

GRIEVANCE ARBITRATION

BEFORE

Arbitrator Dennis Krueger

**Amalgamated Transit Union,
Local 1005
Union**

**BMS Case No: 14PA0316
(Joan Koehnen discharge grievance)**

and

**Metropolitan Council,
Metro Transit Division,
Employer**

**Case Number 14PA0316
Hearing Date: January 8, 2014
Closing Statements: January 22, 2014
Date of the Award: February 19, 2014**

APPEARANCES

FOR THE EMPLOYER:

Andrew Parker, Attorney
Christy Bailly, Director, Bus Operations
John Cook, Asst. Transportation Manager
Jeff Wortrel, Transportation Manager
Marcia Padden, Labor Relations Specialist

FOR THE UNION:

Justin Cummins, Attorney
Joan Koehnen, Grievant
Dorothy Maki, Vice President ATU 1005

JURISDICTION

The first task of this neutral is to determine whether or not the claims raised by the Grievant are subject to the arbitration provision of the collective bargaining agreement and to establish that arbitral authority exists for the resolution of this dispute between the parties.

Metropolitan Council, Metro Transit Division (hereinafter "Metro Transit", "Company" or "Employer") and Amalgamated Transit Union Local 1005 (hereinafter "Union" or "Local") are parties to a Collective Bargaining Agreement covering August 1, 2012 to July 31, 2015 (Joint Exhibit #1). Within that Agreement, there is a Grievance Procedure at Article 5 involving the application and interpretation of the Agreement.

Joan Koehnen (hereinafter "Grievant") is a member of the bargaining unit and hence covered by the Collective Agreement (See Joint #1). On July 12, 2013 the Grievant was served a "Notice of Discharge" (Joint #2). A grievance was filed on July 19, 2013 alleging a violation of Article 5, Section 1, stating the action was "not just and merited" (Joint #3). This grievance was processed through the contractual procedures as evidenced by Joint Exhibit #4.

The arbitrator was mutually selected by Metro Transit and the Union (hereinafter "Parties"). The CBA contains "Arbitration Procedures" at Article 13 which provides that the decision of the arbitrator "shall be final, binding, and conclusive". Neither the Employer nor the Union objected to the implementation of the arbitration process or proceeding forward with this hearing. Given this result, it is determined that this neutral does have jurisdiction over this matter.

With this logical foundation, the finding is that this matter is appropriately presented before this neutral for consideration of procedural and substantive issues raised by the parties. The Parties further agreed on the onset of this hearing that there existed no procedural issues or jurisdictional issues for consideration by this neutral.

HEARING

This matter came to hearing at 9:00 a.m. on January 8, 2014, before the undersigned arbitrator who was appointed as the impartial arbitrator through the utilization of the Minnesota Bureau Mediation Services and the mutual agreement of the parties. No objection was made by either party to this neutral presiding over this case and with both parties agreeing that this matter was properly presented before this neutral. Both parties were afforded a full and complete opportunity to present written evidence and witnesses, to cross-examine witnesses, to provide rebuttal information, and to argue their respective positions. All exhibits presented by the employer and the union were received and made a part of this record and all objections and responses were heard. The hearing was tape recorded with the Arbitrator retaining the tapes for his personal records. The oral portion of this hearing concluded around 5:00 p.m. The Arbitrator requested short briefs outlining the major arguments of both parties which were provided by the end of the day January 22, 2014. Subsequent to the receipt of those briefs, the hearing was closed. The signed award is to be placed in ordinary mail addresses to the parties as designated on the appearance sheet and an electronic copy will be sent to the parties simultaneously.

STATEMENT OF THE ISSUE

The parties were in agreement on the issue before this neutral.

Was the discharge of Joan Koehnen on July 12, 2013, just and merited pursuant to Article 5, Section 1 of the 2012 -2015 Collective Bargaining Agreement?

If not, what is the proper remedy?

LISTING OF JOINT EXHIBITS

- | | |
|------------------------------------|---------------------------------|
| 1. Collective Bargaining Agreement | August 1, 2012 to July 31, 2015 |
| 2. Notice of Discharge | July 12, 2013 |
| 3. Grievance First Step | July 19, 2013 Memo |
| 4. Grievance Second Step Response | August 15, 2013 |
| 5. Bus Operator Absenteeism Policy | dated from 2005 |

RELEVANT CONTRACT LANGUAGE

ARTICLE 5

GRIEVANCE PROCEDURE

Section 1. Metro Transit reserves to itself, and this Agreement shall not be construed as in any way interfering with or limiting, its right to discipline its employees, but Metro Transit agrees that such discipline shall be just and merited.

Section 2. No employee shall be suspended without pay or discharged until the employee's immediate superiors have made a full investigation of the charges against that employee and shall have obtained the approval of the applicable department head. No discipline, excepting discharge without reinstatement, shall be administered to any employee that shall permanently impair the employee's seniority rights. When contemplating disciplinary action, Metro Transit shall not give consideration to adverse entries on an employee's disciplinary record involving incidents occurring more than thirty-six (36) months prior to the date of the incident which gives rise to the contemplated discipline. Prior to a suspension of more than two (2) days, the ATU must be notified. If a case of discipline involves suspension or discharge of an employee, and such employee is not found sufficiently at fault to warrant such suspension or discharge, the employee shall then be restored to their former place in the service of Metro Transit with continuous seniority rights and shall be paid for lost time at the regular rate of pay.

Section 3. Any dispute or controversy, between Metro Transit and an employee covered by this Agreement, or between Metro Transit and the ATU, regarding the application, interpretation or enforcement of any of the provisions of this Agreement, shall constitute a grievance.

ARTICLE 13

ARBITRATION PROCEDURES

In the event a dispute or controversy arises under this Agreement which cannot be settled by the parties within thirty (30) days after the dispute or controversy first arises, the Metro Transit or the ATU, whichever is applicable, in accordance with Article 2 or 5 hereof, may request in writing that the dispute or controversy be submitted to arbitration. The State Bureau of Mediation Services shall furnish a list containing the names of seven (7) persons from which the arbitrator shall be selected. Within five (5) days after receipt of such list, the parties shall alternately eliminate one name from the list until only one name remains. The arbitration hearing shall be held within forty-five (45) days from the date the arbitrator is selected.

In making such submission the issue to be arbitrated shall be clearly set forth in writing. The arbitrator's decision shall be final, binding and conclusive and shall be rendered within thirty (30) days from the date the arbitration hearing is completed.

POSITION OF THE METROPOLITAN COUNCIL
SUMMARY OF KEY EVIDENCE

When assessing whether an employer's discharge decision was reasonable rather than arbitrary or capricious, arbitrators have employed many different criteria which can be summarized into seven categories of fairness and due process. See discussion, e.g. Bolduc Decision at 11-14 (attached).

1. Written Policy

It is undisputed that Metro Transit maintained a written policy agreed to by the Union. (Jt. Ex. 5).

2. Employee Aware of Policy

It is undisputed that the Grievant was fully aware of the Absenteeism Policy, its application, and its consequences. (Employer Exhibit ("Er. Ex.") 1 and Koehnen Testimony ("T").)

3. Employee Violated Policy

It is undisputed that the Grievant violated the Absenteeism Policy maintaining the worst absenteeism record of any employee of Metro Transit including 52 occurrences, and 35 chargeable occurrences within the last three years while continuing on numerous final records of warning during nearly her entire employment. (See in particular, Er. Exs. 2 and 23).

4. Progressive Discipline was Employed

There is no dispute that progressive discipline was followed with each disciplinary measure in this case. (Er. Exs. 2, 23 and Koehnen ("T")).

5. Employee was provided Due Process

There is no dispute that the Grievant signed for each and every occurrence affirming the validity of that occurrence and also was counseled on 21 separate occasions over a three-year period, including numerous Loudermill hearings and additional meetings when final records of warning were issued. The record establishes overwhelming evidence of due process and meaningful opportunities to be heard. (See Er. Exs. 23, 31, 8, 11, 14, 21).

6. Employee Was Counseled and Advised Regarding Consequences

It is undisputed that the Grievant was counseled and advised numerous times regarding the

consequences of her conduct including counseling, records of warning, final records of warning, Loudermill hearings and investigative hearings. (See Er. Exs. General, including Brevig email Ex. 32, and Cook T).

7. Employee was Provided Assistance and an Opportunity to Improve Attendance

It is undisputed and the evidence is overwhelming that the Grievant received advice and counsel regarding Metro Transit's Employee Assistance Program on numerous occasions. In addition, an interactive inquiry process regarding whether any accommodation could be made to assist the employee in rectifying her chronic absenteeism also occurred numerous times. In addition, it is undisputed that the Employer provided numerous breaks and "wake-up" call opportunities to the Grievant including absences which could have been charged but not, being allowed to work when arriving late to work, and reinstatement in March 2013 ("a clear wake-up call"). (See Er. Exs. 15, 16, 17, 2, 23, 32).

Each of the criteria supporting discharge in this case has been met. The evidence is not only overwhelming in support of this conclusion, the evidence in fact is unequivocal and entirely undisputed with respect to each and every criteria.

POSITION OF THE AMALGAMATED TRANSIT UNION

SUMMARY OF KEY EVIDENCE

1. During her substantial career, Ms. Koehnen earned a "large number" of commendations - including three in approximately the last month of her employment - despite driving "urban" routes at night (Director of Bus Operations testimony; Employer Ex 2).
2. Ms. Koehnen struggled with depression and anxiety that resulted in absenteeism issues prior to 2012 (Director of Bus Operations testimony).
3. Mr. Koehnen did not understand that she had been diagnosed with depression and anxiety until 2012, at which point she requested FMLA leave (Grievant testimony; Director of Bus Operations testimony).
4. The FMLA leave enabled Ms. Koehnen to take nearly one day of leave per week to manage her medical conditions (Director of Bus Operations testimony; Employer Ex. 18).
5. The employer took approximately six months to process Ms. Koehnen's FMLA request and, in the meantime, fired Ms. Koehnen for supposed absenteeism (Director of Bus Operations testimony; Employer Ex. 14).
6. In response to the Union's grievance challenging Ms. Koehnen's discharge, the employer reinstated Ms. Koehnen in March 2013 with full back pay (Director of Bus Operations testimony).

7. After reinstatement, Ms. Koehnen struggled with adjustments to the medication for her medical conditions, which prompted her to call in sick several times (Grievant testimony, Director of Bus Operations testimony).
8. The Employer fired Ms. Koehnen just as she was completing her medical stabilization and recovery process, as reflected in the three commendations she earned in the last weeks of her employment (Grievant testimony; Employer Ex. 2).
9. Ms. Koehnen's depression and anxiety levels are now near normal as she has continued with the treatment regimen her doctors had established before the employer fired her (Grievant testimony; Union Ex. 1).
10. In support of the discharge, the Employer relied on testimony and documents regarding alleged events occurring more than three years before Ms. Koehnen's discharge (Director of Bus Operations testimony; Employer Exs. 4, 24, 31).
11. In support of the discharge, the Employer relied on testimony and documents regarding a prior grievance settlement with the Union in an attempt to impugn Ms. Koehnen's character now (Director of Bus Operations Testimony; Employer Exs. 25-26)

ANALYSIS AND DISCUSSION OF THE CASE

Given the gravity of the claims in this case and the impact of these accusations, this neutral is going to take the time to analyze this case to the last point, carefully reviewing the evidence and testimony as provided to him. Normally one bringing a grievance within a labor forum, like one bringing a lawsuit, bears the burden of proving the claims. One arbitral exception, which has been cemented over many decades, is the allocation of the burden of proof to the employer in discipline or termination cases. Given this historic allocation, and the claim of the Grievant that her termination was not just and merited, the burden of proof falls squarely on the Employer.

JUST CAUSE

Arbitrator James McBreaty: in "The question of 'just cause' is nothing more than the question of justice, placed in an industrial setting. True, it is not legal justice; it is not social justice-it is industrial justice. Lear Siegler, Inc., 63 LA 1157, 1160 (1974).

At Article 5, Section 1 of the Labor Agreement, states, "Metro Transit agrees that such discipline shall be just and merited." In the instant dispute, both the Union and the Employer are in alignment

regarding the discharge standard. The Union states that *“any disciplinary action taken by the Employer be just and merited, which is effectively the just cause standard. Jt. Ex. 1, Art. 5.”* The Employer states that *“just and merited” has been consistently interpreted as a “just cause” standard.* See Metropolitan Council and ATU, Local 1005 (Teri Bolduc) Arbitrator Frank Kapsch, Jr. (January 23, 2012). Given that position from both Parties, which is well understood within the labor arbitration community and by this neutral, the just cause standard is present in this case.

While the Union states within its brief that the burden should be by a preponderance of evidence (Wholesale Produce Supply Co., 101LA1101 (Bognanno, 1993), and the Employer indicates that the discharge decision was reasonable, rather than arbitrary or capricious, that final decision rests with this neutral.

GROUND S CITED

The grounds cited by Metro Transit for discharge are 1) Bus Operator Absenteeism and 2) Overall Record. It is important for this neutral to review the evidence and the record for both issues.

KNOWLEDGE OF RULES AND POLICIES

The examination of this case begins with the “Bus Operator Absenteeism Policy” (Joint #5) which was implemented in August of 2003. As part of this process, supervisors are responsible for seeing that operator absence is properly and accurately maintained in each employee's personnel record, shall closely monitor absenteeism, and are responsible for ensuring that records can substantiate disciplinary action. Each employee may be required to initial all entries relative to absence, or it shall be noted and the notation to be initialed by the manager. The system is sometimes referred to as a “no fault” system and runs on a 12 month “rolling” calendar.

Occurrences will be monitored and charged against the operator's record on a no-fault basis (reason for an occurrence will not be considered relevant):

1. Sickness/off-duty injury
 2. Late - no work available – one minute or more late for plug-in time
 3. No show *
 4. Any request off after 9:00 a.m. the day preceding the requested day
- * No Show – Failure to show up or call-in for work within two hours after an employee's scheduled plug in time. The third no-show , and every no-show thereafter, within a rolling calendar year will count as two occurrences.

An occurrence is defined as part of a workday, or a single workday, consecutive workdays missed. An FMLA-certified absence is not considered an occurrence.

The policy clearly states that “*An FMLA (Family Medical Leave Act) – certified absence is not considered an occurrence.*”

Employees in violation of the Attendance Policy are subject to progressive discipline:

1. Seven (7) occurrences within a calendar year will result in a Record of Warning and a counseling session.
2. Ten (10) occurrences within a calendar year will result in a Final Record of Warning.
3. Thirteen (13) occurrences within a calendar year may result in termination.

The policy requires that an employee receive a final warning and be afforded a hearing prior to a determination as whether to terminate/discharge and notes that mitigating circumstances may be considered.

The Grievant had a start date of 02/04/2008 with her probationary period ending 09/05/2008 so has worked for MetroTransit for slightly more than five and one-half years. Employer #1 is a “*Receipt of Operating Policy and Operator Absenteeism Policy*” signed by Grievant and dated 3-05-08. In reading the grievance document, and reviewing the proceedings, the record at this juncture clearly establishes that the work rules and employment policies were communicated to Grievant over her years of service with the Employer. The record and the testimony even assured that this employment knowledge was known by a meticulous signing and/or initialing of new entries and dating of instances as they occurred. There was no evidence in this record that the Grievant had not received all pertinent rules or policies, nor that she did not understand or comprehend them. In this instance, clear objective evidence was supplied by the Employer that the Grievant did have knowledge of the “plant rules”, or in this case, the rules and policies of MetroTransit. During cross-examination, Grievant did acknowledge that she knew the rules and the consequences of her absences.

Decisions of arbitrators have established a general pattern by which employer's disciplinary action may be judged. One of the cornerstones of this pattern is to test whether the employer gave the employee forewarning or foreknowledge of possible disciplinary consequences of the employee's conduct. Once the (plant) rules have been issued or posted, arbitrator's have held that employee's knowledge of such rules may be presumed.

Arbitrator Robert Howlett has stated:

The test with respect to a rule clearly communicated to employees must, of necessity, be determined by objective evidence. Unless strong reason is shown, every employee should be charged with knowledge of rules clearly communicated, whether he/she actually remembers them or not. Valley Steel CastingCo., 22LA 520, 527 (Howlett, 1954)

OPERATOR WORK HISTORY

The work history of the Grievant appears in Employer's Exhibits #2, #3 and #4. ER #2 is a computer scanned document which provides a summary compilation of events appearing on her work record. Not infrequently arbitrators will be confronted with evidence generated by machines – computers and timecard records are the most often used. In this case the employer has offered business records or computerized data. Machines, unlike some humans lack a conscious motivation to tell falsehoods, and because the workings of such machines can be explained by witnesses who are subject to cross-examination or rebuttal, this neutral has no concern. Given testimony at the hearing supported by later signed exhibits during the hearing, and the degree of explanation, this neutral finds the information to be credible. It would not be feasible to reprint over approximately 160 entries which were reviewed to obtain needed information but one can understand the nature of the task. A three-day excerpt (from ER #2) of the Grievant's last three days of employment is included for purposes of clarification and explanation:

Date of the Event	07/10/2013	07/09/2013	06/27/2013
Detail	Administrative Leave	Late for Work	Sick
Name of the Person - Created By	Sabourtj	Burnsmf	Ravelitt
Date Signed by Grievant		07/10/2013	07/10/2013
Occurrence		13	
FMLA-certified			X
Absence End	07/10/2013	07/09/2013	07/02/2013

It is noted that chargeable offenses, such as being **Late for Work**, are placed in **Bold** type as in the middle column of the record cited above. This document (ER #2) fills three and one-half pages and covers a three-year history for the Grievant at the time of discharge. This documentation was made for easier reviewing of facts, dates, and information, and provided both parties and this neutral with a firmer foundation for delving into the landscape of this grievance. Questions, objections, and

refinements of information were provided to test the validity of the data.

The Union advocate objected to these exhibits on the grounds that the disciplinary action cites extend beyond a three-year time period. In reading the Collective Agreement at Article 5, Section 2 in the third sentence:

When contemplating disciplinary action, Metro Transit shall not give consideration to adverse entries on an employee's disciplinary record involving incidents occurring more than thirty-six (36) months prior to the date of the incident which gives rise to the contemplated discipline.

In reviewing the contract language, it is clear and unambiguous. The parties wanted to include a three-year time period for tracking adverse discipline entries. While arguments could be, and have been made, regarding this time limit, it is not for this neutral to interpret. It is what the parties have bargained, so Metro Transit, the Grievant, and this neutral shall not give consideration to “older” adverse entries regarding the disciplinary record.

In response to the Union's objection and in reviewing ER #2, this neutral finds that the timeframe from July 12, 2010 through July 7, 2013 for entries is appropriate since all entries occur within a 36-month window. ER #3 and ER #4 do contain some entries which go beyond the 36-month timeframe. They also include dates and actions, which should be included. Both parties have stretched this window. It is my observation that because of “rolling dates” and timing of occurrences, one must be cognizant of this fact. This neutral is not including or making any finding regarding adverse disciplinary entries which are older than July 12, 2010. In reviewing the record in its entirety, this neutral will separate and carefully make certain that this analysis is accurate and relevant to the contractual timeframe.

ABSENTEEISM RECORD

Moving forward and reviewing the work record of the Grievant, one finds the facts listed below: A summary “construct” is provided from records in evidence, realizing some dates and events may be slightly abbreviated. This will allow the parties to see how the evidentiary record was reviewed and analyzed by this neutral realizing that many facts or documents have been considered and then combined for ease of use.

This neutral notes from the record and the testimony that the Grievant **started** her “three-year disciplinary period” as described in Article 5, Section 2 with one of the Grievant's “Final Record of Warning on 10/03/2010. Later a Final Record of Warning will be abbreviated as “FROW”.

A review of Grievant's personal attendance record indicates the following:

For the period 7/31/2010 to 7/23/2011:

04/07/2011	Final Record of Warning – Absenteeism
10/03/2010 to 05/03/2011	10 Absenteeism Occurrences 4 Employee Counseling

For the period 08/03/2011 to 08/01/2012:

05/04/2012	Final Record of Warning – Absenteeism
04/23/2012	Final Record of Warning -- Absenteeism 12 Absenteeism Occurrences 7 Employee Counseling

For the period 08/02/2012 to 07/10/2013:

03/09/2013	Final Record of Warning - Absenteeism 13 Absenteeism Occurrences 7 Employee Counseling
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Wanting to grasp the full meaning and understanding of these documents, I have reviewed the following specific exhibits and once again I have noted the dates and the messages communicated:

ER #3 – 10/03/2010 to 05/03/2011 Final Record of Warning – re-issue – -See pgs 2-3

ER #4 – not considered due to contractual timeframe limitation

ER #5 -- 05/03/2011 to 04/23/2012 Final Record of Warning - Notice of Hearing

ER #6 – 07/23/2011 to 05/04/2012 Final Record of Warning

Supervisor's Comments:

Dependable operators are paramount in the delivery of reliable service. Your record is lacking in this regard and has failed to meet our expectations. Absenteeism costs the Metropolitan Council a significant amount of money each year.

The Absenteeism Policy stipulates seven (7) occurrences within a rolling calendar year will put you in a Warning Status. Should you have ten (10) occurrences within a rolling calendar year, you will be issued a Final Record of Warning, and upon receiving a Final Record of Warning, three (3) more occurrences will be just cause for your termination.

If you believe Dor & Associates may be of some benefit in assisting you with your attendance problems, they can be contacted at 612-332-4805. (Employee Assistance Program)

This communication above appeared several times on exhibits in the record. This arbitrator does not view these written statements as redundant dicta or a meaningless group of words and paragraphs. It is not a stratagem, it should be a factual statement written in plain English. The term **“warning”** has many synonyms – *caution, admonition, forewarn, alert, threaten, signal, notify, urge, and tip off* - the term itself is well known and accepted. One seeing this, realizes, or should clearly realize, that danger is ahead and specific action should be take to avoid greater problems.

The Assistant Transportation Manager (Cook) from the Heywood garage testified that he maintained and reviewed employee files for 60-80 employees over a 12-13 year period. He has 21 years experience and worked in the same area for 8 years and the Grievant normally reported to him. He was the one that would normally sign for counseling. Usual topics would be the number of occurrences, what is going on?, coaching, ,,,etc. He tried to make accommodations. In his opinion, the Grievant has had “a lot of problems over the years in different areas”. With the record of the Grievant, he observed that “there is not anyone (who) is still on the property that has not been terminated (with this record)”. Later when asked on cross-examination, if he was a caring guy, the Grievant stated, “Yes””he can be”.

In reviewing the three-year absence record, there is pattern of increasing utilization and moving toward the maximum occurrences, which places the Grievant in continued jeopardy of termination. In reviewing the frequency of recorded occurrences and the many subsequent iterations, this neutral has noted that the range has vacillated between 9, 10, 11, 12, and ended on July 7, 2013, when it hit Occurrence #13. The number of occurrences has not fallen below 9 within the three-year disciplinary window. At 9 occurrences, rather than dropping and turning a corner, it continued its upward trend. This neutral has noticed that there are some counting differences between ER #2 and ER #23. While events or situations may impact attendance, it is an anomaly to have the same employee losing an occurrence to have it only replaced within a few days, or bumping within a day or two of termination – month after month. Even more so of anomaly, not only to make the same return trip again, and then to be terminated on occurrence #13. When questioned on cross-examination and walked through the facts, the Grievant indicated that she did see the point about dropping occurrences and then adding a

new one. The management advocate walked the Grievant through the “ping-pong” occurrences on the schedule and how one would drop off, and she would almost immediately have another occurrence. She, and this neutral, discerned the repeated pattern. She indicated that this was due to adjusting meds in January and that she would move closer to the garage. She did not move closer to the garage.

PROGRESSIVE DISCIPLINE

Once again in examining the record, The Director of Bus Operations testified regarding the “no fault” “Bus Operator Absenteeism Policy” (Joint #5) and its derivation with the Union. This policy is clear and well-written and spells out the steps of progressive discipline for management, union, and employees to see. Section V. of the Policy recants that discipline should be progressive and timely, the steps in the process, and administration of discretionary discipline. In this case disciplinary actions have been well recorded, monitored, notifications given with signed acknowledgement by the employee. There are no surprises or vagueness inherent with the chain of events. Absences have kept happening and have escalated over time for the Grievant. The occurrences have moved up the ladder to warnings, final warnings, and termination. Riding the side car of the recorded and documented occurrences, is the recorded history of progressive actions on the part of management. This record is replete with a history of progressive discipline. See the discussion already provided above.

DUE PROCESS

Procedural due process requires two key elements: notice and an opportunity to be heard. The *Loudermill* Court explained that a public employee is, at a minimum, is entitled to “oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story” before the proposed action is taken. *Cleveland Board of Education v. Loudermill*

In this case, there were oral and written notices of the charges of against the Grievant, an explanation of the evidence, and an opportunity to present her side of the story. This process occurred and was repeated several times as the facts of this case unfolded. The Grievant never claimed a violation of due process. This neutral finds that due process was afforded her.

COUNSELED AND WARNED

Employer #2 listed eighteen (18) references to employee counseling. ER #31 listed at least (19) counseling opportunities or sessions. Any references extending beyond 10/11/2010 and the master

agreement parameters have been removed by this neutral. It seems that whether 18 or 19, this counseling count is way out of line and sending messages that should have been received. From the record, this neutral understands that the term “counseling” does not refer to “therapy” sessions. These sessions may be better described as as a time to exchange ideas, opinions, and information, or to receive advice. Management witnesses testified that they asked what can be done to help the Grievant. According to them, and reviewed by this neutral in listening to the tapes, different options included seeing Dor (EAP), possibly moving closer to work, offering unpaid leave to help, coaching, citing the number of occurrences, asking what was going on?, allowing her to leave early, finding accommodations and so on. This neutral does note Metro Transit did send the Grievant home looking ill and this action was not counted as an occurrence. See ER #7 – 06/08/2012 “*A caring manager sent home because she did not look good. This did not count against Grievant.*” From the testimony of the Grievant, she indicated that at times management just had her sign the card and that was it. Probably both responses have truth and credibility attached to them. While not always providing solutions, they were options for future improvement and continued dialogue. Unfortunately they were options which never came to fruition for the Grievant.

Appearing several, if not many times, was the sentence below:

If you believe Dor & Associates may be of some benefit in assisting you with your attendance problems, they can be contacted at 612-332-4805. (Employee Assistance Program)

Testimony from the Grievant that she did use Dor twice before discontinuing the free service and that she was in denial of any problem. She indicated that she did not like them and there were many ups and downs related to her absences.

Above and beyond the Occurrences (absences) were Operator Policy Warnings as evidenced at ER #27 (a) through (f). The dates on these documents have been noted by this neutral as have the dates on the Customer Feedback forms. The comments of the patrons, especially when signed and written in length, provide greater insight, for this neutral.

Another task for the neutral was to review the Record of Warning Operating Policy.

Ran Red Light 12/18/10; 1/01/11; 4/27/11

Running Red Lights - 3 customer complaints for running red lights – 2 day suspension 5/13/11

Running Red Lights – 12/23/10

Running Red Lights – 1/3/11

Running Red Lights - 4/27/11

Driving Too Fast – 1/24/11

Rudeness – 12/08/10

Rudeness – 8/27/12

Rudeness – 9/27/12

complaint – 11/8/12

2 logged complaints – Safety and Rude

There were commendations as well as complaints --- 17 commendations and 4 complaints Customer Feedback forms (ER #28, ER #29, ER #30 which are dated in August, October, and November, 2012) provide more information related to the performance of the Grievant.

EMPLOYEE ASSISTANCE PROGRAM

This comment shows up on numerous documents throughout the hearing:

If you believe Dor & Associates may be of some benefit in assisting you with your attendance problems, they can be contacted at 612-332-4805. (Employee Assistance Program)

In reviewing the Employee Assistance Program, Dor has been available during the 36-month disciplinary period. Grievant testified that she did not complete the free sessions. She also indicated that she was in denial. The record indicates that the Diamond program was started after the Grievant was terminated. (Union #1)

This neutral finds that other than Dor and Diamond, there is nothing in the record denoting WHAT the Grievant did to seek or find further assistance. She seemed to not to like or care for Dor, and Diamond was not used until after termination. A major question is “What did the Grievant do to help herself during the three-year period?”

THE RESPONSE OF THE UNION

Turning to the arguments of the Union, let us take a look at what the Union presents as problems with the discharge of the Grievant while the analysis continues. Given the strength of the Metro Transit case, one must determine whether mitigation of any disciplinary action is needed.

Looking at the number of commendations received by the Grievant over the 36-month period time prior to her discharge, one finds approximately seventeen (17) customer commendations. During the same timeframe, there were four (4) customer complaints. The commendations were rather evenly distributed over the time period, with the exception of the 14 months from 4/02/12 to 5/29/13. This

neutral has taken note that three of the commendations appeared in the last month of employment. This is certainly a step in the correct direction and one hopes this positive action continues. The concern is the weight and timeframe to be applied to the this argument. Simply put, this arbitrator cannot weigh this information on the same scale as the number of occurrences for absences, warnings, and final warnings.

Depression and Anxiety

The record does indicate that anxiety and depression issues were not new to the Grievant.

Ms. Koehnen, speaking on her own behalf, said she began taking antidepressants shortly after she began working for Metro Transit. (2008) (ER #4)

She testified that she would take pills (antidepressants) and vitamins for anxiety. She indicated that some days that would impact her ability to drive and other days she would call sick. This continued for over a year. She quit her meds for over a year. By her admission she had ups and downs frequently. The Grievant did acknowledge that she was given the “program” for Dor in 2010, and had two visits, but stopped even though she did have one more free.

The Union argues that the Grievant struggled with depression and anxiety that resulted in absenteeism issues prior to 2012. That fact seems to be true.

In January 2013 the Grievant indicated (to Bailly) that she was adjusting her meds (but she was getting progressively worse.) Testimony

In 2013 the record indicates after returning to work on March 9 the occurrences continued to climb. There was not a turnaround or fewer occurrences.

Within the entire record there is no actual proof of a medical condition or medical diagnosis. While we are all aware of what it means to be depressed or anxious, this is for the medical professionals to determine and explain.

Family Medical Leave Act –

The Grievant testified that she did not know about FMLA or how it worked until July or August of 2012. At that time the manager (Cook) told her she could go on it and he provided the paperwork for her to fill out. The Grievant admitted on cross-examination that she had received a memo from management indicating that it was an employee responsibility. The Grievant said, “I should have taken FMLA.”

The Family Medical Leave Act (FMLA) is a program and policy created by Federal statute. The rules and regulations governing the operation and administration of the program, as it relates to employers and employees, are established by the U. S. Department of Labor (DOL). The only reference to FMLA to be found appears on page 15 of the CBA at Section 4 where care of a spouse and/or parent is listed. This cite is not relevant to the Grievant. It appears that Metro Transit is making reasonable efforts to comply with current FMLA rules, regulations and protocols as established by the DOL. Much of the Union's argument is centered around the FMLA request and the eventual granting. In reviewing the record and several exhibits, such as ER #8 through ER #18, there was clearly a problem in setting up the ability to use FMLA and errors or omissions were made. With the ATU input during the grievance processing, it was found the FMLA packet had not been processed. From the record and testimony, the correction was made. She was approved for using three days per month of FMLA.

Ms. Koehnen – October 3, 2012 - Designation of FMLA Leave:

The Council has designated your absences as FMLA leave. Please read this form carefully to understand your rights and responsibilities regarding this leave.

- You will be require to furnish medical certification (if not already submitted) of a serious health condition for yourself, child, spouse, or parent. If medical certification has not be submitted, you must furnish this document within 15 days after you are notified of this requirement or Metropolitan Council may delay the commencement of your leave until submitted.
- If you are off work intermittently, you must follow your department's normal call-in procedure indicating at the time of call-in that you are using FMLA and refer to the certification number indicated on the first page of this letter. Failure to due so may result in discipline. Upon return from intermittent time-off you must complete a "Request to Intermittent Family and Medical Leave Request Certification Already On File"

Original: Employee
Copy: Human Resources FMLA Administrator
Employee's Supervisor/Manager

Grievance Decision:

Based on the full FMLA designation provided by Occupational Health on March 5, 2013, with an effective date of October 4, 2012, Ms. Koehnen is immediately reinstated with full back pay.

The sick occurrences on October 8 and October 19, 2013 will be designated as FMLA. Ms. Koehnen, will return to work with 11 occurrences. In addition the Record of Suspension dated October 25, 2012 and the associated three day suspension along with any record of the suspension will be removed. Ms. Koehnen, will receive back-pay for the suspension served on October 25, 26, & 27, 2012, as this suspension was based on the October 19, 2012 occurrence.....

Ms. Koehnen was discharged in error. Additionally, with the FMLA designation for the two October 2012 sick occurrences, the three day suspension should be also returned and associated negative entries removed.

Mr. Lawson was notified at 1:30 p.m. On Tuesday, March 5, 2013. Mr Cook and Mr. Lawson will arrange for Ms. Koehnen's immediate return to work.

Medication Adjustments

"Ms. Koehnen, speaking on her own behalf, said she began taking antidepressants shortly after she began working for Metro Transit. (2008)

She had issues getting adjusted to the medication and was urged to get FMLA but did not initially do so.....Ms. Koehnen further stated that she believes her medication is correct now and she can get to work. (2/4/2013) ER#15

Union Exhibit #1

Joan is currently enrolled in the Diamond (Depression Management) program here at Northwest Family Physicians. She enrolled in the program 7/31/13 and was seen for visits on the follow dates:

7/31/13, 8/14/13, 9/10/13, 10/3/13, 10/17/13, 11/26/13 and 12/19/13

Her PHQ9 scores for depression have improved with medication changes.

Management claimed to not having seen this letter (Union #1) prior to the hearing, questioned other letters, raised hearsay evidence, and the fact that no medical records were in the record and there was no doctor for cross-examination.

On cross-examination of the Grievant, she testified that she was treated by a doctor in September 2008, quit meds for over a year, in 2010 was on/off, May 2010 went to Dor for two days and then stopped (did have one more free visit) , was adjusting meds in July of 2011 two

years before her termination, January 2013 got better with meds from doctor, then got progressively worse, now feeling better.

The arbitrator finds that the Grievant enrolled in the Diamond program around three weeks after the date of discharge by Metro Transit. Read the letter (Union #1). “She enrolled in the program 7/31/ 2013....” There is no evidence provided by the Grievant regarding any specific medical treatment prior to discharge by Metro Transit.

After her reinstatement, the Union claims the Grievant was struggling with adjustments to her medication which prompted her to call in sick several times. The record indicates the Grievant has been struggling with “adjustments” since 2008. The record is clear that the occurrences kept increasing.

The Union claims that the Grievant was completing her medical stabilization process when she was fired. There is nothing in this record to indicate a “medical finding” or a “medical stabilization” prior to her firing. There is no factual information that anxiety levels are now near normal. As a matter of record, no one at the hearing even knew what normal meant related to PHQ9 scores! The Grievant thought that lower numbers were better. In additionally claiming she has continued with the treatment regimen her doctors had established before they fired her, there is not one item regarding the regimen her doctors had established.

The arbitrator finds that this work record of the Grievant in the month preceding discharge.

Prior to 7/10/13 the Grievant's record was as follows:

- 6/8/13 Sick **Occurrence #12**
- 6/8/13 Employee Counseling
- 6/13/13 Customer Commendation
- 6/14/13 Customer Commendation
- 6/19/13 Late for Work – lucky found work
- 6/22/13 Sick FMLA
- 6/27/13 Sick FMLA
- 7/9/13 Late for work **Occurrence #13**
- Terminated

Somewhat related to constructive discharge, this seems to be “constructive treatment” after the fact. There is no discernible pattern of treatment and no medical justification or explanation of what it being done. There seemed to be no evidence of specific and notable improvement. There is no testimony from fellow operators, family, or friends. Once again, this argument does not impress this neutral.

Exhibits #25 and #26 present a different problem in that these documents discuss a grievance settlement. The entire arguments do not need to be repeated, nor should they be. This neutral is not interested in prior arguments of the parties to settled disputes, flowery or harsh dicta, nor impugning one's character. This neutral is interested in the remaining facts, and those specific facts relevant to this case. In other words, that which is left after the dust settles.

While the Union objected to Exhibit #25, this neutral finds no valid reason to not admit this document. This exhibit is an accurate reflection of facts, and while the Union may not care for the content, it is a fact. Exhibit #25 is a Final Record of Warning (FROW) citing Fraud and Misappropriation of Funds. In reviewing this document, this final warning stood and did not disappear from the Grievant's work record or disciplinary record. The Grievant served a three-day suspension from work. The Grievant also signed that she had received this communication. Given these facts, Exhibit #25 is considered by this neutral. In this regard, "where the parties themselves settle a grievance, the evidence of intent as to the meaning of a provision carries special weight." However, this determination is for this fact situation specifically and does not set any binding precedent.

Exhibit #26, Item #5, which states,

NOW THEREFORE, in consideration of the mutual promises and covenants established in this agreement , ATU, Koehnen, and the Metropolitan Council agree as follows:

"The Parties agree that the Agreement is non-precedent-setting and the settlement provided for herein will not be used or introduced in any grievance proceedings between the Parties."

The grievance procedure, when adhered to, advances peaceful and constructive industrial relations with resultant benefits to labor, management, and the public. Arbitration awards, as well as grievance settlements, show that arbitrators expect the parties to pay due respect to the grievance procedure, not only by using it, but also by observing its requirements. In this case, both parties and the grievant mutually agreed upon the settlement, and all parties knew the ramifications and resulting actions. For this reason, Exhibit #26 is to not be considered in a grievance proceeding and will not considered by this neutral.

THE APPROPRIATE REMEDY

This neutral approached this hearing “de novo” and went from ground zero moving through the exhibits and testimony. Just cause is not just an arithmetic calculation of a point system, rather a complex thought process.

Dispensing justice is an awesome responsibility; and it is much more so when the decision maker is afforded no more precise criterion of decision than “just cause.” The search for precise standards of decision making in industrial jurisprudence is likely to be illusory and in vain. Disputants probably will always have to depend on the exercise, by their arbitrator of sound judgment, an informed conscience, and that vague attribute that, for want of a better label, is call “common sense. ”Sietz, “*Substitution of Disciplinary Suspension for Discharge..*” 35 Arb. J 27,29 (1980)

The Grievant did have good work days, received positive comments and did receive commendations. Unfortunately negative happenings kept occurring, building up over three years, increasing in frequency, and increasing in importance. In addition to the Absenteeism, the Overall Work Record contained documented suspensions, warnings and final warnings. While one or two could be accidental, or even overlooked or swept under the carpet, the momentum and magnitude of one after another after another reached critical mass. The Grievant had to be aware of the extreme ramifications as time marched on and the severity of penalties kept increasing over the three-year period.

The question of the use of the employee's past work record by the company in making the determination to discharge him is one which has several ramifications. In the opinion of the undersigned it would be inconceivable that the company do anything else. We have here a matter of equity and fairness. In order to be fair and equitable the totality of an employee's record, good or bad, must be weighed. This would certainly be applicable where the record is good. It must also apply where the opposite is true. It must also apply insofar as an arbitrator is concerned. Arbitrator Louis Belkin

Distinctive facts in the employee's record or regarding the discipline must be given appropriate weight. The work record became worse, not better. Wake up calls went unheeded by the Grievant. March incidents did not change the Grievant's pattern of absences. At some time, it becomes unfair to fellow employees, Metro Transit, patrons, and the public.

The work history for the Grievant with management signatures is provided at ER #2 and ER #31 (with the corrected and modified appropriate time frame). This neutral has reviewed it from 10/11/2010 until the termination date finding approximately 19 counselings and 4 Final Record of Warnings for Absences and Final Record of Warning for Outside Operating Policy. From different management witnesses, the work record was one of the worst, and by reviewing the record, I agree.

After reviewing the arbitration record, I have returned to Joint Exhibit #2 and Joint Exhibit #3, and looked at the request from the ATU for "reinstatement with a Last Chance Agreement" at Step 1 and then for a "Last Chance Agreement with Dor to help with health and family issues". Of critical importance, is that the request is made with Dor to help with **health and family issues**. There are no family issues in the record presented before this neutral. The Metro Transit Authority in the eyes of this neutral has been working with the Grievant over the last three years to counsel, to provide support, and to provide corrective action. The Grievant chose repeatedly to not change her pattern of absences and warnings, even when opportunities presented themselves numerous in the past three years.

For this neutral it has ended to be the reasonable and just ending.....I wish that I could change that which the Grievant could not or would not do.

Arbitrator Harry Platt: "Just cause mandates not merely that the employer's action be free of capriciousness and arbitrariness but that the employee's performance be so faulty or indefensible as to leave the employer with no alternative except to discipline him."

In this case, I find the Employer's actions to be totally free of capriciousness and arbitrariness and supported by fair and just cause. I find that the employee's performance to be so faulty or indefensible that I have no alternative except to rule that the Grievant's discharge was just and merited. The Employer has carried the burden of proof and the grievance is denied.

SUMMARY

The advocates for both the Metropolitan Transit Authority and the Amalgamated Transit Union are commended for a professional presentation that well-represented the interests of both parties and provided hundreds of pages of information and hours testimony.

In reviewing the record as a whole, the Undersigned has determined that Metropolitan Transit Authority as Employer had the burden of proof and has carried that burden with a preponderance of evidence. This discharge is made with just cause and in conformance with the Collective Bargaining Agreement and the Absenteeism Policy and Overall Work Record of the Grievant.

DECISION AND AWARD

For the above reasons, the Arbitrator concludes that the evidence fails to establish that there is a violation of the Collective Bargaining Agreement by the Metro Transit Authority. In arriving at this decision, I have considered all the evidence, arguments and authorities submitted by the parties, even if not specifically discussed in my decision. Based upon the foregoing findings and conclusions, I hereby deny and dismiss the Union's grievance. In so doing, I find that the discharge of the Grievant to be just and merited.

Respectfully submitted:

Dennis A. Krueger, Arbitrator

Date

CERTIFICATE OF SERVICE

I certify that on this _____ day of _____, 2014, I served the foregoing **GRIEVANCE ARBITRATION AWARD** upon each of the parties to this matter by mailing a copy to them at their respective address as shown below:

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Attorney for Metropolitan Council
Metro Transit Division

Electronic copies have been emailed simultaneously to Justin Cummins and Andrew Parker on this date.

Dated the _____ day of _____, 2014

/ s /

Dennis A. Krueger, Arbitrator
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