

THE MATTER OF ARBITRATION BETWEEN

AFSCME MINNESOTA COUNCIL 5,)
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)
) **Union,**) **MANKO SUSPENSION**
) **GRIEVANCE**
and)
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) **CITY OF DULUTH,**)
)
)
) **Employer.**) **BMS CASE NO: 12-PA-1219**

Arbitrator: Stephen F. Befort
Hearing Dates: December 11, 2012
Post-hearing briefs received: N/A
Date of Decision: January 9, 2013

APPEARANCES

For the Union: Diane Firkus
For the Employer: Steven Hanke

INTRODUCTION

AFSCME Council 5 (Union), as exclusive representative, brings this grievance claiming that the City of Duluth (Employer) violated the parties' collective bargaining agreement by suspending Kris Manko for five days without just cause. The Employer maintains that it had just cause to suspend the grievant for insubordination in failing to cooperate in a requested fitness for duty evaluation. 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. The parties elected not to submit post-hearing briefs.

ISSUE

Did the Employer have just cause to suspend the grievant for five days? If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 29 – SICK LEAVE

29.3. A Department Head or Acting Department Head may, for work-related reason stated in writing to the Employee, request an Employee to submit to medical examination, paid for by the Employer, to determine an Employee's medical fitness to do tasks of employment or to attend work. The Employee may refuse the first Employer-recommended doctor. The doctor will report only the medical information relevant to the fitness for duty information request.

ARTICLE 36 - DISCIPLINE, SUSPENSIONS, REMOVALS

36.1. Discipline: Disciplinary action may be imposed upon an Employee only for just cause. Disciplinary action may be grieved by the Employee through the regular Grievance procedure as provided by this agreement. Disciplinary action shall include only the following: 1) written reprimand; 2) suspension; 3) demotion, and 4) removal. Except in the case of a severe breach of discipline any suspension, demotion, or removal action shall be preceded by a written warning.

36.2 Suspensions

a) The Appointing Authority or any Supervisor acting for him or her in his or her absence, may for disciplinary purposes suspend without pay any Employee under his or her supervision from the performance of his or her duties for one (1) or more periods aggregating not more than fifteen (15) working days in a calendar year for each disciplinary incident unless the Union and the Employer mutually agree to a longer period of time.

FACTUAL BACKGROUND

Kris Manko has worked for the City of Duluth as a Utility Operator since 2006.

According to the Utility Operator job description, the purpose of this position is to “perform skilled and semiskilled work in order to install, maintain, and repair the water and gas distribution systems and sanitary and storm water collection systems.” The performance of these responsibilities routinely involves heavy lifting and the operation of heavy equipment. Mr. Manko has no prior disciplinary record.

In late July 2011, Mr. Manko twice missed work due to episodes during which he felt an irregular pulse accompanied by discomfort in his chest. Following the second occurrence on July 29, 2011, Manko’s supervisor left a voicemail message asking Manko to provide a doctor’s note explaining his absences. Manko, in response, provided a letter from Dr. Denver Ulland, dated July 29, 2011, which stated as follows:

Please excuse Mr. Manko from work 07/27/11 and 07/29/11 due to a heart rhythm disorder called paroxysmal atrial fibrillation. He is medically cleared to participate in the rigors of his job as long as he is not in atrial fibrillation. When the abnormal rhythm starts up, it causes him to be exceptionally fatigued and unable to complete routine work. He is currently being sent to Cardiology for treatment recommendations, but again, Mr. Manko is medically cleared to be at work on days when he has a normal heart rhythm. Thank you for your consideration in this matter.

Keely Downs, an Employee Benefits Representative for the City of Duluth, sent Mr. Manko a letter on August 3, 2011 asking him to complete Family and Medical Leave Act (FMLA) paperwork relating to these absences, including a requested medical certification form for Mr. Manko’s health care provider. In a telephone conversation on August 24, 2011, Mr. Manko informed Ms. Downs that he did not intend to claim FMLA coverage for his absences. Both parties acknowledge that Manko acted within his rights in declining the protections of the FMLA.

Ms. Downs set up a meeting with Mr. Manko on September 14, 2011 at which time she presented him with a letter containing the following directive:

This letter is in response to the physician's letter you have provided indicating that you need time off of work due to a medical disorder known as paroxysmal atrial fibrillation. There is some concern that you have restrictions that may not allow you to perform the essential functions of your position. Therefore, the City of Duluth is scheduling a Fitness for Duty examination. According to your collective bargaining unit agreement, this Fitness for Duty examination will be paid for by the City of Duluth, and will determine your fitness to perform the tasks of your employment or to attend work.

Human Resources Generalist Mike Silvis, who also attended this meeting on behalf of the City, testified that Mr. Manko expressed displeasure with this request. Downs and Silvis informed Manko that discipline could result if he failed to comply with the fitness for duty directive. The Employer representatives also gave Mr. Manko a copy of the City's Fitness for Duty Policy.

Section 8 of that Policy states:

The employee must comply with all aspects of the fitness for duty and evaluation procedures, including furnishing necessary consent and release forms to the health provider. Non-compliance may be grounds for disciplinary action and, depending on the situation, up to and including termination.

Ms. Downs then sent a packet of materials to Dr. Brian Konowalchuk relating to the requested fitness for duty evaluation scheduled for September 20. The materials included a job description supplemented by some additional detail concerning activities associated with the performance of various listed duties. Ms. Downs also asked Dr. Konowalchuk to provide guidance with respect to the following questions: 1) whether Mr. Manko is able to perform the essential function of the utility operator position, 2) whether Mr. Manko's condition poses a threat to the personal safety of himself or others; and 3) how to determine when Mr. Manko's absences are the result of his abnormal heart rhythm condition.

Mr. Manko attended the scheduled appointment with Dr. Konowalchuk as requested. On the following day, September 21, 2011, Dr. Konowalchuk authored a written report which, in pertinent part, stated as follows:

On examination, Mr. Manko was somewhat “hostile.” He expressed significant frustration about the city “sending me here and wasting taxpayer dollars.” He noted that he had simply given a work restriction form to his supervisor as a courtesy and it now has resulted in requiring this evaluation. He was at first not willing to sign a medical release so I could obtain further medical records, but did agree to it in the end. The answers to most questions I asked were blunt and to the point.

* * *

Based on review of the records available to me on Mr. Manko’s history, I think the only reasonable and prudent choice at this time is to keep him protected from operating commercial motor vehicles and heavy equipment and working in safety sensitive positions until Cardiology consultation and clearance can be obtained.

At Dr. Konowalchuk’s recommendation, Mr. Manko then was scheduled for an evaluation by a cardiologist, Dr. Nancy Hassinger, on October 3, 2011. Dr Hassinger’s report of that same date included the following information:

Mr. Manko is a difficult historian and very hostile throughout our entire encounter today. He basically refuses to answer any questions. Note, he initially refused to give his date of birth to our registrar to confirm his identity.

* * *

At this point in time, I am in a bit of a quandary regarding recommendations for this gentleman’s return to work. He has not contributed in a positive way to this evaluation.

After Dr. Konowalchuk received Dr. Hassinger’s report, he sent a letter to Ms. Downs, dated October 12, 2011, stating as follows:

I am writing this letter in follow up to this Fitness for Duty evaluation for Mr. Kristofer Manko. . . . He was evaluated on October 3, 2011, by Nancy Hassinger, MD, cardiology. I received a telephone call from Dr. Hassinger at the time of appointment, indicating that Mr. Manko was in her office and had not provided relevant information regarding his medical condition that was helpful to her evaluation.

Based on [Dr. Hassinger's] evaluation, it is my professional medical opinion that Mr. Manko has not had sufficient compliance with cardiac evaluation to assure that he is safe to return to operating commercial motor vehicles or working in safety sensitive positions. It is my position at this point in time that until Mr. Manko can satisfactorily complete a cardiac evaluation with full compliance with reported history, he is unfit for duty with the limitations posed in my previous report.

Consistent with Dr. Konowlchuk's report, the Employer continued Mr. Manko's placement in a light duty position.

On October 26, 2011, the Employer issued a five day unpaid suspension to Mr. Manko.

The grounds for the suspension were described as follows:

Gross insubordination on October 3rd by refusing to complete your Employer-required medical evaluation to do tasks of employment or to attend work as further described in Article 29.3 of the . . . collective bargaining agreement. Specifically at your scheduled evaluation appointment, you displayed inappropriate employee conduct by acting in a hostile manner to the physician and other staff. In addition, the physician was unable to complete the components needed to determine your fitness for duty because of your refusal to cooperate.

The Notice of Suspension also directed Mr. Manko to complete the fitness for duty evaluation on November 1, 2011 with Dr. Chen.

Dr. Chen, another cardiologist, completed an evaluation of Mr. Manko and certified his ability to return to work. The parties do not dispute the fact that Mr. Manko currently is performing the utility operator duties in a satisfactory manner.

At the arbitration hearing, the Union called Union Steward David Leonzal as a witness. Mr. Leonzal testified that, in his opinion, Mr. Manko's conduct was not a sufficiently severe infraction to warrant a deviation from Article 36's usual requirement that a written warning should precede any more serious discipline. The Union did not call Mr. Manko as a witness at the hearing.

POSITIONS OF THE PARTIES

Employer:

The Employer contends that it had just cause to impose a five-day suspension on the grievant. The Employer maintains that its request for the grievant to undergo a fitness for duty evaluation was reasonable in light of the legitimate concern that Mr. Manko's medical condition might interfere with his ability to perform the essential duties of the Utility Operator position in a safe manner. The Employer further asserts that Mr. Manko acted insubordinately by failing to cooperate with the fitness for duty evaluation process. The Employer claims that this insubordination jeopardized workplace safety and delayed the grievant's return from light duty status. Finally, the Employer argues that a five-day suspension is appropriate given the very severe circumstances of the insubordinate conduct.

Union:

The Union maintains that the Employer did not have just cause to suspend the grievant for five days without pay. The Union initially contends that the Employer had no reasonable basis to require a fitness for duty evaluation since the July 29, 2011 letter provided by Mr. Manko's treating physician did not include a request for future absences or accommodations. The Union further asserts that Mr. Manko was not insubordinate in that he attended and provided information at each of the required medical evaluations. Finally, in terms of a remedy, the Union argues that Article 36 bars the Employer from jumping immediately to a suspension without first providing the grievant with a written warning.

DISCUSSION AND OPINION

In accordance with the terms of the parties' collective bargaining agreement, the City bears the burden of establishing that it had just cause to support its disciplinary decision. This

inquiry typically involves two distinct steps. The first step concerns whether the City 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. Elkouri & Elkouri, HOW ARBITRATION WORKS 948 (6th ed. 2003). Each of these steps is discussed below.

The Alleged Misconduct

The Employer alleges as grounds for discipline that the grievant was insubordinate by not cooperating in the requested fitness for duty evaluation process. In this regard, the Employer relies on the reports of Doctors Konowalchuk and Hassinger, both of whom described Mr. Manko as “hostile” during their respective examinations. As result, Dr. Konowalchuk expressed the opinion “that Mr. Manko has not had sufficient compliance with cardiac evaluation to assure that he is safe to return to operating commercial motor vehicles or working in safety sensitive positions.” According to the Employer, the grievant’s failure to cooperate in the fitness for duty examination process both inhibited an accurate evaluation of his capabilities and safety risks and resulted in his continued placement on light duty for several months.

The Union objects to this characterization of the evidence on two grounds. First, the Union maintains that the Employer lacked a reasonable basis to require a fitness for duty evaluation. Second, the Union argues that Mr. Manko did not fail to cooperate during the fitness for duty evaluation process.

As to the first objection, the Union contends that a fitness for duty evaluation is only necessary when there is a reasonable basis to believe that an employee may be unable to perform essential job functions or may need a reasonable accommodation in order to perform such functions in the future. In this instance, the Union claims that the July 29 doctor’s note does not

implicate either concern. The Union points out that Dr. Ulland's letter states that Mr. Manko is medically cleared to be at work when he has a normal heart rhythm, and the letter does not request future time off due to Mr. Manko's condition.

This interpretation, however, does not comport with the plain meaning of Dr. Ulland's letter. By stating that Mr. Manko was capable of reporting for work when he has a normal heart rhythm, the letter necessarily implies that Mr. Manko will not be able to work when he experiences atrial fibrillation. As Ms. Downs testified, Dr. Ulland's letter indicated that Mr. Manko had a serious health condition, and the Employer had a reasonable basis for inquiring whether this condition would interfere with Mr. Manko's ability to perform his job in a safe manner. This concern was particularly heightened given the safety-sensitive nature of the Utility Operator job duties. Under these circumstances, the Employer had a reasonable basis for requesting a fitness for duty examination.

The Union's second objection challenges the merits of the Employer's insubordination claim. The Union argues that Mr. Manko was not insubordinate in that he attended each of the scheduled fitness for duty examinations and provided information in response to doctor questions. The Union claims that this conduct complies with the Employer's stated admonition during the September 14 meeting that the grievant must participate in the fitness for duty process.

While it is true that Mr. Manko attended the various doctor appointments and provided some medical information, it is also clear that he obstructed the purpose of the fitness for duty examination process. According to the two examining physicians, Mr. Manko was hostile and provided minimal information. This obfuscation impeded the ability of the doctors to determine

whether he was fit to perform essential functions in a safe manner and led Dr. Konowalchuk to bar Mr. Manko from performing safety-sensitive job functions.

The purpose of a fitness for duty examination is to determine whether an employee is capable of performing necessary work functions and to determine whether an employee's medical condition imposes unacceptable safety concerns. Here, Mr. Manko's failure to cooperate made it impossible for the examining physicians to make an informed conclusion with regard to either issue. This intentional misconduct was contrary to the basic obligations of Mr. Manko's employment and clearly constitutes insubordination sufficient to warrant the imposition of discipline.

The Appropriate Remedy

The Union alternatively argues that the discipline imposed on Mr. Manko is too severe under the circumstances. The Union primarily relies on that portion of Article 36 of the parties' collective bargaining agreement which states that "except in the case of a severe breach of discipline any suspension, demotion, or removal action shall be preceded by a written warning." Since the Employer did not provide Mr. Manko with a written warning in this instance, the Union maintains that the Employer's jump to a five day suspension was excessive and violated the parties' agreement.

While the parties' agreement generally adopts the laudatory policy of requiring the Employer to warn before imposing discipline, the agreement recognizes an exception for cases involving a severe breach of discipline. That exception is applicable in this instance. Mr. Manko's insubordinate behavior resulted in a two-month period during which the Employer was unable to determine whether Mr. Manko could safely perform his assigned job functions. At a minimum, this deprived the Employer of Mr. Manko's full job performance. At a maximum, it

deprived the Employer of the capability to determine whether the safe delivery of public services was being compromised. In either event, Mr. Manko's conduct constituted a severe breach of discipline and justifies the Employer's imposition of a five-day suspension.

AWARD

The grievance is denied.

January 9, 2013

Stephen F. Befort
Arbitrator