

**IN THE MATTER OF THE ARBITRATION BETWEEN**

---

	)	
	)	
<b>STAR TRIBUNE</b>	)	<b>FMCS NO. 06-053090</b>
	)	
<b>“EMPLOYER”</b>	)	
	)	
<b>And</b>	)	<b>DECISION AND AWARD</b>
	)	
<b>DISTRICT LODGE NO.77 INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS LOCAL 459</b>	)	<b>RICHARD R. ANDERSON ARBITRATOR</b>
	)	
<b>“UNION”</b>	)	<b>MAY 18, 2006</b>
	)	
	)	

---

**APPEARANCES**

**Employer**

Helen Wainwright, Senior Vice-President Human Resources  
Stephen J. Walstead, Human Resource Manager  
James Tretten, Machine Shop Manager  
Richard Ruble, Director Printing Operations

**Union**

Steven Galloway, Business Representative  
Adam Ostendorf, Grievant  
Roger Amundson, Machine Shop Steward

## **JURISDICTION**

The hearing in above matter was conducted before Arbitrator Richard R. Anderson on April 25, 2006 in Minneapolis, Minnesota. Both parties were afforded a full and fair opportunity to present their case. Witness testimony was sworn and subject to cross-examination. Exhibits were introduced and received into the record. The hearing closed on April 25 2006. The Employer and the Union mailed their Post-Hearing Briefs on May 10 and 12, 2006, which were received on May 11 and 13, 2006, respectively.<sup>1</sup> This matter was then taken under advisement.

This matter is submitted to the undersigned pursuant to the terms of the parties' collective bargaining agreement that was effective from July 1, 2003 through and including June 30, 2011<sup>2</sup>. The language in Article XII [GRIEVANCE PROCEDURE] provides for the filing, processing and arbitration of a grievance. The Arbitration Section of this Article defines the jurisdiction of the Arbitrator. The parties stipulated that the grievance is properly before the undersigned Arbitrator for final and binding decision. The parties further stipulated that there are no procedural arbitrability issues.

## **THE ISSUE**

The parties stipulated that the issue is, "Whether the Employer justifiably discharged the Grievant; and if not, what is an appropriate remedy."

---

<sup>1</sup> Both parties complied with the agreed upon mailing date of May 12, 2006.

<sup>2</sup> Joint Exhibit No. 1

## **BACKGROUND**

The Star Tribune, hereinafter the Employer, publishes a daily newspaper at its Heritage production facility located in Minneapolis, Minnesota. The Union represents approximately 26 machinists in the bargaining unit described in Article I [RECOGNITION] of the Agreement. The parties' history of collective bargaining dates back to the 1940's. The Union filed a grievance on December 20, 2005 alleging that the Employer violated Article XI [SENIORITY] Section 4 of the Agreement when it discharged Adam Ostendorf, the Grievant herein.<sup>3</sup> The Employer, by letter dated December 27, 2005, denied the grievance.<sup>4</sup> The parties were unable to resolve the grievance and the Union filed for arbitration. By letter dated February 21, 2006, the Federal Mediation & Conciliation Service [FMCS] notified the undersigned of my selection as the parties' neutral Arbitrator in this matter.

## **RELEVANT CONTRACT PROVISIONS**

### **ARTICLE I. RECOGNITION**

*The Publisher hereby recognizes District Lodge No. 77 of the International Association of Machinists & Aerospace Workers, AFL-CIO, as the bargaining agent for journeymen machinists and apprentice machinists performing maintenance, repair, and similar work on mechanical equipment, as assigned by the Publisher, in the Publisher's sole discretion, in the Publisher's plants at 425 Portland Avenue South and 800 First Street North, Minneapolis, Minnesota.*

### **ARTICLE V. JOB GUARANTEE**

*The Job Guarantee Lists includes employees named thereon and is attached as Exhibit A and Exhibit B.*

*The Publisher agrees that each employee whose name appears on the Job Guarantee List Exhibit A shall be retained in the employ of the Publisher until such*

---

<sup>3</sup> Joint Exhibit No. 2

<sup>4</sup> Joint Exhibit No. 3

time as such employee is removed from the Job Guarantee List Exhibit A as provided in this Article VI. The Publisher agrees that each employee whose name appears on the Job Guarantee List Exhibit B shall be retained in the employ of the Publisher until Contract expiration or until such time as such employee is removed from the Job Guarantee Exhibit B as provided in this Article VI. An employee whose name appears on the Job Guarantee Lists shall be removed from such Lists and all rights to further employment shall be terminated upon the earliest of the following events:

C. Discharge for cause.

## **ARTICLE XI. SENIORITY**

**Section 1.** Seniority is defined as length of an employee's service as a journeyman and apprentice with the Publisher, and it shall apply to layoffs and rehiring of regular employees. Except as hereafter provided, seniority shall also apply to choice of situations. A situation is defined as any five shifts within a financial week designated by the General Foreman with the starting time for each shift designated by the General Foreman. An employee shall maintain and accumulate seniority rights in his department while employed as a foreman.

**Section 4.** Seniority shall cease (a) upon justifiable discharge, (b) upon voluntary resignation, (c) if after being laid off an employee does not accept an offer to return to work within five (5) days' notice by registered mail, return receipt requested.

## **ARTICLE XII. GRIEVANCE PROCEDURE**

For purposes of this Agreement, the term "grievance" means any dispute between the Publisher and the Union, or between the Publisher and any employee concerning the interpretation, application, or alleged violation of this Agreement. Any such grievance shall be settled in accordance with the following procedures:

**ARBITRATION:** Arbitration under this Agreement shall be limited to the interpretation or application of the provisions of this Agreement and to grievances that have been properly and timely processed through the grievance procedure, but shall exclude any alleged understanding, practice or other matter outside the terms of this Agreement.

Within ten (10) working days after the receipt of the appeal for arbitration, either party may request a panel of five (5) arbitrators from the Federal Mediation and Conciliation Service. The parties shall meet within ten (10) working days of receipt of the panel to select an arbitrator by alternately striking names from the panel with the party requesting arbitration making the first strike. The fifth, or last name

*remaining shall be the designated arbitrator and his expenses shall be borne by the losing party.*

*The decision of the arbitrator shall be final and binding upon the Publisher, the Union and the employee(s) provided that the arbitrator shall not have jurisdiction to make an award which amends, alters, enlarges or ignores the provisions of this Agreement, nor shall he have jurisdiction to determine that the parties by practice or implication have amended or supplemented this Agreement.*

## **FACTS**

The Employer's operation includes a Machine Shop Department that consists of 26 machinists and four supervisors who work four shifts of 38 hours during a six-day seven-night operation.<sup>5</sup> The Employer's production process operates under very tight deadlines. Peak newspaper production occurs on the afternoon shift. Consequently, having a fully staffed crew of machinists to repair and maintain the printing presses is critical to the Employer's production process. Machine Shop Manager James Tretten is responsible for the overall supervision of the Machine Shop. His responsibilities include hiring, disciplining and training while the shift supervisors assign work and assist in training.

The Employer maintains an employee Handbook that is given to new employees who are required to sign an acknowledgement that they have received it.<sup>6</sup> The Handbook contains a section titled "On the Job" that sets forth "Standards of Conduct", which includes a "Regular Attendance" policy.<sup>7</sup> This section states:

*Regular attendance is essential to good performance of an individual and Star Tribune as a whole. Absenteeism and tardiness can cause serious losses to both employees and the Company and place a heavy burden on co-*

---

<sup>5</sup> There is no day shift on Sunday.

<sup>6</sup> The Grievant signed his acknowledgement form on June 3, 1999. [Employer Exhibit No. 1]

<sup>7</sup> Employer Exhibit No. 2

*workers. Consequently, the following are among the actions that may result in disciplinary action, up to and including immediate discharge:*

*Tardiness and /or unauthorized absence;*

*Leaving work early without supervisory approval;*

*Unauthorized absences from the work area or route, etc.;*

*Failure by the employee to notify his/her supervisor directly of an absence at least by the beginning of the scheduled workday.*

In addition, Tretten also has additional policies for Machine Shop employees titled "Shop Operational Guidelines". These guidelines include an additional attendance requirement that "Employees are required to report for work on time." Tretten testified that he goes over the Employer's attendance policy listed in the Handbook and "Guidelines"; and stresses their importance during employees' initial orientation. The "Guidelines" are also posted on the Machine Shop Department bulletin board.

Tretten testified that it is extremely important for machinists to call in if they are either going to report late or not report at all. With advanced knowledge, he is able to cover the absence with the use of overtime.<sup>8</sup> Tretten stated that if a machinist does not call in to report a late arrival or absence, he does not have an opportunity to replace him.<sup>9</sup> This in turn puts an additional workload and additional stress on the other shift machinists. Tretten further testified that he is able to be more liberal in excusing a machinist on the day shift where production is not as demanding as the afternoon shift where production is at its peak.

---

<sup>8</sup> This includes both excused and unexcused absences. Calling in does not per se relieve an employee from disciplinary action.

<sup>9</sup> Not knowing there will be an absence or late show, Tretten is unable to query departing machinists on their availability for overtime.

The Grievant was initially employed in 1993. In June of 1999 he transferred to the Machine Shop and worked in the maintenance machinist classification.<sup>10</sup> At all times relevant herein unless otherwise indicated, the Grievant worked the afternoon shift (10:30 a. m. to 8:00 p. m.) repairing and performing preventative maintenance on printing equipment. The Grievant was discharged on December 19, 2005 for continually violating the Employer's attendance policy. The termination letter disclosed that the Grievant was being terminated for his "long and continued history of unacceptable attendance".<sup>11</sup> The termination letter and Tretten's testimony disclosed a history of disciplinary action resulting from the Grievant's attendance violations.

On December 31, 1999, the Grievant failed to show up on time for his scheduled shift.<sup>12</sup> According to Tretten's notes about the incident, which he embellished in his testimony, the Grievant's supervisor called him when he failed to show.<sup>13</sup> The Grievant ultimately reported two hours late. Tretten testified that the next day he discussed the incident with the Grievant, advised him of the importance of being on time and/or calling in and issued him a "verbal warning". According to Tretten, the Grievant acknowledged his shortcoming and gave assurances that it would not happen again. No grievance was filed over this discipline.

On April 5, 2001, Tretten issued the Grievant a written warning letter regarding his failure to call in and subsequently reporting to work one half hour late for his

---

<sup>10</sup> The Grievant testified that his father worked at the Employer as a machinist for 32 years as well as his uncle and various neighbors, and wanted to follow in their "footsteps".

<sup>11</sup> Joint Exhibit No. 4

<sup>12</sup> This was the eve of the millennium where wide scale computer problems had been anticipated. All managers including Tretten were compelled to be present during the night shift. In addition to Tretten, there were three machinists assigned, which included the Grievant.

<sup>13</sup> Employer Exhibit No. 4

scheduled March 30, 2001 shift.<sup>14</sup> The warning letter cited previous absences including tardiness of one and one fifth (1-1/5) hours on March 9, 2001 and his failure to report for work at all on February 22, 2001. The letter also discussed the seriousness of his actions<sup>15</sup> and threatened other disciplinary actions up to and including termination for any further occurrence. The letter also pointed out Tretten's previous observations that the Grievant had been exhibiting "a less than energetic approach in your work", including "sleeping at your bench during lunch and breaks". Finally, the letter pointed out that if the Grievant had "any outside or personal factor affecting or interfering with the proper performance of your job, I ask you to please give serious consideration to using LifeWorks assistance program".<sup>16</sup> Further, that if the Grievant elected "not to discuss any such personal factors with LifeWorks personnel and in the future, if difficulties arise leading to disciplinary action including discharge, you will not be permitted at that time to cite such problems as a defense or an excuse to avoid disciplinary action".<sup>17</sup> Tretten testified that he previously discussed the contents of the warning letter with the Grievant on April 4, 2001 where the Grievant acknowledged his unacceptable behavior and vowed that it would not happen again. No grievance was filed over this discipline.

The Grievant was scheduled for voluntary overtime of four hours prior to his regular afternoon shift on September 5, 2005. He failed to show up for the overtime and when asked by Tretten for the reason, he cited being tired from water skiing. Tretten informed the Grievant that this conduct was unacceptable and made a written

---

<sup>14</sup> Employer Exhibit No. 5

<sup>15</sup> Impact on the Employer's operation including incurring additional employee overtime.

<sup>16</sup> LifeWorks is an Employer assistance program available to employees and managers who can independently and confidentially talk to trained personnel for absenteeism, performance or behavioral issues.

<sup>17</sup> Using the LifeWorks program does not per se excuse disciplinary action.

record of the incident.<sup>18</sup>

On October 26, 2005, Tretten issued the Grievant a written warning and a three-day suspension for violating the Employer's attendance policy by not reporting to work on time and failing to call-in to report a late arrival on the previous work day.<sup>19</sup> According to Tretten, he was unable to replace the Grievant because he did not know if or when the Grievant would show up. Tretten in the warning letter and in a discussion with the Grievant again recommended that he seek LifeWorks assistance.<sup>20</sup> Once again, no grievance was filed over the warning and suspension.

The Grievant contacted LifeWorks on October 26, 2006. According to the report of his contact, the Grievant "presented himself as being informally referred by his workplace for tardiness due to his sleep disorder".<sup>21</sup> The report also states, "Participant discussed that he had been to a sleep clinic and a neurologist". Finally, the report stated that the Grievant was being "Referred to insurance for further consultation and re-evaluation at a sleep clinic".<sup>22</sup> Thereafter, sometime in November, the Grievant was evaluated at a sleep center and diagnosed as having a mild obstructive sleep apnea, however, the doctor stated that he believed that it "was not contributing significantly to his overall situation".<sup>23</sup>

---

<sup>18</sup> Employer Exhibit No. 5

<sup>19</sup> Employer Exhibit No. 6

<sup>20</sup> According to Tretten, the Grievant indicated he felt really bad about his attendance and wanted to "look at himself"; however, he had no idea why the Grievant was having these attendance issues.

<sup>21</sup> Confidential Report by LifeWorks dated December 29, 2005. Union Exhibit No. 2

<sup>22</sup> Since all contacts are confidential and the Grievant never revealed this contact, the Employer was unaware of it until after his termination.

<sup>23</sup> Dr. Vincent Gimino letter dated December 29, 2005. Union Exhibit No. 3

On December 12, 2005,<sup>24</sup> the Grievant failed to show up for work or call in to report an absence or tardiness. The Employer day shift supervisor tried to get a hold of the Grievant, but was unsuccessful. The Grievant never did show up for work and there is a question whether he called in.<sup>25</sup> The Grievant testified that after waking up late for work, he realized that his job could be in jeopardy because of his previous warnings and suspension and called Union Steward Roger Amundson. In the conversation the Grievant stated he apprised Amundson of his drinking problem that caused him to oversleep and miss work. Amundson suggested that the Grievant enter a chemical dependency program in order to save his job.

The next day, December 13<sup>th</sup>, the Grievant left a voice message with Walstead that he was “checking into assistance regarding personal issues related to alcohol”.<sup>26</sup> He later called Walstead directly and repeated that he was checking into a chemical dependency program for issues related to alcohol. According to Walstead he cut the Grievant off and arranged to call him back when other managers and a Union representative were present. Later that day Walstead, who was in a conference room with Amundson, Tretten and Director of Printing Operations Manager Richard Ruble, called the Grievant and informed him that he was being placed on suspension pending a determination of his employment status.

---

<sup>24</sup> Hereinafter, all references to December will be in 2005.

<sup>25</sup> The Grievant initially testified that he left Tretten a voice message on December 12<sup>th</sup>, however under cross-examination he put the date as the 13<sup>th</sup>. Walstead stated he had contact with the Grievant by forwarded voice message on the 13<sup>th</sup>. The termination letter dated December 19, 2005 prepared by Tretten with a copy to Walstead states that the Grievant called Human Resources on December 12th and informed them that his absence “was due to a medical problem”. Also, the letter states that Walstead informed the Grievant that, “you were still responsible for contacting your manager and that not properly setting the alarm was not an acceptable excuse for missing work or not contacting your manager.

<sup>26</sup> Termination letter dated December 19, 2005. Joint Exhibit No. 4

On December 13<sup>th</sup>, the Grievant testified that he began a telephone search for a chemical dependency program where he could get an immediate assessment and begin a program.<sup>27</sup> On December 14<sup>th</sup>, The Grievant was admitted to a Clinic where he received a chemical dependency assessment and then began receiving out patient chemical dependency treatment.<sup>28</sup> He continued to receive treatment until he successfully completed the program on January 25, 2006.<sup>29</sup>

There was a follow-up meeting on December 16<sup>th</sup> with the Grievant, Amundson, Tretten, Ruble and Walstead present. At this meeting the Employer was informed that the Grievant had contacted LifeWorks on October 26, 2005, and was given the results of this contact. The Employer was also informed that the Grievant had entered a chemical dependency treatment program. Thereafter, the Grievant was issued the December 19, letter which severed his employment based on his "long continued history of unacceptable attendance".

On December 21, 2005, the Grievant had an appointment with his personal physician. His physician diagnosed the Grievant as having severe depression with insomnia. He was prescribed medication to control this affliction.<sup>30</sup> The Grievant testified that he is still under the direction of his physician and continues to take medication for his depression.

On January 4, 2006, at the request of the Union, a grievance meeting was held wherein the Union was seeking to have the Employer rescind its termination of the

---

<sup>27</sup> He stated that he did not contact LifeWorks because he wanted immediate treatment.

<sup>28</sup> Letter dated January 3, 2006 from New Guidance Counseling Clinic Evening Counselor Lindsay Erickson. The letter inter alia states that the Grievant was admitted to the clinic on December 14<sup>th</sup>, that he had as of the date of the letter attended 11 out of 20 group sessions, that he was making good progress and his prognosis to remain sober was good. Union Exhibit No. 4

<sup>29</sup> Certification of Completion dated January 25, 2006. Union Exhibit No. 5

<sup>30</sup> Report of Dr. Olson dated December 21, 2005. Union Exhibit No. 6

Grievant. In attendance were the Grievant, Union Representative Steve Galloway, Assistant Steward Dan Freeman, and management representatives Walstead, Tretten and Ruble. At the meeting the Union presented the Employer with the Grievant's LifeWorks contact report, Dr. Gimino's sleep apnea report, Chemical Counselor Erickson's report, and Dr. Olson's report of the Grievant's visit for his depression.<sup>31</sup> On January 12, 2006, the Employer, through Ruble, denied the Union's appeal.<sup>32</sup>

Finally, The Grievant testified that he initially believed that his absenteeism was due to a sleep disorder.<sup>33</sup> It was not until he went through the initial chemical dependency assessment on December 14, 2005 that he realized that he had been "in denial" and that drinking was the real cause of his sleep issues. He further learned from Dr. Olson that severe depression was a factor in his drinking excessively. The Grievant also testified that upon completion of the chemical dependency out-treatment program, he enrolled in Alcoholic Anonymous and continues to attend meetings and currently has two sponsors.

### **POSITION OF THE EMPLOYER**

It is the position of the Employer that it was justified in terminating the Grievant. The Employer argues that the Grievant was terminated for his long continued pattern of unacceptable attendance. Prior to his discharge, the Grievant received numerous verbal and written warnings and was assessed a three-day suspension less than two months before his termination all for unacceptable absenteeism. The Employer further argues that the Grievant was well aware after his suspension that recidivist

---

<sup>31</sup> Union Exhibits Nos. 2, 3, 4 and 6

<sup>32</sup> Union Exhibit No. 1

<sup>33</sup> He also testified that when he contacted LifeWorks his drinking was discussed, but the staff person did not believe it was a cause.

conduct could result in his termination. The Employer also argues that it repeatedly offered the Grievant its Employee Assistance Program and it was only after he was facing discharge that he sought assistance for his chemical dependency.

The Employer further argues that it followed due process in terminating the Grievant and he received representation from the Union. Prior to the Grievant's discharge it followed progressive discipline and recommended that he seek out LifeWorks to assist him in dealing with any personal issue that was affecting his employment.<sup>34</sup> The Employer also argues that it was not aware of the Grievant having contact with LifeWorks prior the December 12<sup>th</sup> absenteeism that triggered his termination. Even assuming that it had, utilizing the employee assistance program does not serve as an escape for disciplinary action. Especially when he continued to have attendance problems even after he contacted LifeWorks in October 2005. Finally, the Employer argues that it did not have any knowledge of a medical condition that was affecting the Grievant's employment prior to the December 12, 2005 final absenteeism incident.

### **POSITION OF THE UNION**

It is the Union's position that the Employer did not have justification to discharge the Grievant under all the circumstances herein. The Union does not dispute the fact that some discipline may be warranted; however, due to extenuating circumstances, the Employer's discipline involving termination was too severe. The Union argues that the Grievant was a quality employee for the majority of his employment and if he were

---

<sup>34</sup> There is no progressive disciplinary provision in the Agreement nor does the Employer have a progressive disciplinary policy.

allowed to follow the recommended treatment of his physicians, he would continue to be a quality employee.

The Union further argues that the Grievant's attendance issues were the result of medical conditions that the Employer was well aware of before a decision had been made to terminate him. Finally, the Union argues that the Grievant has successfully completed his out-patient chemical dependency treatment and is under supervised medication to correct his depression.

### **OPINION**

This issue presents a well-settled two-step analysis: first, whether the Grievant engaged in activity which gave the Employer just and proper cause to discipline him; and second, whether the discipline imposed was appropriate under all the relevant circumstances. It is the Employer's burden to show that the Grievant engaged in conduct warranting discipline and that the appropriate discipline was termination.

Based upon all the evidence there is no question that the Grievant engaged in unacceptable absenteeism and violated the Employer's attendance policy warranting discipline.<sup>35</sup> Therefore, the Employer has met the first test in that it had just and proper cause to discipline the Grievant for his unacceptable attendance.

Having determined that the Employer had just and proper cause to discipline the Grievant for his unacceptable absenteeism, it is incumbent upon the Employer to demonstrate that the appropriate discipline was termination. It is a well-established arbitral rule that, absent a finding that a disciplinary action is arbitrary, capricious,

---

<sup>35</sup> Even the Union agrees that some form of discipline was warranted.

unreasonable, unfair or violates the collective bargaining agreement, an Arbitrator should be hesitant to alter the discipline.<sup>36</sup>

Discharge is the most extreme industrial penalty that can be imposed on an employee. When an employer imposes "workplace capital punishment", it is telling an employee, as well as other employees, that the offense or misconduct committed is so egregious that discharge is the only penalty that can be levied. It further makes a statement that the employee is beyond rehabilitation.

Based upon all the evidence, I agree with the Union's position that the Grievant's discharge was too severe a penalty; and that the Employer's actions under the circumstances herein were both unreasonable and unfair. There are a number of factors that make the Grievant's discharge unreasonable and unfair:

1. The Grievant had in excess of 12 years of employment with more than six years in the Machine Shop. There is no evidence that the Grievant's work performance was other than acceptable during his tenure. Terminations are non-existent or rare in the Machine Shop.<sup>37</sup>
2. The Grievant was not terminated for a single gross misconduct; rather, he was terminated for a pattern of sporadic unacceptable attendance over a six-year plus period of employment in the Machine Shop. An examination of the history of the Grievant's discipline reveals he was first verbally warned for reporting two hours late on December 31, 1999. He then had no attendance problems until early 2001 when he received a written warning

---

<sup>36</sup> Elkouri & Elkouri, *How Arbitration Works*, 5<sup>th</sup> Ed., pgs. 910-912

<sup>37</sup> Tretten testified that he had not terminated any employees during his 15-year tenure as Machine Shop Manager.

for three absenteeism episodes (2/22 – gone a whole shift, 3/09 – late 1 1/5 hours and 3/30 – late 1/2 hour).<sup>38</sup> There were no further episodes during a four and one half year period until the three attendance violations beginning on September 12, 2005 and culminating on December 12, 2005.

3. The Grievant's absenteeism that precipitated his discharge was in part medically related. It is not known what the underlying cause(s) were for the Grievant's absenteeism in late 1999 and early 2001; however, it is clear that medical problems played a part in his 2005 absenteeism.<sup>39</sup>
4. The Employer had knowledge that the Grievant's absenteeism was medically related prior to the decision to discharge him. The Employer may not have known that his absenteeism was medically related prior to December 12, 2005, the date the Grievant failed to report for work; however, there is no question that it was aware that the Grievant had a chemical dependency problem as early as December 13<sup>th</sup> and most assuredly by the December 16<sup>th</sup> meeting of the parties attended by the Grievant. The Employer also learned that the Grievant was enrolled in a chemical dependency program during this same time period, nevertheless, the Employer terminated the Grievant effective December 19<sup>th</sup>. The Employer held to this termination decision even after the Grievant at the January 4, 2006 grievance meeting presented documentation of his

---

<sup>38</sup> All of the aforementioned episodes of absenteeism are too remote in time to support a discharge.

<sup>39</sup> The Grievant was diagnosed with severe depression that fostered excessive alcohol consumption with mild sleep apnea that caused a sleep disorder.

previously asserted medical condition and his subsequent progress in resolving his medically induced behavioral problem.

5. Tretten testified that he "would have worked with the Grievant had he known that he was in treatment prior to termination". The Employer utilizes an employee assistance program [LifeWorks] in order to help employees with behavioral and personal problems that are affecting their work performance. It appears that an employee's use of this program may be a mitigating factor in the Employer's disciplinary decisions. Tretten recognized that the Grievant "may have a problem" affecting his absenteeism and strongly recommended that the Grievant utilize LifeWorks on October 26, 2005. The Grievant subsequently took Tretten's advice and contacted this service, however, it appears that he was in denial and/or not entirely honest regarding his excessive alcohol consumption.<sup>40</sup> Nevertheless, Tretten and management officials obviously knew that the Grievant was in chemical dependency treatment; and had other medical issues prior to the Grievant's discharge, issues that were clearly pointed out at the December 16, 2005 meeting that they attended.

The totality of the circumstances set forth above clearly demonstrates that the imposition of discharge was too severe. Moreover, the Grievant has demonstrated, thus far, that he can be rehabilitated back into the workplace. He has recognized that he has a chemical dependency problem and has successfully completed a chemical dependency program. He has continued his chemical dependency therapy by

---

<sup>40</sup> The Grievant testified that the individual he talked to did not think that excessive alcohol consumption was an issue.

subsequently enrolling in Alcoholic Anonymous. He is also under the continued care of his personal physician for his depression.

Although discharge is not an appropriate discipline herein, the Grievant has culpability for his unacceptable attendance record and deserves harsh discipline. In view of this, I conclude that a suspension is an appropriate discipline under all of the circumstances herein.<sup>41</sup> This suspension will be from the date of The Grievant's last unacceptable absence (December 12, 2005) through the date that he completed his chemical dependency program (January 25, 2006).<sup>42</sup> The Grievant's reinstatement is, however, not without caveat. The Employer needs to be protected in the event the Grievant reverts back to his prior unacceptable attendance. Thus, his reinstatement and continued employment is conditioned on the Grievant maintaining a work record free from unauthorized absenteeism.<sup>43</sup>

---

<sup>41</sup> The Employer initially suspended the Grievant on December 13, 2005.

<sup>42</sup> This is the date that The Grievant sufficiently demonstrated that he was ready to return to the workplace.

<sup>43</sup> The Employer may impose a "Last Chance Agreement" covering unacceptable absenteeism. A one-year period following his reinstatement would be an acceptable enforcement period.

## AWARD

IT IS HEREBY ORDERED that the grievance in the above entitled matter be and is hereby partially sustained for the reasons set forth in this Decision.

IT IS FURTHER ORDERED the discharge of Adam Ostendorf be reduced to a suspension without pay from December 13, 2005 through January 25, 2006.

IT IS FURTHER ORDERED that the Employer expunge the discharge letter to Adam Ostendorf dated December 19, 2005 and any reference to his termination in his personnel file, consistent with my Decision herein.

IT IS FURTHER ORDERED that the Adam Ostendorf be reinstated to his former position; and be made whole for any loss of wages, economic benefits, seniority; or any other benefits or rights or privileges suffered as a result of the Employer's action, less any interim earnings.

IT IS FURTHER ORDERED that the Employer may impose a Last Chance Agreement on Adam Ostendorf, consistent with my Decision herein.

The undersigned Arbitrator will retain jurisdiction in this matter for a period of forty-five (45) days from the receipt of this Award to resolve any matters relative to implementation.

**Dated: May 18, 2006**

**In Eagan, Minnesota**

---

**Richard R. Anderson, Arbitrator**