

In the Matter of the Grievance Arbitration Between

SEIU Local 284,

Ronald Larson, grievant

and

BMS Case #13-PA-0197

Independent School District 197

West St. Paul, Mendota Heights, Eagan

Before: Arbitrator Harley M. Ogata

Date and Place of Hearing: November 27, 29, 2012
ISD 197 District Office
West St. Paul, MN

Date of submission of Briefs: January 9, 2013

Advocates:

For the Employer:

Sara J. Ruff
Attorney at Law
1820 Xenium Lane North
Plymouth, MN 55441

For the Union:

Russ Lewis
Contract Organizer
SEIU Local 284
450 Southview Blvd
South St. Paul, MN 55075

This is a grievance arbitration between the above named parties in accordance with procedures outlined in the collective bargaining agreement. The grievance involves the discharge from employment of Ron Larson (grievant), a school bus driver employed by the above named school district (district). The parties agreed that the matter was properly before the arbitrator

ISSUE

Whether the district had just cause to discharge the grievant from employment as a school bus driver.

FACTUAL BACKGROUND

The grievant has been employed by the district as a school bus driver since August of 2008. He has no previous discipline in his record. The grievant is a veteran covered by the Minnesota Veterans Preference Act and as such has been on paid administrative leave pending the outcome of a hearing under that set of laws.

The grievant was discharged as a result of things that occurred on his afternoon bus route on May 7, 2012. The bus the grievant was driving had an active audio/video camera in operation on the day in question. Much of the activity that occurred on the bus that day was thus recorded and introduced into evidence at the hearing. Accordingly, there is very little dispute about what

happened on the bus that day. What is in dispute is whether the events should serve as a basis for the discharge of the grievant.

In summary, the grievant was discharged for failure to intervene or stop an incident that occurred where two kindergarten girls sexually assaulted a 1st grade student in the front passenger seat of the bus. The occurrence of the assault is not in dispute. Additionally, the grievant was cited with failing to maintain adequate control of the students on his bus, which posed serious safety concerns and ultimately resulted in "significant harm to a student."

On the day in question, the students (grades k through 5) can be seen on the video entering the bus. They appear uniformly upbeat and many are continuing to play a game of tag that apparently was started outside the bus. During the time the bus is being loaded, the grievant can be heard on five occasions telling the students to calm down and attempting to maintain order. His efforts resulted in the abating of the boisterous behavior. His voice at these times was clear, somewhat loud and authoritative. The students clearly responded to his use of authority.

The students loosely sat in order of their grades, with the youngest students in the front and so on to the back. Before the bus departed the school, the students were exhibiting the best behavior seen on the tape, even though a number of students were facing the wrong direction, not otherwise seated properly, and otherwise not following district student behavioral rules covering conduct on the bus. Shortly after the bus departed, the students' behavior

deteriorated. Students can be seen facing backward in their chairs, moving from seat to seat and hitting other students, all while the bus is moving.

As the bus ride continues, the students get more and more unruly. At various times you can see them jumping across the aisle from seat to seat, running up and down the aisle, sometimes eight to nine rows at a time, standing in the aisle, at the same time that a lot of students are making loud noises up and down the bus.

Four minutes after the bus began moving, the grievant finally addressed some behavior by calling out the name of a student. After calling out the name, the behaviors immediately recommenced and escalated. Students can be seen jumping out of their seats trying to grab something on the ceiling, sometimes jumping across the aisle and over seats to grab at it. Students continue to run up and down the aisle, sometimes over half the length of the bus.

While all this commotion is going on, the sexual assault is taking place on the front row seat on the passenger side of the bus. The student victim can be seen being kissed and licked on the face a number of times. At one point in the ride she is grabbed and forced down on her back onto the seat and her legs are sticking up in the air. After she sits up, her demeanor has changed and she looks distraught. The two kindergartners then jut their faces into her face and growl and act dominant towards her. She tries to move on two occasions and is held back by the other girls. When they hold her back, the two other girls glance at the driver to see if they are being watched.

At the six minute mark (beginning when the bus begins to leave the school), the two kindergarten students who perpetrated the assault are seen leaving the bus. At this point, the bus is nearly empty and the bus is orderly and much more quiet. The student victim leaves at the seven minute mark.

DISCUSSION

The record is clear that a sexual assault took place on the bus. There is no dispute that the assault took place on the front row passenger seat less than five or six feet from the grievant's driver seat. The record is also clear that the conditions on the bus were chaotic, loud and the students behaved in an unruly fashion, potentially contributing to diminishing the grievant's ability to hear or see the assault.

The hard question in this matter is whether the grievant should be fired for these occurrences. From the grievant's perspective, getting fired under these circumstances could look like he is "responsible" for the sexual assault. The arbitrator is persuaded that the grievant had no knowledge of the alleged incident occurring. There is also little question that had the grievant been aware of what was happening, he would have taken immediate steps to intervene.

Which leaves us with the question of whether the grievant's actions, or lack thereof, were a contributing factor to the assault. Regarding this, the arbitrator is persuaded that the chaotic nature of bus environment made it easier for the sexual assault to not be heard or discovered. If the students had been under

better control (not necessarily under perfect control), it is clear that the environment would have allowed better circumstances under which the grievant would have seen or heard the assault as it occurred.

The grievant made five attempts to get the students to calm down prior to driving the bus under power. Each of his attempts had some positive effect on the behavior of the students. However, once the bus got underway, the behavior of the students quickly deteriorated and the grievant paid virtually no attention to the behavior of the students. This lack of attention resulted in the bad behavior escalating further and further as the bus ran along its route.

There is no question that conditions in the bus on that date were very unsafe. As stated above, the unsafe conditions contributed to an environment under which the grievant failed to notice the assault that was taking place in close proximity to his seat. The harder question is whether it is reasonably foreseeable that such an assault could take place under such conditions.

First, there is no question that student safety is of paramount importance in a school bus environment. There was ample testimony regarding this fact and it was not contested by the union or grievant. Indeed, much of this is mandated by state law. Accordingly, there is no need to cite the ample authority in state law, district policy, etc. on this issue. Suffice it to say that the students' behavior on the bus the day in question repeatedly violated both state law and district policy with little or no attempt on the part of the grievant to conform that behavior to those regulations.

Second, if the bus in question had gotten into an accident, it is clear that many students would have gotten injured, some likely seriously. The purpose of establishing rules for student conduct on the bus are meant to prevent injury from occurring. If the grievant had been fired where the bus was driven under identical circumstances concerning student behavior and students had been seriously injured as a result of a vehicle on vehicle accident, there is little question that a firing would be upheld.

Third, the harder question remains whether the unsafe conditions could be reasonably foreseen to have caused the sexual assault to occur. Here, the grievant's own defense is enlightening. He testified at hearing and stated during the investigation into this matter that he never heard or saw anything out of the ordinary that day on the bus.

This is important because it affirms that the bus is driven regularly under unsafe conditions. As well, video replays of another day on the bus reaffirms this point. More importantly, it confirms that the noisy, chaotic environment on the bus made it possible for the assault to occur. In other words, it was so noisy and chaotic that the grievant could not hear or see the assault taking place in the one bus seat where he would have had the best opportunity to see or hear an assault.

The video shows the student being forced to the seat with her legs in the air and the victim crying out. The arbitrator sat on the driver's seat during the walk through at the arbitration. The bus in question is the old style bus that does

not have high back seats. The front passenger seat is highly visible to the eye from the driver's seat. In fact, the view of the front passenger seat is at least as visible from the driver's seat as it is from the angle provided by the video camera.

If there is any seat on the bus that is visible to the driver, it is the seat in question. Additionally, the front passenger seat is one of the closest to the ears of the driver on the bus. In short, it is the one seat on the bus where a student should be the most safe. Under these circumstances, it is not enough for the grievant to state that he did not see or hear anything unusual. He should be asking the question why did he not see or hear anything. As stated previously, the grievant unquestioningly would have stepped in had he seen or heard the assault. His demeanor and the way he presented himself at the hearing fully supports this.

The fact that he didn't or couldn't hear or see anything happening confirms that the chaotic nature of the happenings on the bus caused the driver's inability to observe the assault. It is true that bus drivers should not or cannot be held responsible for everything that occurs on their bus. Even the most diligent driver could have something bad happen on their bus, through no fault of their own.

The difference in this case is that the grievant took virtually no action to control the behavior of the students on his bus on the day in question. The bus was so ill behaved that it is credible that the grievant did not hear or see the sexual assault that was occurring a mere five or six feet away, in the seat most visible to his field of view.

If the grievant had made attempts to control the bus and otherwise impose order, the arbitrator would have taken that as a mitigating factor in this decision.

Additionally, the arbitrator is not convinced that the grievant has sufficiently learned anything from this experience so as to ensure that his bus environment would change in the future if he were to be returned to work. In response to a direct question as to whether he believed he did anything wrong on the day in question, the grievant showed no insight regarding his responsibilities to provide a safe environment on his bus. He continued to deflect blame on the district for failing to properly train him or provide him support. Finally, the most that he inferred some responsibility for what happened is when he stated that he got so conditioned to the unruly behavior that it became normal to him.

There is no question that the students on this bus are more unruly than those on many other routes. There was ample testimony from the union to establish this. What is at question here is what the driver should do in response.

Here, the testimony of the driver who is currently driving this route is illuminating. He testified in support of the grievant, but stated that had he been the driver on this day, he would not have left the parking lot with that many students looking backward. The behavior being exhibited before leaving the parking lot was the best behavior the students exhibited during the entirety of the video.

He further testified that he has pulled this bus over on a number of occasions to deal with students and get behavior corrected. He stated that this

was a safety issue for him. He testified that the students on this route are very challenging and very difficult to deal with. He then recited a number of methods and efforts he has undertaken to make things better and safer during the course of this year.

This testimony is in contrast to the grievant's testimony cited above and the actions of the grievant on the day in question. He stated that he became conditioned to the ill behavior so as to make it not noticeable and gradually became normal to him. In the arbitrator's view, it is unacceptable for a driver to give up trying to maintain a safe environment for the students. To do so creates an environment where something bad is reasonably foreseeable.

In order for this arbitrator to overturn a discharge decision under facts like this, the grievant would have to acknowledge responsibility for the alleged errors, evidence a full understanding of what his errors were under the circumstances, provide a reasonable basis to show that they will not recur and not have engaged in conduct that is so egregious that corrective action is not possible.

Further, if the grievant could show that he made a good faith effort to control the bus and notwithstanding those efforts, the injury occurred, the arbitrator would have been more inclined to take those activities under consideration in mitigating the penalty.

The grievant has failed to meet this threshold test.

The union raised other arguments in an effort to mitigate the penalty in this case. The union's arguments are well placed, but are not sufficient to overturn the discharge under these facts.

First, the union argued that the district violated the contract by not sending a copy of the termination letter to the union. This is a clear violation of the contract and the district offered little defense to this procedural violation. However, under the facts of this case, this failure did not prejudice the union or the grievant in any way.

Second, the union objected to the district questioning the grievant before convening a Loudermill hearing and prior to giving him a Tennesen warning. This objection concerns the fact that the grievant's immediate supervisor asked the grievant whether anything unusual happened on his bus on the day in question. This questioning happened two days after the incident and a day before the grievant was formally interviewed by the district. There is no dispute that this occurred and no dispute that there was no union representative present, none offered, and that no Tennesen warning was given. The grievant's response was consistent with his position before and during the arbitration. He neither saw nor heard anything unusual on that day on his route.

Again, under these facts, the grievant suffered no prejudice by this minimal questioning. If the facts were that the grievant suffered prejudice as a result of this questioning, further inquiry would be called for. In some circumstances, this

error could result in affecting the outcome of the case. Under these facts, the district's error is not such that it would affect the outcome of the decision.

CONCLUSION

For the foregoing reasons, the grievance is denied.

Respectfully submitted:

A handwritten signature in black ink, appearing to read "H. Ogata", with a long horizontal stroke extending to the right.

Harley M. Ogata

Dated: February 1, 2013