BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
CITY OF APPLETON - VALLEY TRANSIT	Case 354 No. 49550 MA-7985
and	
TEAMSTERS LOCAL #563	

Appearances:
Mr. Stephen C. Dozer, Assistant City Attorney, on behalf of the City.
Ms. Rassandra L. Cody, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., on behalf of the Union.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and the City respectively are signatories to a collective bargaining agreement providing for final and binding arbitration. The Wisconsin Employment Relations Commission designated the undersigned, a member of its staff, to hear the above-captioned matter pursuant to a request for arbitration by the parties. Hearing was held on November 16, 1993, in Appleton, Wisconsin. A stenographic transcript was made which was received on December 16, 1993. The parties completed their briefing schedule on January 11, 1994. Based on the record herein and the arguments of the parties, the undersigned issues the following Award.

ISSUE:

At the hearing, the parties stipulated to the following framing of the issue:

> Did the City of Appleton violate the collective bargaining agreement when it terminated Marlene Brosman?
> If so, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE 7

DISCIPLINE

7.1 Warning Notices

A. The Employer shall not suspend or discharge an employee without just cause and shall give at least one warning notice of the complaint against such employee to the employee in writing, and a copy of same to the Union, except that no warning notice need be given in the following cases.

1. Dishonesty.

2. Drunkenness, drinking, being under the influence or in possession of alcoholic beverages while on duty and/or on Valley Transit property or when in uniform in a public place provided, however, that the

purchase of sealed package goods while in uniform or having such beverages in a locked personal vehicle shall not be considered "possession" for purposes of this Paragraph.

3. Use of, or being under the influence or in possession of any controlled substance while on duty and/or on Valley Transit property or when in uniform in a public place, unless such substance has been legally prescribed.

4. Recklessness or endangering others while on duty.

5. Miss-outs, as defined in Article 33.5.

6. Failure to report an accident, if the driver is aware of the accident.

7. Attempted rape or sexual assault.

B. The warning notice as herein provided shall not remain in effect for more than one hundred and eighty (180) days from date of issuance, except that warning notices relating to accidents or attendance issues shall remain in effect for one (1) year and records of suspension shall remain in effect for eighteen (18) months.

7.2 Suspension or Discharge

Discharge or suspension of an employee must be by proper written notice, Certified Mail, return receipt requested, sent to the last known address of the employee, or by personal service on the employe, with a copy to the Union. Appeal from discharge must be taken within five (5) working days by written notice to the Director of Personnel and a meeting held between the Employer and the Union within fifteen (15) working days after the appeal is filed. A decision must be reached within five (5) working days from the date of this meeting.

7.3 Reinstatement

The employee may be reinstated under other conditions agreed upon by the Employer and the Union or pursuant to the terms of an arbitration award. Failure to agree shall be cause for the matter to be submitted to arbitration as provided in Article 9 of this Agreement.

7.4 Time Limits

Employees shall be notified of disciplinary action within ten (10) days of the incident or the Employer's knowledge of the incident, or in a matter relating to an accident, within ten (10) days of the decision of the Accident Review Committee. Such discipline shall

be administered starting not later than thirty (30) days from the date the employee is notified of the discipline.

OTHER RELEVANT DOCUMENTS:

VALLEY TRANSIT EMPLOYEE MANUAL

9.06 ACCIDENT/INCIDENT PROCEDURES

If an operator is involved in an accident incident, he should do or not do the following:

A. Observe the emergency procedures outlined in 9.05.

B. If there is any question about whether an accident/incident has happened or whether it needs to be reported, no matter how minor, the operator should radio a supervisor immediately and request instructions.

C. Secure but do not move the coach unless its position poses a continuing danger or unless instructed to do so by a supervisor or police officer. If his coach or the other vehicle must be moved, the operator should first chalk the positions of the tires on the road. The "yellow crayon" included in the pouch should be used as the marker.

D. Once Dispatch has been notified, a supervisor will take control of the situation. The supervisor will make the necessary decisions about bus replacement, stubbing the route, and whether or not the operator is capable of completing his shift.

E. Open the accident packet in the pouch and distribute "Courtesy Cards," making every attempt to obtain the names and addresses of as many witnesses as possible.

F. Exchange information with the other driver, including the "Insurance Information Card," and obtain all other pertinent information regarding the occurrence. This information should be noted on the "Accident Report Envelope."

G. When the supervisor arrives on the scene, he will assist the operator in collecting information, provide liaison with the police officer, and conduct an independent investigation of the accident.

BACKGROUND:

At the time of her discharge, the grievant, Marlene Brosman, had worked for the City of Appleton Transit Authority for eleven years as a city bus driver. For approximately two years prior to the incident which finally

resulted in her termination, Brosman had been experiencing difficulties on the job. She was placed on an eighteen-month probation on September 30, 1991, as a result of an accident occurring on September 24, 1991. At that time Brosman was informed that if at any time during her probationary period she was involved in any accident or incident in which she was found to be in violation of the Valley Transit safety procedures or was cited by the police for any infraction while operating a bus, she would be terminated. On December 7, 1992, she was terminated for violating safety rules as observed as part of a standard ride-along check for all city drivers.

Pursuant to an appeal form the December 7, 1992 discharge, the City reconsidered and reinstated Brosman. As a condition of reinstatement, it again placed her on probation for an additional 18 month period beginning on January 4, 1993. Brosman understood this to be a last chance arrangement. She signed the following letter specifying the agreement on December 29, 1992:

> This is to summarize the agreement reached on your appeal of your discharge. That agreement is as follows:
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> 1. You are suspended without pay for a period of one month, and will be eligible to return to duty on Monday, January 4, 1993.
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> 2. Pursuant to City policy and the labor agreement, you are responsible for payment of insurance premiums during the period of your suspension without pay. You will be contacted relative to the amount due and the method of payment.
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> 3. The probationary period you were serving at the time of the December 2 incidents will be extended for another 18 months beginning January 4, 1993.
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> 4. The terms of your probation shall be as follows:
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> a) If at any time you are involved in an accident or incident in which you are found to be in violation of any of Valley Transit's safety procedures, or are cited by the Police for any infraction while operating a Valley Transit vehicle, you will be terminated.
>
> b) Your performance will be closely monitored. This will include, but not be limited to, ride checks at the sole discretion of Valley Transit.
>
> c) You will participate in the City of Appleton Employee Assistance Program and will authorize the release to the City of Appleton of any information that has a bearing on your capability to perform the job

of bus operator. This applies to Anderson Behavioral Consultants as well as any individuals or agencies to which you might be referred.

d) If it is determined through the Employee Assistance Program, including any referrals, that you are not capable of performing the duties of a bus operator, or if you do not fully cooperate and follow all recommendations arising from the program, your employment will be terminated.

The fact that you are being given this last chance to continue your employment with Valley Transit is not to be interpreted as lessening in any way the seriousness of your actions. The City believes you made several unsafe driving maneuvers and violated Valley Transit safety procedures on December 2, 1992.

Please sign below to indicate that you have read, understood, and agreed with the agreement outlined above.

On February 25, 1993, Brosman was on route downtown transporting three other bus drivers. Her bus made contact with and moved a barricade that was in the road due to road construction. No damage was done to the bus and no injuries were sustained by the passengers. No one reported the event to management authorities.

On March 17, 1993, the City was made aware of the unreported February 25 occurrence. After preliminary inquiries, Brosman's supervisors contacted Brosman on March 18, 1993, to determine whether Brosman, in fact, hit a barricade. Initially she denied hitting the barricade or any knowledge of any accident on or around February 25. Later that same day, she did contact the City and admit that she had been involved in an accident or incident on February 25. She acknowledged striking the barricade. Brosman's failure to report the accident or incident and her initial denial were motivated out of her fear that she would lose her job if the City became aware of the event.

On March 23, 1993, Brosman was again discharged for dishonesty, failing to report an accident, failing to follow Employee Manual accident/incident procedures, and for failure to abide by the terms and conditions of her probation set forth on December 29, 1992. As part of the last chance agreement, Brosman was subject to termination if she was involved in an accident or incident in which she violated Valley Transit's safety procedures, or she did not cooperate and follow all recommendations arising from the Employee Assistance Program (EAP).

POSITION OF THE PARTIES:

City

According to the City, Brosman at hearing conceded that she had violated Sections 7.1 A(1) and 7.1 A(6) of the collective bargaining agreement, Section 9.06 of the Employee Manual, and Section 4(A) of the terms of her probationary period as set forth in the letter dated December 29, 1992. She did not dispute being dishonest; she did not dispute failing to report an

accident; and she did not dispute failing to call a supervisor and securing the coach after an accident or incident. The only allegation with which the grievant did take issue is the fourth allegation regarding not fully cooperating with or following the EAP recommendations.

Even assuming for the sake of argument that Brosman did in fact comply with the EAP's recommendations, this does not vitiate the fact that she knowingly and willfully violated the terms of the labor agreement and the Employee Manual. It notes that the Union has not claimed misapplication of the collective bargaining agreement, but rather fear on the grievant's part of losing her job.

Concurring with the Union that there is little doubt that Brosman was in a stressful situation due to her working pursuant to a Second Last Chance Agreement, the City nevertheless, maintains that to find that a probationary employe may violate the terms of a bargaining agreement would be absurd.

According to the City, the Union's grievance should be denied because Brosman had admitted that she violated the terms and conditions of the Last Chance Agreement. The issue here is not whether Brosman can articulate her underlying motivational factors, but whether the City had cause to discharge her. The City stresses that neither the Union nor Brosman has presented any evidence that the City has violated the agreement by its termination of Brosman. It requests that the grievance be denied in its entirety.

Union

According to the Union, the City did not discharge Brosman for just cause and she is therefore, entitled to reinstatement. The Union maintains that the City has not established that Brosman did not comply with the recommendations of her Employee Assistance Program Counselor by clear and convincing evidence. The Union insists that the City's sole contention is that Brosman did not attend enough counseling sessions because she did not attend them three times a week. Brosman's unrebutted testimony establishes that she was never given an specific directive as to the frequency of the sessions which she was required to attend and could only attend once a month due to financial constraints. Based upon these facts, it is clear, in the Union's view, that the City failed to prove that Brosman did not follow the recommendations of her EAP counselor. Therefore she was improperly discharged for lack of just cause on this basis.

The Union also argues that Brosman is not guilty of failing to report an accident under Section 7 of the collective bargaining agreement because she was not involved in an accident, but rather an incident. It contends that the City has failed to prove that she was involved in an "accident." Stressing that the Employee Manual distinguishes between an "accident" and an "incident", the Union argues that given that road conditions were not optimum while Brosman was driving on February 25, it is reasonable to conclude that Brosman could not have avoided contact with the barricade. Because the City did not present any concrete evidence that the occurrence on February 25, was definitely an accident, this factor is not a justifiable basis for discharge.

Finally, the Union claims that the penalty of discharge is too severe. It cites the following case as arbitral precedent: "the line must be drawn between employee inadequacies and other deficiencies which are basically the result of an employee's overall or momentary inability to comprehend...the necessities of the situation. In short, there are errors which are the result of willfulness, and error which are the result of faulty judgment exercised in good faith by the employee....In cases involving error of judgment, where the

good faith of the employee is not in question, correction, yes -- but punishment, no!" 1/ Although the Union acknowledges that Brosman initially denied hitting the barricade, it submits that she rectified her mistake that same day and this denial, is not a part of a pattern or history of dishonesty.

The Union suggests that the incident of hitting the barricade is not serious enough in nature to warrant discharge. Because there were no passengers on the bus except for the three co-workers, and there was no damage to the bus or injury to any rider, no discipline should have been issued. It points to the case of another driver who hit a barricade and received no discipline.

According to the Union, while it is arguable that Brosman exercised poor judgment in not reporting the incident immediately and denying its occurrence when first confronted by the City, these are not the actions of an employe who has repeatedly been dishonest with the City or failed to follow safety procedures in reporting accidents or incidents. Rather, they were the type of initial panic actions that can be reasonably expected when an employe fears that he or she will be terminated.

The Union respectfully requests that the grievant be reinstated to her former position with full backpay and other benefits.

DISCUSSION:

The facts in this matter with the exception of whether or not the grievant complied with the EAP counselor's recommendations are essentially undisputed. Because Brosman was operating under her Second "Last Chance" letter which reinstated her but placed her on a very restrictive probation, it must be concluded that the City gave her adequate warnings and opportunities to correct her driving performance prior to her discharge.

Even assuming that no previous warnings were given, Article 7.1 A.(1) and (6) provide that no warning notice needs to be given in the case of dishonesty or failure to report an accident, if the driver is aware of the accident. Where, as here, the allegations are serious in nature and enumerated in the collective bargaining agreement, the undersigned finds that the parties have agreed that prior warning is unnecessary under the circumstances.

It is undisputed that Brosman knew that she hit the barricade on February 25, 1993, and deliberately failed to report it. She acknowledges as much, reasoning that she would have been terminated at that time for violating the terms of the December 29 Last Chance letter. Brosman also asked certain of her co-workers not to report the incident or accident. This action on her part is both dishonesty and failure to report an accident/incident when the driver is aware of the accident.

The Union seeks to distinguish between an accident and an incident maintaining that hitting the barricade under the circumstances was an "incident" which did not rise to the level required in Article 7.1 A(6). The flaw in this argument is that it is the supervisor who is notified about the occurrence who makes a determination as to whether the occurrence is an accident or an incident and what type of report is required pursuant to Section 9.08 of the Employee Manual. Because Brosman never notified her supervisor, no such determination could be made so that she can not now claim that the

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1/ General Telephone Co. of California, 44 LA 669, 672 (Prasow, 1965).

occurrence did not rise to the level of an "accident" as provided in the agreement. To hold otherwise would reward the grievant for failing to report the occurrence in the first place.

The Union also argues that the City failed to prove that Brosman did not comply with her EAP Plan. The undersigned cannot find that the city has met its burden of proof with respect to this single allegation. She, nevertheless, concludes that the City had sufficient grounds to justify the discharge based upon Brosman's failure to report the occurrence on February 25, 1993, in which she was involved and her false representation to management on being confronted with the incident on March 18, 1993. In view of the Last Chance letter under which she was reinstated, it must be concluded that the City exercised the appropriate progressive discipline under the circumstances.

The Union argues that the penalty of discharge is too severe. Because Ms. Brosman did not inform her supervisors as to the February incident with the barricade, their decision to discharge her is not unreasonable under the instant facts especially when the two Last Chance letters are taken into consideration. In light of Brosman's initial behavior on March 18, 1993, this arbitrator declines to substitute her judgment for that of the City. Accordingly, it is my decision and

AWARD

That the City had just cause to discharge Marlene Brosman and did not violate the collective bargaining agreement when it terminated her.

That the grievance is denied and dismissed in its entirety.

Dated at Madison, Wisconsin this 24th day of January, 1994.

By Mary Jo Schiavoni /s/
Mary Jo Schiavoni, Arbitrator