BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

IOWA COUNTY PROFESSIONAL EMPLOYEES UNION, LOCAL 413, AFSCME, AFL-CIO

and

IOWA COUNTY

Case 141
No. 69774
MA-14736

Appearances:

Krekeler Strother, S.C., by **Attorney George B. Strother IV,** 15 North Pinckney Street, Suite 200, P.O. Box 828, Madison, Wisconsin 53701-0828, for the Union.

Davis & Kuelthau, S.C., by **Attorney Kirk D. Strang,** Ten East Doty, Suite 401, Madison, Wisconsin 53703, for the County.

ARBITRATION AWARD

The Iowa County Professional Employees Union, Local 413, AFSCME, AFL-CIO (herein the Union) and Iowa County (herein the Employer) were, at all pertinent times, parties to a collective bargaining agreement covering the period from January 1, 2008 through December 31, 2010, which provided for binding arbitration of grievances arising thereunder. On April 12, 2010, the Union filed a request to initiate grievance arbitration with the Wisconsin Employment Relations Commission (WERC) concerning a grievance filed by the Union challenging the termination of bargaining unit member Troy Brechler. The Commission appointed John R. Emery, a member of its staff, to arbitrate the matter and a hearing was conducted on January 25, 2011. The proceedings were transcribed and the transcript was filed on March 1, 2011. The parties filed initial briefs on April 8, 2011 and reply briefs by May 8, 2011, whereupon the record was closed.

ISSUES

The parties did not stipulate to a statement of the issues. The Employer frames the issues as:

Is the grievance substantively arbitrable?

If so, is the grievance procedurally arbitrable?

If so, did Mr. Brechler violate the Last Chance Agreement?

The Union frames the issues as:

Did Mr. Brechler violate the Last Chance Agreement and/or was there just cause for termination of his employment consistent with the requirements of the collective bargaining agreement?

If not, what is the remedy?

The Arbitrator frames the issues as:

Is the grievance substantively arbitrable?

If so, is the grievance procedurally arbitrable?

If so, did Mr. Brechler violate the Last Chance Agreement or was there otherwise just cause for termination of his employment?

If not, what is the remedy?

PERTINENT CONTRACT PROVISIONS

Article 1 – Recognition

1.01 Bargaining Unit: The Employer recognizes the Union as the sole and exclusive collective bargaining agent for all regular full-time and part-time professional employees of Iowa County, including social workers, juvenile court intake workers, soil conservationist, soil conservation technicians, community health nurses, programmer analyst, senior systems analyst and sanitarian/assistant zoning administrators, but excluding all supervisory, managerial and confidential employees, for the purposes of collective bargaining on matters concerning wages, hours and all other conditions of employment.

. . .

Article 3 – Management Rights

3.01 The Union recognizes the prerogatives of the County to operate and manage its affairs in all respects in accordance with its responsibility and powers or authority which the County has not officially abridged, delegated or modified by this Agreement and such powers or authority are retained by the County. These management rights include, but are not limited to the following:

. . .

d) To suspend, demote, discharge or take other disciplinary action against an employee for just cause.

. . .

Article 4 – Grievance and Arbitration Procedure

4.01 Definition: A grievance shall mean any dispute concerning the interpretation or application of a provision of this contract, and shall be handled in the following manner.

4.02 Step 1: The employee shall discuss the grievance with his/her immediate supervisor. The Union steward may be present at the employee's discretion.

4.03 Step 2: If a satisfactory settlement is not reached in Step 1, the Union steward and/or Union representative, shall present the grievance in writing to the department head no later than five (5) working days after the grievance occurred or the employee or the Union knew or should have known of such occurrence. In the event of a grievance, the employee shall perform his/her assigned work task and grieve his/her complaint later. The department head shall, within five (5) working days, in writing inform the employee and the representative of his/her decision.

4.04 Step 3: If a satisfactory settlement is not reached as outlined in Step 2, the Union steward and/or Union representative, may within seven (7) working days of the receipt of the department head's decision present the grievance to the Iowa County Personnel Committee. A meeting shall be held within seven (7) working days of receipt of the written request by the other party unless a later date is set by mutual agreement. The committee shall within ten (10) working days of the meeting, in writing, inform the Union and the employee of its decision.

4.05 Step 4: If a satisfactory settlement is not reached as outlined in Step 3, either party to this Agreement may request within ten (10) working days of the Union's receipt of the Committee's decision that the dispute be submitted to arbitration. The Wisconsin Employment Relations Commission shall be requested to appoint an arbitrator from its staff. The arbitrator shall make a decision on the grievance, which shall be final and binding on both parties. Only questions concerning the application and interpretation of this Agreement are subject to arbitration. Expenses for the arbitrator shall be borne equally by the employer and the Union. The arbitrator shall have no power to modify, add to or delete from the express provisions of the Agreement.

4.06 Time Limits: Time limits may be extended by mutual agreement.

4.07 Grievances Concerning Discipline, Suspension, Discharge: In accordance with paragraph (d) of Management Rights, employees shall not be disciplined, suspended or discharged without just cause. A suspension shall not exceed thirty (30) days. Written notice of the suspension, discipline (where it will be noted on the employee's personnel record) or discharge or the reason or reasons for the action shall be given to the employee with a copy to the Union steward within twenty-four (24) hours. A grievance may be started in Step 2 or Step 3. If the parties agree, or the arbitrator finds that such discipline, suspension, or discharge was improper, such disposition of the matter may be made as appears proper.

BACKGROUND

Troy Brechler, the Grievant herein, was employed as a Soil Conservationist/Farm Preservation Specialist by the Iowa County, Wisconsin Land Conservation Department (LCD), which shares office space with employees of the U.S. Natural Resource Conservation Service (NRCS). At all pertinent times there were five LCD employees and approximately four NRCS employees occupying the office space, each having an individual office. The LCD and NRCS work collaboratively in some respects, including the fact that LCD employees are permitted to use NRCS vehicles in their work so long as they comply with NRCS vehicle use policies. These policies include obtaining and signing receipts for all gas purchases, placing signed receipts in a specific envelope for reimbursement, recording beginning and ending mileage, reserving vehicles in advance on a master calendar, signing out vehicles at the time of use and obtaining vehicle keys from a specified NRCS employee. All County employees are familiarized with NRCS vehicle use policies.

Brechler's work required him to travel throughout the county, and he frequently used NRCS vehicles in his work. Beginning in 2007, however, Brechler was involved in a series of incidents involving breaches of NCRS vehicle use policies. On November 2, 2007, he took an

NCRS vehicle without signing it out, for which he was issued a verbal warning and received counseling. In April 2008, he took a vehicle that was reserved by an NCRS employee and altered the calendar to hide his action, which resulted in the issuance of a written warning on May 2, 2008. There were additional problems with Brechler observing NCRS vehicle policies in early 2009, which resulted in him receiving additional training in NCRS policies. He was also required to attend regular staff in-service meetings regarding those policies.

In early 2006, Brechler also began paying an unwarranted, and unwanted, amount of attention to a co-worker, C. E. Ms. E complained to management about Brechler's attentions, which management investigated and determined to be inappropriate and inconsistent with the County's Harassment, Discrimination and Retaliation policy. Brechler initially was issued a verbal warning on May 5, 2006 for his conduct toward Ms. E. His behavior continued, which led to another complaint from Ms. E, resulting in Brechler receiving a written warning on December 15, 2006 and an admonition that further contact with the complainant of a personal nature would lead to additional discipline. On February 20, 2009, Brechler and Ms. E were attending a work-related conference in Green Bay. While there, Brechler purchased an expensive box of chocolates as a gift for Ms. E and presented it to her in front of a group of employees from other counties serving on a committee with her, causing her embarrassment. She filed another written complaint with the Employer and indicated that if something definitive was not done about Brechler's behavior she would pursue legal action. On February 23, 2009, Brechler's immediate supervisor, County Conservationist Jim McCaulley, along with Personnel Director Bud Trader, met with Brechler about the February 20 incident, which Brechler admitted. As a result of the meeting, Brechler was placed on administrative leave pending the result of the County's investigation. After meeting with Union representative Mike Goetz, on March 4, Brechler, through Goetz, issued an apology to Ms. E and the Employer and indicated the behavior would not be repeated. Nevertheless, the Employer required as a condition of Brechler's continued employment that he enter into a last chance agreement, to which he and the Union agreed. On March 6, 2009, therefore, the Employer, the Union and Brechler entered into the following agreement:

LAST CHANCE AGREEMENT

This Last Chance Agreement ("Agreement") is entered into by and between Iowa County ("Employer"), Troy Brechler ("Employee"), and the Iowa County Professional Employees Union, Local 413, AFSCME, AFL-CIO ("Union"), and addresses the conditions under which Employee will continue to be employed by Employer.

WHEREAS, the Employee has been employed by Employer for approximately twenty-one (21) years; and

WHEREAS, the Employee recently engaged in inappropriate actions toward a fellow employee on or about February 20, 2009; and

WHEREAS, the parties hereto are desirous of providing the Employee one last chance to remain employed by Employer; and

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, it is agreed as follows:

1. The Union and Employee acknowledge that Employee engaged in actions and conduct on or about February 20, 2009, that resulted in unwanted attention to another Iowa County employee, C. E., and which actions and conduct were in clear violation of previous verbal and written directives to Employee not to have any personal contact with Ms. E.

2. Because of the length of his employment with Iowa County, and other mitigating reasons, Employer has agreed to enter into this Last Chance Agreement with Employee.

3. The parties agree that for Employee's actions and conduct on or about February 20, 2009, Employee will receive a three (3) day unpaid suspension, during which time Employee will be off work. Employee shall be allowed to substitute accrued benefit time for the three (3) day suspension. The Union and Employee agree not to grieve or otherwise challenge this suspension.

4. The parties agree that any future violation of any Employer Ordinance, any Employer policy placed on Employer's website, or any directive or order issued by a supervisor of Employee is grounds for immediate termination of Employee's employment under this Agreement.

5. The parties also agree that Employee shall have no further contact with Ms .E., other than contact that is limited strictly to completion of work required of Employee and Ms. E. This prohibition on Employee's contact with Ms. E is meant to be as all-inclusive as possible and includes, but is not limited to, providing gifts, cards, or other items to Ms. E, attempting to or actually discussing information about Employee's or Ms. E's personal lives, sharing of personal tangible objects (e.g. photographs) with Ms. E, or any unwanted personal attention to Ms. E. Employee agrees to limit his contact with Ms. E to what is necessary to get his and Ms. E's work completed, and nothing more. The parties agree that any violation of this condition is grounds for immediate termination of Employee's employment under this Agreement.

6. Union and Employee agree that in the event Employee engages in conduct that violates this Agreement, Employee and/or the Union have the right to grieve and/or arbitrate the issue of whether Employee engaged in the conduct alleged, but all parties agree that if Employee did engage in the conduct alleged,

the Employer's decision to terminate Employee's employment is not grievable or arbitrable, nor will it be challenged in any legal or administrative forum.

7. This Agreement is entered into by and between the parties on a non-precedential basis and shall not be admissible in any legal proceeding not involving this Employee, except to enforce its terms, provide for a defense, or other purposes unrelated to establishing precedent under the collective bargaining agreement.

8. Paragraph 4 of this Agreement shall be effective for a period of four (4) years from the date of execution of this Agreement. Each and every other provision of this Agreement is unlimited in duration.

Dated this 6th day of March, 2009

/s/

Subsequently, the Employer discovered that at the same February 20 conference, Brechler had also purchased a number of raffle tickets for Ms. E. After the discovery, the parties agreed that the raffle ticket matter, since it occurred simultaneously with the chocolate incident, did not constitute a violation of the Agreement and would not result in additional discipline, but the Employer did not, thereby, waive future enforceability of the Agreement.

On April 22, 2009 and May 18, 2009, Brechler again used NCRS vehicles. On those occasions he purchased gas for the vehicles without signing the receipts, per NCRS policy. As a result, on July 8, 2009, McCaulley was notified of this lapse by NCRS staff and informed that Brechler's vehicle use privileges would be suspended from July 13 through July 24. On July 16, 2009, Brechler and Union representative Goetz met with Trader and McCaulley, wherein Brechler was confronted with the gas receipt complaint, which Brechler did not deny. He was then informed that, inasmuch as not signing the receipts was considered to be a violation of the Last Chance Agreement, his employment was immediately terminated.

On July 22, 2009, the Union filed a grievance for termination without just cause. The grievance was advanced through the contractual grievance procedure, at one point the parties agreeing to suspend the contractual timelines while settlement negotiations took place, until the grievance was ultimately denied by the County Administrative Services Committee on December 11, 2009. Thereafter, on April 9, 2010, the Union filed its request for arbitration with the WERC.

At some point, Brechler determined that he did not want representation from the Union in the arbitration, but wanted to retain his own counsel. Negotiations ensued between Brechler and the Union, resulting in an agreement between them dated August 8, 2010 wherein the Union agreed to allow Brechler to retain his own counsel in return for indemnification against any claim by Brechler against the Union for failure in its duty of fair representation to him in

handling the grievance, as well as an understanding that the Union retained the right to approve any settlement of the grievance or remedies sought by the Grievant, to the extent they impacted the rights or interests of the bargaining unit, and also to attend any subsequent proceedings related to the grievance, should it choose to do so. The Employer was not a party to this agreement. The matter then proceeded to arbitration, with the Employer reserving its right to object to the substantive arbitrability of the grievance. Additional facts will be referenced, as necessary, in the **DISCUSSION** section of this award.

POSITIONS OF THE PARTIES

The Employer

The Employer argues that the grievance is not substantively arbitrable. It maintains that the collective bargaining agreement is a contract between itself and the Union. As such, the Union cannot, absent agreement by the Employer, subcontract the right to arbitrate grievances to third parties. The rights of parties to pursue grievances are set forth in the grievance procedure, which provides that only the Union can advance grievances and submit them to arbitration. Here, the Union entered into an agreement with the Grievant, without the Employer's consent, wherein the Grievant waived Union representation and released the Union from any responsibility toward him thereafter. The Union was thus trying to compel the Employer to arbitrate with a party with which it did not have a contract and with whom it had not agreed to arbitrate. The Waiver also purports to absolve the Union from any responsibility or liability for the resolution of the grievance, which violates the contractual provision that makes arbitration awards final and binding between the parties.

The grievance is also not substantively arbitrable because it violates the Last Chance Agreement by inserting a question of just cause after the Grievant admitted violating the Employer's directives, which is a *per se* violation of the Last Chance Agreement. Under the Last Chance Agreement the only issue to be determined in the case of an alleged violation is whether, in fact, the Grievant committed the acts alleged. If that be established the Employer may terminate the Grievant forthwith without objection or resort to the grievance procedure or arbitration. At the time of his termination the Grievant admitted violating the Employer's directives and testified likewise at the hearing. There is, therefore, no dispute that the Grievant violated the NRCS vehicle use policies after entering into the Last Chance Agreement, conduct which had previously resulted in counseling, poor performance evaluations and discipline. It is also submitted that the Grievant's notes on his desk calendar regarding C.E., discovered after his discharge, were also violations of the Agreement and further support the argument that the grievance is inarbitrable.

The grievance is also not procedurally arbitrable because the Union failed to observe the express time limits set forth in the grievance procedure. In enforcing those guidelines, the arbitrator is bound to honor and enforce the express language of the contract. Consequently, it is well-established that where contractual timelines for filing and processing grievances are ignored, the grievances are typically dismissed. (citations omitted) In this case, the grievance

timelines were tolled at an earlier stage to allow for settlement discussions. After negotiations failed, the timelines were reinstituted. Throughout the processing of the grievance the parties were careful to observe the timelines and the process for agreeing to any extensions thereof until the Union failed to move the grievance to arbitration in a timely manner. The contract makes the timelines mandatory and they were followed explicitly through Step 2. After Step 2, and before moving to Step 3, the Employer agreed to suspend the timelines to allow for settlement discussions. The Union, on the Grievant's behalf, made a settlement proposal, to which the Employer agreed, but then the Grievant withdrew his agreement to the settlement. When the discussions were unsuccessful, the parties agreed to reinstitute the timelines and the grievance was moved to Step 3. The Employer denied the grievance at Step 3 on December 11, 2009, which gave the Union until December 28 to request arbitration, but the request was not filed until April 9, 2009. At no time did the Employer agree to such an extension. Given the lengthy delay, therefore, this is not a case of a mere technical violation of the timeline and the arbitrator should enforce the contract and dismiss the grievance as being not procedurally arbitrable.

Assuming the grievance is found to be arbitrable, it must be dismissed because the Grievant clearly violated the Last Chance Agreement. It has been held that an arbitrator has no authority to modify a Last Chance Agreement and that where a violation of such an agreement is established it must be enforced according to its terms. The agreement here provided that violation of any employer ordinance or policy, or any directive or order issued by a supervisor would constitute grounds for immediate discharge, as would any further non-work-related attentions to C.E. The agreement further stipulates that in the event a violation is alleged, the Union or Grievant may challenge whether the alleged violation actually occurred, but not a discharge based on a proven violation. It is established that Brechler turned in unsigned gas receipts in April and May 2009 in violation of NRCS policies of which he was aware, and for past violations of which he had previously been disciplined. He did not deny this at his termination meeting and admitted it at the hearing. Further, after signing the agreement, Brechler made notes on his desk calendar regarding C.E. which were of a personal nature and which could have been seen by anyone. This was also a violation of the agreement and, though not discovered until after the termination, constitutes admissible after acquired evidence because the Union was apprised of it immediately and had an opportunity to challenge it at every stage of the proceeding. For these reasons, the grievance should be dismissed.

The Union

The Union asserts that the grievance is arbitrable. The Employer has failed to explain its rationale for objecting to the Grievant retaining his own counsel. The agreement to waive representation is between the Union and the Grievant and in no way prejudices the Employer. Further, the Employer has cited no authority supporting its claim that the Union cannot agree to allow the Grievant to be represented by separate counsel. The Employer's argument that the Last Chance Agreement precludes arbitration is also not sustainable. To support such a claim, it would have to be shown that the Grievant violated the Agreement, which is not demonstrated by the evidence. Paragraph 5 prohibits any non-work-related contact with C.E. Paragraph 4

does not list any particular conduct that is deemed a violation of the Agreement. It simply indicates that certain types of conduct, without specificity, will be deemed grounds for termination. It does not state that any particular conduct will be result in immediate termination. The evidence does not show that the Grievant violated any ordinance or policy listed on the County's website. Further, while the Grievant was counseled regarding following NRCS vehicle use policies, but nothing in Employer Exhibit 10 rises to the level of a directive or prohibition and it was clearly created independent of the Last Chance Agreement.

The immediate cause of termination was the Grievant's failure to sign two gas purchase receipts. If such could be considered a violation of paragraph 4 of the Agreement, the Grievant would have a dubious basis for a grievance, but the Agreement contains no such language. The history of this matter shows that the Employer engaged in an unfair campaign to brand the grievant as a sexual harasser and subvert the contract's clear intent that just cause is the proper standard for discipline and that grievance arbitration is the proper forum for the resolution of disputes. The language of the Agreement makes it clear that its purpose was to prevent any further unwelcome contact between the Grievant and C.E. As such, it should be interpreted narrowly to comport with its clear intent.

Without a basis for dismissal under the Agreement, the Employer must rely on the just cause standard as its basis for termination. The evidence introduced at the hearing, however, does not rise to the level of just cause. The only reason for dismissal was the Grievant's failure to sign two gas receipts. The Employer acknowledges there was no prohibited contact with C.E. after the signing of the Agreement. The Employer raises the fact that after the termination it discovered comments about C.E. written on the Grievant's desk calendar. This did not violate the Agreement and there is no evidence these comments were seen by Ms. E or any other employee. Their discovery after the termination further proves they were not considered in the termination decision. The failure to sign the gas receipts, in and of themselves, does not establish just cause. He has received a verbal warning and written warning in the past for failure to properly check out vehicles, for which the penalty for an additional violation would be a suspension. He had never failed to sign receipt before and never before was termination ever raised as a possibility for failure to adhere to the vehicle policy.

Reviewing the language of paragraph 4 of the Agreement, as well as the Iowa County Land Conservation Department Expectations, it is clear that these documents are ambiguous as to what would or would not be considered grounds for termination. The Grievant had a long and satisfactory work record with the Department. Given that, and the ambiguous language in the Agreement and Expectations, it is unreasonable to conclude that the failure to sign the two receipts should result in termination, especially since the Agreement was clearly intended to address the issue regarding C.E. and only was intended to give the Employer relief from the contract's just cause requirements as to that issue alone.

The just cause standard requires a finding that the employee committed the acts alleged and that the penalty imposed was consistent in degree with the seriousness of the offense.

Here, the conduct leading to the discharge is not in dispute. Rather, the dispute lies in the severity of the penalty imposed, which involves questions of due process, progressive discipline and disparate treatment. Only one employee has previously been disciplined for violation of the vehicle policy and only a verbal warning was imposed. Termination is clearly a much harsher penalty. Further, the Employer skipped over imposing a suspension on the Grievant when it terminated him. In this case, suspension would have been the appropriate response, if any to his infraction. In sum, there is no jurisdictional impediment to arbitration, the Last Chance Agreement does not apply to this case and there was not just cause for termination. The grievance should be sustained.

Employer Reply

The Employer reasserts that the just cause standard does not apply to this case. The Grievant entered into the Last Chance Agreement on March 9, 2009, which meant the just cause standard no longer was applicable. He violated the Agreement when he failed to sign the gas receipts and when he continued to harass C.E. Arbitral authority supports the conclusion that when an employee enters into a last chance agreement the just cause standard no longer applies. (citations omitted) The Agreement here was clear that the Grievant would be discharged if he violated any County or Department policy or directive, or any supervisory order. By agreeing to this, the Grievant acknowledged that the Agreement, not just cause, would govern the response to any future violations.

The Union also makes several erroneous and irrelevant factual assertions. The Union asserts that the Grievant's conduct was not overtly sexual in nature and did not violate the County's sexual harassment policy. The Agreement, however, does not reference the policy, but orders the Grievant to not have any additional unwanted contact with C.E. beyond that necessary to conduct work or to direct further unwanted attention toward her. When he violated this stipulation, he violated a supervisory directive and, therefore, the Agreement. The Grievant's actions toward C.E. were certainly unwelcome and were clearly based on her gender, leading her to demand that something be done to make him leave her alone. Nevertheless, he continued writing his thoughts about her on his office calendar. Even in his testimony at hearing indicated that he continued to be infatuated with her. The Employer is entitled to prevent a hostile work environment and need not wait until an employees actions rise to level of meriting legal recourse to step in. The Union also suggests that the Grievant did not receive due process and that there were not legitimate reasons for the NRCS policies. The record shows that the Employer acted deliberately in dealing with the Grievant and conducted a thorough investigation before terminating him. Further, it is irrelevant whether the Grievant, or the County, finds the NRCS policies to be valid. The NRCS establishes its own rules for the use of its vehicles, with which the County, and the Grievant, are required to comply. In short, the County could have discharged the Grievant, with just cause, on March 6, 2009. To keep his job, the Grievant signed the Last Chance Agreement and surrendered his right to apply the just cause standard in the future. He cannot now turn back the clock and reclaim now that which he previously surrendered.

Even if just cause applied, however, the Employer would have been justified in terminating the Grievant. Just cause requires that he Employer establish the employee's conduct and that the discipline imposed was appropriate under the circumstances. Arbitrators have used different verbiage to define these formulations, but the principles remain consistent. When an employee continues in a course of conduct to the point where there is little hope of reclamation even after several interventions, the Employer is justified in severing the employment relationship.

The Employer had just cause to discharge the Grievant for his behavior toward C.E. on March 6, 2009. He continued after that in pining for her and writing about her on his desk blotter. Clearly this behavior was not going to be corrected by further warnings or discipline. The Grievant had created a hostile work environment for C.E. by his unwanted attentions, which is a violation of the Wisconsin Fair Employment Act. He was told on March 6, that any further unwanted attention to C.E. would result in termination, yet he continued to track her movements and write his thoughts about her on his calendar, which was in plain sight. He was repeatedly disciplined for his unwanted attentions to C.E., culminating in a three day suspension at the time he signed the LCA. His testimony at hearing indicated that he still dreams and fantasizes about her and it is clear this behavior will not stop while he is in the same workplace with her. This clearly constitutes just cause.

His violation of the NRCS policy also constitutes just cause for discharge. His failure to sign the gas receipts on April 22, 2009 and May 18, 2009 resulted in a suspension of his vehicle privileges, despite several past disciplines and interventions for policy violations. His continued violations, in spite of counseling, training, negative performance reviews and discipline constituted just cause for termination. In reviewing the Iowa County Conservation Department Expectations, Supervisor McCaulley specifically directed the Grievant to the NRCS vehicle use policies and instructed him to observe them. He was well aware of the gas receipt policies, which were discussed with him, which he admitted. He did not deny violating the policy on April 22 and May 18. The lower levels of discipline and counseling did not remediate his behavior, so his gas receipt violations also constituted just cause for termination.

Union Reply

The Union denies that the notations about C.E. in the Grievant's calendar constitute a violation of the LCA. The notations did not violate the letter of the Agreement or any prohibitions on his conduct. No reasonable reading of the Agreement could lead to this conclusion. The notations do not constitute contact with C.E. and there is no evidence that anyone other than the Grievant saw them, least of all C.E. The notations were not discovered until after the discharge and so were not, and could not have been a basis for discharge. The only basis was his violation of the NRCS vehicle use policies. By referencing the notations, therefore, the Employer is overreaching in order to support its unjustifiable case for discharge.

There are also jurisdictional bars to arbitration. Neither the Union nor the Grievant gave up the right to arbitration by entering into an agreement permitting the Grievant to choose

his own counsel. The contract does not require the Union to be represented by an AFSCME representative, nor did the agreement disavow AFSCME's right to participate in the proceeding in any way it chose. The contractual relationship between the parties was not altered by the agreement and it did not bar the Grievant from proceeding to arbitration or eliminate the arbitrator's jurisdiction.

The delay in filing for arbitration also did not deprive the arbitrator of jurisdiction. It is clear from the history of the processing of the grievance that the parties were in accord that strict adherence to the timelines was not contemplated by them and any objections to timeliness were waived. The grievance should, therefore, be addressed on its merits and sustained.

DISCUSSION

In this case, the Grievant, Troy Brechler, was terminated by the Employer for an alleged violation of a last chance agreement (LCA) entered into between the Employer, Brechler and the Union on March 6, 2009. In addition to defending the termination decision on the merits, the Employer has raised substantive and procedural objections to arbitrability and prays that the grievance be dismissed. The Union has contested the substantive and procedural objections and also asserts that the LCA does not apply to this case. It, therefore, maintains that the merits must be determined based on a just cause standard, which it asserts has not been met. I will address each of these arguments, in turn.

Substantive Arbitrability

The Employer first contends that the grievance is not arbitrable because, subsequent to filing for arbitration, the Union entered into an agreement with Brechler to allow him to retain his own counsel to arbitrate the grievance in return for a release of any further responsibility to Brechler for the furtherance of the grievance and an indemnification from any claim of improper representation in the future regarding the particular grievance. The Employer was not a party to this agreement, which it asserts violates the collective bargaining agreement and purports to require the Employer to arbitrate a grievance with a party with which it has no contractual relationship. The Union cites no authority for its position, but claims that arbitration is a creature of contract and, as such, only parties to the contract calling for arbitration as a dispute resolution mechanism may enforce it.

While the Employer's position, as far as it goes, may have merit as a general statement of contract law, I do not find that is what happened here. The agreement between Brechler and the Union permits Brechler to use his own counsel, at his own expense, to assert his rights as to the grievance, and expressly waives any claim Brechler may have against the Union for representation or for the outcome of the arbitration. It does not, however, serve as a withdrawal by the Union from ownership of the grievance itself. Indeed, it expressly states that the Union retains authority to appear and assert its own interests, should it so choose, and to approve of any settlement or resolution of the grievance to the extent that Union interests are impacted. As I see it, the Union remains a party to the grievance, but has merely chosen to

permit the Grievant to select the advocate of his choosing, rather than accept one of the Union's choosing. As indicated by AFSCME Council 40 Executive Director Richard Badger at the hearing, the Union views its interests, and those of the Grievant, as being largely consonant and is content to allow Brechler and his counsel to advance them. Should they diverge, however, the Union retains the right to intervene and asserts its own interests. The Union was prepared to arbitrate the grievance on Brechler's behalf, as indicated by the fact the request for arbitration was made by Council 40 Staff representative Michael Goetz. Had the Union retained Attorney Strother to advocate the matter, there would be no argument to be made. Had Brechler refused Union representation and proceeded *pro se,* with the Union retaining control of the grievance, presumably this would also be the case. I do not see how the retention of private counsel by Brechler alters the matter. Had the Union refused to arbitrate the grievance and Brechler attempted to go forward on his own, the situation would be different, but that is not the situation here. Further, it is not clear to me that the Employer was prejudiced by this agreement and I do not find any bar to arbitrability on that score.

The Employer also asserts that the grievance is not substantively arbitrable because arbitration is explicitly barred by the LCA. The specific language in the LCA on this point is found in paragraph 6, as follows:

> "Union and Employee agree that in the event Employee engages in conduct that violates this Agreement, Employee and/or the Union have the right to grieve and/or arbitrate the issue of whether Employee engaged in the conduct alleged, but all parties agree that if Employee did engage in the conduct alleged, the Employer's decision to terminate Employee's employment is not grievable or arbitrable, nor will it be challenged in any legal or administrative forum.."

The Employer's position is that Brechler's violation of the LCA was established by his admission (or failure to deny) that he had failed to sign the gas receipts in accordance with NRCS policy and that, therefore, under the Agreement he waived any right to grieve or arbitrate the Employer's decision to terminate him for it. The Employer's contention as to the effect of the language with respect to the termination is correct, but Brechler still retained the right to challenge the assertion that he violated the Agreement. Brechler may have admitted to not signing the receipts, but whether this action constituted a violation of the Agreement is a question of fact that may be grieved and arbitrated. I find therefore, that the Employer's argument that the grievance is not arbitrable on this basis is without merit.

Procedural Arbitrability

Here, the Employer asserts that the contract establishes strict timelines for the advancing of grievances which may only be altered by mutual agreement or the grievance is deemed waived. The specific language at issue is found in Article 4.06, which states:

> 4.06 Time Limits: Time limits may be extended by mutual agreement.

Notably, the language does not state what the consequences are for failing to timely advance the grievance, but, as the Employer observes, arbitral authority supports a finding that failure to honor the contractual timelines without agreement typically results in dismissal. In this case, the parties agree that at least between Steps 2 and 3 the timelines were tolled by mutual agreement to pursue settlement discussions, but the Employer maintains that thereafter the parties were "back on the clock" and that the Union's failure to request arbitration until April 9, 2010, after receiving the Step 3 denial on December 11, 2009 mandates dismissal. I disagree.

First, if it was understood that the timelines were reinstituted at the point the Union moved the grievance to Step 3, there is no documentation of the fact. Further, while the Employer's points regarding the respect to be accorded to contractual timelines are well taken, fairness requires that the argument that they have not been met must also be asserted in a timely manner. Here, there is nothing in the record that indicates that the Employer raised an objection to timeliness prior to the hearing in this matter, at which point it noted a procedural objection to arbitrability. I also note that at the time this arbitrator was assigned I advised the parties that any procedural objections to arbitrability needed to be made in writing in advance of hearing, but none were received. In my view this placed the Union in an unfair position, particularly inasmuch as Brechler's counsel did not appear in the case until after the grievance was moved to arbitration, so he was not involved in the processing of the grievance in its earlier phases. If a defense to untimeliness existed, it would most likely have been based on the recall of Union representative Goetz, who processed the grievance. Mr. Goetz was not present for the hearing, however, presumably because Brechler and his counsel were not aware that timeliness would be an issue. In short, therefore, because the claim of untimeliness was, itself, raised untimely, I find that it was waived.

The Merits

The Employer's case rests on two purported violations of the Last Chance Agreement – that Brechler violated a directive from his supervisors and a recognized policy by failing to sign the gas receipts on April 22 and May 18, in violation of paragraph 4, and that he continued to engage in improper behavior toward C.E. by writing his thoughts about her on his desk calendar, in violation of paragraph 5. The Union maintains that the incidents regarding the gas receipts did not technically violate the LCA and that his writings about C.E. were unknown to C.E. and everyone else in the Department and, further, were not covered by the restrictions in the LCA. Contrary to the Union's assertions, I find the failure to sign the receipts to be dispositive.

The Union views the LCA as having been exclusively designed to prevent further unwanted contact between Brechler and C.E. and, thus, the issue of the NRCS vehicle policies was tangential. The record is clear that Brechler's behavior toward C.E. was the primary reason for the LCA, and was the precipitating cause for its creation. It is also clear, however, that there had been problems with Brechler's continual infractions of the NRCS policies going back at least two years, which the Employer had tried to correct in a variety of ways without

much apparent success. In 2007 he received a verbal warning for using an NRCS vehicle without properly signing it out. In 2008 he again took a vehicle without properly reserving it first and attempted to alter the calendar to conceal his act, for which he received a written warning. He was counseled repeatedly on the need for following the policy in order to be permitted to use NRCS vehicles and his performance reviews reflect an ongoing concern by the Employer on this point. Communications from the NRCS staff to Jim McCaulley also reflect its growing frustration with Brechler's neglect of these rules and desire that the Employer address the problem. In March 2009, days after Brechler entered into the LCA, McCaulley and Personnel Director Trader met with him specifically about the NCRS policies. At that time they specifically went over the policies with him, reiterated the need for strict compliance, and gave him a copy on the Iowa County Land Conservation Department Expectations. This document sets forth the County's expectations of employees regarding following all work rules and policies and specifically lists NRCS vehicle policies, including the signing of gas receipts, as among those expectations. It concludes with the following statement:

> "Any violation of the above, depending on the nature of the incident and/or history of related performance problems or misconduct, may result in one of the following actions:
>
> Counseling
> Verbal Warning
> Written Warning
> One or More Days of Suspension Without Pay
> Termination
>
> The County reserves the right to take any action it deems appropriate, and therefore the above examples are not intended to be all inclusive and other action may be taken if appropriate in the judgment of the County." (emphasis added)

In short, there is no reasonable way to argue that Brechler did not know, or should not have known, that noncompliance with NRCS vehicle policies constituted a violation of County work rules or directives and that termination was a potential consequence of doing so.

It is also true that paragraph 4 of the LCA goes beyond just inappropriate contact with C.E. and includes violations of any County ordinance, policy, or directive as grounds for termination. Given the ongoing problems with Brechler's violations of NRCS vehicle policies, and the fact that they were essentially contemporaneous with the problems regarding C.E., it is hard to imagine that this was not the exact circumstance contemplated by that language. It is also notable in this regard that paragraph 8 of the LCA indicates that paragraph 4 was to be in force for 4 years, whereas the remainder was to remain in force indefinitely. Clearly, therefore, paragraph 4, dealing with Employer rules and policies, was intended to address issues beyond merely the concerns of C.E., which were addressed in paragraph 5.

Further, as the Employer asserts, at the time the LCA was executed the Employer believed that it had just cause to terminate Brechler and agreed to the LCA as a last resort in order for him to keep his job. The *quid pro quo* for this agreement was Brechler's waiver of just cause as a defense in the event of any future violations. Even though the contract itself established just cause as a necessary basis for discipline, therefore, the Union, and Brechler, agreed to amend the contract's just cause provision as applied to Brechler. Thus, with respect to any actions contemplated within the LCA, if the act and its inclusion within the scope of the LCA were proven, Brechler and the Union agreed that he could be discharged without recourse. Brechler did not deny that he did not sign the receipts and I find that this failure was within the conduct included in the LCA, therefore the Employer was within its rights to discharge him without further inquiry into the existence of just cause, including departing from the normal steps of progressive discipline. Because I find that Brechler's failure to sign the receipts justified his termination under the LCA, it is unnecessary to address the additional argument regarding his notations about C.E. in his calendar.

For the foregoing reasons, therefore, and based upon the record as a whole, I hereby enter the following

AWARD

The grievance is substantively and procedurally arbitrable.

Mr. Brechler did violate the Last Chance Agreement in his failure to properly follow NRCS policy regarding vehicle usage. The grievance is, therefore, denied.

Dated at Fond du Lac, Wisconsin, this 1st day of August, 2011.

John R. Emery /s/
John R. Emery, Arbitrator

JRE/gjc
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