

IN THE MATTER OF THE ARBITRATION BETWEEN

AMALGAMATED TRANSIT UNION, LOCAL 1005,)	MINNESOTA BUREAU OF MEDIATION SERVICES CASE NO. 07-PA-0832
)	
)	
Union,)	
)	
and)	
)	
METRO TRANSIT, A DIVISION OF THE METROPOLITAN COUNCIL,)	
)	
Employer.)	DECISION AND AWARD OF ARBITRATOR

APPEARANCES

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On June 28, 2007, in Minneapolis, Minnesota, a hearing was held before Thomas P. Gallagher, Arbitrator, during which evidence was received concerning a grievance brought by the Union against the Employer. The grievance alleges that the Employer violated the labor agreement between the parties by discharging the grievant, Michael F. Powell.

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FACTS

The Employer operates the public transit system in the metropolitan area that includes Minneapolis and St. Paul, Minnesota. The Union is the collective bargaining representative of most of the non-supervisory employees of the Employer, including those working in the classification, Bus Operator, (hereafter, "Driver," as the parties refer to it).

The grievant was first hired by the Employer in 1994 as a part-time Driver. After working in that position for seventeen months, he accepted a "buy-down" and a voluntary layoff. On February 28, 2002, he was again hired by the Employer as a part-time Driver. He reported to the Employer's Heywood Garage ("Heywood"), driving busses garaged and maintained there.

On December 20, 2006, the Employer issued a Notice of Discharge to the grievant, which provided:

The grounds for discharge are:

Violation of Final Record of Warning dated 12-20-05
Overall Record

The event that was the immediate cause of the grievant's discharge occurred on November 6, 2006, in the afternoon. The grievant, arriving at Heywood before a work shift, drove his car into the upper parking lot, which was full. The grievant saw an employee approach a parked car on foot to leave the lot, and the grievant, who had already driven slightly past that parked car stopped, intending to take the parking space soon to be vacated. Meanwhile, LaQuanda Jarrett, another employee, also seeing that the driver of the parked car was about to leave, stopped her

car, intending to park in the soon to be vacated space. Jarrett's car was behind the grievant's car heading in the same direction. The grievant backed his car up several feet toward Jarrett's car, trying to position it so that he could take the parking space. Because his car was poorly positioned, however, slightly beyond the parking space, he did not succeed in his effort to take the space, and Jarrett did. The grievant, thinking that he should have had priority to the parking space, then confronted Jarrett, trying to get her to identify herself so that he could report her conduct to the Union. The confrontation with Jarrett was an extended one, the details of which are in dispute, but that confrontation led to the grievant's discharge.

Joyce Masur and Janelle Wegman of the Employer's Human Resources Department investigated this incident and sent an investigation report dated November 14, 2006, to Mark C. Johnson, Manager of Business Operations at Heywood. Johnson and other management personnel decided to discharge the grievant after considering the investigation report and the grievant's previous discipline record, including a "Final Record of Warning" issued to the grievant a year earlier, on December 20, 2005. Below, I set out the text of the investigation report:

On November 6, 2006 at approximately 2:30 p.m. in the afternoon, a car driven by Michael Powell was driving through the upper parking lot looking for a space. Behind him was a car driven by LaQuanda Jarrett. From a review of the video [tape from a security surveillance camera], Powell drove past a parked car whose driver was just getting in. Powell had driven past the spot (by one car length) and Jarrett stopped to let the driver pull out. Powell then backed up his car and pulled along side

Jarrett (to the extent he could) in order to get the spot when the driver pulled out. The driver of the parked car got out of his car at one point, presumably to see if he had enough room to get out and ask Jarrett to move back, then got back into his car and drove out of the spot. Jarrett was on the "inside" and pulled into the space.

From a review of the tape, as well as a review of the individuals' written statements, Powell then gets out of his car and goes to the driver's window of Jarrett's now parked car. From the statements, Powell informed Jarrett that he would be late for work, that she needed to move her car as she didn't know how it worked "here." Once Jarrett informed him that she worked at Transit, he demanded her badge number and began talking about homeland security. Powell stated that Jarrett and her passenger traded "inflammatory comments" -- unspecified by Powell. Powell also stated that Jarrett held up her hand which he took to mean "talk to the hand" and that they both walked away shaking their heads.

Jarrett and her passenger then entered the building. Powell parked his car in front and walked into the building right behind them. They all stopped at the front desk. Gloria Allen's [the receptionist's] statement explained that Powell asked Jarrett for her name and ID badge and Jarrett refused to give it to him. He stated that any employee had the right to challenge anyone on the property to see if they are employees. Powell then asked Allen to give him the information -- Allen refused to give him the information as well. Allen stated that Powell seemed very angry. Powell then said he was going to follow them to their department. The two, Jarrett and her passenger, then went into the lunch room. Allen stated that she called Gordon to ask him to follow up on the matter.

Powell then went into the lunch room where Jarrett was having lunch. Joyce Hodges [a Staffing Specialist] from HR was at the vending machine getting a snack. Hodges saw Jarrett having lunch and saw Powell approach her and demand her badge number. He again stressed that Powell [sic] had cut him off and stole his parking spot. Powell said that Jarrett was not going to leave the lunch room without giving him her badge number. Hodges also heard Powell tell Jarrett "you must not know about Homeland Security -- when someone asks to see your badge, you must show your badge. You have to do it." Jarrett repeatedly told Powell to leave her alone and that she had done nothing wrong. Jarrett looked at Hodges and asked "who can she (Jarrett) call to make him leave her alone." Hodges then went to the front desk and informed Allen of the situation. In the mean time, Powell said that he was going to file a complaint with the union and call Sam Jacobs and have the tapes pulled. Powell also demanded

that if Jarrett would not show him her badge, that she should be removed from the property. Hodges told him that no one there had the authority to do that but he should go ahead and file his complaint. Powell said that he could not understand how a union sister could do that to a union brother.

Powell then left (and headed to HR). Hodges conferred with Allen as to what to do next. Hodges then went to HR and was confronted by Powell telling his story to Shirley Evans at the HR Front Desk. Evans recalled that Powell came in to request how he to [sic] file a complaint. Evans stated that Powell seemed really upset. Evans, unsure of what to do, told him (erroneously) to go to Customer Service.

As Hodges walked past Powell, Powell stated "She (Hodges) is the one who told me that she (Jarrett) did not have to show her badge." Hodges then told Powell that that was not what she had said but rather that he could not make her leave the property and that he should move forward with filing his complaint. Powell then became upset and said, "You (Hodges) are a liar like the rest of them." At which point Hodges told him to "have a good day" and walked away. . . .

What appears above is the investigation report's description of the relevant events of November 6, 2006. I omit the report's conclusions.

Below, I set out the written description of the events of November 6, 2006, that the grievant gave to Johnson on November 9, 2006:

This is a response to HR's request for information on 11/09/06. For the facts regarding an incident on 11/06/06. . .

Statement of Michael Powell #9444

Upon my arrival at work [Heywood] on Nov. 6, 2006 at approximately 14:25 hrs, I was driving through the upper lot looking for an open parking space. I noticed a driver was leaving, and I backed up to give him room to get out. There was a vehicle directly behind me occupied by 2 females, whose driver adamantly refused to back her car up so that I could move back a couple of more feet to make room for the other driver to leave his spot. The other driver (5915) exited his vehicle and motioned the female driver to back up. I apologized to him, and said

I was trying to back up. I finally backed up on the other vehicles left side. When driver (5915) vacated the spot, I went to pull into the open spot and was immediately cut off as the other driver lunged her car forward in an excessive and unsafe manner in which my vehicle was narrowly missed.

I exited my vehicle to request the employee's ID number. It was my intention at the time to request the union to intervene regarding this employee's rude, inflammatory and disrespectful behavior. I also would have requested the union to fully explain to this employee how such actions could result in impending consequences from the company for such unethical behavior should a complaint be filed.

At the point of asking this employee for her ID#, she made several inflammatory comments. She stated in no uncertain terms that she was not going to give me any information, and proceeded to hold her hand in the air towards my face, which I took to mean "Talk to the Hand," and she then walked away. As they walked away, they were both shaking their heads in an over exemplary fashion, laughing, dancing about and making off the cuff comments that I based to be directed towards me. Their comments were inflammatory and racist in nature, as well as their posturing actions towards me which I recognized as such. [The grievant is white and Jarrett, and her passenger are black.]

I wrote down the license number of the vehicle, a brown Buick Century, as I had decided at this point to file a complaint regarding this incident. I then parked my vehicle and went to enter [Heywood]. Upon entering the common area between HR and the tower, I noticed the occupants of the vehicle in question going into the tower building. I followed them into the lunchroom to ask them for their ID's again so that there would be other witnesses who could verify their refusal. Both employees refused to give their ID#'s. They again made several of what I consider to be hostile, inflammatory, and derogatory comments towards myself. I asked them that if they did nothing wrong, then why was giving me their badge #'s a problem? More disrespect and verbal assaulting.

The woman who was a passenger in the vehicle with the driver stated "I don't need nobody standing around me while I'm trying to eat my sandwich." The driver of the vehicle stated "You had better get to your bus or you are going to be late." (Laughing) Then she blurted out loudly for everyone to hear, that somebody better get this person outta my space before I do something! At that point I felt very threatened, concerned and afraid by this employee's statement that she was intimating that she was about to go off. I left the tower to seek an

opinion from HR as to who I should file a complaint with. On the way out of the building, another employee who had been in the lunch room, stopped at the front desk and questioned my asking the employee for her number. She told me that I didn't have the right to ask anyone for his or her badge #. I responded that our employee right to know class co-sponsored by homeland security stated very specifically that not only do we have the right to request it, but that it is part of our job to identify who is an employee and who is not.

I then went to HR and briefly mentioned my situation to Shirley Evans, and asked her if she could tell me how to go forth with a complaint. At this point, the lady who said we couldn't request ID's from people [Hodges] came into HR. She evidently works in HR. I have never had contact with her before or since then. I mentioned to Shirley what she had said to me regarding employee ID's. The employee then laughed at me, rolled her eyes, and told me "Don't even go there!" I said to her you didn't just say that? She stated no. Then exasperated and feeling threatened I said to her that I know what I heard, and you are a liar. Being that all three people were people of color, and females, I felt ganged up on in a racially abusive manner that I would not dignify with a response at the time. I have never felt that type of singling out and ganged up on because I was a certain race or sex.

I then left HR and went to discuss the situation with Mark Johnson. I stated to him that I wanted to file a complaint regarding this incident. He stated that he would investigate the incident. He asked me what my intentions were with the persons vehicle license plate #, and I stated that I wasn't sure, maybe to file a report with the Metro Transit police. He said he would investigate it and I gave the plate number to him. I then completed my work assignment for the day under extreme duress at the situation.

In the statement the grievant gave to Johnson on November 9, 2006, he also wrote that "the actions of these individuals are deemed by me as deliberate and intentional, which has created a hostile and fearful work environment for which I am in extreme fear, suffering from anxiety and emotional distress that cause me to currently be unable to safely perform my duties as an operator for Metro Transit." He requested that he be placed "on work related sick leave due to this incident." In an e-mail

sent to Johnson on November 9 or 10, 2006, the grievant also requested administrative leave. On November 10, 2006, Johnson sent the grievant a letter in which he denied the grievant's request for administrative leave, but granted his request for sick leave and enclosed a "Report of Injury or Illness" form for the grievant to fill out and return. The grievant returned the completed form to Johnson, dating it November 20, 2006; he gave the following description of his illness and the circumstances out of which it arose:

Attended complaint hearing which was extremely upsetting and triggered an unhealthy reaction to an ongoing health situation.
Confronted by another employee - & Co complaint filed.
Afraid to attend work/fear of violence in work place.
Inflamed serious health condition [caused by] other employee's actions.

The grievant testified that the "complaint hearing" referred to in this form occurred on November 8, 2006. In the section of the form reserved for a response from a supervisor, Johnson wrote on December 12, 2006, "this employee has serious mental health issues." In a "First report of Injury," sent by Johnson to the Minnesota Department of Labor and Industry on December 12, 2006, Johnson wrote "Operator upset over confrontation with another employee," and he described the "nature of injury or illness" as "mental stress."

On December 29, 2006, the Union brought the present grievance in behalf of the grievant, alleging that his discharge violated Article 5, Section 1, of the parties' labor agreement. That provision requires that "discipline shall be just and merited." Section 2 of Article 5 requires that the Employer

limit its consideration of adverse entries on an employee's disciplinary record to those occurring within thirty-six months of the incident for which discipline is contemplated.

As noted above, the notice of discharge grounds the discharge on the grievant's "overall record" and on "violation of Final Record of Warning dated 12-20-05." Many of the entries in the grievant's personnel record pertain to his attendance. The Employer and the Union have agreed to use a "no-fault" attendance policy, 1) which defines some occurrences of absence or tardiness as excused and all others as not excused and 2) which triggers discipline automatically without regard to fault at fixed accumulations of unexcused occurrences within the previous twelve months. The record shows that the grievant has had numerous absences, but that many of his absences were caused by illness. The grievant's attendance record has triggered warnings, but not more severe discipline. As the Union argues, it appears that his attendance is within the limits set by the attendance policy, i.e., he could not have been discharged for poor attendance.

The Employer argues that, in addition to the grievant's record of poor attendance, I should consider the following incidents from the grievant's record.

On November 21, 2005, the grievant received a warning for having had a second accident within three years for which he was judged responsible by the Employer after investigation (the kind of accident referred to by the parties as "chargeable"). The first of the two chargeable accidents upon which this warning

was based occurred on June 23, 2005. The grievant's bus hit a protrusion on a van that he was driving around as he was approaching a bus stop. The second chargeable accident occurred on November 17, 2005. His bus grazed a parked Sports Utility Vehicle as he was pulling into a bus stop, damaging the mirror cowling on his bus.

The grievant's personnel record includes complaints from customers as well as a substantial number of customer commendations. The Employer considers one of the complaints, which preceded a voluntary resignation by the grievant -- soon rescinded by him -- to be relevant here. On October 18, 2005, a customer complained that the grievant, stopped at a bus shelter with the door to the bus closed, refused to open the door after the customer knocked on the door and that the grievant looked at him and then drove off. The customer complained of similar treatment by the grievant on a previous occasion. After the Employer went through its verification procedures and filed this complaint in the grievant's personnel file, the Union grieved its filing. On October 21, 2005, the grievant submitted a resignation from his employment, but he rescinded it a few days later before it was finally processed, thus retaining his employment. On January 16, 2006, at the first step grievance meeting regarding the challenge to the filing of this complaint, the grievant, as related by Johnson in his report of the meeting, said that "this was a safety issue and [he] couldn't allow the customer to board his bus." The grievance was denied and not processed further.

On December 20, 2005, the grievant was given a Final Record of Warning, and he was suspended without pay for ten working days. Because this discipline was not grieved, I accept as true the allegations upon which it was based, though I also consider the brief explanation of those allegations that the grievant gave in his testimony before me, which I describe below.

The suspension was based on allegations that I summarize as follows. On December 15, 2005, the grievant was driving his bus in downtown Minneapolis at about 4:40 p.m., during rush hour. As he approached a bus stop, a vehicle (an "Escalade," according to one witness) ahead of him was attempting to parallel park by backing into a parking space also ahead of the bus. The grievant pulled his bus up to the back of the Escalade, preventing the parking maneuver, and he blew the horn of the bus repeatedly. He may have touched the back of the Escalade with the front of the bus, though the accounts upon which the discipline was based are not conclusive that he did so. The driver of the Escalade motioned to the grievant to drive around, but the grievant opened his window and told the driver that he had to get to his bus stop. The grievant continued to block the vehicle, and he continued to blow the horn of the bus.

According to a written statement given by Brad Caron, a passenger on the bus, Caron said, "enough -- you should of let the guy parallel park -- we are now sitting here 5 times more than we should of." The grievant yelled at Caron, and told him

repeatedly that it was "do-gooders like you that make me want to quit." Eventually, the impasse between the Escalade and the bus was resolved -- though the evidence does not show how -- and the grievant continued to drive his route. The written statement of Caron gives the following description of the grievant's subsequent behavior:

. . . From the time we left from the middle of the block on Nic. and LaSalle until we go to the highway he [the grievant] was yelling at me. He asked me about 6 times where I work because he was planning to come to my office and harass me. He then got on the intercom and said that I was the problem when we were delayed. He was on the intercom kept going on and on until we got to the highway. I said to him it's ragging bus drivers like you that think they are the only ones on the rode. He was really rude and not driving safe. 3 or 4 times he tried to kick me off the bus near Target and the other passenger's told me not to get off. I told him I'm not getting off the bus he can call his supervisor or the police. I told him he is the problem. At the bus stop at 36th Ave/Hwy 169, he apologizes to everybody for what happened except me the good doer. . . .

The grievant testified that he did not touch the Escalade with the bus, and he denied yelling at Caron. He conceded that he asked Caron to get off the bus, saying, "please leave the bus or quit harassing me."

The Final Record of Warning and suspension issued to the grievant for this incident provides:

Gross misconduct will not be tolerated. If you are involved in another incident that involves behavior misconduct on duty, you will be subjected to more severe disciplinary action up to and including discharge. In addition you will serve a 10-day suspension and mandatory referral to dor (an external agency that provides employee assistance). You must remain in compliance with any/all recommendations made by dor. Compliance with those recommendations will be mandatory. This warning will expire on 12/20/08.

DECISION

The parties agree that the primary issue presented by the grievance is whether the Employer had just cause to discharge the grievant.

The Employer makes the following arguments. The grievant's history of emotional outbursts shows that he cannot be trusted with public safety. He has exhibited a pattern of inappropriate, emotional behavior when he is under stress. He repeated this pattern by his refusal to concede the parking space to Jarrett on November 6, 2006, and by his subsequent harassment of her. His claim that he was intimidated by Jarrett and her passenger is not credible. Rather, his repeated insistence that Jarrett give him identifying information was intimidating to her. The grievant's extreme displays of emotion indicate danger to the public. His overall record of performance shows that he is not a good employee.

Further, the Employer argues that, as Johnson testified, the grievant's behavior on December 15, 2005, which led to the Final Record of Warning and ten-day suspension issued on December 20, 2005, was serious misconduct -- sufficiently serious to justify his discharge then rather than the suspension imposed. The Employer urges that the grievant's behavior on November 6, 2006, violated the conditions set by the Final Record of Warning issued on December 20, 2005, thus establishing, with his poor overall record, just cause for his discharge.

The Union makes the following arguments. On November 6, 2006, the grievant thought he had priority over Jarrett to the

parking space that was about to be vacated, because his car was ahead of hers. Jarrett thought she had priority to the space because the grievant had driven past it. Whether his opinion or her opinion about priority was correct is not relevant. Any misjudgment about that priority cannot justify his discharge. The evidence about his behavior after Jarrett took the space shows without contradiction that, though he was persistent, he was always polite, as he tried to identify her so that he could make a complaint about her taking the parking space. He did not display the emotional behavior similar to the behavior that gave rise to the Final Record of Warning of December 20, 2005. He did not yell or swear or otherwise display anger.

The Union asks that the grievant be reinstated to his employment, conceding that such reinstatement could be conditioned on his passing a fitness-for-duty examination by an appropriate professional -- a psychologist or a psychiatrist.

I make the following rulings. The grievant's behavior on November 6, 2006, was unusual. Most people in his situation would simply move on, conceding that, because they have realized too late that a parking space just passed was about to be vacated, they must continue searching; and most people would not persist in an effort to identify the successful driver merely to complain about perceived rudeness. Nevertheless, I accept the Union's argument that this behavior was different from the kind of inappropriate emotional conduct that led to the grievant's Final Record of Warning on December 20, 2005. Though he was persistent, he did not yell or swear as he continued his effort to

identify Jarrett. As I understand the Employer's argument, it sees the grievant's persistence itself as intimidating and based on the same kind of emotion that led to past incidents of inappropriate emotional behavior, including the behavior that led to the Final Record of Warning of December 20, 2005.

For the following reasons, the award directs the Employer to reinstate the grievant to his employment, but it conditions reinstatement on a successful fitness-for-duty examination. The grievant's behavior on November 6, 2006, was unusual and, to one familiar with his past episodes of emotional behavior, it was on the edge of degrading into a similar angry emotional display. He did not, however, exhibit the kind of overt anger that he had in the past -- except perhaps when he said to Hodges in the Human Resources office, "you are a liar like the rest of them."

It may be that the psychological source of the grievant's behavior on November 6, 2006, was similar to the source of his past angry displays -- a too ready tendency to take offense even from a slightly adverse occurrence. The grievant testified that he has been treated for a post-traumatic stress disorder emanating from childhood, but that he thinks he now has the disorder under control. Though the record does not provide such information, it is possible that, with the employee assistance he received after the Final Record of Warning of December 20, 2005, he has made progress, developing some control of displays of overt anger caused by his emotional reactions.

I rule that the grievant's behavior on November 6, 2006, did not constitute such serious misconduct that it justified his

discharge -- although his behavior on that day and his behavior on December 15, 2005, may have a common source in his mental make-up. At most, an additional suspension is appropriate, consistent with the principles of progressive discipline.

As I have noted above, in the statement the grievant gave Johnson on November 9, 2006, he asked to be placed on sick leave because the events of November 6, 2006, led him to suffer "from anxiety and emotional distress that cause me to currently be unable to safely perform my duties as an operator for Metro Transit." The grievant testified that he would be willing to undergo a fitness-for-duty examination as a condition to his reinstatement. On this record, I rule that the grievant is entitled to reinstatement, but that the Employer is entitled to have reinstatement conditioned on his passing a fitness-for-duty examination. The record does not include evidence detailing the nature and manner of administering such an examination -- matters that I leave to the parties to determine by agreement.

AWARD

The grievance is sustained. The Employer shall reinstate the grievant to his position as a part-time Driver, without loss of seniority and without back pay, provided he passes a fitness-for-duty examination, as described above.

August 10, 2007


Thomas P. Gallagher, Arbitrator