BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS UNION LOCAL 695

and

THE CITY OF MADISON
(MADISON METROPOLITAN TRANSIT SYSTEM)

Case 211
No. 57215
MA-10553

(Termination of G.H.L.)

Appearances:

Mr. Larry W. O'Brien, Assistant City Attorney, Office of the City Attorney, City of Madison, City-County Building, Room 401, 210 Martin Luther King, Jr. Boulevard, Madison, Wisconsin 53709, appeared on behalf of the City.

Ms. Andrea F. Hoeschen, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 1555 North Rivercenter Drive, Suite 202, P.O. Box 12993, Milwaukee, Wisconsin 53212, appeared on behalf of the Union.

ARBITRATION AWARD

On January 22, 1999, Teamsters Union Local No. 695 and the City of Madison requested that the Wisconsin Employment Relations Commission appoint William C. Houlihan, a member of its staff, to hear and decide a grievance pending between the parties. Hearing on the matter was conducted on May 5, 1999, in Madison, Wisconsin. A transcript of the proceedings was made and distributed by May 17, 1999. Post-hearing briefs were submitted and exchanged. Reply briefs were waived by letter of July 22, 1999.

This Award addresses the termination of employe G.H.L., for her off-duty conduct during a period of time in which she received Worker's Compensation benefits.

BACKGROUND AND FACTS

G.H.L., the grievant, has been employed by the Madison Metropolitan Transit System since May, 1984. The grievant has been a bus driver for the last several years. In 1992, the grievant was terminated from employment at Madison Metro for presenting false and/or altered medical leave notes. The grievant was terminated by a letter which included the following paragraph:

> It has been established that you knowingly and repeatedly submitted fraudulent and altered medical documentation, during the period from January, 1991 to August, 1992, in order to substantiate your application and receipt of sick leave benefits. The fraudulent appropriation of sick leave benefits, by an employe of Madison Metro, cannot and will not be tolerated. Your actions subject you to termination under Article 23.2(D) of the labor agreement.

On November 11, 1992, the grievant was reinstated to her employment pursuant to the terms of a last chance agreement. That agreement included the following provisions:

> . . .
>
> Investigation has revealed that Ms. H. altered a valid medical certification of illness. Ms. H. submitted various versions of the altered document to the employer on numerous occasions to validate claims for sick leave pay and was in fact paid sick leave benefits for dates certain in 1991 and 1992. . .The parties desire to avoid further litigation and agree to the following enumerated terms and conditions as an alternative to the letter of termination dated October 9, 1992.
>
> (1) The letter of termination dated October 9, 1992 shall be rescinded and replaced with a letter of disciplinary suspension. . .
>
> (2) The disciplinary suspension is to be served without pay for a period of thirty-one (31) calendar days commencing on and retroactive to October 1, 1992.
>
> (3) Ms. H. will be returned to work on Monday, November 2, 1992 without loss of seniority.

(4)

(a) Upon returning to work, Ms. H. shall serve in the position of Transit Information Specialist I. Ms. H's. salary shall be that of the Transit Information Specialist I. . .

(b) Ms. H. shall serve in this position for a period of six (6) calendar months. Prior to the end of the six (6) month period, the employer will conduct a complete performance review of Ms. H., including, but not limited to, job performance, attendance (both days worked and timeliness in reporting), and abilities. If she successfully passes the performance review, she shall be afforded the opportunity to return to a Motor Coach Operator position when the next authorized vacancy occurs in accordance with number (5) below. In the event she does not successfully pass the performance review, her employment shall be terminated without recourse to the arbitration provisions of the labor agreement. Unsatisfactory performance during a probationary period shall result in termination prior to the end of the six (6) month period.

(5)

(a) In the event that Ms. H. receives a successful performance review as set forth in number (4) above, she shall be returned, without loss of current Motor Coach Operator seniority, to the position of full-time Motor Coach Operator when the next authorized vacancy occurs. This shall not occur any sooner than six (6) months from November 2, 1992.

. . .

(c) Ms. H. shall serve in a special probationary status for a period not to exceed twelve (12) calendar months. Prior to the end of the twelve (12) month period, the employer will conduct a complete performance review of Ms. H., including, but not limited to, job performance, attendance (both days worked and timeliness in reporting), and abilities. If she successfully passes the performance review, she shall continue in the position of full-time Motor Coach Operator. In the event she does not successfully pass the performance review, her employment shall be terminated without recourse to the arbitration provisions of the

labor agreement. Unsatisfactory performance during the probationary period shall result in discharge prior to the end of the twelve (12) month period.

(6)

(a) During the time period described in numbers (4) and (5) above, the employer shall have the right to request that Ms. H. provide medical documentation to justify any absence (other than vacation, floating holiday and jury duty).

(b) Performance reviews referred to in numbers (4) and (5) of this agreement shall not be performed in a discriminatory, arbitrary or capricious manner.

(7) In the event any time subsequent to November 2, 1992, Ms. H. is charged with and found guilty of willfully and knowingly supplying the employer with false, fraudulent, altered or forged information or certifications, it shall be deemed sufficient cause for discharge without recourse to the arbitration provisions of the labor agreement.

It was the testimony of Paul Larrousse, Transit General Manager, that during the course of the negotiation of the last chance agreement the grievant indicated that she would be a model employe, and that the employer would never again see any action along these lines. Larrousse further testified that the grievant indicated that whatever city procedures were out there, the city could rest assured that the grievant would follow them. Larrousse further indicated that the grievant indicated that the city would never again see an altered doctor's excuse, and that whatever the doctor said, the grievant would have to do.

The grievant did return to work, and since 1992 worked as a bus driver. In August of 1997, the grievant suffered an injury to her right shoulder. The injury was compensable under Worker's Compensation. As a consequence of this injury, the grievant missed ten partial days of work in August, 1997. She missed 14 partial days in September of 1997. She missed fourteen full days and seven partial days of work in October. In November, the grievant missed 16 partial days of work. In December, she missed 12 partial days of work. In January, 1998, the grievant missed 10 partial days of work. In February, the grievant missed 20 full days of work. In March, she missed two full days, and was thereafter released to return to work.

The grievant was treated by Dr. Diana Kruse. The grievant's treatment and work schedule were made in conjunction with the treatment provided by Dr. Kruse. The grievant visited Dr. Kruse on a number of occasions to be treated. Two of those occasions, November 4 and December 9, 1997, are particularly noteworthy. Kruse wrote the following letter, dated March 20, 1998, summarizing her treatment of the grievant:

> G.H. was seen on 12/9/97 for work-related injuries to her right shoulder girdle, shoulder, neck and lower back. The right shoulder girdle and neck problem have been long-standing. The low back problem began in August of 1997, improved over a several week period, and then increased again in August of 1997, as reflected in my 10-7-97 office note. She returned to work part-time on or about 10-22-97. When seen on 11-4-97, her low back problem was improving and on or about 11/11/97, she was increased to six hour workdays, continued in therapy as this was helpful in decreasing her low back symptoms.
>
> On the 11-4-97 visit, bowling was discussed, and I indicated bowling was not appropriate at that time, so as not to stress her low back and added in the 12-9-97 office visit that it would be best to wait until she had been working full-time for several weeks such as January, since she returned to full-time on or about 12-15-97. My understanding is that G. tried bowling in her back support in December and did not have adverse reaction to that with respect to low back pain. Since she bowls left-handed, this does not stress her right shoulder and shoulder girdle problem.
>
> When seen on 1-27-98, G. again had increased back pain after working a 10-hour day on Martin Luther King day. Her back exam and symptoms were significant at that visit, an MRI of the lumbar spine was ordered and done on 1-30-98, showing a disc protrusion at L-5-S1. Subsequently, an ESI was done on 2-9-98, and the patient was kept off work to maximize effect from injection and instructed to gradually increase activity as tolerated. She did this, and on 3-3-98 was given a return to work full-time.

The grievant testified that she could not recall a discussion relative to bowling at the November 4 visit. It was her testimony that she did not bowl much during the month of November, 1997.

Dr. Kruse's December chart notes contain the following reference to bowling:

> "G. wonders about trying bowling. Specifically, I indicated that it would best to wait until she has been working full-time for several weeks and at least waiting until January prior to trying some bowling.

> With respect to a healing plateau as questioned by Chris Zimdars, the rehabilitation consultant associated with G.'s case, I would not anticipate a healing plateau prior to another three to four months. G. is going to be seen again on 1-27-98 for a follow-up check."

Dr. Kruse's notes relative to the December discussion is consistent with the testimony of the grievant.

The grievant bowls recreationally. Notwithstanding her injury, the grievant bowled in the fall and through the winter. She bowled in a weekly league on Tuesdays, and also bowled in yet another league every other Sunday. She wore a brace to support her back while bowling. The grievant, who suffered a right shoulder injury, bowls left-handed. It was her testimony that when she experienced discomfort, she would refrain from bowling. The grievant acknowledged that the doctor advised her it would be better to wait. She denies the doctor ever directed or ordered her not to bowl, or that the doctor used the term "inappropriate" in describing her bowling.

The grievant bowled in the open. She made no effort to conceal the fact that she was bowling. Co-workers, including the secretary of the General Manager, were members of one bowling league. It was the grievant's testimony that Jane Warncke, the adjuster for Crawford and Company, a Worker's Compensation administrator for the city, called in December of 1997, and asked her if she was bowling. The grievant responded that she previously bowled, and that she was again in a bowling league. According to the grievant, there was no subsequent follow-up telephone call from Warncke or anyone else.

In late January/early February, a co-worker of the grievant's, evidently aware that she was receiving Worker's Compensation, approached the employer with information that the grievant was bowling. That person, or another co-worker, videotaped the grievant bowling, and provided the videotape to the employer. The videotape was made during a time frame in which the grievant was off work due to an exacerbation of her Worker's Compensation injury.

By letter dated March 3, 1998, the grievant was advised as follows by Crawford and Company:

. . .

> Please be advised that we have information which indicates that you have chosen not to follow the treatment plan specified by your treating physician. Therefore, we must inform you that no temporary disability can be authorized beyond the date of this letter.

On that same day, March 3, 1998, the grievant received a letter from her employer advising her of the following:

> You are hereby placed under investigation for receiving Worker Compensation benefits under a fraudulent pretense.
>
> Madison Metro is in receipt of information which indicates that you were receiving Worker Compensation benefits while participating in activities in direct contradiction to your physician's recommendations. If this information is found to be accurate, your actions may be in violation of Article 22(D) of the labor agreement between the City of Madison and Teamsters Union Local No. 695 and may subject you to disciplinary action.
>
> You will be advised of the outcome of this investigation. . .

Following the issuance of these two documents, a pre-determination meeting was conducted in order to elicit information relative to the grievant's bowling. The grievant did not deny her bowling. The meeting adjourned with an understanding that the grievant would consult Dr. Kruse to present the employer with information seeking to clarify whether or not her bowling exacerbated her injury. The document referenced above was Dr. Kruse's response.

The grievant was sent for an independent medical examination, which took place on May 13, 1998. The grievant testified that the examination took approximately five minutes. The report is an eight-page report prepared by orthopedic surgeon Stephen Weiss. Two of Dr. Weiss' responses to specific questions are noteworthy. Dr. Weiss was asked:

> Q: What is the relationship, if any, of the recent low back pain to the August, 1997 work incident?
>
> A: For the reasons stated above, I do not believe that Ms. H.'s low back pain, even though it was present on August 22, 1997, was either caused or aggravated by the work incident in question. . .
>
> Q: Given the nature of Ms. H.'s injury, was she capable of bowling during her recovery?
>
> A: Considering the nature of her shoulder injury, I would not have recommended that she bowl during recuperation. . .

The grievant was subsequently terminated by the following letter, dated August 31, 1998:

> The City of Madison has concluded its investigation regarding your conduct in use of Worker's Compensation benefits and your subsequent failure to follow the doctor's directions designed to facilitate healing.
>
> On November 11, 1992, the City of Madison and Teamsters Union Local 695, and yourself, entered into a Memorandum of Understanding. This Memorandum of Understanding returned you to work after you had been terminated for submitting various versions of altered documents to receive sick pay. The Memorandum of Understanding that you signed contained the following clause:
>
> > 7. In the event any time subsequent to November 2, 1992, Ms. H. is charged with, and found guilty of willfully and knowingly supplying the employer with false, fraudulent, altered, or forged information or certifications, it shall be deemed sufficient cause for discharge without recourse to the arbitration provisions of the labor agreement.
>
> When this Memorandum of Understanding was signed, the employer, union, and yourself discussed the consequences of what would happen if you subsequently were found to have violated the terms of the Memorandum. In responding to this, you indicated that you understood that you had to properly submit certifications and comply with all of the restrictions that were contained therein. You indicated that you would be a "model" employe.
>
> On November 12, 1997, you were seen by Dr. Diana L. Kruse, M.D., for a Worker's Compensation claim. You applied for, and received Worker's Compensation benefits as a result of this doctor's appointment. Part of the certification that Dr. Kruse submitted, it was indicated that you would be able to work six (6) hour days on split shifts. Dr. Kruse's chart notes contained this further notation:
>
> > "G. wonders about trying bowling. Specifically, I indicated that it would best to wait until she has been working full-time for several weeks and at least waiting until January prior to trying some bowling."

At your pre-determination hearing, you admitted you knew of that notation.

The City of Madison has obtained documentation that you did not follow the doctor's restrictions. You bowled in two bowling leagues during the month of December, which indicates that you did not follow the doctor's directions contained above. You admitted at the hearing that you had bowled in December. By submitting Worker's Compensation documentation that contained restrictions on the work you were to perform, you agreed to abide by these restrictions. You ignored your doctor's recommendations, which were part of the stipulations under which the Worker's Compensation payments were provided.

Based upon the information that the City has received and which you have admitted is accurate, it is clear that you did not follow your doctor's recommendations. This constitutes behavior that is not in accordance with, or acceptable under the Memorandum of Understanding of November 11, 1992, and its intent. In the instant circumstance, you have falsely submitted information to obtain benefits from the City.

Therefore, in accordance with the Memorandum of Understanding that was previously signed, your employment is hereby terminated.

Respectfully,

Paul J. Larrousse /s/
Paul J. Larrousse
Transit General Manager

ISSUE

The parties stipulated the following issue:

Was the grievant discharged for just cause? If not, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 8

GRIEVANCE AND ARBITRATION

. . .

8.4 The Arbitrator shall have no power to change, modify or add to, or detract from any of the terms of this agreement. The award of the Arbitrator within the term of authority conferred upon him/her by this Agreement shall be final and binding upon both parties. Any question of excess of authority, fraud or arbitrary action, shall be subject to the usual legal remedies.

8.5 The Arbitrator's decision may or may not be retroactive as the equities of the case may demand, but in no event shall any award with respect to backpay, in discharge or suspension cases, be retroactive more than ten (10) days before the date on which the grievance was first presented in writing in Step 1 above. In the case of a discharge or disciplinary layoff grievance, the arbitrator shall have the power to uphold the action taken by the employer, or to, return the grievant to his/her employee status with or without restoration of backpay, or mitigate the penalty as equity suggests under the facts. . .

ARTICLE 22

DISCIPLINE

22.1 The employer shall not discipline any employee without just cause.

22.2 Discharge shall be only after written warning notices to the employee with a copy to the Union except for the following serious offenses:

a. Failure to stop for railroad crossings as required by law and employer policy. This provision applies equally to all shop and operator employees.

b. Conviction of morals offense making the employee unacceptable to the public as a bus operator.

c. Performing assigned duties while under the influence of, or use of, or in possession of controlled substances or alcohol.

d. Theft or embezzlement.

e. Other misconduct of a serious nature acted on by the employer and agreed upon by the union after its investigation.

f. Permitting unauthorized person to perform operating duties.

g. No-show for work for two (2) consecutive days or more without notice to the Employer except where the notice cannot reasonably be given.

h. Fighting (physical contact) on employer premises or while on duty.

i. Operating a bus with knowledge of revoked Commercial Motor Vehicle License required by state law and failure to notify employer of revoked status.

j. Willful damage to employer's property.

k. Possession of a firearm, bow and arrow, or any instrument designed specifically to do bodily harm.

. . .

POSITIONS OF THE PARTIES

The Employer notes the stipulated issue presented for decision and contends that, fleshed out, the issue becomes did the grievant's bowling, intentionally undertaken contrary to the specific directions of her treating physician, constitute a violation of the Memorandum of Agreement entered into between the parties in November of 1992? The Employer concludes that the answer is yes. The Employer construes that Agreement and the grievant's contemporaneous comments to provide that she would do nothing which would result in any receipt of City benefits to which she was not entitled.

In its argument, the Employer relies heavily upon the grievant's proffered statement that she would do nothing similar in the future, that she would be a model employe, and that whatever the doctor said that she would have to do, she would. The employer relies upon Larrousse's hearing testimony in so contending. It is the Employer's view that the grievant's promises in this regard were an integral part of the basis of the settlement leading to the last chance agreement and Larrousse's corresponding willingness to allow her reinstatement. It is the Employer's claim that Larrousse relied upon her promise in agreeing to the last chance agreement. It is the Employer's contention that the grievant's words, as testified to by Larrousse, are as much a part of the MOA as if they were written out as a part of that document.

The Employer contends that the Union's claim that the MOA is invalid due to a lack of time limit, is without merit. The Employer acknowledges that the document has no end point, but asserts that during the course of the discussion leading to the creation of the document, there was no discussion as to how long it would survive. It is the Employer's view that neither the Union nor grievant can now be heard to complain about the lack of time limit for the application of this bargain.

The Employer points to the two doctor's cautions about bowling, and contends that the doctor was concerned that the grievant not exacerbate her injury by bowling. The Employer goes on to contend that the concern for the grievant's back problem which led to the instruction became real when, in January of 1998, the back pain increased. The grievant attributes her problem to working a 10-hour workday, but, contends the Employer, the grievant did not tell her doctor that she had been continually bowling against instructions during the recuperative time. The Employer believes it is reasonable to infer that the grievant did exacerbate her back problem by bowling, and may have extended her return to work.

It is the Employer's view that by bowling, the grievant risked injury to her back and to her shoulders and neck. This is the very risk her doctors seek to avoid. It is the Employer's view that the grievant mislead her doctor about the extent of her bowling, and by choosing to ignore her doctor's instructions, the grievant has been fraudulent in her dealings with her doctor and with her employer. Her actions are contrary to the words, the spirit and the intent of the MOA and to her own promises made to secure her reinstatement.

The Employer believes that actual proof of exacerbation of injury is not the point of this proceeding. The Employer contends that the critical factors which must cause this grievance to fail are the grievant's conduct throughout, and the undeniable fact that she broke her promise to follow each and every one of her doctor's instructions and restrictions and that she did so knowingly and intentionally.

It is the Union's view that there is no just cause for the termination of the grievant. It is the Union's conclusion that what the City has done is to simply question the grievant's judgment in bowling, while she suffered from a medical condition.

It is the Union's view that the last chance agreement is invalid. The document was executed on November 11, 1992. Almost six years later, the grievant was terminated for allegedly violating the Agreement. The last chance agreement purports to bind the grievant to its standards forever, and permanently deprive her of the just cause protection of the collective bargaining agreement. The Union cites authority for the following propositions: like any other contract, a last chance agreement must have a term; and, in the absence of a term, it is incumbent upon the Arbitrator to insert a reasonable duration for the Agreement. The Union contends that nine months, the period that warning notices survive, would be a reasonable time period for the last chance agreement. In summary, it is the position of the Union that the last chance agreement should be deemed to have expired.

Assuming, for purposes of argument, the last chance agreement is operative, it is the Union's position that the grievant did not violate that agreement. The agreement makes no reference to complying with doctor's medical recommendations. Compliance with medical restrictions was not one of the reasons for the grievant's termination in 1992. Medical restrictions were not even an issue in the 1992 termination. The issue in 1992 was falsifying medical documents, and the Employer does not allege that the grievant has submitted any false medical documents in 1997 or 1998. At most, the City has charged the grievant with exercising questionable judgment by bowling. Neither bowling nor questionable judgment violates the terms of the MOA.

The Union contends that the Employer lacks just cause to terminate the grievant. Bowling does not constitute just cause for discharge. There is absolutely no evidence that bowling exacerbated the grievant's shoulder. On December 9, 1997, Dr. Kruse predicted that the grievant would reach a healing plateau in three to four months. Not quite three months later, the grievant secured a full release to return to work. The Union contends that the grievant was very conscientious about her recovery, despite bowling. She did not bowl with her injured shoulder, she refrained from bowling when she felt pain, she always wore a back brace, and she diligently attended her medical appointments.

The Union points to other employes and contends that the Employer treated the grievant more harshly than other employes who violated medical restrictions.

DISCUSSION

I believe the last chance agreement continues to exist, and controls the disposition of this proceeding. That agreement has no termination date. Had the parties wanted a terminal date, they were in a position to insert one at the point of the document's creation. The Union claims this could be a contract without end, i.e., running in perpetuity. That is not the case. This grievant will someday quit or retire. Her severance from service will terminate the agreement. In the alternative, circumstances may dictate that these parties, or an arbitrator, declare it at an end. Such circumstances are not present here. Six years passed since the creation of the document. That is admittedly a long period of time. However, the context is the fraudulent behavior described in the memorandum of understanding (MOA). What survives of the memorandum of understanding is paragraph 7. Given the limited scope of paragraph 7, and the behavior described, I do not believe it to be particularly onerous or oppressive to hold the grievant to that standard six years after execution of the last chance agreement.

I believe that the last chance agreement governs this proceeding. That is what the discharge letter says. The MOA modifies the contractual just cause provision as applied to the grievant under certain circumstances. The employer does not here contend that her behavior offends the collective bargaining agreement's just cause provision; rather, it is alleged to violate the MOA.

The Union contends that the grievant has been subjected to disparate treatment. Certain examples were offered which I do not believe to be persuasive. The circumstances described were very different from that involving the grievant. The employes involved had no history paralleling that of the grievant with the employer. Where applicable, the MOA creates a standard which subjects the grievant to an analysis significantly different from that enjoyed by her co-workers.

I do not believe that the last chance agreement was violated. The grievant did not willfully and/or knowingly supply the employer with false, fraudulent, altered or forged information or certification. The employer must establish this to be the case for its behavior to be measured against the memorandum of agreement, as opposed to the just cause provision of the collective bargaining agreement.

What the grievant did was to bowl, contrary to the advice of her physician. While that may reflect a poor exercise of judgment on her part, it does not begin to rise to the level of behavior described by paragraph 7 of the MOA. The grievant bowled openly. She did so in the presence of co-workers. That fact is relevant in light of paragraph 7's focus on willful misrepresentation.

The employer argues that I should infer that the grievant exacerbated her back problem by bowling. I am not willing to do so. There is nothing in the record that supports such a finding. The parties to this proceeding had access to the treating physician and the independent medical examiner. Neither of those doctors has so indicated.

The employer relies heavily upon Larrouse's testimony relative to the grievant's assurances surrounding the last chance agreement. Whatever was said was not incorporated into the written terms of the agreement. It thus stands like the rest of the puffery that surrounds negotiated agreements.

The employer contends that representations made should be treated as if they were a part of the MOA. I am not willing to do so. Paragraph 7 is explicit in carving out an area of conduct that is exempt from the collective bargaining agreement's just cause provision, and grievance arbitration protection. The representations attributed to the grievant are vague, general, and sweeping. To incorporate them into the MOA requires me to determine if the grievant has been a "model employe", whether the grievant has followed "whatever procedures the City requires", and/or whether or not the grievant has done "whatever" her doctor says. To give full effect to these behavioral standards reads all meaning out of the words the parties used in crafting the memorandum of agreement. If the words testified to by Larrouse form the standard of review, paragraph 7 has no meaning.

AWARD

The grievance is sustained.

REMEDY

The employer is directed to reinstate the grievant and to make her whole for any lost wages and/or benefits she suffered as a consequence of the termination. The employer is free to offset its obligation under this award by any interim earnings the grievant may have earned during the period since she was terminated. I will retain jurisdiction over this matter for purposes of resolving disputes as to remedy. Absent a request to extend my jurisdiction, I will consider my jurisdiction terminated February 1, 2000.

Dated at Madison, Wisconsin this 27th day of December, 1999.

William C. Houlihan /s/

William C. Houlihan, Arbitrator

WCH/gjc
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