

IN THE MATTER OF THE ARBITRATION BETWEEN

**MINNESOTA TEAMSTERS PUBLIC
LAW ENFORCEMENT EMPLOYEES
UNION, LOCAL 320,**

**DECISION AND AWARD
BMS CASE NO. 11-PA-0030
GRIEVANT CHARLES RADNIECKI**

- and -

THE CITY OF ANOKA, MINNESOTA,

ARBITRATOR

William E. Martin
Hamline University School of Law
1536 Hewitt Avenue
St. Paul, MN 55104
(651)523-2758

APPEARANCES

For the Union:

Paula R. Johnson
General Counsel
Teamsters Local No. 320
3001 University Avenue S.E.
Minneapolis, MN 55414
(612)378-8700

For the City:

Joan Quade
Barna, Guzy & Steffen
400 North Town Financial Plaza
200 Coon Rapids Blvd.
Minneapolis, MN 55433
(763)780-8500

PROCEEDINGS

The hearing in this case was held on January 13, 2011 at the City of Anoka City Hall, 2015 First Avenue North, Anoka, MN 55303. At the hearing the City presented the testimony

of: Mark Anderson, Anoka Superintendent of Public Services; Robert Sachs, Bus Driver; Michelle Soldo, Attorney/Investigation; Gregg Lee, Anoka Public Services Director; Jon Holmes, Anoka Public Services Supervisor; and Timothy Cruikshank, Anoka City Manager.

The Union presented the testimony of the Grievant Charles Radniecki.

The City presented Exhibits A through V, listed on Appendix A. The Union presented Exhibits 1 through 5 listed on Appendix B. Both parties submitted oral argument at the hearing and written briefs on February 3, 2011. Subsequently the parties agreed to extensions of the time for this award until May10, 2011.

Based upon the testimony and the exhibits and the oral and written arguments of the parties the arbitrator makes the following Decision and Award for the reasons stated herein.

DECISION AND AWARD

I. THE GRIEVANCE IN FACTUAL CONTEXT

This grievance arose when the Grievant was terminated on May 19, 2010. The incident for which the termination occurred was on October 28, 2009. On that date Grievant, who among other jobs operates heavy equipment as an employee of the City of Anoka Public Works Department, was operating a street sweeper. While going around a corner on a street adjacent to a school, he failed to stop for a school bus that had its flashing lights on and stop arm out. When this incident was reported by the bus company to the City, the City determined who the driver of the sweeper was and the bus driver filled out a violation form. The police investigated and a citation was issued. Mr. Radniecki pleaded guilty to a petty misdemeanor. After further investigations by an attorney employed by the City, the City terminated Mr. Radniecki. The termination was thus predicated upon the failure of Mr. Radniecki to stop for the school bus. However, at the time of the termination and at the arbitration, the City made clear that the school

bus incident was the culmination of a series of disciplinary actions taken against Grievant for safety related misconduct or carelessness. The termination letter [City Exhibit S] cited the October 28, 2010 incident as the basis of the Grievant's discharge and went on to state:

Aside from the severity of the conduct you engaged in this instance, which I have determined warrants your termination, this incident represents the latest in a continuing pattern of policy violations and unsafe work practices. The October 28, 2009 incident is one of many documented driving/safety related incidents in which you failed to comply with state and/or City policies, procedures and rule.

In citing the incidents upon which the City relied to discharge the Grievant, the City emphasized that the severity of the situation was primarily determined by the City based upon the safety related nature of the incidents upon which it decided that discharge was necessary.

In response to the termination of Mr. Radniecki, the Union filed a grievance on May 20, 2010. The grievance cited Article 11 of the CBA, the just cause provision, as the basis of its claim. The Union's contention throughout this case has been that the incident here was not serious enough to merit discharge. The Union has claimed also that Mr. Radniecki's past record was not as bad as portrayed by the City. Indeed, the Union has argued that for some 25 years, Mr. Radniecki has been a good employee, who has received good performance reviews for serving the City well. The provision relied upon by the Union herein states:

ARTICLE XI. DISCIPLINE

11. 1 The Employer will discipline employees for just cause only. Discipline will be in the form of:

- a) oral reprimand
- b) written reprimand
- c) suspension

- d) demotion; or
- e) discharge.

Following the grievance this case was forwarded to arbitration when the parties could not resolve it under their grievance procedure.

II. STATEMENT OF ISSUES

The parties stipulated that the issues herein are:

1. Did the employer have just cause to terminate the grievant?
2. If the employer did not have just cause, what should the remedy be?

III. ARGUMENTS OF THE PARTIES

A. EMPLOYER ARGUMENTS

The City argued that by driving the street sweeper through the school bus stop lights and stop arm the Grievant committed a serious illegal act and a serious safety policy violation. The City's view of this unsafe act was colored also by Grievant's long record of safety violations.

In evaluating these acts the employer emphasized that Mr. Radniecki's job involves the operation of heavy equipment on the roads of Anoka. As such, the City argues careful attention to safety matters is essential. The City presented much evidence to show how careful it had been to promote safety through its policies and it's training of employees. It also showed that Grievant had been singled out for extra training and had received prior discipline to address past safety issues. The City argued that Grievant's pattern of careless acts, including some acts intentionally in disregard of safety rules and some acts of simple carelessness require Mr. Radniecki's termination now to protect the public and fellow workers.

The City also argues that Mr. Radniecki's attitude has been such over a long period that

the City's attempts to cure his carelessness with extra training and minor forms of discipline such as warnings and suspensions have proved unavailing. Thus, the Employer argues that thus far the fact that Grievant's carelessness has not resulted in more serious injuries or property damage has been fortunate, but that the City should not have to wait for serious consequences before discharging a habitually careless and thus dangerous employee. The Employers case included a detailed picture of Grievant's job, of the City's safety rules and regulations, and of Mr. Radniecki's record of violation of these rules.

While Radniecki was employed for many years with the City and performed most of his assigned duties satisfactorily, Radniecki had a long history of documented safety violations, accidents and incidents starting in November 1988 and continuing on a regular basis throughout his 25 year employment. The documented work-related incidents leading up to the final October 28, 2009 school bus incident included the following:

- On November 30, 1988, while driving a City grader, Radniecki backed into and hit another city vehicle that he had just parked. Radniecki reported that he looked in his mirrors but didn't see the City vehicle he hit. On November 5, 1988 Radniecki received a one (1) day suspension and was directed to attend driving school.
- On January 2, 1999, while operating a City snow plow, Radniecki failed to stop at a stop sign and hit a parked car. Radniecki received a written reprimand.
- During the three-month period of January 1999 to March 1999, the City received three citizen complaints that Radniecki was driving too fast. Radniecki received verbal warnings.
- On November 15, 1999, Radniecki failed to set the parking brake on the City's Tymco Sweeper. The unoccupied sweeper rolled down a hill and hit a parked vehicle. Radniecki received a three (3) day suspension for two vehicle accidents in one year.
- On October 4, 2000, Radniecki redirected a City blacktop crew (without City

authorization) to patch the driveway of a City employee and assisted with the project. Radniecki received a one (1) day suspension.

- On August 14, 2002, Radniecki improperly permitted a seasonal student employee who did not have the requisite Commercial Driver's License to drive a City blacktop truck. Radniecki received a five (5) day suspension.
- On October 29, 2003, Radniecki backed a City street sweeper into a SUV. Radniecki admitted he did not look back prior to backing up the sweeper. Radniecki received a verbal reprimand.
- On February 10, 2005, while backing a city vehicle into the shop, Radniecki hit and broke off the strobe light on the overhead door jam.
- On November 29, 2005, Radniecki broke the plow and pin on a City snow plow when he entered a Post Office parking lot too fast.
- On December 15, 2005, Radniecki backed a City loader into a City pick-up truck.
- On March 14, 2008, Radniecki received a verbal reprimand for doing homework during the workday, while sitting in a City loader on a work site.
- On April 14, 2008, Radniecki failed to properly supervise a Sentence-to-Service crew. While the crew worked, Radniecki sat in a City vehicle, ate food and did homework. On April 17, 2008, Radniecki received a written reprimand for two homework incidents (3/14/08 and 4/14/08). An April 23, 2008 grievance settlement resulted in Radniecki's receipt of a verbal reprimand with the assurance Radniecki would not repeat the offense.
- On December 17, 2008, Radniecki backed a City loader into a driver occupied SUV, crushing the driver side door. (See Ex. R, March 19, 2009 Written Reprimand and Photo; Ex. N, Soldo Investigation Report, Ex. 6, Incident Report and Photos.) On March 19, 2009, Radniecki received a written reprimand. (Id.)
- On March 3, 2009, Radniecki operated a City chain saw without the proper Personal Protective Equipment ("PPE". On April 20, 2009, Radniecki received a three (3) day suspension. (See, Ex. R, April 20, 2009 Discipline.)
- On April 7, 2009, Radniecki failed to supervise an Anoka County Workhouse crew on a construction worksite. While the crew worked, Radniecki sat in a city vehicle, ate food and did homework. (See, Ex. N, Soldo Investigation Report, Ex. 6, Photos.)

(Ex. G, Incident/Accident Record for Charles Radniecki; Ex. N, Soldo Investigation Report and Exhibits; Ex. R, Discipline Memoranda: April 20, 2009, April 17, 2009, March 19, 2009; May 12, 2010.) The City showed that prior to the incident for which he was terminated, Mr. Radniecki had been suspended thirteen days, had two separate written reprimands and four separate oral reprimands related either to his operation of city equipment or his failure to follow specific policies and procedures promoting safety. (Ex. G; Ex. E, Personnel File.)

In sum, then, the City argued that the traffic violation involving the school bus was independently a clear safety policy violation serious enough to warrant discharge. The City also argued that this violation was the culmination of a long history of carelessness that showed a repeated pattern uncorrected by prior disciplines that is just cause for termination. The City also argued that Grievant's reaction to his citation and the City's investigation betrayed an attitude that the incidents he was involved in were not Abig deals@. The City suggests that this attitude is the reason Mr. Radniecki has failed to correct his conduct over time.

B. UNION ARGUMENTS

The Union has not denied the basic facts but rather has argued that "under no reasonable analysis can the Grievant's action of passing the school bus be considered severe enough to justify termination." The Union's argument "freely admits" that the Grievant failed to stop but avers that it was not a willful or intentional act. Indeed the Grievant testified that he did not recall seeing the school bus with its stop sign and flashing lights. He pleaded guilty and paid his fine because he accepted the truth of the bus driver's statements. He did not account for how he failed to notice the school bus, but testified under oath that he did not intentionally drive

illegally past the bus. Also the Union argued that this act was a petty misdemeanor, not defined as a crime, and it stressed that the sweeper was only going three mph so any danger was minimal.

The Union acknowledged the need for safety here, but emphasized that there was no reason to believe Mr. Radienecki was a danger. The Union stated in its brief:

There is no doubt that the law requiring drivers to stop when a school bus displays its flashing lights and stop arm is an important one. The Union does not dispute the fact that the law requires a driver to stop in that situation. However, there is a difference between unknowingly passing a school bus due to concentrating on a task assigned by your employer and a complete and utter disregard for human safety. The facts of this case clearly show Grievant did not deliberately or recklessly pass the school bus with no regard for the safety of bystanders.

[Union Brief p. 3]

Arguing that the City overreacted to this incident eventually manufacturing a discharge case, the Union also argued that this incident could not reasonably be treated as a "last straw" incident. A predicate to its argument here is that the list of grievant's accumulated disciplinary incidents combined non-disciplinary incidents with safety related incidents and other non safety related discipline. Indeed, the Union analyzes the list of incidents occurring since 1988 and points out that a demotion and 30 day suspension was reduced by arbitration in part because performance notes not involving discipline had been held against grievant in 2003. In conclusion the Union argued that the remaining stated discipline and non disciplinary performance issues constituting the "record" for this case since 2003 involves "only" three verbal reprimands, one written reprimand and one three day suspension. Thus, removing off duty traffic incidents and non disciplinary incidents, the Union argues that "only" ten incidents remain

on the City's list, for grievant's 25 year career. The Union argues that with gaps and given the minor nature of the remaining incidents, this case simply does not arise to the level of a "last straw" case justifying termination with a pattern of incidents over time.

The Union also argued that a "last straw" case was unsupported here because the City failed to prove efforts to rehabilitate grievant, usually an element in a "last straw" case. In particular, the Union stated:

The City did not prove that past efforts to "rehabilitate" the Grievant had failed and that the City had no reasonable alternative to terminating him. It's attempt at portraying the Grievant as a "menace" and a safety hazard failed. Given that Grievant had no discipline for safety related incident for five years after the 2003 written reprimand and given there is no evidence that Grievant was warned or coached during those years, the City's argument that it attempted and failed to rehabilitate Grievant is not persuasive.

[Union Brief p. 9]

Taken together then the Union's arguments conclude that the penalty of discharge here is too severe under any view of grievant's offenses and past record.

IV. ANALYSIS AND CONCLUSIONS

A. Just Cause and Burden of Proof

All agree that the City has the burden of proof that it had just cause to terminate Grievant.

The familiar "just cause" standard is defined differently from case to case, but it must inevitably include two parts. 1) Whether the Employer proves that Grievant did what he was disciplined for, and 2) whether what he did was sufficiently serious to merit the penalty given. The

seriousness inquiry involves a judgment based upon an assessment of the legitimate interests of the employer and the employee in the case, and a judgment about the fundamental fairness of the penalty in light of those interests.

B. The School Bus Incident

There is little if any factual dispute about the incident that caused the termination. Grievant drove his street sweeper at about three or four miles per hour by a stopped school bus with its stop lights flashing and its stop arm out. Moreover the bus was adjacent to a school. Grievant then pleaded guilty to a petty misdemeanor. If there is any question surrounded the incident it is about Grievant's state of mind. While it might be slightly worse if the act were wilful, it is careless enough if Grievant simply failed to notice a huge school bus with flashing lights. Clearly he ought to be aware enough of his surroundings, while operating heavy equipment near a school to see a stopped school bus with stop-arm out. I believe Grievant when he says it was not a willful act. However, it remains a careless act creating a safety hazard.

At the same time, considering only the incident for which he was disciplined, I agree with the Union that as a solitary infraction the act would not merit discharge. It is an infraction and it carries with it risks of accident and injury to children but at 3 mph, the risk is certainly not extreme, and I would be hard pressed on that ground alone to sustain a discharge. However, the incident does not stand alone.

If we assume that the record of discipline and correction for safety related, incidents is accurate, this final incident is revealing. While relatively minor (from the context of just cause to terminate if not from the context of potential for injured school children), the incident as

described by Grievant betrays a continuation of the pattern he had established over time to act with a lack of sufficient care to avoid accidents and otherwise dangerous situations.

I conclude then that while it might not justify termination standing alone, the incident herein was serious and posed a safety threat as such. Even as a first offence, this incident would constitute just cause to discipline grievant. Certainly a short suspension would not be overturned. In this case, however, it was not Grievant's first offence but his tenth, or more. I turn then to a discussion of his record, having found that the City clearly sustained its burden to prove that Grievant did what he was accused of doing.

C. The Grievant's Record-Pattern of Conduct

In the section on the City's arguments above, I set forth the City's listing of prior discipline and other recorded incidents of safety related misconduct in Grievant's employment record. I find that the City proved this record and fairly included relevant incidents to evaluate Grievant's safety after the school bus incident had yet again brought this issue to the fore. From 1988 to the present he was disciplined for, or had noted fifteen safety related incidents. While one might quibble about the relevance or significance of several of these, most are serious enough to merit discipline and relevant as a part of a pattern of unsafe conduct. And five of the incidents involved minor accidents including three in which heavy equipment was allowed to go backwards into other vehicles.

The Union has argued the list is too long, including for example non-disciplinary incidents. The Union's arguments are unconvincing because the non-disciplinary incidents are relevant to the pattern of unsafe conduct, see e.g., February 10, 2005 note of backing City vehicle into the door jam of the city garage and the November 29, 2005 breaking of a plow when running the snow plow too fast

into a post office parking lot. The two noted incidents are significant because they came in the middle of a five year period the Union urges is a five year lull in misconduct that should cut off the record on Grievant for application to the just cause issue here.

Finally, the Union did argue that this is not an appropriate case for termination based upon a pattern of misconduct. While I have not thought of "last straw" as a doctrine, certainly not a bright line doctrine, the idea is sensible in terms of situations involving employees who are involved in repeated incidents of conduct occurring over time when each incident is relatively minor, or seems to be. At some point it is not unreasonable for the employer to conclude these incidents reveal a real and serious problem. Without belaboring the point, it seems clear this idea is especially revealing with regard to safety related behavior. While no formula can determine how many events, over how much time, with what lulls require what discipline, I conclude that the City was reasonable here in concluding that with the school bus incident Grievant had committed the last straw safety violation and that termination was warranted.

It should not be necessary to elaborate that the present case involves safety which is a critical interest of a city road department. In protection of this interest after 15 safety related instances of misconduct, the City should not be required to await a serious incident before terminating an employee with Grievant's record.

I therefore conclude that the City had just cause to terminate Grievant.

V. AWARD

Based upon the above opinion, the grievance herein is dismissed.

May 9, 2011

Dated

William E. Martin
Arbitrator