BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

OCONTO FALLS EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION

and

OCONTO FALLS AREA PUBLIC SCHOOL DISTRICT

Case 35
No. 71191
MA-15100

Appearances:

Attorney Stephen Pieroni, Wisconsin Education Association Council (WEAC), 33 Nob Hill Road, P.O. Box 8003, Madison, Wisconsin 53708-8003, appearing on behalf of the Oconto Falls Educational Support Personnel Association.

Attorney Robert Burns, Davis & Kuelthau, 318 South Washington Street, Suite 300, Green Bay, Wisconsin 54301, appearing on behalf of the Oconto Falls Area Public School District.

ARBITRATION AWARD

Pursuant to the terms of a collective bargaining agreement (the Agreement) between The Oconto Falls Educational Support Personnel Association (the Association) and The Oconto Falls Area Public School District (the District), the undersigned was selected from a panel of arbitrators provided by the Wisconsin Employment Relations Commission to hear and resolve a dispute between the parties. The dispute involves whether the District had just cause within the meaning of the Agreement to terminate the Grievant's employment following a near vehicular accident in which the Grievant and several students were involved while the Grievant was driving a school bus during the course of her employment with the District. A hearing in the matter was held on February 7, 2012, at the District offices, located at 200 North Farm Road, Oconto Falls, Wisconsin 54154. A duly-appointed court reporter recorded the proceedings and provided copies of the transcript to the parties and the undersigned. The parties filed written briefs, the last of which was received on July 17, 2012.

STIPULATED ISSUES

The parties stipulated in writing to two issues: "Did the District have just cause to terminate the employment of Grievant? If not, what is the appropriate remedy?"

RELEVANT CONTRACT LANGUAGE

The relevant contract language includes the following:

ARTICLE III – MANAGEMENT RIGHTS

Section 3.01: Management . . . rights include, but are not limited by enumeration to, the following . . .

4. To suspend, discharge and take other disciplinary action toward employees for just cause;

. . .

ARTICLE VII – PROGRESSIVE DISCIPLINE PROCEDURE

Section 7.01: The District shall utilize progressive discipline in dealing with its non-probationary employees, except when the alleged conduct-giving [sic] rise to the disciplinary action warrants a stronger penalty. Progressive discipline action is defined as the following:

1. Oral reprimand (with the option of inserting a statement outlining the oral reprimand into the employee's personnel file).

2. Written reprimand.

3. Suspension (either paid or unpaid).

4. Discharge.

. . .

Section 7.03: No non-probationary employee shall be suspended, discharged or disciplined without just cause. Any such action asserted by the District or any representative thereof shall be subject to the grievance procedure of the Agreement.

BACKGROUND

I. Overview of Grievant's Work Record

Prior to the termination of her employment, the Grievant had been employed as a school bus driver by the District for approximately 21 years and had a positive employment record in many respects. She completed various driving/safety seminars. She sought to

maintain a high level of discipline amongst students who rode her bus by strictly enforcing rules (e.g. remaining seated) without favoritism. As a result, parents of vulnerable students or students susceptible to harassment requested the Grievant as a bus driver. The Grievant was especially patient with, and attentive to, the needs of a disabled student who testified favorably about the Grievant at hearing. The Grievant also received letters of appreciation from both parents and students.

The Grievant had no moving or traffic violations as a bus driver; however, the District did raise various driving incidents in addition to the May 16, 2011, incident that precipitated her discharge (discussed below). Chief among these incidents preceding the May16, 2011, incident was one that occurred on May 13, 2010, resulting in a three-day unpaid suspension that subsequently was reduced to a paid three-day suspension.[1]

In his August 4, 2011, letter to the Grievant notifying her that she was "being placed on unpaid administrative leave until further notice pending investigation and possible termination for safety violations", Superintendent David Polashek summarized the incidents of concern as follows:

> During the most recent safety violation on May 16, 2011, you were not paying attention and almost slammed into the back of [a] stopped bus. This could have resulted in serious or fatal injuries to students on the bus and a pedestrian. You chose to go on medical leave immediately after this incident.
>
> While you were on leave, we learned that some time prior to going on that leave you slammed on your brakes leaving skid marks on Sandalwood Road as a disciplinary action for students on your bus. Clearly this was a significant lack of judgment on your part and a complete disregard for safety.
>
> Previous incidents have included the slamming on the brakes on County Road I which contributed to an accident on May 13, 2010. You also admitted in a letter to the school board that you saw a dangerous situation in front of you while driving the school bus and went into the fast lane almost hitting another vehicle on March 4, 2010. You were also involved in [an] accident July 5, 2007 driving a privately owned vehicle.
>
> The combination of these incidents and our knowledge of your pattern of disregard for appropriate bus driver behavior leave[s] us with no alternative [but] to consider termination to avoid any future incidents, which could have dire consequences.
>
> . . .

[1] This reduction from an unpaid to a paid three-day suspension ultimately does not impact the progressive discipline imposed herein. Article VII, Sec. 7.01 expressly specifies that the third level of progressive discipline, a suspension, can be "either paid or unpaid", and the fourth and final level is discharge.

In addition to these incidents, the District also introduced evidence at hearing regarding an accident in which another vehicle's left-side mirror was broken when it hit the folding mirror of the Grievant's bus. The other driver attempted to pass by the Grievant's bus rapidly as she was backing into a student's driveway in early May, 2011. The Grievant was not ticketed and the bus she was driving was not damaged.

In a letter dated September 1, 2011, Superintendent Polashek notified the Grievant that her employment was being terminated, effective immediately. That letter stated in part:

> As you know, you were placed on unpaid Administrative Leave beginning August 4, 2011 in response to an incident that occurred on May 16, 2011 while you were driving a bus on County I.
>
> Luckily a tragic situation was averted, but it was upsetting enough that you placed yourself on medical leave after it happened. . . .
>
> The May 16 incident drew a lot [of] attention from parents, law enforcement officials, and others in the community because of its serious nature. . . . I felt compelled to proceed with the termination given the fact that we have gone through the other steps in the Progressive Discipline Process in the Master Agreement and other Board Policies that allowed for termination based on other factors.
>
> As I noted, I felt that we needed to proceed with that option based on our obligation to maintain trust with parents and law enforcement officials; to reduce liability exposure, and to follow Board Policy in this situation. As we discussed, we appreciated the 22 years of service you provided to the District, but if [we were] to put you back on the road and have another tragic accident, we would not be able to sleep at night. As a result, I indicated that I feel we are forced to terminate your employment with the District effective immediately. . . .
>
> I am sorry that it has come to this but we feel that we cannot risk putting you back on the road, even with the reassurances from your health care providers given the previous pattern and no guarantee that you will not have another similar incident in the future. . . .
>
> . . .

For reasons discussed below in the Analysis section of this award, details of the early May 2011 (broken-mirror) accident, the March 4, 2010, (fast-lane) incident, and the July 5, 2007, accident need not be entertained; rather, I limit my consideration of incidents preceding the May 16th near accident to the May 13, 2010, and the Sandalwood Road incidents.

Incidents Preceding the May 16th Near Accident

In the May 13th incident, according to the Association, the Grievant

> . . . forgot that a certain boy was on the bus because he was not a regular drop-off. She was reminded by the students when they noticed that she was not slowing down for the student's driveway. [The Grievant] immediately began to apply her brakes and brought her bus to a stop about 4 feet beyond the student's driveway. The driver of a pickup truck immediately behind the bus was able to stop but the high school student driving a car behind the truck failed to stop before hitting the rear-end of the pickup truck. . . .
>
> Further, [bus driver] Connie Konitzer told [the Grievant] at the time of the collision that she saw the female student texting as she passed Connie's bus on Highway I just before the accident. Mrs. Wellnitz was not cited for any driving violation by the police. . . .

(Assoc. Br. 4-5) (citations to Tr. Omitted). I accept the accuracy of the Association's narrative based on the Grievant's testimony.[2]

The Sandalwood Road incident involved the Grievant slamming on the brakes during her p.m. route during the fall of 2010. The last two students on the bus, who had been acting up for several minutes despite the Grievant's instructions to sit down, began wrestling on the floor between the seats. When the Grievant saw them in her rear view mirror, she yelled at them to knock it off and get back in their seats. At about that moment, she also saw a deer along the side of the road and hit the brakes. This series of events caused neither accident nor injury. After it occurred, the Grievant told the boys that she would not have had to slam on the brakes if it weren't for them, and that they would have to sit in the front seat until the skid marks on the highway disappeared. However, she did not actually impose this discipline and advised the boys before they exited the bus that they could return to their assigned seats, as long as they would behave themselves.

May 16th Near Accident Precipitating Termination of Grievant's Employment

The near accident triggering employment termination occurred on May 16, 2011, at approximately 7:50 a.m., as the Grievant was driving her route on County I, a highway with a 55 mph speed limit. There were no adverse weather conditions interfering with visibility or creating slippery conditions. The Grievant was following another bus driver (Connie) whom she didn't usually follow, and who, according to the Grievant, was slightly ahead of schedule

[2] However, I have omitted the portions of this narrative that I do not accept (indicated by ellipses). I believe that the Grievant's testimony regarding the omitted portions is too speculative, including her conclusions about what the pickup driver behind her observed (the student behind him not slowing down) and his motive for allegedly pulling to the right of the road (to give the student more space to regain control of her vehicle). (Assoc. Br. 5). Such details, however, are not necessary to resolve the issues before me.

on her route that day. The Grievant thus didn't expect Connie to stop where she did to pick up a student. As she drove down County I, the Grievant became distracted by a dead cat in the middle of the highway that she approached and passed. As the Grievant's bus passed the cat, she looked at it through the driver-side window. When she glanced back up, she saw Connie's bus at a full stop with both yellow and red lights on. To avoid rear-ending Connie's bus, the Grievant slammed on her brakes and veered the bus to the right, off of the highway. When the Grievant's bus stopped, the front of it was either approximately even with the back of Connie's bus or slightly past it. The students on Connie's bus complained of smoke coming in it, which apparently had been caused by the Grievant's locked brakes or her tires skidding. Moreover, just prior to this emergency stop, Connie had signaled to a young girl student waiting to cross the highway that it was okay to cross and board the bus. At the time of the near accident, the little girl was either in front of Connie's bus on her way across the highway or had just begun to board Connie's bus. As the girl walked in front of Connie's bus, Connie observed that "her eyes were huge" (Tr. 18-19), and Connie heard high schoolers yelling Connie's name. The Grievant, however, never saw the little girl.

Although Gloria Schindel, the transportation supervisor, did not measure the skid mark, she estimated it to be about 80 feet long, based on photos she took of the marks and her comparison of the length of her vehicle (also in the photos) to the skid mark. It appears to me from one of the photos (Dist. Ex. 10) that the skid mark is about four to five times as long as the minivan in the photo. The photos of the skid marks on County I also reveal that the portion of the highway on which the Grievant's bus was traveling prior to slamming on her brakes was a slight downslope as she approached Connie's vehicle. However, there was no proof offered, nor do I believe, that the crest of this slight hill obscured the Grievant's ability to see Connie's bus as she came over it, especially given the height of both buses.

Following the incident, Ms. Schindel received telephone complaints from a citizen who had witnessed the incident and from the mother of the little girl who was crossing the highway when the incident had occurred. The mother of the girl requested that the Grievant be terminated and informed Ms. Schindel that the near accident caused her daughter to be afraid to get on the bus and prompted her to change her daughter's pickup time to 7:00 a.m. to prevent her from having to cross the road. In addition, the Oconto Falls Sheriff's Department notified Ms. Schindel that it had received a complaint about the incident. The Grievant was immediately given a two-day, unpaid suspension, which she did not contest. She then took medical leave until August 1, 2011, after which the District resumed its investigation of the near accident and its consideration of the Grievant's future employment. The Grievant's employment was terminated on September 1, 2011.

II. Facts Related to Allegedly Disparate Treatment

One District bus driver, "RD," with 25 years of experience was involved in an accident for which he was assessed a one-day, paid suspension. His bus went off the road at a curve into a ditch, and then came back up onto the road. He lost control of his bus, because he hit an icy area on the road. He was nonetheless disciplined because Superintendent Polashek

concluded that he had been driving too fast for conditions. Some kids on his bus had been shaken up, bruised, taken to Urgent Care, and then released.

Another District bus driver, "BR," had numerous complaints about her driving and treatment of students before the District finally terminated her employment, effective April 22, 2011. Evidence from BR's personnel file was introduced at hearing. In a memorandum to BR and copied to the Grievant dated May 15, 2008, Supervisor Schindel notified BR that due to many complaints received about BR's driving, the Grievant would retrain her in her driving skills. The memorandum listed the following kinds of complaints that had been received about her: confidentiality, speeding (multiple complaints), dangerous passing, improper backing up, not allowing students to sit before moving the bus, and pulling out in front of other vehicles. The memorandum also detailed the following areas that needed improvement:

1. Proper speed
2. Slowing down before coming to stops
3. Allowing students to sit before moving [on] the bus.
4. Judging distances when pulling into traffic.
5. Keep your distance between vehicles. Appreciate the fact that the bus weighs over 16,000 pounds and cannot stop immediately.

Notwithstanding this retraining, complaints about, and issues with, BR's driving continued to surface. On December 18, 2009, BR was issued a three-day suspension for pulling out into traffic, forcing a car to apply its brakes quickly. Following the three-day suspension, BR received a memorandum from Superintendent Schindel dated January 4, 2010, that expressed concern that BR had attempted to orchestrate false accusations against another bus driver for pulling out in front of a semi, and that warned BR of discharge, if she in anyway coerced a student to make a false accusation. Following this memorandum, incident reports documented BR's driving into the high school driveway the wrong way, as well as a parent's complaint about BR not treating his children nicely regarding their untimeliness. A memorandum from Supervisor Schindel to BR dated October 4, 2010, documents a citizen complaint regarding pulling out from side roads in front of her, a complaint that also was sent to the Oconto County Sheriff's Department and the Oconto Falls Police Department. The memorandum noted BR's denial of ever having pulled out in front of anyone at the locations in question, to which Ms. Schindel responded, "I am a bit suspicious because you have previously been accused of pulling out in front of vehicle without sufficient room." However, no discipline was assessed; instead, Supervisor Schindel cautioned:

> I am sure that the police officers will be watching your bus from now on. In addition, I will instruct the mechanics to put front and back cameras in your bus as soon as possible. You will be monitored as closely as possible. If I find that you continue to dangerously pull in front of vehicles, or perform any other dangerous act while driving the Oconto Falls School District Bus, your employment with the Oconto Falls School District will be terminated. Keep our students safe!

. . .

In a memorandum dated December 9, 2010, Supervisor Schindel documented parents' complaints regarding BR's unsolicited remarks about a family's daycare provider, BR's bossy attitude regarding moving a trailer in a driveway, her varying arrival times while driving, and her efforts to shift blame on Ms. Schindel. The latter concluded:

> This is a verbal warning. Adjust your attitude. You are here to provide a service to the students and parents of this school district. Do it and do it with a smile.

In another memorandum from Ms. Schindel to BR bearing the same date, the former noted yet another parent complaint about BR's unprofessional interaction with the parent and BR's failure to follow instructions regarding turning around in the driveway instead of backing out. The memorandum warned, "The next time a parent complains about your behavior, you will receive a 3 day unpaid suspension."

An incident report dated 12/10 documents a teacher's complaint that BR did not allow K2 students on her bus at the high school, opting instead to take other students first and return for the K2 students.

Finally, in a memorandum dated April 19, 2011, Supervisor Schindel apprised BR that on April 15th, she (Ms. Schindel) had witnessed BR exit the high school onto County I without stopping or braking at the stop sign. The memorandum summarized previous complaints and incidents related to BR's driving, quoted the final warning that had been issued to BR on October 4, 2010, and concluded:

> I consider the safety of the students of the Oconto Falls School District to be my main concern. The safety of the students should also be the main concern for every bus driver. By your careless, negligent driving habits you are jeopardizing the safety of the students.
>
> Because of your past record and the incident that I witnessed on April 15th, your employment with the Oconto Falls School District will be terminated. . . .

. . .

Other relevant facts are set forth below where appropriate.

ANALYSIS

Article III, Sec. 3.01, and Art. VII, Sec. 7.03, empower the District to discharge employees covered by the Agreement, but only for "just cause". Article VII, Sec. 7.01, further restricts the right of discharge for just cause by requiring the District to use expressly defined progressive discipline, "except when the alleged conduct-giving [sic] rise to the disciplinary action warrants a stronger penalty." Because the Agreement does not define "just

cause," an appropriate construction of the standard should be identified at the outset. Second, I must apply that construction to the facts herein.

I. APPROPRIATE CONSTRUCTION OF "JUST CAUSE"

Although the District and the Association select and apply different articulations of "just cause" from different sources, the constructions on which they rely are consistent in important respects. The District applies the seven factors for determining just cause set forth by Arbitrator Daugherty in Enterprise Wire Co., 46 LA 359 (1966). Four of the seven tests relevant herein, are: 1) whether the employer gave the employee forewarning of the possible or probable consequences of the employee's disciplinary conduct; 2) whether the employer obtained substantial evidence or proof that the employee was guilty as charged; 3) whether the degree of discipline administered by the employer in a particular case reasonably relates to a) the seriousness of the employee's proven offense, and b) the record of the employee in his service with the employer, when taking into account any mitigating circumstances; and 4) whether the employer applied its rules, orders and penalties even handedly and without discrimination to all employees.[3] The Association selects and applies a similar standard from St. Antoine's The Common Law of the Workplace: the Views of Arbitrators, quoted by Frank Elkouri & Edna Asper Elkouri, *How Arbitration Works* 960 (Alan Miles Ruben ed., 6th ed. 2003), regarding arbitrators' authority to reduce discipline imposed on an employee. Elkouri states:

> One arbitrator cited the following passage from The Common Law of the Workplace for her authority to reduce the disciplinary penalty imposed on an employee:
>
> § 10.23 Arbitral Authority to Reduce Discipline
>
> In the absence of a contractually specified penalty or [a] clear limitation on arbitral discretion, both arbitrators and courts agree that the arbitrator may reduce the penalty imposed by management. *Most arbitrators will change a penalty if, given the facts of the case, including the grievant's seniority and work record, it is clearly out of line with generally accepted standards of discipline.*

Id., *citing* Wayne State Univ., 111 LA 986, 994 (Brodsky, 1998) (*quoting* The Common Law of the Workplace: the Views of Arbitrators 349 (St. Antoine ed., BNA Books 1998) (emphasis added by arbitrator)). In addition, the Association relies on various other arguments, including the District's allegedly disparate treatment of the Grievant and its failure to adequately notify her of an elevated standard of care for bus drivers. I find the four, above-quoted tests

[3] The other three Daugherty tests in essence address 1) whether the employer's allegedly violated rule or managerial order was reasonable; 2) whether the employer undertook an investigation prior to administering discipline; and 3) whether that investigation was fair and objective. These criteria are not at issue herein.

suggested by Arbitrator Daugherty substantially similar to the above-quoted language from Elkouri and the various other arguments the Association offers.

Accordingly, I find it appropriate to structure my just-cause analysis in response to the Association's main arguments. The Association concedes that the conduct at issue – the Grievant's driving on County I that caused a near accident on May 16th – occurred, and that she deserves to be disciplined for it. But discharge, the Association urges, is too severe a penalty. Thus, the crux of my just-cause inquiry is whether the discipline of discharge was too severe in light of arguments raised by the Association.

II. WHETHER THE DISCIPLINE OF DISCHARGE WAS TOO SEVERE

In addressing whether the discipline of discharge was too severe, I shall consider, as does the Association, 1) the Grievant's years of service and work record; 2) the near accident of May 16th; and 3) the Grievant's allegedly unfair subjection to harsher discipline than other bus drivers (*i.e.* disparate treatment).

A. Grievant's Years of Service and Work Record Prior to May 16th Incident

I take note of, and give some weight to, the Grievant's 21+ years of service, her strict and even-handed discipline of students, her absence of traffic and moving violations, and the appreciation she received from students and parents. However, the primary issue herein is her infrequent but dangerous lapses of attention, not the fairness of her discipline of students, the nature of her interaction with students and parents, or the absence of specific driving skills necessary to operate a bus safely (such as BR's ill-timed entrances into traffic). It is in the context of this issue – her lapses of attention – that I consider her driving record.

As noted above, I deem certain driving incidents raised by the District inconsequential to my analysis: the early May 2011 (broken-mirror) accident, the March 4, 2010, (fast-lane) incident, and the July 5, 2007, accident. The evidence does not adequately support a conclusion that the Grievant was at fault for the May 2011 (broken-mirror) accident, nor was she disciplined for it. Regarding the March 4, 2010 incident, it was the Grievant who raised a safety issue regarding where buses should stop via correspondence. In that correspondence, she related an incident while driving her bus in which she sensed potential danger caused by a car slowing down behind another bus that had stopped in what she claimed was a dangerous area. The Grievant thus made a lane change to the "fast lane" or "passing lane", but had to stop abruptly to avoid rear-ending another vehicle that hit the brakes in front of her. One could colorably argue, as the District did, that the Grievant should have slowed down rather than changing lanes under these circumstances; however, the Grievant was not disciplined for this incident, and it was not even raised until the District was considering terminating her. As the Elkouri treatise notes, "the failure of the employer to notify employees of alleged infractions at the time of occurrence precludes the employer from using the notations to support disciplinary action at a later date, because employees should not be required to disprove stale charges." Frank Elkouri & Edna Asper Elkouri, *How Arbitration Works* 985 (Alan Miles Ruben ed., 6th

ed. 2003). Finally, although the police report from the July 5, 2007, accident suggests that the Grievant was at fault for failing to yield the right of way at a controlled intersection and colliding with a vehicle that had the right of way, this incident occurred off duty nearly four years prior to the May 16, 2011, near accident. Even assuming *arguendo* that such considerations do not preclude the District from considering this accident, I am uncertain as to when the District found out about it. If the District had knowledge of the accident prior to the May 16th incident but opted not to discipline the Grievant for the accident, I do not think the District may now use the accident to support its discharge decision. In any event, consideration of this accident, insofar as it might suggest inattentive driving, would not disturb my ultimate conclusions.

I thus limit my consideration of incidents preceding the May 16th near accident to the May 13, 2010, and the Sandalwood Road incidents. The former is more significant, because it ultimately resulted in a paid three-day suspension that placed the Grievant one rung below the highest rung of termination on the ladder of progressive discipline. The Association argues that the District accords excessive weight to this incident, in part because a student that had been distracted by texting while driving caused a rear-end collision with the car in front of her (but not with the Grievant's bus) when the Grievant braked. Moreover, according to the Association, the Grievant willingly accepted the Association's desire to withdraw her grievance during contract negotiations to enable the finalizing of a collective bargaining agreement in the wake of Act 10. While the Grievant's taking one for the team in this fashion is commendable, the discipline meted out (a paid, three-day suspension) cannot now be questioned or qualified when applied as progressive discipline. The Association cannot be allowed to revisit here the merits of a grievance that it voluntarily had agreed to withdraw to reach an Agreement, in order to escape the progressive disciplinary consequences of the very discipline for which the grievance had been withdrawn. Put slightly differently, the Association cannot resuscitate a previously and voluntarily withdrawn grievance to avoid progressive disciplinary consequences, when the reason for withdrawing the grievance was to obtain the benefit of the bargain. This conclusion applies with equal force to preclude the Association's attempt herein to argue belatedly that progressive discipline was not applied properly when the District imposed the allegedly excessive, three-day suspension.

Yet even if I were to consider this incident and accept the Association's characterization of it as described above, I would conclude that the Grievant had a lapse of attention that was *a* cause of the accident. She admitted that although she had seen a particular student board the bus, she had forgotten that he was a passenger. It was her responsibility, not that of other students riding the bus, to remember that the student in question was on board. Nevertheless, other students had to call out to the Grievant to stop at the student's house when they noticed that she was not slowing down. That they noticed the Grievant was not slowing down and ended up stopping approximately four feet past his driveway suggests that her stop had to be more abrupt than usual. Accordingly, her inattention necessitating a more abrupt stop than usual (and the need for cars behind her to slow down abruptly) arguably could have been *a* cause of the ensuing accident behind her, even though her bus was not rear-ended and the student apparently distracted by texting was arguably more at fault.

For the foregoing reasons, the three-day, paid suspension stands and must be considered without qualification in the application of progressive discipline.

I further conclude that the District could consider the Sandalwood incident when determining appropriate discipline for the May 16th near accident, because the District heard about the Sandalwood allegations from students during its investigation of the May 16th incident. However, I also conclude that this incident should carry very little, if any, weight in determining the appropriate discipline for the May 16th incident. I am not persuaded, as the District apparently was, that the Grievant deliberately slammed on the brakes on Sandalwood Road to get the students' attention on the bus. I found the Grievant to be credible when she explained that she slammed on the brakes in reaction to seeing a deer along the side of the road amid the chaos of two boys wrestling on the bus floor. Even if slamming on the brakes is the natural but not optimal reaction when seeing a deer, I do not believe that the Grievant did so to harass or discipline the students. Moreover, I do not find credible a student's testimony in response to a leading question that the Grievant slammed on the brakes about once a month for such an improper purpose. Lastly, Superintendent Polashek credibly testified that even if the Sandalwood Road incident had been explainable in some way, that factor alone would not have altered his decision to terminate the Grievant's employment.

B. Near Accident of May 16th

Having concluded as much, I must decide whether the District had just cause to impose the next (and highest) level of progressive discipline, termination, for the Grievant's conduct leading to a near calamity on May 16, 2011. I have little hesitation concluding as much, at least if I assume for the moment that the Grievant was not subjected to disparate treatment, based on the extent of the Grievant's negligence and the potential magnitude of the harm it nearly caused. It is difficult to fathom how the Grievant, under the circumstances described above, could allow her attention and lookout to lapse for such a duration and all-consuming degree as to necessitate the shockingly long, emergency skid and off-road veer that she was forced to, and fortunately did, successfully negotiate. The Grievant's explanation of being distracted by a dead cat in the middle of the highway (and choosing to look at it through her side window as she passed by) does not exonerate her inattentiveness. Moreover, there were no adverse weather conditions affecting visibility or road conditions. The Grievant had been following Connie's bus prior to the emergency stop and thus was aware, or should have been aware, of her presence. And there is no credible evidence that her visibility was obscured by the crest of the slight slope on County I, over which she drove prior to descending the slope and slamming on her brakes.[4] It is also hard to imagine a more visible target than a large yellow school bus with flashing yellow and red lights, let alone a more costly target (two potential accident vehicles replete with young lives). The near blood bath thankfully averted could have affected the lives not only of those children but of their families as well. *Compare* Greyhound Lines, Inc., 19 LA 210 (1952) (upholding discharge of bus driver upon his first

[4] Even if the crest of the slight slope momentarily had obscured her vision of the highway ahead, she should have reduced her speed accordingly.

violation of safety rule requiring dead stop before crossing railroad tracks, despite his excellent driving record, his having slowed down at tracks, and his having safely crossed them, since violation of rule was so serious a nature that employer properly cannot be required to run the risk of its repetition).

While the Association questions the District's concern with liability due to the lack of any evidence that its insurance would not have covered any loss, I find this argument unpersuasive for various reasons. First, the Association apparently conflates the issue of liability with the issue of indemnification.[5] Second, the District would be adversely affected by a potentially huge liability claim that would reduce its resources to pay claims if self-insured, or possibly adversely affect its loss experience, insurability, and premium level if covered by a third-party liability carrier. Third (and most importantly), the issues of liability and indemnification, though legitimate concerns, ultimately are subordinate to the potential, colossal tragedy that was so narrowly avoided here. Lastly, the near impact did have an adverse impact on the girl crossing the highway, who became too frightened to cross, and on the public's confidence in the Grievant's driving.

In light of both the egregiousness of the Grievant's neglect and the magnitude of the nearly averted tragedy, the District had just cause to impose the next and final level of progressive discipline, termination of employment, unless the Grievant can escape this result by having been subjected to disparate treatment.

C. Allegedly Disparate Treatment

The Association argues, "The just cause standard requires equal enforcement of rules for similar conduct." (Assoc. Br. 16). Elkouri is generally in accord with this view:

> It is generally accepted that enforcement of rules and assessment of discipline must be exercised in a consistent manner; all employees who engage in the same type of misconduct must be treated essentially the same, unless a reasonable basis exists for variations in the assessment of punishment (such as different degrees of fault, or mitigating or aggravating circumstances affecting some but not all of the employees).

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[5] The District's concern about its exposure to liability is especially apropos, given the inapplicability herein of discretionary immunity for negligent acts under Sec. 893.80, Stats. , due to the applicability of Sec. 345.05, Stats., "a specific statute governing tort claims based on motor vehicle accidents." Frostman v. State Farm Mutual Automobile Ins. Co., 171 Wis. 2d 138, 143-144, 491 N.W.2d 100, 102-103 (Ct. App. 1992). Section 345.05, Stats., "expressly permit[s] municipal liability for motor vehicle accidents without any explicit provision limiting liability to ministerial acts . . ." Id. Under Sec. 345.05(1)(c), Stats., the definition of "Municipality" includes school districts. In addition, pursuant to Sec. 345.05(3), Stats., "the amount recoverable *by any person* for any damages, injuries or death in any action shall not exceed *$250,000*" (emphasis added) – an amount five times the $50,000 per person cap on damages otherwise imposed under Sec. 893.80(3), Stats. Two buses with school children thus present colossal liability exposure for the District.

> In this regard, one arbitrator declared: "Absolute consistency in the handling of rule violations is, of course, an impossibility, but that fact should not excuse random and completely inconsistent disciplinary practices."

Frank Elkouri & Edna Asper Elkouri, *How Arbitration Works* 995-996 (Alan Miles Ruben ed., 6th ed. 2003). Applying this principle to a comparison between the Grievant and RD does not suggest disparate treatment. RD's conduct was mitigated greatly by a difficult road condition not present herein: ice on a curved portion of the highway.

However, applying this principle to a comparison between the Grievant and BR presents a much closer question of disparate treatment. Both the Grievant and BR were assessed three-day suspensions as part of progressive discipline, prior to being discharged.[6] However, while the Grievant's discharge was the very next discipline imposed after her three-day suspension, BR's next discipline after her three-day suspension for pulling out into traffic unsafely was less severe, including the issuance of a final, zero-tolerance warning for future safety infractions, after having again entered traffic without adequate room. What I find striking in comparing the discipline of these employees is not the unfairness with which the Grievant was treated, but the excessive leniency with which BR was treated. Superintendent Polashek implicitly acknowledged as much, to some extent, in his response to a question regarding his perspective on the pertinence of the circumstances of BR's termination to the issues related to the Grievant:

> This one [BR's termination] there was a longer period of time that was involved with it, but regardless – *and perhaps we should have terminated earlier*, but ultimately we did terminate, as we did those others that were indicated there previously.

(Tr. 260) (emphasis added). The Superintendent further explained the difference in treatment by opining that the District has sought to elevate its safety standards and by differentiating the near fatality of the Grievant's May 16th incident from BR's safety infractions:

> I think one of the things that has happened is that we have elevated our standards, the threshold prior to consideration of termination, due to a number of factors, but obviously it's that heightened concern whenever there's a bus accident any place in the state. Safety is a higher priority, and I guess that's the thing that has happened here, is that we were, you know, 5 feet away from what could have been a fatality with our buses, and so – that was not the case with Ms. "R".

[6] BR's personnel record was also rife with complaints and she was required to be retrained prior to her three-day suspension. However, because the Grievant herein withdrew her grievance regarding the three-day suspension, any arguments about disparate treatment related to BR's infractions preceding her three-day suspension are effectively waived. The issue of disparate treatment appropriately focuses on the discipline that the Grievant and BR received after each was assessed a three-day suspension.

(Tr. 260-261). Superintendent Polashek, however, admitted that no notice was ever sent to employees regarding any elevated standard of safety. I am thus left to decide whether the arguably lax disciplinary treatment of another bus driver who ultimately was fired and the apparent lack of formal notice of any elevated safety expectations compel the reduction of the Grievant's discipline of discharge, where absent such considerations, I would conclude that the employer had just cause to terminate the Grievant's employment.

I conclude that the contractual progressive discipline itself constituted adequate notice to the Grievant that she could be terminated for such egregious conduct; moreover, for various reasons, the less severe treatment of BR does not, and should not, disturb my conclusion that the District had just cause to terminate the Grievant. First, BR contested the citizen's complaint about BR having pulled out in front of her vehicle, the complaint that had prompted the final warning. While I highly doubt BR's claim that no such incidents occurred, the account of the incident may have been exaggerated by the angry citizen filing the complaint. More importantly, however, "[a]bsolute consistency in the handling of rule violations is, of course, an impossibility . . .",[7] and here, "a reasonable basis exists for variations in the assessment of punishment (such as different degrees of fault, . . . or aggravating circumstances . . .) Frank Elkouri & Edna Asper Elkouri, *How Arbitration Works* 995-996 (Alan Miles Ruben ed., 6th ed. 2003). BR's safety incident for which she was issued a final warning involved two instances of pulling unsafely in front of a vehicle. While doing so could indeed have resulted in a serious accident, the Grievant's near accident entails aggravating circumstances that exacerbate both the culpability of her conduct and the potential harm resulting from it. The Grievant's inattentiveness caused a near accident involving two buses with children, not one, and had an enduring impact on a young school girl crossing the highway. While the increased potential harm is self-evident, the presence of another bus loaded with kids also impacts the duty of care owed by the Grievant. For she knew, or should have known, that children were present as she approached the stopped bus. Such actual or constructive knowledge triggered a duty of increased vigilance:

> The rule is simply stated in Wis.J.I.-Civil 1045 as:
>
> > 'Drivers of motor vehicles are chargeable with the knowledge that children of tender years do not possess the traits of mature deliberation, care, and caution of adults. The driver must increase his vigilance if he knows, or in the exercise of ordinary care should know, that children are in, or are likely to come into, his course of travel.'
>
> This does not mean a driver of a motor vehicle is under a higher standard or degree of care approaching absolute liability but rather, *when children are present or likely to come into his course of travel, he must exert greater effort in*

[7] The permissibility of some disciplinary inconsistency is arguably even greater when workplace safety is implicated: "As to the imposition and choice of sanctions, arbitrators frequently give employers significant latitude in disciplining employees who, for one reason or the other, have jeopardized workplace safety. "Frank Elkouri & Edna Asper Elkouri, *How Arbitration Works* 1005 (Alan Miles Ruben ed., 6th ed. 2003).

> *respect to lookout, speed and management and control of his car to fulfill the duty of exercising ordinary care under such circumstances. . . .*

Binsfeld v. Curran, 22 Wis. 2d 610, 612, 126 N.W.2d 509, 511 (1964) (emphasis added). In sum, the Grievant's near accident entailed greater negligence and potential harm than that of the accident for which BR was spared termination but given a final warning. And the next unequivocal safety violation that BR committed (running a stop sign) prompted the termination of her employment. Under these circumstances, I do not find that the just cause the District had for discharging the Grievant was nullified by disparate treatment. While I do not believe that the Grievant would make another such flagrant error if she were reinstated, I, like the District, am not adequately convinced. The District should not be forced to risk the lives of its students to discover whether this lingering doubt would actually materialize.

AWARD

For all of the foregoing reasons, the District had just cause within the meaning of the Agreement to terminate the Grievant's employment. Accordingly, the grievance is hereby denied.

Dated at Madison, Wisconsin, this 15th day of October, 2012.

John C. Carlson, Jr. /s/
John C. Carlson, Jr., Arbitrator

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