

**IN THE MATTER OF ARBITRATION BETWEEN**

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<b>SUPERVALU, INC.</b>	)	
	)	<b>BMS. CASE NO. 06-RA-1073</b>
	)	
<b>“EMPLOYER”</b>	)	
	)	<b>DECISION AND AWARD</b>
<b>And</b>	)	
	)	
<b>GENERAL DRIVERS, HELPERS AND TRUCK</b>	)	
<b>TERMINAL DRIVERS EMPLOYEES LOCAL</b>	)	<b>RICHARD R. ANDERSON</b>
<b>UNION NO. 120 a/w INTERNATIONAL</b>	)	<b>ARBITRATOR</b>
<b>BROTHERHOOD OF TEAMSTERS, JOINT</b>	)	
<b>COUNCIL 32</b>	)	
	)	
<b>“UNION”</b>	)	<b>JANUARY 4, 2007</b>

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**APPEARANCES**

**FOR THE EMPLOYER:**

Jonathan O. Levine, Attorney  
Suzanne Hansmann, Former Human Resources Manager Hopkins Distribution Center  
Jeremy Laine, Operations Support Manager Hopkins Distribution Center  
Susan Hanson, Human Resource Specialist

**FOR THE UNION:**

Katrina E. Joseph, Attorney  
Martin J. Costello, Attorney  
Thomas Erickson, Business Agent  
Kent Schearer, Grievant

**JURISDICTION**

The hearing in above matter was conducted before Arbitrator Richard R. Anderson on November 20, 2006 in St. Paul, Minnesota. The 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 November 20, 2006. Post-hearing briefs were simultaneously mailed by the parties on December 18, 2006 and received on December 19, 2006. This matter was then taken under advisement.

This matter is submitted to the undersigned pursuant to the terms of the parties' collective bargaining agreement, hereinafter the Agreement, that is effective from June 1, 2001 through December 1, 2010.<sup>1</sup> The language in Article 15 [GRIEVANCE PROCEDURE] provides for the filing and processing of grievances and Article 16 [ARBITRATION] provides for the arbitration of grievances including the final and binding authority of the Arbitrator. Pursuant to this authority, the parties stipulated that this matter is solely before the undersigned Arbitrator for final and binding decision. The parties further stipulated that this matter does not involve any procedural issues that warrant consideration.

### **BACKGROUND**

The Employer operates a warehouse distribution center in Hopkins, Minnesota, the only facility involved in this proceeding. There are approximately 850 employees in a warehouse and driver unit that is represented by the Union. The bargaining unit is set forth in Section 1.01 of Article I [RECOGNITION AND UNION SHOP] in the Agreement. The Union has represented these employees since the early 1950's.

The Grievant, Kent Schearer, was employed as a warehouse employee from October 2001<sup>2</sup> until he was terminated on April 2, 2006 for excessive absenteeism.

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

<sup>2</sup> It appears that he initially may have been a temporary employee because his seniority date is March 2, 2002.

On April 5, 2006, the Union filed a grievance protesting the Grievant's discharge.<sup>3</sup> The parties held a Step 3<sup>4</sup> Joint Grievance Committee hearing on April 21, 2006 to discuss the termination, at which time the Joint Committee deadlocked on the grievance.<sup>5</sup> Thereafter, the Union moved the matter to arbitration by letter dated April 24, 2006.<sup>6</sup> The undersigned Arbitrator was notified of being selected as the neutral Arbitrator by memorandum from Union Counsel Martin J. Costello dated June 7, 2006.<sup>7</sup>

## **THE ISSUE**

The parties did not stipulate to the Issue. The Union phrased the Issue as; "Whether the Employer had just cause to discharge the Grievant; and if not, what is the appropriate remedy"? The Employer phrased the Issue as; "Whether the Grievant was discharged in accordance with the terms of the January 26, 2006 agreement reinstating his employment on a "last chance" basis".

## **RELEVANT CONTRACT PROVISIONS**

### **ARTICLE 13 DISCHARGE**

**13.01** Drunkenness, dishonesty, insubordination, or repeated negligence in the performance of duty; unauthorized use of or tampering with Employer's equipment; unauthorized carrying of passengers; violations of Employer's rules which are not in conflict with this Agreement; falsification of any records; or violation of the terms of this Agreement shall be grounds for immediate discharge.

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

<sup>4</sup> Throughout their briefs both parties refer to the Panel meeting as Step 4, however, the language in the Agreement refers to this forum as Step 3. There is no Step 4 in the grievance language of the Agreement; therefore, throughout this decision I will make reference to this Panel action as occurring in Step 3.

<sup>5</sup> Union Exhibit No.8

<sup>6</sup> Union Exhibit No. 9

<sup>7</sup> Union Exhibit No. 10

**13.03** Employees desiring to protest discharge must do so within five (5) calendar days by giving notice in writing to the Employer and the Union.

**13.05** Warning notices will be disregarded after an eleven (11) month period for disciplinary purposes.

### **ARTICLE 15 GRIEVANCE PROCEDURE**

**15.01** *Any differences, disputes or complaints arising over the interpretation or application of the contents of this Agreement which cannot be resolved between the employee and his immediate supervisor shall be a grievance and, to be timely, shall be submitted in writing by the aggrieved party within five (5) working days of its occurrence to the supervisor's superior.*

**Step 3:** *Such Labor-Management Council shall be comprised of two Union representatives and two Employer representatives. Such Council shall have the power and authority to settle the grievance and such settlement shall be final and binding on the parties. Meetings of this Council may be held from time to time and at such places as the Council members may elect. This Labor-Management Council Step is by mutual agreement between the Employer and Teamsters Local No. 120 and will continue to be in effect during the term of this Agreement.*

**15.03** In the event the Labor-Management Council, as described herein, cannot reach agreement, the grievance may be submitted to arbitration in accordance with Article 16. Such decision to move to arbitration must be done by either of the local parties within thirty (30) days of the Labor-Management Council's impasse, or the grievance is considered resolved.

### **ARTICLE 16 ARBITRATION**

**16.04** *The Arbitrator shall have jurisdiction and authority only to interpret and apply the express provisions of this Agreement. The Arbitrator shall not have authority to alter, amend, subtract from, add to, or otherwise modify any of the terms of this Agreement. The Arbitrator's decision, rendered in writing, shall be final and binding upon the Employer, Union and employee(s). The total costs of the arbitration shall be shared equally between the Employer and the Union. In the event either party elects not to receive a copy of the transcript of the*

*hearing, the cost of the reporter and transcript shall be borne exclusively by the party using such copy.*

## **FACTS**

Prior to June 12, 2005, the Employer had an absenteeism policy based upon a point system wherein various points were given for tardiness and absences. Additional points were assessed if an absence occurred on dates surrounding an employee's weekend. Accumulated points resulted in progressive discipline. Employees received a verbal warning after six (6) points, a written warning after eight (8) points and a second written warning after ten (10) points. When an employee reached twelve (12) points, he or she was subject to termination. During the course of point progression there were provisions for employees to reduce accumulated points through good attendance.

On June 12, 2005, the Employer adopted a no-fault attendance policy without any input or consent of the Union. Former Human Resource Manager Suzanne Hansmann testified that the new policy was adopted because absenteeism was out of control at the Employer's Hopkins Distribution Center especially on days surrounding employee weekends.<sup>8</sup> The point system was abolished, however, employees could use accumulated lifetime free points earned for good attendance if an employee reached termination level. The free points could not be used if an employee had received a "last chance" warning.

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<sup>8</sup> She testified that absences were approximately 30% on those days.

In the new policy, unexcused absences were defined as:

- 1. Absence for a full day**
- 2. Absence from a scheduled shift**
- 3. Early departure from a scheduled workday or shift,**
- 4. Tardiness of sixty (60) minutes or more for a scheduled workday or shift**
- 5. Every two (2) tardies of less than sixty (60) minutes will count as a full days absence**

Under the new policy progressive discipline is imposed as follows, unless it is covered by the accelerated disciplinary provision covering unexcused absences on days surrounding employee weekends:

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| <b>1. Consultation</b>                   | <b>Upon three (3) absences (Includes FMLA, DOR documents/discussion)</b> |
| <b>2. Verbal Warning</b>                 | <b>Upon five (5) or more absences</b>                                    |
| <b>3. 1<sup>st</sup> Written Warning</b> | <b>Upon seven (7) or more absences</b>                                   |
| <b>4. Final Written Warning</b>          | <b>Upon nine (9) or more absences</b>                                    |
| <b>5. Termination</b>                    | <b>Upon eleven (11) or more absences</b>                                 |

Because absences before or after holidays, vacation and split vacation days, personal days or weekends (two regularly scheduled consecutive days off) were especially problematic and burdensome to the Employer and fellow employees, they would be treated more aggressively. In those situations, accelerated discipline would be used. The first time an absence listed above occurred, no accelerated discipline would apply. However, each time thereafter, an employee would receive the next level of progressive discipline greater than what their absences would have otherwise qualified them for. Progressive discipline was applied using a rolling eleven (11) month period, and discipline remained active in an employee's file for eleven (11) months.

Evidence adduced at the hearing discloses that prior to April 25, 2005, the Grievant had a history of absenteeism, which resulted in the following disciplinary actions.<sup>9</sup>

<b>8/20/02</b>	<b>Verbal Warning</b>
<b>9/15/02</b>	<b>Written Warning</b>
<b>7/10/03</b>	<b>Verbal Warning</b>
<b>7/29/03</b>	<b>Discharged-Reinstated<sup>10</sup></b>
<b>3/12/04</b>	<b>Written Warning</b>
<b>4/02/04</b>	<b>Final Warning</b>
<b>4/23/04</b>	<b>Final Warning</b>
<b>7/31/04</b>	<b>Subject to Discharge Used free point to avoid termination</b>
<b>12/17/04</b>	<b>Final Warning</b>
<b>2/27/05</b>	<b>Final Warning</b>
<b>3/11/05</b>	<b>Final Warning</b>

On April 25, 2005 the Grievant was robbed at gunpoint and shot in the face and leg after he refused to give up his wallet. Both wounds required extensive hospitalization, after hospital treatment and left the Grievant permanently injured as the facial injury caused his right eye to be surgically removed. Thereafter, the Grievant applied and was granted twelve (12) weeks of unpaid leave pursuant to the Family Medical Leave Act (FMLA) covering the period April 26, 2005 through June 26, 2005.<sup>11</sup> The Grievant was not able to return to work on June 26, 2005 and was granted an extension of his medical leave until August 31, 2005.<sup>12</sup> On that date, his doctor released him noting that the Grievant had lost his right eye resulting in him having no binocular depth perception.<sup>13</sup> The doctor placed no restrictions on the Grievant's employment, however, he indicated that the Grievant needed to be retrained and retested in his job environment teaching him

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<sup>9</sup>Notice(s) of Disciplinary Action. Employer Exhibit Nos. 2- 12

<sup>10</sup> Pursuant to a grievance settlement, the Grievant's discharge was reduced to an unpaid suspension for time served and received a final written warning

<sup>11</sup>Letter from Human Resource Specialist Sue Hanson to the Grievant dated June 25, 2005. Employer Exhibit No. 13

<sup>12</sup> This was approximately one month more than the yearly maximum of twelve (12) weeks required under FMLA.

<sup>13</sup> Letter from Dr. Natalia Kramarevsky dated August 31, 2005. Employer Exhibit No. 15

to turn his head for visual scanning to the right. He also prescribed protective lenses to be worn at all times. Thereafter, the Employer got the Grievant recertified on the forklift, the job function he was performing before he was wounded in April 2005.

On August 17, 2005, the Employer issued a Weekly Bulletin to all employees citing inter alia that excessive absenteeism was causing problems for its retail division that resulted in numerous complaints due to late loads caused by absenteeism.<sup>14</sup> On August 30, 2006, the Employer issued an Urgent Bulletin to all employees citing excessive weekend absences as a cause for recent significant disruption in service to its retailers.

The Bulletin also informed employees that:

***As an employee of SUPERVALU, you have an important responsibility: To report to work every shift to which you are assigned. When you call in with limited notice or simply do not show up, all of us-your co-workers, this DC and our retailers – are left in a precarious and unnecessary position. The absenteeism on Sunday forced us to violate our contract with Local 120 as a last resort in an attempt to meet the needs of our retailers. Despite this necessary decision, we still ran more than six hours late on many loads. This is not acceptable. All employees who were absent will be reviewed for compliance with the attendance policy and appropriate action will be taken.***

On September 20, 2005, Human Resources Specialist Sue Hanson notified the Grievant by letter that he had exhausted all of his FMLA leave and would not be eligible for further FMLA leave until April 28, 2006.<sup>15</sup> The letter also informed the Grievant that any absences occurring after September 1, 2005 would be subject to the Employer's attendance policy.

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<sup>14</sup> Weekly Bulletin for the week of August 17, 2006. Employer Exhibit No. 16, p. 1

<sup>15</sup> Employer Exhibit No. 17

On October 12, 2005, a Step 3 Grievance Panel issued a decision that resolved a number of grievances over inconsistencies that had arisen since the Employer's June 12, 2005 attendance policy was implemented.<sup>16</sup> The Panel directed that pending terminations involving various grievants be reduced to unpaid suspensions and be placed at a final written warning stage. The grievants also had their attendance records adjusted to reflect that they had accrued nine (9) absences. The Panel also directed that other employee attendance records including the Grievant's be adjusted,

As a result of this on October 24, 2006, the Grievant, in the presence of Union Steward Fred Longway, was issued a final written warning by supervisor Jess Whitehead.<sup>17</sup> The document disclosed that the Grievant was a no-show no-call on September 10, 12, 23, 26; sick on September 25 and October 14; and left early on September 5, 17, 22 and October 10. The document disclosed that the Grievant objected to all the charged no-call no-show absences issued as well as the charged unexcused absences issued on September 22, 23, and 25 because they were untimely. However, no grievance was ever filed.

Based on the Grievant's medical records and his testimony, he sought treatment on November 14, 2005 with Dr. David Lynch at Park Nicollet Clinic for reoccurring headaches.<sup>18</sup> According to the report of Dr. Lynch, the Grievant complained about recent headaches that caused him to miss work and wanted Dr. Lynch to complete a FMLA form for the Employer so he could get FMLA leave for his headaches. Dr. Lynch never

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<sup>16</sup>The document states that it is a Step 4 resolution, however, as stated earlier the Agreement states the Panel meets at Step 3. Employer Exhibit No. 18

<sup>17</sup> Notice of Disciplinary Action dated October 24, 2006. Employer Exhibit No. 20

<sup>18</sup> Union Exhibit No. 11(a)

completed the form; rather he told the Grievant that he needed to review the medical records from Hennepin County Medical Center (HCMG) before he could assist him. It also appears that he prescribed no medication for the Grievant's headaches.<sup>19</sup>

Thereafter, the Grievant incurred unexcused absences on December 24, 2005 and on January 4, 5, 15, and 16, 2006. On January 19, 2006 the Grievant was terminated for excessive absenteeism.<sup>20</sup> A grievance protesting his discharge was filed by the Union on January 20, 2006.<sup>21</sup> At a Step 2 meeting on January 26, 2006, the parties agreed to a settlement that reinstated the Grievant with the understanding that if he incurred two future unexcused absences, he would be terminated. During this meeting, it was brought up that the reason that the Grievant was missing work was re-occurring headaches due to his eye injury. According to the testimony of Human Resource Manager Hansmann, she explained to the Union Representative John Schwartz and to the Grievant that if the Grievant needed some accommodation on the job, the Employer would certainly look into it to "physically manipulate the environment" to allow the Grievant to conduct his daily job functions. According to the testimony of Hansmann and the Grievant, the Grievant never requested any accommodation nor did he present any medical documentation concerning his headaches. In addition, the Grievant testified that both Union and Employer representatives informed him that it was imperative that he not incur two more unexcused absences, even if those absences were because of headaches. If he did he would be terminated. Thereafter, on February 2, 2006, Human

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<sup>19</sup> The medical report did not list any prescribed medication.

<sup>20</sup> Notice of Disciplinary Action issued by Supervisor Andy Welna dated January 17, 2006. Employer Exhibit No. 21

<sup>21</sup> Joint Exhibit No. 3

Resource Manager Hansmann sent the Grievant a letter confirming the results of the January 26th meeting.<sup>22</sup>

On January 25, 2006 presumably pursuant to a referral from Dr. Lynch, Dr. Eric Schenk saw the Grievant for his headaches at the Park Nicollet Clinic. According to the doctor's report, which was not given to the Employer until the day of the hearing, the Grievant reported the following,<sup>23</sup>

***...{Mr. Schearer} developed new onset of headache occurring anywhere from one to two times per week, occasionally going a couple weeks without a headache. The headache begins in the left temple and then it tends to increase in severity over time to be associated with sensitivity to light plus/minus sensitivity to sound, and he usually has to go lay down with a cold cloth over his forehead to try to get better. There has been no nausea or vomiting. He usually states it lasts until he can get to sleep.***

***He has no obvious warning or precipitator for the headache. He has just tried Aleve or Tylenol without apparent benefit.***

Doctor Schenk prescribed eating right and getting sufficient sleep and exercise. He also prescribed propranolol to "try to diminish the tendency to headache." He also prescribed the drug Midrin at the onset of a headache. He also gave the Grievant a "slip" to give to the Employer letting them know about his periodic headaches. Finally, Dr. Schenk also gave the Grievant a form to send to HCMC to have his medical records sent to Dr. Lynch.<sup>24</sup>

On March 12, 2006, the Grievant was unable to report for work. He called his supervisor, presumably Ben Strom, to report that he could not come to work because of a

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<sup>22</sup> While Hansmann lists the Step 2 settlement date in the letter as January 30, 2006, the date on the grievance resolution form is January 26, 2006. Joint Exhibit No. 5

<sup>23</sup> Union Exhibit No. 11(b)

<sup>24</sup> It is not known if the Grievant ever sent the form; and if he did, whether it was sent to the doctors at Park Nicollet Clinic.

severe headache.<sup>25</sup> On March 29, 2006, the Grievant reported to Supervisor Strom that he was leaving work because of a headache and left during the middle of his shift. Thereafter on April 2, 2006, Supervisor Strom issued the Grievant a termination notice.<sup>26</sup> The Notice contains the March 12 and 29, 2006 unexcused absences as well as eleven (11) other unexcused absences incurred since September 1, 2005 when the Grievant returned to work following extended leave after his FMLA leave had expired.

Finally, on April 14, 2006, Dr. Schenk saw the Grievant again. In his report, which was also not given to the Employer until the day of the hearing, Dr. Schenk noted that the Grievant had stopped taking the Midrin three weeks ago because it was not helping his headaches, which caused him to miss three days of work.<sup>27</sup> The doctor prescribed the drug Imitrex to be taken at the onset of a headache and a stronger dosage of propranolol to be taken twice daily.

Finally, it should be noted that the Grievant began working at a sugar beet plant in southern Minnesota approximately four months after he was terminated. As of the date of the hearing, he had not missed any work because of headaches. The Grievant also has not seen a doctor for his headaches since his April 14, 2006 visit with Dr. Schenk. The Grievant cited the reason being he no longer had health insurance.

### **POSITION OF THE EMPLOYER**

It is the Employer's position that it was justified in discharging the Grievant on April 2, 2006 after the Grievant incurred unexcused absences on March 12 and 29, 2006.

The Employer argues that the discharge was justified because the Grievant violated the

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<sup>25</sup> The Grievant stated that he called the Employer and believes that he talked to Supervisor Strom.

<sup>26</sup> Notice of Disciplinary Action dated March 30, 2006. Joint Exhibit No. 4

<sup>27</sup> Union Exhibit No. 11(c)

provisions of the Step 2 settlement agreement that resulted in the Grievant's reinstatement following his discharge for excessive unexcused absences on January 19, 2006. This "last chance agreement" specifically requires that if the Grievant incurs two more unexcused absences, he will be terminated.

Contrary to the Union's assertion that the resolution at Step 2 on January 26, 2006 was not a "last chance agreement", the Employer argues that the evidence clearly demonstrates that it was. Testimony from both Human Resource Manager Hansmann and the Grievant disclosed that the Grievant was told by both Hansmann and Union Representative John Schwartz that his reinstatement was conditioned on his attendance; and that if he had two more unexcused absences, he would be terminated even if those absences were due to headaches. Further, the letter that Human Resource Manager Hansmann sent to the Grievant on February 2, 2006 [Joint Exhibit No. 5] demonstrates that the Grievant's reinstatement was a result of a grievance resolution between the Employer and the Union that was conditioned on the Grievant's future attendance record.

The Employer further argues that the Grievant was well aware that he had exhausted his FMLA leave and would not be eligible for further leave until April 28, 2006 through numerous discussions with Employer representatives and in the letter dated September 20, 2005 from Human Resource Specialist Hanson to the Grievant. After receiving this letter, the Grievant did not file a grievance nor did he notify the Employer that he was missing work due to headaches nor did he request any type of work accommodation. Additionally, there is no evidence that the Grievant was disabled

nor did he ever claim a disability. When the Grievant was released for work, the doctor placed no restrictions other than he needed to be reintroduced to his work environment because of loss of vision in his right eye, which the Employer took steps to accommodate through retraining and retesting on the forklift. Additionally, the doctor's reports given to the Employer at the hearing also do not cite nor did the Grievant claim to the doctor that he was disabled.

The Employer also argues that irrespective of the "last chance agreement", the Employer had just cause to discharge the Grievant for excessive absenteeism. The Grievant had a horrendous absenteeism record resulting in numerous warnings and three discharges prior to his April 2, 2006 final termination. At the time he was terminated, he had accumulated in excess of the eleven (11) unexcused absences in an eleven (11) month period. These accumulated absences in and of themselves were grounds for his termination pursuant to the Employer's absenteeism policy.

The Employer further argues that the Grievant and the Union are seeking the right to allow the Grievant an unrestricted right to be absent or leave work early every time he has a headache. The Grievant is seeking an accommodation that is neither reasonable nor required by law or the parties' Agreement. Additionally, the Union is not arguing that the Grievant was disabled or was denied a reasonable accommodation under state or federal law. The Grievant has not pursued a claim of disability discrimination under the American Disability Act (ADA) or its state counterpart, nor could he. Regular attendance and punctuality under the Employer's absenteeism policy is an "essential function of every job". Allowing the Grievant to miss work whenever he

had a headache would create an absurd and unworkable precedent. It would effectively exempt the Grievant from the Employer's attendance policy for a medical condition not covered by FMLA since headaches are not a "serious health condition" under the FMLA. Allowing the Grievant to be absent every time he claimed he had a headache would also create an unworkable system for managing attendance.

Finally, the Employer argues that contrary to the Union's claim of unfair or disparate treatment, it treated the Grievant fairly in its decision to terminate him. Throughout his tenure, the Grievant had been apprised many times that his attendance was unacceptable and was issued numerous warnings. He was in fact discharged and brought back three times before his final termination. During disciplinary meetings, the Grievant was given pamphlets about and encouraged to call the Employer's Employee Assistance Program or the Union's Service Bureau to deal with any personal issues that might be contributing to his attendance problems. It also extended the Grievant's leave after FMLA leave was exhausted as it did with employees Michael Morris and Robert Moore who had cancer and Sid Gardner who had a serious stomach illness that resulted in his permanent disability. In addition, the Union did not present any evidence that the Grievant was similarly situated to any of the aforementioned employees in terms of tenure, work record, ailment and requested accommodation or otherwise.

### **POSITION OF THE UNION**

The Union's position is that the Employer did not have just cause to discharge the Grievant.

The Union argues that the Grievant did not commit a disciplinary offense; therefore, the Employer had no just cause for discipline, much less invoke the ultimate penalty of discharge. It is the Union's position that the standard of review in disciplinary cases including discharge cases, where there is no clear explicate contract language, just cause is deemed reasonably implied. It contends that there is no "last chance agreement" involved herein. There is no written document, which all parties including the grievant executed present in this situation, as there traditionally has been whenever the Union agreed to a "last chance agreement". Since there is no "last chance agreement", just cause is the standard that the arbitrator must apply.

Further, the Union argues that just cause need not be implied since the Employer has agreed in recent similar cases that just cause is required under the terms of the Agreement.<sup>28</sup> Also, in a recent arbitration proceeding when the question was whether the parties' Agreement required just cause to discharge even where there was a "last chance agreement", the arbitrator concluded that the Agreement did require just cause.<sup>29</sup> Thus, there is a clear past practice for the parties to apply a just cause standard in this matter.

The Union further argues that the Employer's no-fault attendance policy is no substitute for just cause. The Union agrees that the Employer has a right to establish a reasonable attendance policy and that a "point system", in and of itself is reasonable. The Union, however, does not agree that just cause can be quantified into an eleven

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<sup>28</sup> The Union cited three recent arbitration decisions wherein the Employer agreed to a just cause standard. Teamster Local 120 and SuperValu, Inc., BMS 03-RA- 827 (Daly, 2003); BMS 04-RA-168 (Daly, 2004) and BMS 04-RA-1460 (Daly, 2005)

<sup>29</sup> Teamster Local 120 and SuperValu, Inc., BMS 06-RA- 182 (Ver Ploeg, 2006)

(11) point no-fault policy. It therefore considers the Employer's attendance policy to be a guideline or a quantitative system of monitoring attendance under normal circumstances, and not an automatic calculator that substitutes for a just cause analysis.

The Union argues further that the Grievant's situation was extraordinary in which individual treatment was necessary. The Employer's number based no-fault attendance policy cannot be equated with just cause because just cause includes individual treatment. Attendance policies are designed to look at everyday common occurrences. Being shot in the face is hardly an everyday common occurrence and the Employer would not have designed its policy to accommodate such a tragic event. In view of this, the Employer cannot go by the numbers in assessing the discharge penalty for the Grievant.

The Union states the Grievant suffers from re-occurring headaches that constitute a chronic health condition under FMLA; and at the time of his termination, the Grievant was within a month of qualifying for additional unpaid leave under FMLA. Accordingly, he would then have been entitled to intermittent leave for the times when a headache precluded him from working and or completing a shift. To be just, the Employer could have extended his unpaid leave until he qualified for FMLA leave. Based on only two occurrences from April 2, 2006 to the end of March, the Grievant would have probably had at most only a few occurrences until his FMLA leave became effective April 28, 2006.

The Union further argues that the Employer treated the Grievant disparately when he was not permitted additional unpaid leave until he became eligible for FMLA leave. The Employer had granted additional unpaid leave to employees Michael Morris, Robert Moore, Sid Gardner and Nigel Walsh. Both Morris and Walsh had worse attendance records than the Grievant and both were on "last chance agreements" when they were granted additional unpaid leave. The Employer failed to produce any evidence to rebut the Union's evidence that the Grievant was treated disparately. The un rebutted evidence is that the Employer knew that the Grievant was under treatment for headaches, which were causing him to miss work. In fact, the Employer's own exhibit [Employer Exhibit No. 21] reflects that the Grievant was missing work for a FMLA related reason, one for which he was seeking medical treatment.<sup>30</sup> The failure of the Employer to treat the Grievant in the same manner as it treated similarly situated employees deprives it of just cause for termination.

Finally, the Union argues that even assuming that the Grievant committed misconduct, the penalty imposed was not appropriate given the circumstances surrounding the Grievant's absences. It is undisputed that the Grievant was absent and left work early after he was reinstated on April 2, 2006. However, as discussed above it was because he was suffering from headaches. It is also undisputed that the Grievant was denied the opportunity given to other employees to take additional unpaid leave until he was eligible for FMLA leave. Under these circumstances assuming misconduct occurred, just cause dictates a lesser penalty.

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<sup>30</sup> A handwritten note at the bottom of the Notice of Disciplinary Action form dated January 17, 2006 that was issued by Supervisor Welna to the Grievant on January 19, 2006 states, "Kent say (sic) he has FMLA pending. He has an apt. to "See a Specialist". Kent says "Sue (Hanson) knows what is going on".

## OPINION

The parties could not agree on the issue. The Union argues that the standard of review is just cause while the Employer argues that the standard is a violation of a "last chance agreement". The Union is correct that just cause is the acceptable standard of review among arbitrators even where the contract language is silent on this standard. However, a violation of a "last chance agreement" may in and of itself constitute just cause. It is an exception to the traditional just cause standard in industrial due process. Arbitrators do not apply the same procedural and due process considerations in disciplinary matters in considering whether there is just cause for discharge or other disciplinary actions.<sup>31</sup> When the parties enter into a "last chance agreement", the Employer is empowered to carry out the consequences of said "agreement" if it can establish that the "agreement" has been violated.

The Union contends there is no "last chance agreement" involved in this matter. Contrary to this position, I conclude there is a "last chance agreement" present herein by virtue of the parties' Step 2 grievance settlement. While this "agreement" is not the traditional written and signed agreement that the Union been a party to, it nevertheless constitutes an enforceable agreement between the parties. The evidence clearly shows that the Grievant's termination of January 19, 2006 was resolved at the Step 2 January 26, 2006 grievance meeting wherein his termination was reduced to an unpaid suspension with future employment restrictions. In that meeting, the parties agreed that two future unexcused absences by the Grievant would be grounds for his immediate

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<sup>31</sup> Elkouri & Elkouri, How Arbitration Works, 5<sup>th</sup> Ed, p. 920 (1997)

termination. The Grievant also testified that both Union and Employer representatives told him that two more unexcused absences, even if they were for headaches, would be grounds for his immediate termination. Human Resource Manager Hansmann reiterated this grievance resolution to the Grievant by letter dated February 2, 2006 wherein she stated:

***This letters (sic) serves as confirmation of the agreement reached on January 30, 2006 at the Step II hearing. SuperValu management and the Local Union #120 agreed to reinstate your employment under the following conditions:***

***You must maintain acceptable attendance. Any incident resulting in two more occurrences will be grounds for termination. It is imperative that you maintain an acceptable attendance record to maintain employment with SuperValu.***

***Please do not hesitate to contact me if you should have any further questions.***

There is no evidence that the Grievant either opposed or objected to this grievance resolution: rather, the evidence clearly shows that the Grievant accepted it with the restrictions imposed. Finally, to negate the "last chance agreement" would allow the Union and the Grievant to renege on a grievance resolution and could seriously undermine the parties' negotiated grievance procedure.

In view of the foregoing, I conclude that the parties had a "last chance agreement" as a result of the Step 2 grievance resolution on January 26, 2006, that put restrictions on the Grievant's future employment with the Employer. I will, therefore, frame the issue as, "Whether the Employer had just cause to discipline the Grievant for excessive absenteeism and discharge him pursuant to the parties' "last chance agreement", and if not, what is an appropriate remedy.

Before the Employer can invoke its right pursuant to the "last chance agreement", it must sustain the burden of proof that the Grievant engaged in conduct warranting discipline. The evidence clearly established that the Grievant failed to report to work as scheduled on March 12, 2006 and left work in the middle of his shift on March 29, 2006. The Grievant testified that his failure to report to work and his early exit from work were due to headaches. The Employer treated both episodes as unexcused. The overwhelming evidence discloses that the Employer has sustained its burden of proof that the Grievant engaged in the conduct warranting disciplinary action. The Employer's action in treating the aforementioned absences as unexcused was not arbitrary, capricious, unreasonable, unfair, violated the collective bargaining agreement, or was otherwise unlawful.

The Grievant was seeking an accommodation to leave work early or not report at all every time he claimed that he had a headache. It would be unreasonable to expect the Employer to make such an accommodation especially when there was no proven medical basis for doing so.<sup>32</sup> Not reporting to work or leaving early are both unexcused absences under the Employer's attendance policy. The Employer's attendance policy in and of itself is not arbitrary, capricious, unreasonable, unfair, violated the collective bargaining agreement, or was otherwise unlawful. In fact, the Union admits that both the policy and the maintenance of the policy's point system are reasonable. The Grievant was well aware of the policy and its disciplinary provisions. He was also apprised at the January 26, 2006, Step 2 grievance resolution meeting that two more

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<sup>32</sup> Neither doctor who examined the Grievant imposed any medical restrictions on his employment status or his ability to perform his job functions.

absences even for headaches would be treated as unexcused. In addition, neither the attendance policy nor the way it was administered violates the parties' Agreement.

The absences also were not covered under the FMLA since the Grievant was not eligible for FMLA leave at the time the absences occurred.<sup>33</sup> There is also insufficient evidence to establish that the Grievant was treated disparately or unfairly when his absences were treated as unexcused. While the record indicates that certain employees may have received unpaid leave after their FMLA leave had been exhausted, some of whom had worse attendance records than the Grievant, this fact alone does not establish disparate or unfair treatment.<sup>34</sup> In fact, the evidence disclosed that the Grievant did receive a four-week extension of unpaid leave after he had exhausted his FMLA leave in 2005. There is also no evidence that these employees were similarly situated to the Grievant in terms of ailment, work record, seniority or requested accommodation.

## **CONCLUSION**

The Grievant suffered a traumatic episode in April 2005, which resulted in the loss of his right eye. It was a tragic and unfortunate event. After the Grievant's FMLA leave expired, the Employer took steps to accommodate him by extending his unpaid leave by four weeks and by working to retrain him in the operation of the forklift. The evidence disclosed that the Grievant had a history of excessive absences prior to his returning to work on September 1, 2005. After his return, he continued to have

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<sup>33</sup> The next period of eligibility for FMLA was April 28, 2006. Even assuming arguendo that he was eligible under FMLA, it is doubtful that his headaches constituted a "serious health condition" under FMLA guidelines; however, this is not within the arbitrator's authority to determine.

<sup>34</sup> The only evidence is the testimony of Business Agent Thomas Erickson. No records or testimony of Human Resource Specialist Hanson, who attended the hearing, was elicited.

attendance issues, allegedly caused by headaches that he was experiencing. His repeated absenteeism finally resulted in his discharge and reinstatement on January 26, 2006, and his final discharge on April 2, 2006. Although, the parties and the Grievant agreed to his reinstatement on January 26, 2006 with the condition that two more absences, even if they were caused by headaches, would result in his termination, he continued his pattern of absenteeism. Although, there was medical evidence that the Grievant was experiencing headaches, there were no physician authorized medical restrictions placed on his employment.<sup>35</sup> There is also no reason to believe that the Grievant's headaches constituted a "serious health condition" under FMLA. In any event, having a serious medical condition does not in and of itself insulate an employee from disciplinary action including termination.

In reality, the Grievant is seeking an award allowing him to be late or miss work whenever he alleges that he has a headache. The Employer considers attendance to be an important and essential job function and is unwilling to grant this accommodation. Allowing the Grievant or any employee to be absent from work for alleged headaches without having secured advanced physician authorized medical approval would create an unmanageable attendance policy, and further exacerbate the already high rate of absence that plagues the Employer. Finally, there is no evidence that the Agreement or state or federal law requires such an accommodation.

Based on the foregoing, I conclude that the Employer has met its burden of proof that it had just and proper cause to discipline the Grievant for unexcused absences.

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<sup>35</sup> The medical records given to the Employer on the day of the hearing reveal that both doctors believed that the Grievant's headache issue could be addressed with a combination of medication and lifestyle changes.

Having determined that the Employer had just and proper cause to discipline the Grievant, the Employer was empowered to enforce the provisions of the parties' "last chance agreement". In view of this, the grievance will be dismissed.<sup>36</sup>

**AWARD**

IT IS HEREBY ORDERED that the grievance filed in the above entitled matter be, and is, hereby dismissed

**Dated: January 4, 2007**

**In Eagan, Minnesota**

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**Richard R. Anderson**  
**Arbitrator**

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<sup>36</sup> Assuming arguendo that there was not a "last chance agreement, my ruling would be the same.