

FEDERAL MEDIATION AND CONCILIATION SERVICE

ARBITRATION AWARD

_____)	
IN THE MATTER OF ARBITRATION)	
)	
Between)	
)	FMCS# 12-52467-3
GILLELAND CHEVROLET/CADILLAC INC.)	
)	Steve Schleicher, Grievant
And)	
)	
)	John Remington,
IAMAW District 165, Local Lodge #623)	Arbitrator
)	
_____)	

THE PROCEEDINGS

The above captioned parties, having been unable to resolve a grievance over the termination of Steve Schleicher, selected the undersigned Arbitrator John Remington, pursuant to the provisions of their collective bargaining agreement and under the rules and procedures of the Federal Mediation and Conciliation Service, to hear and decide the matter in a final and binding determination. Accordingly, a hearing was held on April 26, 2012 in Sartell, Minnesota at which time the parties were represented and were fully heard. Oral testimony and documentary evidence were presented; no stenographic transcription of the proceedings was taken; and the parties made oral closing arguments on the record.

The following appearances were entered:

For the Company:

Matt Gordon

General Manager

For the Union:

Colleen Murphy-Cooney

Business Representative

Jeremiah Shegrud

Steward

THE ISSUE

DID THE COMPANY HAVE JUST CAUSE TO
DISCHARGE GRIEVANT STEVE SCHLEICHER AND,
IF NOT, WHAT SHALL THE REMEDY BE?

BACKGROUND

Gilleland Chevrolet/Cadillac, hereinafter referred to as the “COMPANY,” is engaged in the sales and service of General Motors vehicles in the greater St. Cloud, Minnesota area. Employees of the Company including service, mechanics, craftsmen, bodymen, painters, metalmen, porters, lubemen, service runners, delivery drivers, counter person, receiving clerk and parts runner, but excluding office clerical employees, salesmen, professional employees, guards and supervisors are represented by the International Association of Machinists and Aerospace Workers, District 165 and its Local Lodge #623, hereinafter referred to as the “UNION.”

Grievant had been employed by the Company for approximately sixteen (16) years as a shipping and receiving clerk/ delivery driver when he was terminated following an accident with damage to both a Company and another vehicle. This accident occurred when Grievant backed into the other vehicle late in September of 2011 in the

private parking lot of Mid-State Wholesale Tire (Tire Maxx) in St. Joseph, Minnesota. While the Union contends that Grievant promptly reported the accident to the Company, the Company maintains that it did not even learn of the accident until October 24, 2011 when Grievant advised the Company's collision manager that the other vehicle was being brought in for repairs. The Company was subsequently unable to locate an accident report or any other information concerning the accident and began an investigation. During this investigation it discovered that Grievant had experienced a prior accident while driving a Company vehicle in 2009 or 2010; that he had prior discipline for apparently minor offenses; and that he had been recently warned about working unauthorized overtime. Grievant was not charged by the authorities with any violation in connection with either of the above accidents.

Based on the results of the above investigation together with Grievant's alleged failure to report the 2011 accident, the Company determined to discharge Grievant for cause. He was notified of his discharge verbally by Company General Manager Matt Gordon on December 31, 2011. The Union responded by filing a grievance contesting the discharge on January 3, 2012. This grievance alleges violation of Article 19 of the collective agreement and requests, in remedy, that Grievant be reinstated "with all lost pay and benefits due to this unjust termination." Gordon responded for the Company on January 4, 2012 as follows:

In the month of September or October Steve was involved in an automobile accident with a Gilleland vehicle and another party during working hours. The accident caused over \$2000 in damages. The issue of safety is important to Gilleland Chevrolet. Steve was involved in this accident as he was involved in another in the last 2 years. Steve never reported this accident to anyone at Gilleland and he also did not report the accident to the authorities. Due to safety

and Steve's unethical way of handling the accident we must stand by our decision.

The grievance was thereafter advanced to Arbitration in compliance with the provisions of Article 7 of the parties' collective agreement. There being no contention that the grievance was untimely filed or irregularly processed, it is properly before the Arbitrator for final and binding determination.

PERTINENT CONTRACT PROVISIONS

Article 2. Management Rights

2.01 The Union recognizes the Employer's right to make all decisions and exercise all judgment regarding the management of the business. The method of determining what the contractual rights of the Union shall be is by reference to the provisions of this Agreement only.

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The management of the business and the direction of the working force, including the employees in the bargaining unit, including, but not restricted to: the right to hire, retire, transfer, promote, discipline or discharge for just cause, relieve employees due to lack of work and/or other legitimate reasons, establish and maintain minimum production quotas, maintain discipline, maintain efficiency, establish rules and regulations, establish discipline procedures, establish safety rules and regulations, establish safety practices, are considered as the exclusive rights of the Employer.

Article 6. Grievances

6.07 After nine (9) months, warning notices relating to job performance, job issues and quality of work will be removed or considered void and all other warning notices will stay on file indefinitely.

Article 19. Termination of Employment

19.01 A regular employee covered by this Agreement may have his employment terminated by his Employer for good cause shown, but in such case, the employee shall be given one (1) week’s notice of severance of his employment or one (1) week’s pay in lieu of such notice. One (1) week’s notice or any week’s pay shall mean five (5) working days, and shall include any legal holiday occurring during that period. An employee’s drinking of intoxicating beverages on the job, or his appearance on the job under the influence of liquor, or any act of dishonesty on the job or on the premises of his Employer, or the commission of any unlawful act on the premises of his Employer, or his solicitation or performance of work of the character ordinarily performed by his Employer in any violation of any posted rules of his Employer (assuming the posted rule so violated is not in conflict with the law or any of the provisions of this Agreement). Employee shall be suspended without pay pending grievance procedure outcome. If employee is found to be unjustly terminated, the employee shall receive all back pay due.

Company Rules

Worker Health and Safety

The prevention of accidents and maintenance of safe working conditions is the shared responsibility of Gilleland Inc. and our employees. Gilleland Inc. complies with all requirements of deferral, state, and local safety regulations to ensure a safe work environment. Your supervisor will provide you with information on company safety rules and requirements. You are expected to cooperate by familiarizing yourself with and obeying all safety rules and regulations.

.....

Employees will be subject to disciplinary actions up to and including termination for any of the following activities:

- 1. Failure to comply with applicable health and safety requirements
- 2. Unsafe or unhealthful unauthorized activities; i.e. horseplay

3. Bringing unauthorized weapons of any kind, at any time, onto dealership property.

All accidents and illnesses that occur at the workplace must be reported to your supervisor immediately.

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Dealership Vehicles

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If a vehicular accident occurs and a dealership car or a customer car is damaged due to your negligence, you will be liable for a deductible charge of up to \$1,500.00.

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CONTENTIONS OF THE PARTIES

The Company takes the position that Grievant failed to report a traffic accident in violation of both Company requirements and state law. The Company characterizes this failure as an act of dishonesty and possibly an unlawful act within the meaning of Article 19 of the collective agreement. The Company further takes the position that Grievant has been dishonest in his employment during the past two years with regard to repeated violation of the "overtime rule," failure to keep the parts area secure, damaging floor tiles, and failure to take disciplinary warnings seriously. The Company concludes that Grievant is incapable of following rules and complying with reasonable directives from management. Accordingly, it asks that the discharge be upheld.

The Union takes the position that Grievant, contrary to the Company's contention, called in and reported a minor accident to his immediate supervisor immediately after the accident occurred in September of 2011. It argues that Grievant thereafter did exactly as he was instructed by the Company representatives, and that his call to the Company and report of the accident was corroborated by three (3) employees of the Tire Maxx Service

Center where the accident occurred. The Union notes that Grievant is a sixteen (16) year employee with a good work record and serves as the union shop steward in his department. The Union further takes the position that several of the disciplinary warnings cited by the Company are stale and barred from consideration by Article 6.07 of the bargaining agreement. It therefore maintains that the Company cannot demonstrate just cause for discipline and that Grievant should be reinstated and made whole.

DISCUSSION, OPINION AND AWARD

It is fundamental in labor arbitration that the Company shoulders the burden of proof in disciplinary matters. Accordingly it must prove that Grievant has violated a reasonable rule and that the penalty imposed for that violation is consistent with the nature of the offense and the circumstances, including Grievant's disciplinary history, surrounding that offense. Here Grievant is charged with violating a clear Company rule regarding the reporting of accidents and possibly a violation of state law.¹ The Company must therefore demonstrate, by competent evidence, that Grievant failed to report the incident to his immediate supervisor.

The Company relies solely on the sworn statement of Company Parts Manager Howie Stang, Grievant's immediate supervisor, to show that Grievant failed to report the accident. Stang's statement, which was not taken until March 21, 2012 simply states:

The last accident Steve had was not reported to his Direct Supervisor, Human Resources, or Authorities. No information as to what happened was recorded. No victims

¹ Minnesota law requires drivers involved "in a crash that results in injury, death, or property damage of \$1000 or more" to file a traffic crash report within ten days of the incident. However, it is questionable whether or not the incident in question would be deemed a "crash" since Grievant simply backed into another vehicle in a private parking lot, or if the property damage appeared to exceed \$1000 at the time. While it is true that the Company charges for repair exceeded \$1000, these charges were assessed internally by the Company and there is no evidence to show that Grievant was required to compensate the Company up to the deductible charge. Accordingly, the Arbitrator is unable to determine from the evidence presented that Grievant failed to report the incident in violation of state law.

name was given to myself or Human Resources. No Accident Report was filled out. Steve knows these items are Company Policy, but, did follow procedures.

The failure of Stang to appear at the hearing and testify in support of the allegation that Grievant did not report the accident is a crucial shortcoming in the Company's case. Grievant testified credibly that he reported the accident by phone to Stang, exchanged license and insurance information with Ralph Boeckers, the driver of the car he backed into, and subsequently presented that information to Stang. Grievant further testified that he also contacted Mike Harmsen, another Company representative and reported the accident. Although Harmsen did not appear at the hearing, he did provide a sworn statement confirming that Grievant had reported the incident to him on October 24, 2011. While the statements of Stang or Harmsen must not be given any significant weight because neither man appeared to testify, Harmsen's statement does support Grievant's version of events, at least in part. Stang's failure to appear and contradict Grievant's testimony or respond to cross examination by the Union compels the Arbitrator to draw an adverse inference and conclude that Stang either forgot that Grievant had called to report the accident, misplaced the information, or failed to handle the matter as Grievant testified Stang had assured him he would do. Alternatively, the Arbitrator must credit the apparently credible and unrebutted testimony of Grievant.

In light of the foregoing discussion it is evident that Grievant did, in fact, report the September 2011 accident to the Company. While he may not have fully satisfied the Company's expectations in this regard, it is clear that Grievant did not attempt to conceal his involvement or withhold information regarding the incident from the Company. His actions certainly cannot be deemed dishonest or unethical. We are therefore left with

Grievant's prior disciplinary record and his apparent unwillingness to respond to Company concerns over his frequent and unauthorized use of overtime.

On February 21, 2011 Grievant was warned for signing a time card that apparently misrepresented his actual starting time. However, this warning was over nine months old at the time Grievant was terminated and the Arbitrator is barred from considering it by Article 6.07 of the parties' collective agreement. The same is true for warnings that Grievant received in October of 2010. The Arbitrator must therefore conclude that, as the Union contends, Grievant's work record was essentially free of discipline.

The Company maintains that Grievant was "verbally warned" in October of 2011 that overtime was not allowed but proceeded to incur overtime on October 31, November 1 and November 7 of 2011. On November 8 he was shown a copy of an "overtime policy" which simply states:

Parts Department Memo

11/8/11

Shipping and receiving hours to be 7:00 A.M. To 3:30 P.M.
Any card punched before or after these hours will be
unpaid unless O.K. signature by department manager!

Grievant acknowledged receipt of this policy. However, he incurred overtime on November 14, November 28, December 1, December 5 and December 12, 2011.

Grievant testified that his assignments as a parts delivery man throughout central Minnesota caused him to incur overtime in order to finish his deliveries and return to work. Documents presented by the Company indicate that at least one other employee also utilized overtime apparently in violation of the "overtime policy."

It cannot be denied that the record suggests that Grievant was unresponsive to the Company's request to curtail overtime. This is so even though the "policy" which Grievant signed does not prohibit overtime. It simply indicates that overtime will be unpaid unless approved by a supervisor and it appears that Grievant was indeed paid for the overtime which he worked. However, to terminate a sixteen year employee with an otherwise unblemished record for lack of compliance with the overtime policy would appear to be excessive. Neither do Grievant's two admitted minor vehicle accidents justify such an extreme penalty. It is generally recognized that the purpose of discipline is to correct an employee's behavior. Corrective or progressive discipline as it is often called requires that the penalty fit the seriousness of the offense and that more severe discipline, up to and including discharge, should only be applied to major or repeated violations. In the instant case Grievant has never received more than a warning for any infraction of Company rules and has committed no major violations. Although concealing a vehicle accident in violation of Company policy and state law would most certainly be deemed a major violation, the Company was unable to establish by any probative evidence that Grievant concealed or even failed to report the September 2011 incident.

The Arbitrator has made a detailed review and analysis of the entire record in this matter and he has fully considered the closing arguments submitted by the respective parties at the hearing. Further, he has determined that the critical issues which arose in these proceedings have been discussed above and that certain other matters raised at the hearing must be deemed immaterial, irrelevant, or side issues at the very most, for example: whether or not Grievant was the departmental union steward; the suggestion

that Grievant's unsafe conduct contributed to the accident; the customer endorsements offered on Grievant's behalf; and so forth. Having considered the above review and analysis together with the findings and observations hereinabove made the Arbitrator has determined, and so he finds and concludes, that with the specific facts of the subject grievance and within the meaning of the parties' collective bargaining agreement, the evidence presented by the Company is wholly insufficient without the testimony of Grievant's immediate supervisor to support a finding that the Company had just cause to discharge Grievant. Accordingly, an award will issue, as follows:

AWARD

THE COMPANY DID NOT HAVE JUST CAUSE TO DISCHARGE GRIEVANT STEVE SCHLEICHER. THE GRIEVANCE MUST BE, AND IS HEREBY, SUSTAINED.

REMEDY

GRIEVANT SHALL BE REINSTATED TO HIS POSITION AS A SHIPPING RECEIVING CLERK WITH NO LOSS OF SENIORITY AND ALL BACK PAY AND BENEFITS FROM THE DATE OF HIS DISCHARGE TO APRIL 11, 2012. THE TERMINATION OF THE COMPANY'S BACK PAY LIABILITY IS ATTRIBUTABLE TO THE UNILATERAL POSTPONEMENT OF THE MARCH 30, 2012 HEARING DATE BY THE UNION. ALL REFERENCE TO THE VEHICLE ACCIDENT OF SEPTEMBER 2011 SHALL BE EXPUNGED FROM GRIEVANT'S RECORD.

John Remington, Arbitrator

Minneapolis, MN

May 7, 2012