Griggs, Cooper & Co. Inc.

TIME REQUIRED TO RENDER AWARD 54 DAYS

IN THE MATTER OF ARBITRATION BETWEEN

International Brotherhood of Teamsters - Local 120	) OPINION AND AWARD Closed
	) Grievance Arbitration: Discharge (B. Mischel)
-and-	) Arbitrator: John W. Boyer, Jr.
Griggs, Cooper & Company, Inc. St. Paul, MN	) Gr. No. 03-3541 BMS 06-RA-322

APPEARANCES

For International Brotherhood of Teamsters - Local 120
Martin J. Costello, Attorney
HUGHES & COSTELLO
Tom Erickson, Business Agent
Jeff Gindesmeier, Steward
Brian Mischel, Grievant

For Griggs, Cooper & Company, Inc.
Alec Beck, Attorney
SEATON, BECK & PETERS
Tim Delaney, Controller
Pat Oney, Warehouse Manager
Sue Sturnieks, Human Resource Manager

Date of Hearing
May 24, 2006

Close of Hearing
June 22, 2006

STATEMENT OF JURISDICTION

Pursuant to the National Labor Relations Act, as amended, and Article 2 - Adjustment of Grievances of the Agreement, the Issue as stipulated by the Parties and stated below was submitted to Arbitration.

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At the Hearing each of the Parties presented testimony under Oath, was afforded full opportunity for examination and cross-examination of witnesses, and submitted exhibits in support of their respective positions. The Parties elected to submit post-Hearing briefs and reply briefs, such were duly received, and the Hearing was declared closed.

THE ISSUE

Was the Grievant discharged for sufficient just cause? If not, what shall be the appropriate remedy?

BACKGROUND

The dispute involves interpretation of the 2005-2009 Agreement, as the facts giving rise to the matter are essentially not in dispute.

The Employer is a wholesale distributor of liquor and wine products, and the Union represents certain warehouse employees and drivers.

The Grievant was hired as a "regular extra employee" in the warehouse in April 2003, and reclassified as a "regular full-time" employee in January 2005. The genesis of the dispute are matters relative to the Grievant's attendance.

The Record indicates the Employer implemented a formal Attendance Policy on April 1, 2005 that cited a schedule of disciplinary action(s) for instances of employee tardiness or unexcused absence. The "no fault" policy assigned points for such violations and such automatically imposed specific disciplinary action, and was not bargained with the Union.

Further, it is undisputed that between October 7, 2004 and July 26, 2005 the Grievant had exhausted all available paid time off and had accrued five (5) documented unexcused absences, and two (2) additional that were not documented by the Employer.

Accordingly, following violations on July 26 and August 1, 2005, the Grievant was discharged on the latter date. However, at the subsequent August 18, 2005 grievance meeting the Employer agreed to reinstate the Grievant pursuant to a Last Chance Agreement that provided in relevant part: 1) the Grievant entering and completing chemical dependency treatment as an outpatient, 2) the Grievant shall have no additional unexcused absences, and 3) the Grievant agreed to contact the Employer's Controller directly about any further absence(s).

Pursuant to such Agreement, the Grievant contacted the Controller on September 27, 2005 stating he was ill and unable to report to work, but the Record indicates disparate versions of that discussion. The Controller testified and provided documentation the Grievant indicated the illness was "food poisoning" and that he was going to the Emergency Room, and he was directed to return with a physician's statement. Conversely, the Grievant contends not stating he was going to the Emergency Room.

On September 28 the Grievant (or his mother) made an appointment with a family physician for him to be seen on September 29, and the Grievant routinely reported to work on September 28, 2005. Upon arrival, the Warehouse Manager requested the physician's statement cited for the prior days absence, and when unable to produce such, the Grievant was sent home.

Finally, on September 29 the Grievant had his physician's appointment, and telephoned the Warehouse Manager indicating he had a physician's statement stating he could return to work on October 3, 2005. However, at some point the manager inquired if he had a physician's statement for September 27, and when the Grievant responded in the negative, he was discharged effective that date for violation of his Last Chance Agreement.

Consequently, the Union submitted a grievance that constitutes the basis for the dispute that provided in relevant part:

Statement of Grievance
Protesting discharge dated September 29, 2005

Remedy Requested
Immediate reinstatement with any and all lost wages.

However, the Employer consistently denied the position and request of the Union on the basis the Grievant was discharged for excessive absenteeism and violation of his Last Chance Agreement, and such constitutes sufficient just cause pursuant to the bargained Agreement.

Therefore, given the Parties were unable to resolve the dispute and stipulate to an absence of procedural deficiency, the matter was reduced to writing in accordance with Article 2 - Adjustment of Grievances and appealed to Arbitration.

PERTINENT PROVISIONS OF:

A) THE AGREEMENT (Excerpts Only)

ARTICLE 2 - ADJUSTMENT OF GRIEVANCES

Section 1. Any controversy arising from the interpretation of or adherence to the terms and provisions of this Agreement shall be settled by negotiation between the Union and the Employer. Failing settlement on that basis, the controversy shall be referred in writing with the Section and Article of this Agreement allegedly violated specified, to a committee chosen by the Employer to represent him. This committee shall negotiate with the Union to effect an adjustment. If the matter cannot be adjusted in this manner, it shall be referred to an arbitration board composed of two representatives of the Union and two representatives of the Employer, and a fifth neutral member selected by a majority vote of these four. If the four representatives are unable to select a fifth neutral member within five (5) days of their appointment, either party may request the State Mediation Service or the Federal

Mediation Service to submit a list of seven (7) names. The arbitration board shall meet promptly after reference of the matter to it and shall render its decision within five (5) days after hearing of the evidence is completed. A majority decision of the arbitration board based on the evidence submitted shall be final and binding on all parties to the controversy. No power is conferred by this section to the Employer, the Union, the Committee or Arbitration Board to change or amend any provisions of this Agreement or add any terms to provisions thereto, and all such persons or bodies are hereby prohibited from effecting any changes, amendments, or additions to this Agreement during its life. In the event that the Employer is adjudged to have violated any provisions of this Agreement, any back pay owed to the employee because of such violation shall be paid by the Employer at the standard straight time and overtime rates. No complaint of alleged violation will be acted upon or considered valid unless filed in writing within thirty (30) days of the date of the alleged violation.

ARTICLE 5 - DISCHARGES

Section 1. The Employer shall not discharge an employee without just cause. Except for misconduct sufficient to warrant immediate termination, including but not limited to insubordination, fighting, theft, drunkenness, and dishonesty, the Employer shall follow the concept of progressive discipline prior to discharge, including verbal warning (which may or may not be documented), written warning and suspension. A copy of any written disciplinary documentation, other than documented verbal warnings, shall be sent to the Union. Any appeal from such notice must be made in writing within five (5) working days.

Section 2. If an employee is discharged, and subsequent investigation proves that an injustice has been done the discharged employee, he shall be reinstated and compensated for any wage loss suffered while he has been out of work, provided that written notice of appeal of the discharge was given within five (5) working days. Company rules must be posted in a conspicuous place.

ARTICLE 18 - MANAGEMENT RIGHTS

All the rights, powers, prerogatives and authority the Company had prior to the execution of this Agreement are

retained by the Company and remain exclusively within the rights of management, and are not subject to negotiations or the grievance-arbitration procedure. The rights, powers, prerogatives and authority of the Employer include, without being limited to, the right to determine qualifications for positions, to determine the number of employees, to select, hire, train, layoff, assign and reassign employees, to schedule work, to determine shift times, hours worked, including overtime, and the length of the workday and week, to determine performance and quality standards, to create, combine, modify and abolish jobs, job classifications and routes, to evaluate employees' performance, to establish and modify rules and practices, including safety, disciplinary and work rules and practices, to determine the location, number and type of facilities and departments and the number and nature of jobs, job descriptions and routes, to control and regulate the use of equipment, to establish and modify light duty programs or positions, and to direct and discipline the work force, including the right to reprimand, suspend and discharge employees for just cause and impose all other discipline. The Employer shall have the right to establish and modify any lawful training programs and any lawful drug and alcohol policies, including lawful testing policies, of its choosing, whether for existing employees or for applicants for employment. The parties specifically agree that Wirtz Corporation Code of Conduct, and other lawful policies not in conflict with any express provisions of this Agreement, shall be implemented, subject to lawful future modifications, by the Employer. To the extent that the rights, powers, prerogatives and authority of the Employer have been specifically abridged, delegated, granted, or modified by this Agreement, the issues relating thereto are subject to the grievance-arbitration procedure.

B) EMPLOYERS ATTENDANCE POLICY Effective July 1, 2005 (Excerpts Only

A. Generally, it is the policy of Griggs, Cooper to require its employees to be in attendance during the scheduled working hours. The purpose of this policy is to maintain the necessary workforce for the greatest possible efficiency. The company will not retain an employee if his/her absences or tardiness exceed the limits set forth in this Article except in case of those circumstances set forth in Paragraph D.

B. Attendance Guidelines for Regular Employees (Casual Employee Guidelines in [brackets])*: These Guidelines apply to unexcused absences from work and all tardies. Attendance Guidelines apply to a rolling 12-month period.

Three [seven] tardies or unexcused absences in a 12-month period will result in a VERBAL WARNING.

Four [eight] tardies or unexcused absences in a 12-month period will result in a WRITTEN WARNING.

Five [nine] tardies or unexcused absences in a 12-month period will result in a WRITTEN WARNING AND ONE-DAY SUSPENSION.

Six [ten] tardies or unexcused absences in a 12-month period will result in DISCIPLINARY ACTION UP TO, AND INCLUDING, TERMINATION

*casual Employees are subject to Guidelines for Regular Employees once eligible for one (1) week's vacation.

C. Consecutive Day(s) Absences: If an employee is absent due to an illness that lasts two (2) or more consecutive working days, the absences arising out of that illness shall be treated as one (1) absence. This exception will be limited to one (1) time during the twelve (12) month period and only if the employee has obtained and provided to the Company a doctor's certification that the employee could not work in a form satisfactory to the Company.

D. Exempt Absences: Absence from work for one of the following reasons shall not count toward the corrective measures for the attendance policy, if all conditions for such leave or other excepted absence are met by the employee.

1. Leave of absence approved at the Employer's sole discretion;
2. Any leave mandated under State or Federal law;
3. Paid holidays;
4. Paid vacations;
5. Worker's compensation time;
6. Bereavement leave;
7. Jury duty;

8. Voluntary layoff, and
9. Earned sick time subject to the limitation set forth in the Labor Agreement.

The appropriate requests and documentation on the above-mentioned elements will be submitted to the Employer by the employee in accordance with the Employer's policies, State and Federal law requirements for mandatory leave, and any insurance company requirements for worker's or disability compensation claims.

E. Absences and Tardiness Definition: Absences are defined as not being at work during any time the employee is scheduled to work in excess of one hour; tardiness is absence of under one hour.

F. Legal Obligations with regard to Federal and State Laws: Nothing in this Attendance Policy shall be construed or applied in a manner which limits or expands rights and obligations of the Employer or the employee under the Americans With Disabilities Act, and the Family and Medical Leave Act or any other State or Federal leave law.

POSITION OF THE PARTIES

The position and requests of the Parties were outlined by their representatives and supported by a variety of documents and testimony as follows:

THE EMPLOYER

1) The Grievant was discharged for sufficient just cause, that is, for excessive absenteeism in accordance with the Attendance Policy.

2) The Grievant was discharged for the totality of his absences, not the latter singular instance.

3) That Article 18 - Management Rights of the Agreement vests the Employer with the authority "to establish and modify rules and practices".

4) The Attendance Policy applies only to absences not covered by the Agreement.

5) The Attendance Policy provides a form of progressive discipline that Arbitrators approve when evaluating just cause. Submitted an Arbitral reference allegedly supportive of this contention.

6) The Attendance Policy provides absences and discipline are premised upon a "rolling 12-month calendar".

7) There is no dispute the Grievant had exhausted both his paid time off and the progressive disciplinary steps of the Policy.

8) There is no dispute the Grievant had been reinstated from discharge in January 2005 subject to a Last Chance Agreement, and he violated such at the time of the last absence.

9) That Arbitrators routinely enforce Last Chance Agreements when such establish more stringent conditions of employment. Submitted an Arbitral reference allegedly supportive of this contention.

10) That pursuant to Last Chance Agreements Arbitrators do not apply the same due process or procedural protections for discharge, but determine whether the specific terms of such have been violated.

11) The Grievant's Last Chance Agreement specifically provided that he have no more unexcused absences. Accordingly, the Grievant's failure to provide a physician's statement for his September 27 absence constituted an additional "unexcused absence".

12) The Union's contentions relative to applicability of the FML Act to the latter absence are not valid for the following: a) the Grievant's illness did not rise to the level of a "serious health condition" and b) there is no acceptable

excuse for his failure to provide the required physician's statement.

13) Similarly, the Grievant's contention his mother was not available to drive him or that he could not get a physician's appointment until two (2) days later shall not negate his requirement to produce a physician's statement or to be considered as unexcused, and such is in violation of his Last Chance Agreement.

14) The Grievant understood he was required to provide a physician's statement or be subject to discharge per the Last Chance Agreement.

15) The Grievant's testimony was characterized by inconsistencies and implausibilities to the extent of rendering such to be less than credible.

16) The Grievant's September 29 physician's statement has no relevance to his September 27 absence that is the basis for the discharge. Further, the discharge was for sufficient just cause, given the Grievant elected to violate the clear terms of his Last Chance Agreement.

17) Requested the Arbitrator to sustain the discharge, and to deny the grievance of the Union in its entirety.

THE UNION

1) The Employer lacked just cause for the discharge.

2) The discharge was without warning, corrective measures or other forms of discipline and without consideration of the Grievant's past record, tenure and/or factual circumstances or mitigating factors.

3) That Arbitrators recognize the seriousness of a discharge. Submitted Arbitral references allegedly supportive of this contention.

4) That in discharge cases a significant quantum of proof is required to show the Grievant committed the alleged act, and such act justifies the extreme industrial penalty.

5) The Employer failed to satisfy the fair investigation and fairness of the penalty criteria of just cause.

6) The Attendance Policy is not a substitute for just cause, and such was not bargained with the Union.

7) That strict construction of the Policy contravenes the principle of just cause. Submitted an Arbitral reference allegedly supportive of this contention.

8) The Employer interpreted the Policy to require discharge upon an accumulation of six (6) points, and such is not a reasonable way to impose the discharge.

9) The Attendance Policy attempts to set quantifiable guidelines for just cause, and such cannot be simply quantified in that manner.

10) That other Arbitrators have found just cause requires more than such a provision of a policy. Submitted Arbitral references allegedly supportive of this contention.

11) The Employer's decision was based upon eight (8) absences in a twelve (12) month period, and such ought not constitute just cause given the total set of circumstances.

12) The Grievant's disputed September 27 absence should not be considered as unexcused.

13) The Grievant had strictly complied with all terms of his Last Chance Agreement, but became ill on September 27th and was unable to report for work.

14) The Grievant was examined by a physician and diagnosed with bleeding ulcers at the earliest possible appointment time.

15) The Employer refused to accept the physician's statement or to consider other evidence when it became available.

16) The Employer failed to conduct any investigation prior to discharge.

17) In this instance, the Grievant believed he had done everything required to preserve his job.

18) The Grievant was not "on notice" he would lose his job when he suffered a legitimate illness. Submitted Arbitral references relative to the potential for confusion in such Last Chance Agreements.

19) The Employer refused to hear the Grievant's version of the series of events, and just cause requires a full and fair investigation of the alleged misconduct prior to discharge. Submitted an Arbitral reference allegedly supportive of this contention.

20) The Employer refused to even look at the physician's statement offered by the Grievant.

21) The Grievant's September 27 absence should have been excused pursuant to the FML Act. The medical diagnosis indicates his illness qualified for such leave and should not have been counted as unexcused under the Attendance Policy.

22) The Grievant is a "qualified worker" under the FML Act that gives him the right to take up to twelve (12) weeks leave under such conditions. Further, the Grievant had a "serious health condition of more than three (3) calendar days" as detailed in the Act.

23) The Grievant provided the Employer with "notice of leave" and is not required to request FMLA leave, and the Act provides a "qualified worker" must be given fifteen (15) days to provide medical documentation.

24) The discharge was for less than sufficient just cause and in violation of the federal FML Act.

25) The Employer failed to provide the required burden of proof to support the discharge, and the Arbitrator ought reduce

or mitigate the penalty imposed. Submitted Arbitral references allegedly supportive of this contention.

26) The Grievant had excessive unexcused absences in the past, but was enrolled in chemical dependency treatment and had eliminated absences until the instant illness, and had shown positive behavior modification.

27) The Arbitrator's decision should provide industrial justice to all parties consistent with maintenance of a positive relationship. Accordingly, the Grievant should be returned to work.

28) Requested the Arbitrator to sustain the grievance and to direct a suitable modification of the discharge.

OPINION AND AWARD

On the basis of the evaluation of all documents, testimony and arguments presented by the Parties, the decision of the Arbitrator is to deny the grievance of the Union. The basic reasons for the Award are the following:

1) Initially, the Arbitrator can readily empathize with the mutual concerns and apparent frustration inherent in the disparate position of the Parties when confronted with the emotion-laden matter of the discharge of the Grievant for one (1) unexcused absence from a shift pursuant to the terms of a Last Chance Agreement when he was allegedly suffering from an illness and unable to report for scheduled work and/or to obtain a required physician's statement for the date, that necessitated adjudication through these proceedings.

Further, the Award shall not be interpreted as reflecting upon the integrity of the principals given the behavior of each exhibited at the Hearing could be characterized as an open, reserved, and sincere attempt to provide convincing

argumentation supportive of their positions. Nevertheless, the Award was predicated upon well documented standards of contract interpretation recognized by both the principals in a dispute and neutrals alike.

2) The Record indicates no dispute relative to the Grievant's previous attendance data or discipline. Specifically, the Record indicates no disagreement the Grievant's attendance prior to August 1, 2005 was "bad" and the basis for his discharge pursuant to the Employer's Attendance Policy. Further, the Parties acknowledge that employee attendance is a critical expectation for the effective operation of the business.

Accordingly, the Arbitrator is totally cognizant of a basic axiom of such dispute resolution as initially articulated by the often-quoted Whitney McCoy over five (5) decades past that:

> No matter how good the excuses for absences may be, the company is entitled to the attendance of the workers. Where an employee is absent so such, even with the best of reasons, that his services are of no value to the Company, he cannot expect to remain the company's employ. [1]

Similarly, the simple rationale provided by the often-quoted Leo Kotin that:

> It can hardly be held that the retention of an employee with an attendance record such as the grievant has is conducive to proper conduct of business. It has been universally held that the agreement between an employer and an employee as to the regular hours of work confers on the employer a reasonable expectancy that such hours would be adhered to. Carried to its ultimate, widespread denial of this expectancy would make it manifestly impossible to conduct any business. It goes beyond the realm of reason and logic to assume that any penalty provision in a labor-management agreement can be construed so as to achieve this consequence. [2]

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[1] See Arbitrator McCoy in Goodyear Clearwater Mills, No. 2 in 11 LA 419.
[2] See Arbitrator Kotin in Baltimore Transit Company, 23 LA 663.

Finally, it is also undisputed the Grievant was reinstated from a prior discharge for violation of the Attendance Policy as a result of a grievance settlement that included the instant Last Chance Agreement with the explicit term for his conditional reinstatement and continued employment that he have no additional unexcused absences.

3) A primary basis for the Award is the Arbitrator's conclusion premised upon the totality of the Record the Grievant warranted an "unexcused absence" for the September 27 incident, and such shall be construed as a direct violation of the explicit term of his Last Chance Agreement as agreed to by all Parties. Such finding is premised upon the following:

A) The Record clearly indicates the consistent testimony of all principals, including the Grievant that a physician's statement was required documentation for the September 27th absence to substantiate a contention such was "excused" rather than "unexcused". Therefore, while the Grievant contends the September 29th physician's statement ought to be sufficient, there is no disagreement such was required for the 27th absence. Indeed, the Record includes acknowledgment by the Grievant as follows:

> Q. Mr. Delaney testified that he told you to go get a note that day.
>
> A. Correct
>
> x x x x x x
>
> Q. So you knew when you showed up the next evening, you had to have the note in hand, correct?
>
> A. Correct.

B) The requirement of such a physician's statement as a basis for determination of an "excused" versus "unexcused"

absence is nearly universally understood in the workplace. Simply stated, such is not an atypical requirement and was clearly understood by the Grievant.

C) Similarly, the Arbitrator was impressed by the Controller's testimony and supportive documentation that functioned to buttress his contention the Grievant indicated he was going to an Emergency Room on September 27 and understood he absolutely needed to provide a physician's statement to document his alleged illness on that date prior to returning to work and to avoid being assessed with the instant "unexcused absence" that would trigger his discharge pursuant to his Last Chance Agreement.

D) The Arbitrator is compelled to reject the explicit and/or implicit contention of the Union that a physician's statement obtained several days later could/should be sufficient to excuse the Grievant's previous September 27 absence. Clearly, such a tardy statement could be obtained, but such would not be construed to document an alleged illness or physical state of inability to work the day prior to such.

Accordingly, the Arbitrator is compelled to conclude the Grievant knew or should have known a physician's statement produced on such an untimely basis would not be acceptable.

E) The Arbitrator is also compelled to conclude the Grievant was totally knowledgeable of the terms of his Last Chance Agreement, and ought to have been "more cautious" and vigilant in ensuring his total compliance with any and every requirement of such relative to attendance that was the singular basis for his continued employment.

Accordingly, the Record is totally clear the Grievant failed to provide the required physician's statement for his September 27 absence in a timely manner. Consequently, the

Arbitrator is compelled to conclude such failure provided a legitimate and appropriate basis for the Employer's designation of an "unexcused absence" that constitutes a clear violation of the Grievant's Last Chance Agreement and the basis for the discharge.

4) Given the conclusions above, the Arbitrator is compelled to comment upon the significance of the Last Chance Agreement in the Award. Neutrals generally characterize such as a mutually binding agreement between all parties (the Employer, Grievant and Union) that functions to afford the Grievant a final chance to demonstrate the ability to modify undesirable behavior, as the only alternative to discharge for the behavior that precipitated the bargained settlement.

As cited above, in the instant matter the Grievant must be assumed to have been totally aware that failure to produce the required and requested physician's statement immediately following the absence and prior to returning to scheduled work would result in discharge. Accordingly, there can be no acceptable explanation for his failure to provide the statement pursuant to the terms of the Last Chance Agreement. Further, and more significantly, in such matters the Arbitrator is compelled to find the Last Chance Agreement shall constitute the singular determinant of whether the behavior was consistent or inconsistent with the express terms of the conditioned reinstatement.

Therefore, the Arbitrator is compelled to find the Grievant's non-provision of the required and requested physician's statement constituted a direct violation of the Last Chance Agreement and the appropriate basis for discharge, and to find otherwise would render such as moot and potentially less available to other similarly situated "troubled" employees who would be denied the "last chance" to save his/her employment

given such are construed as a unique set of terms and/or conditions of employment applicable only to the affected employee, and often are more stringent than any such conditions/rights/obligations imposed or vested employees in the bargained Agreement.

Nevertheless, such is the reality of the matter where the Grievant is portrayed as a "troubled" employee who is allegedly regaining sobriety, etc. and absent the instant Last Chance Agreement the Arbitrator would/could have concluded modification of the discharge may have been appropriate. However, given the multiple conclusions above, such must remain for conjecture.

Accordingly, the Arbitrator is cognizant of the simple compelling rationale of a basic axiom of such dispute resolution as articulated by the often-quoted William Daniel that:

> Arbitrators encourage such progressive programs of salvage and rehabilitation by strict enforcement of such "last chance agreements" in accordance with the terms which the parties, including the employee, have been willing to accept. However harsh or strict such terms and even though the arbitrator might well regard such conditions as unfair, that cannot be his concern. [3]

5) Given the finding the Grievant's violation of the Last Chance Agreement was the basis for the discharge and shall constitute sufficient cause for such, the Arbitrator is compelled to address other contentions that arguably may have been of influence had the controlling provisions of the document not been determined to be dispositive of the matter. The primary contentions referenced are the following:

A) The Record includes extensive and disparate contentions relative to applicability of the FML Act in the matter, including the extent to which the Grievant's illness

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[3] See Arbitrator Daniel in Daydon Corp., 89 LA 377, 379 (1987)

ought be construed as a "serious health condition" and the extent to which the Act ought function to provide the applicable criteria and/or excuse to reassess the significance of this fatal September 27 absence.

However, the Award as cited above is premised upon the explicit terms of employment specified in the mutually agreed Last Chance Agreement that must be construed to constitute the singular criteria for the Grievant's prior reinstatement, continued employment and discharge.

Therefore, while the FML Act clearly provides eligible employees with the right to medical leave under stated criteria, the genesis of the instant dispute is the Grievant's failure to provide a physician's statement in a timely and required manner pursuant to the explicit terms of the Last Chance Agreement to avoid being assessed an "unexcused absence".

B) Similarly, the Arbitrator is less than sufficiently compelled by the eloquent and otherwise cogent contentions of the Union that the Employer had failed to satisfy the tenets of just cause. Specifically, the Union contended the Employer was required to provide a full and complete investigation, and a more complete notice of the requirements for and possible consequences of non-compliance prior to discharge.

However, while such contentions would warrant more consideration and "weight" in a traditional just cause matter, such were construed to be less than relevant in the instant matter where the Last Chance Agreement was deemed to provide the required full notice and direction, and the only investigation required was verification the Grievant failed to provide the required and requested physician's statement that would have excused his absence and negated the singular basis for the discharge.

C) The Record also references disparate characterizations of the Grievant's alleged successful behavior modification credibility, and the alleged existence of significant mitigating circumstances, and such were assessed in rendering the Award.

The most significant was the Grievant's inconsistent recollection or changing versions of the basis for his absence and his positive effort and progress toward recovery from alcoholism. However, given the Award is not premised upon credibility, the Arbitrator shall not address the efficacy of the Employer's contentions relative to the Grievant's lack of credibility.

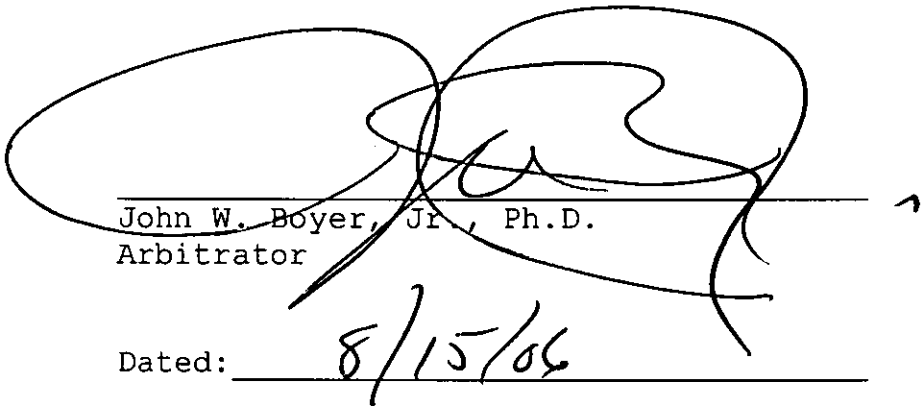
Further, while the Arbitrator is clearly impressed with the Grievant's effort toward recovery, such shall not be construed as warranting mitigation of the discharge. Rather, to accept such as mitigation would unfortunately negate the purpose and integrity of the Last Chance Agreement that specified express terms of employment executed by the Parties to provide the Grievant with continued employment, as addressed in detail above.

6) Finally, the Record indicates the Grievant reacted in the affirmative to the Arbitrator's question of the extent to which the Union had afforded full, fair and/or adequate representation throughout the proceeding.

Therefore, on the basis of the analysis and conclusions above, the Arbitrator is compelled to render the Award.

AWARD

The decision of the Arbitrator is to deny the grievance of the Union.



John W. Boyer, Jr., Ph.D.
Arbitrator

Dated: 8/15/06