

**IN THE MATTER OF ARBITRATION** )  
 )  
 **Between** )  
 )  
 **CITY OF FERGUS FALLS, Employer** )  
 )  
 **and** )  
 )  
 **INTERNATIONAL BROTHERHOOD** )  
 )  
 **OF TEAMSTERS, LOCAL 320, Union** )

**Opinion and Award**

**BMS Case No. 07-PA-0918**

**Appearances:**

For the Employer: Kristi A. Hastings, Pemberton Sorlie Rufer Kershner, Fergus Falls, Minnesota.

For the Union: Paula R. Johnston, General Counsel, Local 320, Minneapolis, Minnesota.

**Procedures:**

The undersigned was chosen as Arbitrator in the present matter through the procedures of the Minnesota Bureau of Mediation Services. A Hearing was held on September 26, 2007 in the Council Room of the City Hall in Fergus Falls, Minnesota, commencing at 9 a.m. With the exchange of Briefs, postmarked October 11, 2007, the Record in this Matter was closed.

**Issue:**

Did the City of Fergus Falls have just cause to terminate its employee, Leah Schultz If not, what is the appropriate remedy? The Remedy sought by the Union is that the Grievant be reinstated and made whole.

## **Central Facts of the Case**

The employer is a smaller-size Minnesota City with a history of operating a municipal liquor store (now, two of them). The union, Local 320 of the International Brotherhood of Teamsters represents a unit of city employees, including those in the liquor store(s). The Parties are signatories to a Labor Agreement, effective January 1, 2006 through December 31, 2007. Article 15, section 1 of the Agreement provides that “The Employer will discipline the employees for just cause only. Discipline will be in the form of one or more of the following: A. Oral reprimand, B. Written reprimand, C. Suspension, D. Demotion, E. Discharge.”

Leah Schultz has been an employee at the liquor store since 1999, starting as a “call-in” employee but full-time since 2003. In recent years, the Employer, through the efforts of the liquor store managers, Brian Olson and his predecessor, has documented a number of violations of liquor store policy and/or contractual provisions relating to work breaks, use of facilities like the liquor store break-room, or practices and procedures for obtaining sick days or permission for other absences from work.

## **Opinion**

The Employer provides the following time-line of events:  
January 2006: an all-staff meeting to review the rule and procedures applicable to the liquor store, including rules against leaving the store, going into the back room or break room, and the length and number of breaks (the latter rule also appears as Article 8, section 3 of the Labor Agreement). Brian Olson testified that this all-staff rules review was also repeated in late

summer or early fall, 2006.

September 19, 2006: Security surveillance video shows Ms. Schultz taking numerous, cumulatively lengthy, breaks, involving entering the break room and leaving the store.

September 20, 2006: Ms. Schultz is given a written reprimand.

September 26, 2006: Security surveillance video shows Ms. Schultz taking numerous, cumulatively lengthy, breaks, again involving entering the break room and leaving the store.

September 28, 2006: Ms. Schultz is given a memo in which the subject line reads: "RE: Last Chance Agreement."

March 3, 2007: Security surveillance video shows Ms. Schultz extensively socializing with her mother, going to the back room, and leaving the store.

March 13, 2007: Transcriptions of two telephone messages left for Mr. Olson contain requests for the day off; the second call asks whether she needs (as a "key holder") to come in and close up the store at 10 p.m. She did not personally contact Mr. Olson, as store practice seems to have required, in order to take a day off. She takes the day off anyway. The Employer regards this behavior as insubordination.

March 15, 2007: Ms Schultz is issued a letter of termination of employment.

The Employer concludes from this time line of events that it had ample just cause to terminate Ms. Schultz, and therefore did so.

The Union attacks this conclusion in several ways. The first line of attack is that the so-called “Last Chance Agreement” issued to Ms. Schultz on September 28, 2006 is defective , in part because it was not negotiated with the Union. But this may be only part of it defectiveness. Consider what Elkouri and Elkouri (Alan Miles Ruben, ed., *How Arbitration Works*, 6<sup>th</sup> edition, at 970) have to say about last chance agreements:

Elements of an enforceable last chance agreement may include the presence of competent union counsel for the employee when negotiating the agreement, consideration from the employer (usually, this consists of the employer foregoing its right to terminate the employee for the recent misconduct), a standard of fairness demonstrated by the designation of a specific time period during which the employee will be subject to the agreement’s terms, and a clear statement of what action will result in termination.

Written agreements, signed by the employer and the employee or the union, are preferred.

In this Arbitrator’s experience, last chance agreements usually provide that the write-ups and records of the “recent misconduct” will be removed from the employee’s file on successful

completion of the period of the agreement.

Few of the elements listed by Elkouri & Elkouri or noted by this Arbitrator are present in Ms. Schultz's last chance agreement. The operative sentence is simply: "Due to the continuous infractions and insubordinate behaviors, any further abuse of the break periods, leaving the building or not following procedure for calling in for absences or other policy infractions will be cause for immediate termination."

But this isn't a last chance agreement anyway—it is simply an ultimatum.

But, as the Record of Hearing reveals, it doesn't seem to have been a real ultimatum. After the issuance of the "last chance letter" on September 28, 2006, the following incidents occurred involving Ms. Schultz and her work or attendance at work. (All material but the March 3, 2007 incident is from Employer Exhibit 16.)

November 29, 2006: Ms. Schultz called in to say her child was sick. Store manager Olson drove by her house and saw the child's father's truck outside, so he was apparently available to care for the child. Also, contrary to instructions, Ms. Schultz did not produce a doctor's note to substantiate the illness.

November 30, 2006: Ms. Schultz called manager Olson at 8 p.m., saying she was ill and could not finish her shift (until 10 p.m., presumably).

December 6, 2006: A call to manager Olson by Ms. Schultz's mother about a family emergency, followed by a call by Ms. Schultz, ended with Ms. Schultz going to work her scheduled shift.

February 8, 2007: A phone message was left by Ms. Schultz about 9:15 p.m. (Apparently indicating that she would not be available the following day), but she eventually did come to work.

February 12, 2007: Ms. Schultz called someone else (not manager Olson) to say her kids were sick and she wouldn't be able to work

March 3, 2007: The earlier-described incident involving socialization on the job and leaving the store took place on this date.

Finally, at last crunch-time arrived on March 13, 2007. Ms. Schultz left voice messages at 10:20 a.m. and 12:57 p.m., before taking the day off. She did not speak with manager Olson. As a result, the letter of termination of employment was issued on March 15, 2007.

On cross-examination, Mr. Olson's attitude toward some of these incidents seemed vague, uncertain or unclear. Asked whether the incident of November 29, 2006 was "serious," he answered no; asked whether he disciplined Ms. Schultz for that incident, Olson also replied "no." Asked why he didn't discipline her, he said he didn't know; asked why the incident wasn't

serious, he gave an unclear answer. Asked whether the incident of February 12, 2007 was “serious,” he replied affirmatively, but still indicated that there was no discipline imposed. One might ask the same questions about the incidents of March 3, 2007, which surely seem serious, but for which no discipline was imposed.

Finally, the following exchange took place during cross-examination of store Manager Olson:

Q: Exhibit 1 [the city’s application for leave or time off] was not always required?

A: Yes.

Q: Were there times when people took time off without telling you?

A: I suppose.

Q: Why did you have Christy [Love-Anderson, another employee] call Leah [on March 13 in reply to Ms. Schultz’s voice mail message, instead of yourself]?

A: I was busy.

Q: So, the rule on talking with you [about time off] was not consistent? .....No more questions.

On redirect examination of Mr. Olson:

Q: *They* are going to fault you for inconsistency. [Emphasis in the Arbitrator’s notes as Record of the Hearing.] What is different about the incident of March 13?

A: Direct defiance. I told her she can't have the day and she took it anyway.

What is difficult to accept about the City's argument is that the reactions to the various incidents before the one on March 13, 2007 are inconsistent with the language of the September 28, 2006 ultimatum/last chance agreement. The ultimatum is very clear: "*any* further abuse of the break periods, leaving the building or not following procedure for calling in for absences or other policy infractions *will* be cause for immediate termination." [emphasis added] By March 13, 2007, five and a half months after the ultimatum---months with numerous troublesome incidents--it should have been clear to all that this ultimatum was not in force any more. After all, the incident of November 29, 2006, which involved 2 infractions—it did not appear that Ms. Schultz was the only available care-giver for her child nor did she provide a doctor's note about the child's illness—had resulted in no discipline. At the Hearing Mr. Olson didn't think it was "serious." Presumably, he didn't think it was serious at the time of the incident, since no discipline ensued. This Arbitrator believes that failure to discipline for earlier incidents requires that the "just cause test mandates that the punishment assessed be reasonable in light of all the circumstances." [Arbitrator Axon in *City of Portland, Bureau of Police*, 77 LA 826] "All the circumstances"—repeated failures to discipline—had so muddied the waters as to make it unclear what actions and behaviors might trigger discipline under the last chance letter/ultimatum.

Grievant Schultz, while not unjustified in concluding the ultimatum/last chance agreement was most likely a toothless tiger, is nevertheless not blameless in this Matter. Even a Minnesota-resident Arbitrator, well-aware of our almost interminable winters, finds it a less than fully

grown-up response to a nice day in mid-March to decide it's the day for a drive, not for work.

## **AWARD**

The Grievance is sustained. The Remedy sought by the Union is denied. If the Grievant applies for re-employment, she will be placed on the "call in" roster for work when available. Ms. Schultz is to be treated like any other part-time call-in employee in terms of possible advancement. She worked her way up from call in status to full-time employee earlier in her life; let's see if she can do so again.

**Given at Minneapolis, Minnesota this ninth day of November, 2007.**

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**James G. Scoville, Arbitrator.**