**THE MATTER OF ARBITRATION BETWEEN**

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| **TEAMSTERS LOCAL 320,** | ) | |
| **Union,** | ) | |
| **and** | ) | **MORROW DISCHARGE GRIEVANCE** |
| **RICE COUNTY,** | ) | |
| **Employer.** | ) | **BMS CASE NO: 10-PA-1561** |

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| Arbitrator: | Stephen F. Befort |
| Hearing Date: | December 16, 2010 |
| Post-hearing briefs received: | January 18, 2011 |
| Date of Decision: | February 18, 2011 |

APPEARANCES

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| For the Union: | Paula R. Johnston |
| For the Employer: | Terrence J. Foy |

## INTRODUCTION

Teamsters Local No. 320 (Union), as exclusive representative, brings this grievance claiming that Rice County (Employer) violated the parties' collective bargaining agreement by discharging Debra Morrow without just cause. The Employer maintains that it had just cause to terminate the grievant for violating the terms of a Return to Work Expectations agreement. The grievance proceeded to an arbitration hearing at which the parties were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

## ISSUES

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

## RELEVANT CONTRACT LANGUAGE

ARTICLE X. DISCIPLINE

10.1 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; or
E. Discharge.

## FACTUAL BACKGROUND

Debra Morrow began her employment with Rice County in 1996 as a financial worker in the County's Social Services Department. In the following year, she was appointed to the position of a Children's Mental Health Social Worker (CMH-SW). During her fifteen years of employment with Rice County, Ms. Morrow's only prior disciplinary event was a one-day suspension for failing to contact a supervisor concerning an absence.

The CMH-SW position provides ongoing support for children with significant mental health needs. According to the position job description, a CMH-SW's responsibilities include:

- Meeting with children and their families monthly, at a minimum, to observe and assess mental health symptoms and behaviors.
- Scheduling, attending and transporting clients to appointments with therapists, psychiatrists and doctors.
- Attending school meetings and placement staffing.

- Providing crisis intervention in situations involving clients in their home, school and community, and devising plans to de-escalate and mediate conflicts, and formulating safety plans.
- Collaborating and communicating on a professional basis with county attorneys, judges, law enforcement and probation officers.
- Completing reports to the court system and attending court proceedings as required.
- Reporting child protection situations to law enforcement as mandated.
- Driving frequently, requiring a valid driver's license.

On March 14, 2009, Ms. Morrow was arrested on a 5th degree domestic assault charge growing out of an altercation with her husband. At the time, both were active alcoholics. The Employer placed Ms. Morrow on administrative leave and ordered her to undergo a fitness for duty examination. Dr. Gratzer, the examining psychiatrist, determined that Ms. Morrow was fit to return to work as a CMH-SW, but recommended that the return be subject to a number of conditions.

On April 15, 2009, Ms. Morrow and the Employer entered into a Return to Work Expectations agreement that incorporated the recommendations set out in the fitness for duty evaluation. The agreement conditioned Ms. Morrow's continued employment on the following conditions:

- Provide documentation of regular attendance at AA meetings,
- Provide documentation of regular sessions with her therapist,
- Submit to random drug and alcohol screening for 6 months,
- Meet regularly with supervisor to review work activities, and
- Acknowledge that additional incidents or failure to comply with stated conditions will result in disciplinary actions up to and including termination of employment.

Ms. Morrow had a Union representative present when she entered into this agreement. The agreement terminated in October 2009.

On March 13, 2010, Ms. Morrow attended a birthday party outing at a casino with a number of co-workers. Prior to the trip, Ms. Morrow received some distressing news concerning her mother that exacerbated already strained family relations. She spent most of the party on the telephone and cried during the return bus trip. One or more of her co-workers thought that Ms. Morrow might be suicidal and contacted the local police. Although Ms. Morrow does not recall making any suicidal statements, she eventually agreed to go with the police to the hospital. The medical staff at the hospital conducted an evaluation and determined that Ms. Morrow had not been drinking and was not subject to suicidal ideation.

The Employer once again placed Ms. Morrow on administrative leave pending completion of a fitness for duty evaluation. Ms. Morrow entered an in-patient treatment program on March 19 followed by an out-patient after care program. On April 7, 2010, Dr. Gratzer conducted a fitness for duty evaluation and determined that she could return to work subject to certain conditions.

The Employer presented Ms. Morrow with a Return to Work Expectations document on April 15, 2010 that conditioned Ms. Morrow's continued employment upon compliance with the examining doctor's recommendations. In particular, the document provides that "Ms. Morrow may return to work at Rice County with the following conditions:"

1. Ms. Morrow maintains sobriety for one year.
2. Ms. Morrow completes alcohol after-care program . . . .
3. Every month Ms. Morrow will provide Rice County Human Resources with documentation of attendance at AA meetings . . . .

4. Ms. Morrow will obtain treatment including management of medications by a psychiatrist rather than a primary care physician . . . .

5. Ms. Morrow will participate in individual therapy with either a CBT or DBT therapist.

6. Ms. Morrow will submit to random drug/alcohol screens . . . .

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8. Additional incidents impacting work relationships and job performance or failure to comply with the expectations of the return to work plan will result in disciplinary action up to and including termination of employment.

Ms. Morrow signed the agreement on that same day. The record establishes both that the Employer did not contact the Union to negotiate this agreement and that Ms. Morrow did not specifically request Union representation.

Ms. Morrow was arrested and charged with driving while intoxicated (DWI) during the early morning hours of April 16, 2010. On May 3, 2010, the employer advised Ms. Morrow that it was considering the termination of her employment. Following a pre-termination *Loudermill* hearing, the County Board voted to terminate Ms. Morrow on May 11, 2010.

At the arbitration hearing, the Union elicited testimony establishing that the Employer had on a prior occasion not terminated another social worker who had lost a driver's license due to a DWI. In that instance, the Employer temporarily accommodated the social worker until she regained driving privileges. County Administrator Gary Weiers testified that even though he served as the Social Services Director at that time, the non-termination decision was made by the County Administrator rather than himself.

## POSITIONS OF THE PARTIES

### Employer

The Employer contends that Ms. Morrow's violation of the 2010 Return to Work Expectations agreement constitutes just cause for termination. The Employer maintains that the agreement imposes job-related requirements that implicate the grievant's ability to handle the emergency mental needs of her clientele and to interact with law enforcement personnel. The Employer further asserts that the fact that Ms. Morrow violated the terms of the Return to Work Expectations agreement less than 24 hours following execution undercuts the trust necessary to work effectively with supervisors, co-workers, and clients. The Employer argues that the fact that the Union did not formally participate in crafting the 2010 Return to Work Expectations document does not detract from its value as a performance improvement plan recommended by an expert. Finally, the Employer claims that discharge is an appropriate remedy under the circumstances.

### Union

The Union argues that the Employer did not have just cause to support its termination decision. The Union's principal line of attack is to claim that a last chance agreement such as the Return to Work Expectations document is not valid since the Employer did not negotiate it with the Union as an exception to the just cause language of the parties' collective bargaining agreement. As such, the Union argues, the Employer's discharge decision must be evaluated under the normal just cause standard established by the parties' contract. In this instance, the Employer terminated Ms. Morrow for off-duty misconduct. Discipline for off-duty misconduct is appropriate only if the conduct in question has some nexus to the job and precludes effective job performance. According to the Union, both of these elements are missing in this matter.

Finally, and in any event, the Union argues that termination is too harsh of a penalty under the circumstances of this case.

## DISCUSSION AND OPINION

Most discharge cases involve a two-step analysis: 1) did the grievant engage in the misconduct alleged by the employer; and 2) if so, is discharge an appropriate remedy for such conduct? This case requires a somewhat different mode of analysis. Here, it is clear that Ms. Morrow engaged in the conduct that the Employer alleges; namely, that she violated the terms of a Return to Work Expectations agreement that prohibited the consumption of alcohol. What is not so clear, however, is whether this behavior constitutes job-related misconduct warranting discipline. The determination of this issue requires an analysis of both the agreement and the impact of Ms. Morrow's behavior on job performance. Both of these issued are discussed below.

### The Non-Negotiated Return to Work Expectations Document

The Union contends that the 2010 Return to Work Expectations document is an attempted last chance agreement that is without legal force because it was not negotiated with the Union. The Employer counters that this document may or may not be a last chance agreement, but, in any event, it is a valid agreement that should inform the outcome of this proceeding.

Arbitrators are split as to whether a last chance agreement is valid only if negotiated with an employee's representative. The range of opinion is illustrated by this excerpt from the *Elkouri* treatise:

> In some cases, arbitrators have ruled that individual employees "are powerless to enter into such agreements without the consent of the Union." However, some arbitrators have upheld the validity of such agreements, even though unsigned by a union representative, if the employee did not exercise his right to representation by the union or the employer offered the employee representation by the union but the employee declined. . . . In at least one instance, an arbitrator has held a last-chance agreement valid

> even though neither the union nor the employee signed it but both were aware of the terms and tacitly consented to them.

ELKOURI & ELKOURI, HOW ARBITRATION WORKS 972 (6th ed. 2003).

In the end, a resolution of this issue is not necessary since the Return to Work Expectations document is not a true last chance agreement. A last chance agreement generally serves to amend the collective bargaining agreement's just cause provision by stipulating that termination automatically will result in the event that the covered employee engages in the conduct specifically prohibited by the last chance agreement. *See* Donald S. McPherson & Burt R. Metzger, *Last Chance Discharges at Arbitration: Emergent Standards of Judicial Review* 315 INDUSTRIAL RELATIONS RESEARCH ASSOCIATION SERIES: PROCEEDINGS OF THE 46TH ANNUAL MEETING (Industrial Relations Research Association 1994). In this case, however, the agreement merely states that "failure to comply with the expectations of the return to work plan will result in disciplinary action up to and including termination of employment." As such, the agreement is more in the nature of a performance improvement plan than a last chance agreement. Since the agreement informs rather than alters the contract's just cause provision, the normal just cause standard applies in this case. But the Return to Work Expectations document constitutes pertinent evidence even if not negotiated with the Union.

**Impact on Job Performance**

The Employer in this case terminated Ms. Morrow for off-duty misconduct. More specifically, the Employer discharged Ms. Morrow for violating the terms of the Return to Work Expectations agreement by drinking alcohol off duty and by being arrested for a DWI.

In general, an employee's off-duty time is her own and non-work related conduct is not an appropriate basis for discipline. An exception exists, however, when off-duty conduct has a nexus with employee's job. Thus, it is well recognized that off-duty misconduct may be grounds

for discharge or discipline where the misconduct has a substantial impact on the employer's business or reputation. DISCIPLINE AND DISCHARGE IN ARBITRATION 392-93 (Brand & Biren, eds., 2nd ed. 2008). So, for example, a police officer who engages in off-duty illegal conduct may be subject to discipline in the event that such conduct impairs the employee's ability to credibly perform law enforcement duties. *See, e.g.,* Cass County Sheriff's Department and Teamsters Local 346, BMS Case No. 02-PA-40 (Bognanno 2002).

The Union argues that no such nexus exists in this case. The Union points out that the grievant works for a social service agency rather than a law enforcement agency, and that an off-duty misdemeanor does not impair her ability to counsel minors with mental health issues in the same manner that an off-duty offense impairs a police officer's ability to enforce the law. The Union also maintains that Ms. Morrow's problems with substance abuse have never resulted in any documented problems with job performance. Finally, the Union notes that Ms. Morrow has completed treatment since the March 2010 incident and has now been sober for seven months.

These contentions are not without merit, and I find this case to be a close call. I nonetheless find that the Employer has established a sufficient nexus between the grievant's off-duty conduct and her job duties to warrant the imposition of discipline. I base this conclusion on the following findings:

First, Ms. Morrow's job duties require her to work with vulnerable children in crisis situations. This work is performed independently and with little supervision. Ms. Morrow's history of substance abuse and emotional instability raises serious concerns about her ability to respond to emergency situations in a reliable fashion.

Second, Ms. Morrow's job duties require her to testify in court and to interact with the law enforcement and correctional systems. Her ability to perform these functions has been compromised by her off-duty conduct and DWI conviction.

Third, an essential job requirement as noted on the CMH-SW job description is the maintenance of a valid driver's license for the purpose of transporting clients to appointments and meetings. In this instance, the grievant lost her license because of the DWI, although she was able to obtain a work permit ten days following the arrest.

Finally, and most importantly, the grievant's conduct has fallen short of that recommended by Dr. Gratzer. On two occasions, Dr. Gratzer, a forensic psychologist, conducted a return to work examination of Ms. Morrow following serious off-duty incidents. On each occasion, Dr. Gratzer recommended Ms. Morrow's return to work only upon compliance with several recommendations related to her emotional and chemical health. In essence, Dr. Gratzer provided an expert opinion as to Ms. Morrow's fitness for the job. These recommendations were incorporated in a document, not unlike a performance improvement plan, by which Ms. Morrow agreed to abide by these recommendations as a condition of returning to work. By violating the terms of this agreement only one day after execution, Ms. Morrow has seriously undermined the Employer's trust in her ability to perform the sensitive responsibilities with which she has been entrusted.

**The Appropriate Remedy**

The Employer contends that discharge is appropriate because of the Employer's loss of trust in Ms. Morrow's ability to perform the sensitive duties of her job.

The Union, in contrast, maintains that a lesser penalty is appropriate for several reasons. First, the Union points out that Ms. Morrow has a good work record that encompasses only a

one-day suspension over the course of approximately sixteen years of employment. Second, the Union submitted evidence showing that Employer did not terminate another social worker who also was convicted for a DWI violation. Finally, the Union stresses that the grievant has completed treatment and has been sober for the past seven months.

Once again, these arguments have merit and warrant serious consideration. In the end, however, the fact remains that Ms. Morrow has had several emotional meltdowns that raise serious questions concerning her capacity to perform sensitive mental health counseling functions. She twice has been subject to late-stage performance improvement plans, and she violated the second plan after only one day. At some point, an Employer need not continue to accommodate an employee with emotional and chemical problems that threaten to compromise effective job performance.

## AWARD

The grievance is denied.

February 18, 2011

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Stephen F. Befort
Arbitrator