in the following two weeks, which would be sufficient to cover the absence in dispute.
- The Union believes that the Grievant's supervisor made misstatements that the Grievant relied upon.
- While the Grievant testified he knows what his supervisor said, the supervisor testified that he doesn't remember specifics.
- Until recent years, the Grievant has been a good employee and wants his job back. The Grievant has medications and will be a good employee in the future.
- The Grievance should be sustained. The Union has satisfied its burden of proof and the Grievant should be reinstated, without loss of wages or benefits.

DISCUSSION

The sole issue before the Arbitrator is whether the Grievant violated the "Last Chance Agreement" (LCA), Paragraph 5, by being absent from work in excess of the limits specified. If a violation occurred, there is no basis for a determination of "just cause" as the penalty specified in the LCA is discharge.

The LCA in paragraph 12, specifies that . . . "the jurisdiction of the Arbitrator is limited to determining whether Mr. Lester was in violation of the Agreement. All parties agree that the arbitrator shall not have jurisdiction to modify the discharge penalty in the event such a violation is found."

There is no dispute that the LCA was properly executed and that the Grievant was fully informed of its content and conditions. The Grievant's signature and that of his Union representative attest to same.

The record shows that the Grievant's absences were frequent and ongoing.³ From January 1, 2009 until his discharge on December 1, 2009, the Grievant had at least 32 absences, categorized as "sick." Most of the "sick" absences were protected by the "Family Medical Leave Act" (FMLA), but some were categorized as "chargeable" as the Grievant's "sick" days exceed the FMLA limit. The record shows that the Grievant had at least 21 absences categorized as "sick" during 2008.

The record shows that the Grievant was considered eligible for FMLA protection due to a qualifying health condition. However, the FMLA protection is limited to 12 weeks within a

³ Employer Exhibit #6.

rolling 12-month period. If absences exceed this limit, they are subject to the employer's regular absenteeism policy and, in the instant case, to the LCA.

The record shows that the Grievant should have been familiar with the benefits and limitations of FMLA. The Grievant was provided a copy and acknowledged he understood and was responsible for familiarizing himself with it, via his signature on April 27, 1995.

The record shows that the Grievant's absences violated the LCA by "exceeding five (5) [chargeable] occurrences " within a rolling calendar year.⁴ This had first occurred by September 23, 2009, when he had exhausted his FMLA protection. Notwithstanding this violation of the LCA, the Grievant was allowed to continue his employment via an addendum to the LCA, but with notice that he could not have another chargeable occurrence prior to the end of the LCA (July 27, 2010).⁵ The Grievant acknowledged having been given this notice via his signature on the addendum, dated October 30, 2009.

On November 20, 2009 a hearing was held with the Grievant and his Union representative regarding a violation of the LCA. The violation occurred on November 13, 2009, when the Grievant called in sick and had already exhausted FMLA protection available. The Grievant had used what FMLA protection was available when he was absent (sick) on November 11, 2009. The Grievant's response at the meeting was that he was not aware he had violated the LCA.

The Grievant argues that when he met with his supervisor on October 30, 2009, he was told that he could pick up additional FMLA hours in the future as FMLA leave protection hours are based on a rolling calendar year. Supervisor Brown testified that the Grievant was given the record of his leave usage at the meeting and the record showing his FMLA leave balance.⁶ Supervisor Brown testified that he told the Grievant he would pick up additional FMLA protection hours in the future as it is based on a rolling calendar year.

The record shows that the Grievant did pick up eight FMLA protection hours after the October 30, 2009 meeting, which he exhausted when absent on November 11, 2009.⁷ Therefore, when the Grievant was absent again on November 13, 2009, there were insufficient FMLA protection hours available and his absence was "chargeable" under the LCA.

A simple analysis of the availability of FMLA hour's shows that if FMLA leave had been exhausted as of October 30, 2009, a sufficient number of new hours would become

⁴ LCA, Paragraph #5.

⁵ Employer Exhibit #5.

⁶ Employer Exhibits #6 & #7.

⁷ Employer Exhibits #6 & #7.

available to cover the Grievant's absence on November 11, but not enough to cover his absence on November 13, 2009.⁸

Considering the precarious situation of the Grievant with respect to exhausting his FMLA leave protection and the risk of violating the LCA, it seems reasonable that he would have been diligent in keeping close track of the available FMLA hours. The record shows that, if the Grievant could not have figured this out on his own, he could have requested the information from the Employer.

The Arbitrator does not find the Grievant's argument compelling that Supervisor Brown misled him. Supervisor Brown's statement was correct that he would accumulate additional FMLA hours in the future. It was incumbent on the Grievant, knowing he was either out of FMLA leave or nearly out, to keep track of how much and when.

FINDINGS

Under the "Last Chance Agreement" the Arbitrator's authority is limited to determining whether the Grievant violated said Agreement.

The Arbitrator finds that the Parties, via the "Last Chance Agreement," have established violation of the Agreement as "Just Cause" for discharge.

The Arbitrator finds that the Grievant violated the "Last Chance Agreement," therefore discharge is the required remedy.

The Arbitrator finds that if the Grievant was not aware of his FMLA leave balance, it was because he failed to exercise due diligence in monitoring his leave balances.

The Arbitrator does not find the Grievant's argument that he was misled to be either compelling or creditable.

AWARD

The grievance is denied.

CONCLUSION

The Parties are commended on the professional and through manner with which they presented their respective cases. It has been a pleasure to be of assistance in resolving this grievance matter.

⁸ Employer Exhibit #7 & #19.

Issued this 17th day of September 2010 at Edina, Minnesota.

ROLLAND C. TOENGES, ARBITRATOR