BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 796, AFSCME, AFL-CIO

and

CITY OF OSHKOSH

Case 361
No. 66700
MA-13602

Appearances:

Mary Scoon, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Tony Renning, Attorney at Law, Davis & Kuelthau, appearing on behalf of the City.

ARBITRATION AWARD

The Union and Employer named above are parties to a 2004-2006 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties asked the Wisconsin Employment Relations Commission to appoint the undersigned to hear and resolve the grievance of B__ W__. A hearing was held on March 27, 2007, in Oshkosh, Wisconsin, at which time the parties were given the opportunity to present their evidence and arguments. The parties completed filing briefs on June 12, 2007.

ISSUE

The parties did not agree to the framing of the issues. There are a couple of issues. First, the City has raised the issue of whether this grievance is subject to the grievance procedure in light of the last chance agreement. Secondly, the issue is whether the City has cause as defined in the last chance agreement to terminate the Grievant, and if not, what is the remedy?

BACKGROUND

The Grievant started working for the City as a seasonal employee in the Street Department about 15 years ago, and became a full-time employee in 1994 in the Sanitation Department, driving a garbage truck. She transferred to the Street Division in 1999 and became an Equipment Operator II. She was terminated in July of 2005. Subsequently, there was a vacancy in the Equipment Operator II position, and the Grievant applied for the job. The City determined that she had the best qualifications for the job and rehired her with a last chance agreement, which states:

> **THIS LAST CHANCE AGREEMENT** (hereinafter the "Agreement") is entered into by and between the **CITY OF OSHKOSH** (hereinafter the "City") and **OSHKOSH CITY EMPLOYEES UNION, LOCAL 796, AFSCME, AFL-CIO** (hereinafter the "Union") and **B__ W__** (hereinafter "W__"), and in exchange for mutual consideration, the parties hereto agree as follows:
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> 1. On or about June 23, 2005, W__ lost her Commercial Driver's License (CDL). W__ was eligible to regain her CDL on or about May 18, 2006. A valid CDL is a requirement of being an Equipment Operator II in the City of Oshkosh. The City terminated W__ on or about July 20, 2005, because she did not have a valid CDL.
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> 2. The City agrees that in consideration for entering into this Agreement, it will reinstate W__ to a vacant Equipment Operator II position. W's reinstatement shall be effective June 26, 2006. Reinstatement is subject to all of the terms and conditions set forth herein as well as the terms and conditions set forth in the Collective Bargaining Agreement between the City and the Union.
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> 3. W__ was terminated by the City on July 20, 2005 because she could not perform the essential functions of her job as an Equipment Operator II. W's reinstatement is based upon a voluntary settlement of claims, for which each party hereto received valuable consideration, made possible by a vacant Equipment Operator II position.
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> 4. W__ has obtained an Alcohol and Other Drug Abuse (AODA) Assessment from Winnebago Behavioral Health Consultants and agrees to release the findings of said Assessment to the City. W__ has successfully completed the recommended in-patient treatment program, has obtained out-patient counseling and, further, agrees to participate in and abide by any other recommendations provided in said Assessment. The City shall not be responsible for any costs; except insofar as such expenses may be covered and payable to W__ or on her behalf as a result of her future participation in the City's health insurance plan (as permitted). W__ agrees to obtain a release from the provider indicating that she is able to return to work prior to her reinstatement.

5. From the date of W's reinstatement and for the duration of her employment with the City, W__ agrees to refrain from any involvement in any alcohol-related incident(s) including, but not limited to, failure to report for work because of the use of alcohol, being at work under the influence of alcohol or any off-duty incident involving alcohol that results in W__ being issued a citation of any type. In the event W__ becomes involved in any alcohol-related incident(s), such conduct shall be "cause" for immediate discharge pursuant to Article VIII of the Collective Bargaining Agreement between the City and the Union.

W__ and the Union agree that should the City exercise its rights under Paragraph 5, such action shall not be subject to the Grievance Procedure of the Collective Bargaining Agreement between the City and the Union.

6. From the date of W's reinstatement and for a period of three (3) years thereafter, W__ agrees to serve a last chance period. During this period of last chance, W__ agrees that in the event her conduct violates the City of Oshkosh Employee Handbook, the City of Oshkosh Personnel Policy Manual or any Work Rules in effect in the Public Works Department, Street Division, such conduct shall be "cause" for immediate discharge pursuant to Article VIII of the Collective Bargaining Agreement between the City and the Union.

During the period of last chance, W__ and the Union agree that should the City exercise its rights under Paragraph 6, such action shall not be subject to the Grievance Procedure of the Collective Bargaining Agreement between the City and the Union.

7. W__ and the Union agree not to file any claims, grievances and/or complaints pertaining to this Agreement.

8. All parties agree that they are entering into this Agreement with the understanding that W__ does and will continue to possess a valid CDL (without restriction(s)) upon her reinstatement. Should W__ not have a valid CDL (without restriction(s)) upon her reinstatement, such situation shall be "cause" for immediate discharge inasmuch as W__ will lack the ability to perform the essential functions of her job as an Equipment Operator II. W__ and the Union agree that such action shall neither be subject to the Grievance Procedure between the City and the Union nor the basis of any other claim or complaint.

9. W__ acknowledges that she possesses an occupational driver's license with restrictions (ignition interlock device). W__ further acknowledges that from time to time the essential functions of the Equipment Operator II position require that she operate vehicles that require an occupational driver's license or driver's license but not a CDL. W__ agrees that until such time as her driver's license is reinstated without restrictions, she shall refrain from operating any and all vehicles requiring an occupational driver's license or driver's license but

not a CDL for employment-related responsibilities. To this end, the City hereby agrees to accommodate W__ (on a non-precedent or practice setting basis) as necessary. However, until such time as W's driver's license is reinstated without restriction(s), W__ shall not be eligible for overtime assignments.

10. All parties agree that they are entering into this Agreement voluntarily and that they have had full opportunity to review this Agreement with a representative of their choice and that the terms are final and binding.

On November 16, 2006, there was an incident that led to the discharge of the Grievant. Supervisors Jon Groth and Mark Van Pelt assigned the Grievant to patch some potholes with truck #48. This truck is a five-yard dump truck that can have a front plow and a wing plow on it. The front plow was off on that day but the wing was on it. The truck was in a separate shed next to the main building. Part of the employee's responsibility is to go through and double check a truck, which is called a pre-trip. The employee is to make sure liquid levels are okay, safety lights are working, and then to look for damage that might make it unsafe to use that truck. There is a pre-trip booklet in the trucks with a form to sign. The form lists all the things to be checked, with 28 items, but nothing specifically on the wing or pin holding the wing up.

The Grievant signed the pre-trip book and she did not show that there was any body damage. The Grievant took the truck out of the shed because there was another vehicle too close for her to take the wing down. She took the truck to an open area in the yard in order to test the wing and to be able to raise or lower it. The wing can block one's vision on the passenger side of the truck. In order to lower the wing, there is a safety pin that needs to be removed. The wing can be lowered by controls inside the truck, but the pin has to be removed manually outside the truck. One cannot necessarily see the pin from inside the truck. At the time of the incident in question here, the pin was painted black, as was the strut bar that held the wing up with the aid of the pin.

The Grievant wanted to test the controls in the open area. The controls are not labeled. One raises and lowers the box, another runs the plow in the front, etc., and she needed to test each control lever to see everything move in order to know which control did what. When the Grievant tried to lower the wing, the wing stopped after going down about six to eight inches. The wing would not move when the Grievant tried to put it up. The steel strut was bent, and the wing could not be raised or lowered again while the strut was bent.

Another co-worker, Joe Handschke was in the vicinity, and the Grievant asked him why she could not raise the wing back up. He looked at it and told her that she forgot to pull the pin out. The Grievant had not been in a truck with a wing for seven or eight years, and she did not recall ever taking a pin out of such a truck. After this incident, the Grievant was put in another wing truck and two co-workers showed her how to take the pin out, by slowly bringing the wing to the truck a little bit to release tension of the pin on the bar.

The Grievant then reported the incident to Jon Groth in the office. He typed up a statement noting that the Grievant approached him shortly after 7:00 a.m. and said she had bent the strut for the wing because she had forgotten to pull the locking pin out before lowering it. The Grievant told Groth that it had been awhile before she had been in a truck with a wing. The Grievant was assigned to another truck and went ahead with her patching assignment.

The Central Garage Supervisor, Bob Knaup, was notified about the damage. Dennis Spanbauer, a maintenance welder and mechanic, repaired it. It took him about two hours to fix it, including going out to get the truck, drilling a hole on the pipe and welding it back on. He noted that without the pin in the strut, the wing can settle down and not stay in position. The wing could fall on a truck parked next to it in the shop. Some of the wings have safety pins and some have chains to hold them up. There have been times when someone has not put in the pin or chain back in, and if that happened on a Friday night, the wing might have gone down by Monday. Spanbauer has repaired struts before that are damaged or bent.

Robert Horton, the Superintendent of the Streets, Sanitation, and Central Garage, became aware of the incident by the end of the day. As part of the investigation into the incident, the Grievant wrote a statement stating that she had not been in a wing truck for many years and forgot to take the pin out of the wing. She noted that the bar could have been bent before this incident as it had rust where the bend was. Horton noted that a truck would deal with a lot of salt and get rust and flaking. After the November 16th incident, he asked the Street Supervisor, Mark Van Pelt, and the Assistant Superintendent, Sean Hutchison, to try to lower the wing to see how much pressure was needed in order to bend the strut. They kept the pin in place and slowly let the wing down about one foot before they thought that damage would occur.

Also, after this incident with the pin, the safety committee decided to paint the pins orange or pink so that they stand out. They had been black, the same color as the strut and the surrounding metal.

The Grievant thought it had been about seven years since she had operated a truck with a wing on it. She told management that she felt comfortable operating the truck, that she knew where the controls were and how to operate the controls to raise and lower the wing. She forgot there was a pin to pull out. She was trying to be careful, but she said she could have looked at the truck all day long and it would not have dawned on her to pull a pin because she never had to take one out or put one in before.

Horton determined that because the Grievant failed to pull the pin on the wing before lowering it and damaged City equipment, she violated the personnel policy manual, the work rules, and the employee handbook. Accordingly, he found that she had violated the last chance agreement. He was not aware of anyone else who had done the same thing, but if another employee had done this, he or she would be disciplined for it. Struts have been bent when the wing has hit a manhole cover or curb while someone is plowing. Employees have not been disciplined in those circumstances.

Horton cited Section 8 of the personnel policy manual on safety, which states: "Safety is a matter of good judgment, common sense and correct working habits...." He said that failing to pull the pin was not a safe act. Section 14 of the manual is grounds for disciplinary action, and subparagraph C refers to theft or destruction of City equipment or property. Horton considered the destruction of the strut to be destruction of City equipment, because the strut had to be replaced. Subparagraph D refers to abuse of City equipment, and Horton explained that the strut had to be replaced and the truck was out of service for a period of time. Subparagraph K refers to disregard of the public's interest, and Horton noted that taxpayers had to pay for the added expense of repairing equipment. He also cited subparagraph O, which states "Disregard or repeated violation of safety rules and regulations." He felt that the Grievant disregarded safety rules and did not follow proper procedure by not pulling the pin. Horton felt that the Grievant's action also violated subparagraph U, which is the failure to perform assigned work in an efficient manner, because she could not go out on her assignment until they did some jockeying around with equipment. Finally, subparagraph V says: "Being wasteful of material, property or working time." Horton said that the fixing of the strut, as well as the Grievant not being productive, violated that part of the manual.

The City has an employee handbook that addresses safety and accident prevention as follows:

> Concern over job safety is a major responsibility of your job performance as an employee of the City of Oshkosh. Safety is a matter of good judgment, common sense and proper work habits. The City provides special safety equipment for certain jobs. It is your responsibility to use the safety equipment when it is required by the job . . .

Horton felt that the Grievant's conduct also violated the above portion of the employee handbook. Finally, the collective bargaining agreement in Article IX states:

> It is agreed that each employee shall be responsible for the cleanliness and proper care of the equipment and tools used by said employee, and it is further agreed that all employees shall comply with the Employer's safety rules and regulations.

Horton considered the Grievant's failure to pull the pin and the resulting damage to violate the contract. The Grievant was terminated on December 13, 2006.

The Grievant did not believe she violated any rules, and that she was being safe by taking the truck out into the open to work the controls and make sure the wing would not hit anything when she lowered it.

Horton admitted that employees are not always disciplined in every situation when an incident happens. Management might give someone a strong reminder or go over procedures with that person so that it does not happen again. He said it depends on the circumstances and a person's prior record.

David Patek is the Director of Public Works, and he testified that employees are subject to discipline if they cause damage to City property or equipment. He found that the Grievant's action had violated her last chance agreement.

Although the Grievant was not supposed to work overtime under the terms of the last chance agreement (#9), she was assigned to work overtime in the summer of 2006 by Groth. She worked one hour of overtime. She was on a chip sealing crew, then Groth got on the radio and asked everyone to work through their lunch period.

Bill Sitter is a trades tech who repairs things in the parts department. He is also the Union President. He was familiar with the Grievant's last chance agreement as well as other employees working under last chance agreements. He knew of another employee in the transit department who had a last chance agreement but was given many chances, particularly for tardiness, before he was terminated about five years ago. Sitter knew that no one other than the Grievant had been disciplined for bending the strut on a truck. He had never heard of a strut being bent before this.

THE PARTIES' POSITIONS

The City

The City contends that the last chance agreement definitively resolves the question of whether the Grievant's conduct – disregarding safety rules and regulations as well as damaging City equipment - provides a legitimate basis for discharge, and therefore, the grievance is not subject to the grievance procedure. Accordingly, the arbitrator has no option but to dismiss this grievance. While the arbitrator may inquire into the question of whether the Grievant engaged in the conduct giving rise to her discharge and whether said conduct violates the handbook, personnel policy manual or the collective bargaining agreement, the last chance agreement precludes the arbitrator from imposing a requirement of proportionality or progressivity.

The last chance agreement states in paragraph #6: "During the period of last chance, W__ and the Union agree that should the City exercise its rights under Paragraph 6, such action shall not be subject to the Grievance Procedure of the Collective Bargaining Agreement between the City and the Union." The instant dispute is not subject to the grievance procedure inasmuch as the City discharged the Grievant pursuant to paragraph 6 of the last chance agreement and the Grievant concedes that she disregarded City safety rules and regulations and that she damaged City equipment.

There is no dispute that the conduct giving rise to the discharge occurred during the three year period in the last chance agreement. There is no dispute that the conduct violated the handbook, the personnel policy manual, and the collective bargaining agreement. The only dispute is whether the conduct rises to the level of discharge. The Union and the Grievant are focused only on the proportionality of the penalty in this case. However, the issue of proportionality is not subject to the grievance procedure.

The Grievant conceded that she destroyed the strut holding the wing plow because she neglected to remove the safety pin prior to attempting to lower and then raise the wing plow. In so doing, she disregarded City safety rules and regulations and damaged City equipment. The City handbook, in Section 8, stresses the importance of safety and directs employees to conduct themselves in a safe manner. It states in part:

> Concern over job safety is a major responsibility of your job performance as an employee of the City of Oshkosh. Safety is a matter of good judgment, common sense and proper work habits. The City provides special safety equipment for certain jobs. It is your responsibility to use the safety equipment when it is required by the job…

The handbook also provides that employees are expected to work in a competent and conscientious manner. The City Personnel Policy Manual also provides:

> Safety is a matter of good judgment, common sense and correct working habits. Accidents are costly both to the City in lost man hours and to the employee in terms of injury, loss of pay or even death. Recognizing the fact that accidents don't happen, but are caused, the City provides special safety equipment for certain jobs . . .

The manual provides in Section 14 the grounds for disciplinary action, which include in relevant part:

> C. Theft or Destruction of City equipment or property.
> D. Unauthorized use or abuse of City equipment or property.
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> K. Disregard of the public's interest.
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> O. Disregard or repeated violation of safety rules and regulations.
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> U. Failure to perform assigned work in an efficient manner.
> V. Being wasteful of material, property or working time.

As Horton testified, not pulling the pin was not a safe act, and property was destroyed. There is the added expense for repairing the equipment. The Grievant did not follow proper procedure by not pulling the pin. The repair of the strut was wasteful of material, property and working time.

The last chance agreement defines what is "cause" for discharge. There is cause for immediate discharge if during the three year period the Grievant's conduct violates the handbook, the personnel policy manual or any work rules in effect. Most arbitrators uphold discharges where a last chance agreement clearly defines the conditions of employment and grounds for immediate termination. In this case, the City conducted an investigation where it obtained substantial proof that the Grievant violated the handbook, the personnel policy manual as well as Article IX of the bargaining agreement. The Grievant conceded that she failed to pull the safety pin and that her failure resulted in the destruction of the strut holding the wing plow. The Grievant was on her last chance when she entered into the last chance agreement. An employee may be held to a different standard than other employees where he or she voluntarily agrees to the standards of a last chance agreement.

The City asserts that the arbitrator should not substitute her personal judgment for that of the Employer because she does not agree with the Employer in its discipline decision. The role of an arbitrator in an arbitration concerning an alleged violation of a valid last chance agreement is generally limited to determining whether the employee's actions or conduct constituted a violation of the last chance agreement. If the actions or conduct are found to violate the last chance agreement, a majority of arbitrators will enforce the penalty agreed to by the parties in the last chance agreement, usually discharge.

The Union

The Union states that the City's request to have the grievance dismissed is unwarranted. The Union did not attempt to get the arbitrator to ignore the last chance agreement between the City and the Union. Under the parties' agreement, no employee shall be discharged except for cause. Under paragraph 6 of the last chance agreement, a violation of the City's handbook, personnel policies or work rules shall be cause for immediate discharge. Thus, "cause" must be met in order to terminate the Grievant. As Arbitrator Gratz discussed in KENOSHA COUNTY, CASE 178, NO. 56229, MA-10213, the agreement may or may not replace the just cause requirement, and an arbitrator should not presume the parties intended to abandon it without express language. Gratz further noted that if the agreement does replace the just cause requirement, the arbitrator's authority may be limited to interpreting the last chance agreement and determining whether the employee actually violated the agreement. The Union states that in this case, it did not abandon the cause requirement in the last chance agreement. The Employer has the burden of proving that the Grievant violated the handbook, the personnel policy manual, the work rules or the last chance agreement. The Union asks for a decision on its merits.

The Union finds the Employer's claim that the Grievant violated policies and rules to be preposterous. The Grievant was exercising very good judgment when the incident occurred. Horton agreed that she was exercising good judgment. It had been seven years since she operated a truck with a wing attached. The truck was parked in the shed where it was difficult to test the wing. The Grievant drove the truck out into the yard.

The Union wonders how can not removing a pin that holds the wing up be a safety violation. The Grievant was not even aware of the pin, and she had never removed one or put one in before. After this incident, her co-workers showed her how to remove a pin. Horton admitted that the pin is difficult to see from inside the truck looking out the passenger side window. The safety committee recommended the pins be painted to make them more visible after the Grievant was terminated, and the pins are now repainted.

The Grievant did not destroy City property. She simply forgot to pull a pin which resulted in a strut being bent. There was nothing intentional in the Grievant's act. Struts get damaged when the wings hit manhole covers and curbs. The City stocks pipes to replace struts. It took only two hours to replace the strut in this incident. To claim that the Grievant had a disregard of the public's interest or failed to perform her work assignment in an efficient manner is clearly a stretch. After the incident, she continued to do her normal duties until her termination. The Employer had no concern that she might jeopardize public safety. Horton testified that no employee has ever been terminated for violating the City's personnel policies and safety rules.

The Union submits that the Employer failed to prove that the Grievant violated the last chance agreement. The reasons for the last chance agreement were related to a loss of her CDL. She was required to comply with alcohol and drug related treatments. She was rehired because she had the best qualifications for the job. She was a good employee, and there were no prior disciplinary actions that played a factor in the City's decision to terminate the Grievant. The Employer may have violated the last chance agreement with it instructed the Grievant to work overtime, since she was not eligible for overtime under the last chance agreement.

The Grievant is not a repeat offender. The Employer is not abiding by the last chance agreement and cannot simply jump on a technicality to get out of it.

In Reply, the City

The Union contends that the City's request to have the grievance dismissed is unwarranted. The instant dispute is not subject to the grievance procedure inasmuch as the City, the Union and the Grievant all agreed that should the City exercise its right to discharge the Grievant under this last chance agreement, such action shall not be subject to the grievance procedure of the collective bargaining agreement. The City contends that the Grievant conceded that she disregarded City safety rules and regulations by failing to pull the safety pin and that she damaged City equipment. The Arbitrator is left with no option but to dismiss the grievance pursuant to the language of the last chance agreement.

Contrary to the Union's contention, the City established that the Grievant violated the handbook, the personnel policy manual and Article IX of the bargaining agreement. The Grievant failed to pull the safety pin and consequently destroyed the strut holding the wing when she tried to lower and raise it. In doing so, she disregarded safety rules and regulations and damaged City equipment.

While the Union infers that the City should have provided the Grievant with instruction to operate the wing plow, the Grievant never asked for instruction. She stated that she knew how to operate it and felt comfortable doing so. She testified that she felt comfortable operating the wing plow even though it had been seven years since she had done it. She admitted that if she had a question, she would always ask someone.

While the safety committee recommended painting the pin after this incident, that had nothing to do with the Grievant's failure to pull it. This was done to keep the wing pinned in an upright position before entering the garage. It makes no difference that the pin cannot be seen from inside the cab, because one has to know to pull it in the first place. Whether or not the Grievant intended to destroy property is irrelevant. When she neglected to pull the pin, she destroyed City equipment. The fact that struts are often damaged in the course of operations is a different matter than due to negligence. Negligently damaging property is not the nature of the business.

In Reply, the Union

The Union objects to the City's statement that the Grievant conceded that she disregarded the City safety rules and regulations. The Grievant never said anything of the kind. She admitted to not removing the pin, a pin that she did not know even existed. Had she known a pin needed to be removed, she would have asked for help. In fact, she was taught by a co-worker after the fact, how to remove a pin.

The Union does not believe that all portions of the last chance agreement are clear and unambiguous. Paragraph 6 is generic and subject to interpretation. The only specifics in the last chance agreement were related to the Grievant's CDL and any alcohol related incidents. The Employer's claim that the Grievant destroyed the strut, disregarded policies, and was neglectful is purely inflammatory. There was no intent to cause damage. If the Grievant had such a disregard for the public's interest, she would not have moved the truck outside in an open area to make sure she did not hit anything or anybody. Past employees who were subject to a last chance agreement were never terminated on a technicality. The Employer terminated the Grievant at will. The Union vehemently disagrees that the employee's conduct violated her last chance agreement.

The Union asserts that the Employer offered nothing to prove that the Grievant violated the personnel policy on safety, the employee handbook on safety and accident prevention, or the collective bargaining agreement on safety and sanitation. How can not removing a pin be unsafe**?** The Grievant's action of moving the truck out into an open area before taking the truck out on the road was proof that she exercised good judgment, common sense and proper work habits. As to the theft or destruction of City equipment or property and unauthorized use or abuse of equipment or property, nothing was destroyed or abused. A strut was bent, but it did not rise to the level of destruction or abuse. The City's claim that the Grievant failed to perform assigned work in an efficient manner and was wasteful of material, property or working time is an exaggeration. It took only two hours from start to finish to repair the truck. There is nothing in the record on the cost of the repair.

DISCUSSION

The last chance agreement is of critical importance in this dispute. As Arbitrator Gratz stated in KENOSHA COUNTY, MA-10213:

> It is a well established arbitral principle that "an arbitrator must abide by the terms of a last-chance agreement fairly negotiated between an employer, and employee and (where applicable) the union representing the employee." St. Antoine, et al., The Common Law of the Workplace – The Views of Arbitrators (BNA, 1998) at 161. That treatise elaborates with the following "Comment:"
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> a. Occasionally parties may settle a disciplinary grievance with a "last-chance" agreement. These agreements vary in terms but usually grant the employer discretion to discharge the employee for any subsequent offense (sometimes for a subsequent similar offense) and commonly state or imply that the usual procedural protections will not apply. One of the most common occasions for last-chance agreements is the reinstatement of an employee discharged for problems related to substance abuse. (citations omitted)
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> b. Preclusive Effect. Depending on its exact phrasing, the last-chance agreement may definitively resolve the question of whether a given offense provides a legitimate basis for discharge. Such an agreement may bar an arbitrator from imposing a further requirement of proportionality or progressivity, but it normally would not bar inquiry into the question of whether the employee committed the final offense charged by the employer.
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> . . .
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> c. Relationship to the "Just Cause" Requirement. Depending on its wording, the agreement may or may not replace the just cause requirement. Because the just cause requirement is so fundamental, an arbitrator should not, without express language, presume the parties intended to abandon it. If the agreement does replace the just cause requirement, the arbitrator's authority may be limited to interpreting the last-chance agreement itself and determining whether the employee actually violated that agreement.
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> d. Necessary Parties. In a unionized workplace, no employee may enter into an agreement that conflicts with the collective bargaining agreement. The union, however, is generally free to modify the collective agreement, even in the context of a last-chance agreement affecting a single employee. If the last-chance agreement conflicts with the collective agreement, the union must be a party to it before it will be fining.

. . .

e. Duration. A well-drafted last-chance agreement will specify an expiration date, after which the employee will be subject to the same disciplinary rules and procedures applicable to other employees. If the agreement does not state how long it lasts, an arbitrator should find that the parties intended it to last a "reasonable" time, depending on the nature of the offense, the parties' practices, and other relevant factors.

In this case, the parties have defined what will be cause for termination. Paragraph 6 of the last chance agreement has a strict requirement – lasting for three years – that the Grievant not violate the employee handbook, the personnel policy manual or any work rules in effect in the Street Division of the Public Works Department. If she does, her conduct is "cause" for immediate discharge, and that action is not subject to the collective bargaining agreement's grievance procedure.

Paragraph 6 is a tough requirement. Any mistake that the Grievant made would likely violate the handbook or policy manual or work rules. Particularly a mistake that causes some damage. The Grievant admitted that she made a mistake, that she simply forgot that there was a pin to pull out before lowering the wing. It was not intentional, and she was trying to be safe in all respects of operating the truck.

The question is whether the Grievant's unintentional mistake of not pulling the pin out and thereby damaging the strut bar falls within the handbook, the personnel policy manual or the work rules. The Employer cited Section 8 of the personnel policy manual, which states: "Safety is a matter of good judgment, common sense and correct working habits. . ." The Grievant was attempting to use good judgment in taking the truck out into an open area. Both parties agree on that. She really did not violate Section 8 by her mistake in failing to pull the pin.

The Employer also cites Section 14 of the personnel policy manual, which is the section called "grounds for disciplinary action." The first subsection that the Employer points to is "C" – theft or destruction of City equipment or property. There is no theft, but there is destruction of City equipment in the fact that the strut was bent and had to be replaced. This is probably the strongest argument that the Employer makes in this case. It is arguably a technicality, but in this case, where there is a last chance agreement with strict requirements, technicalities are important.

The Arbitrator has reviewed the other sections of the personnel policy manual and finds them not to be directly related to the Grievant's mistake. There is no unauthorized use or abuse of City equipment or property. The Grievant was not disregarding the public's interest or disregarding safety rules and regulations or had repeated violations of rules. The allegation that she failed to perform assigned work in an efficient manner is not supported by the record. There is no record of how much time she lost in doing her assigned job that day, and there is

only a record that it took two hours to replace the strut. Likewise, the allegation that she was being wasteful of material, property or working time is somewhat overstated and unsupported by the record. The employee handbook repeats the statement in the personnel policy manual about safety being a matter of good judgment, common sense and proper work habits. Article IX of the collective bargaining agreement is the section that states that all employees shall comply with the Employer's safety rules and regulations, as well as be responsible for the proper care of equipment and tools. Thus, the Arbitrator considers Section 14(C) of the personnel policy manual to be the most relevant section that applies in this case.

The Grievant's mistake is such a minor one that it would hardly warrant much, if any, discipline, but for the last chance agreement. That's why this is such a harsh result. However, the parties agreed that any violation of the handbook, policy manual or work rules would be cause for immediate discharge. That leaves no latitude for the Arbitrator. It would be up to the Employer to show some leniency, or the Employer and the Union could work out a nonprecendential agreement that does not waive future rights under the last chance agreement. However, the Arbitrator's hands are tied by the last chance agreement. In order to overturn the discharge, there would have to be no violation of the handbook, the policy manual or the work rules. Damaged equipment – even when occurring through a simple mistake – will fall into the areas stated in Paragraph 6 of the last chance agreement.

This is an unfortunate result in other respects too. The Grievant had not operated a truck with a wing on it for seven or eight years. Yet she admitted that she was comfortable operating this truck and comfortable working the controls. If she thought she needed help or some instruction, she would have asked for it. We will never know whether a supervisor or co-worker would have said – first, you have to take the pin out of the strut bar. So it is difficult to fault the Employer where the Grievant did nothing to alert the Employer that she might not know how to lower the wing on the truck.

Since the Grievant violated paragraph 6 of the last chance agreement, the grievance is denied.

AWARD

The grievance is denied and dismissed.

Dated at Elkhorn, Wisconsin this 2nd day of August, 2007.

Karen J. Mawhinney /s/
Karen J. Mawhinney, Arbitrator

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