

IN THE MATTER OF GRIEVANCE ARBITRATION BETWEEN

GRANT COUNTY MINNESOTA,

EMPLOYER

-and-

ARBITRATOR'S AWARD¹

BMS Case No. 07-PA-0717

(Employee Termination)

AMERICAN FEDERATION OF STATE,

COUNTY & MUNICIPAL EMPLOYEES,

LOCAL 65,

UNION.

ARBITRATOR:

Rolland C. Toenges

GRIEVANT:

Bill Saathoff

GRIEVANCE FILED:

December, 2006.

ARBITRATOR SELECTED:

May 10, 2007

DATE & PLACE OF HEARING:

August 29, 2008

Elbow Lake, Minnesota

RECEIPT OF POST HEARING BRIEFS:

October 7, 2008

DATE OF AWARD:

October 14, 2008

ADVOCATES

FOR THE EMPLOYER:

Justin Anderson, Attorney

Assistant Grant County Attorney

FOR THE UNION:

Teresa Joppa, Attorney

Staff Attorney, AFSCME 65

ISSUE

Did the Employer have just cause to terminate the Grievant? If not, what should be the remedy?²

WITNESSES

FOR THE EMPLOYER:

Luthard Hagen, County Engineer

Steve Torgrimson, Foreman

FOR THE UNION:

James Moore, Staff Representative

Donald R. Amundson, Equip. Opr.

Morris Christians, Equip. Opr.

Bryan Melby, Equip. Opr.

Bill Saathoff, Mechanic (Grievant)

JURISDICTION

The instant matter at issue, regarding whether the Employer had just cause to terminate the Grievant, came on for hearing pursuant to the Grievance Procedure contained in Collective Bargaining Agreement (CBA) between the Parties. The CBA, in Article VII, EMPLOYEE RIGHTS – GRIEVANCE PROCEDURE, provides as follows:

“7.3 PROCEDURE: Grievances as defined in Section 7.1, shall be resolved in conformance with the following procedure:

STEP 3. Arbitration: A grievance unresolved in Step 2 and appealed to Step 3 by the Union shall be submitted to arbitration subject to the provisions of the Public Employment Labor Relations Act (PELRA) as amended. The parties may agree to each submit a list of five (5) names. If one name is common to both lists, then that arbitrator shall be selected for the hearing. If more than one name is common to the list, then the parties shall flip a coin to determine who has the option

² Subsequent to the hearing, the Parties stipulated in their Post Hearing Briefs that there was “just cause for discipline. Therefore, the issue before the Arbitrator is: What is the appropriate level of discipline?”

of striking first, and then proceed to strike names on an alternate basis until only one name is left. That arbitrator shall herein decide the grievance.”

“7.6 ARBITRATOR’S AUTHORITY;

- a. The arbitrator shall have no right to amend, modify, nullify, ignore, rewrite, add to or subtract from the terms and conditions of this Agreement. The arbitrator shall consider and decide only the specific issues submitted in writing and shall have no authority to make a decision on any other issue not so submitted.
- b. The arbitrator shall be without power to take [make] decisions contrary to, or inconsistent with, or modifying or varying in any way the application of laws, rules or regulations having the force and effect of law. The arbitrator’s decision shall be submitted in writing within thirty (30) days following the close of the hearing or the submission of briefs by the parties, whichever be later, unless the parties agree to an extension. The decision shall be binding on both the Employer and the Union and shall be based solely on the arbitrator’s interpretation or application of the express terms of this Agreement and to the facts of the grievance presented.
- c. The arbitrator must make written findings of fact and conclusions based on competent and relevant evidence introduced at the hearing.
- d. The fees and expenses for the arbitrator’s services and proceedings shall be borne equally by the Employer and the Union, provided that each party shall be responsible for compensating its own representatives and witnesses. If either party desires a verbatim record of the proceedings, it may cause such a record to be made, provided it pays for the record. If both parties desire a verbatim record of the proceedings, the cost shall be shared equally.”

The Parties selected Rolland C. Toenges as the Arbitrator to hear and render a decision in the interest of resolving the disputed matter.

The Arbitration hearing was conducted as provided by the terms and conditions of the CBA and the Public Employment Labor Relations Act (MS 179A.01 - .30). The Parties were afforded full opportunity to present evidence, testimony and argument bearing on the matter in dispute. Witnesses were sworn under oath and were

subject to examination and cross-examination. There was no request for a verbatim record of the hearing.

The Parties jointly stipulated to the issue before the Arbitrator and that there are no procedural issues. The Parties also stipulated to the admissibility of the exhibits submitted, provided that Exhibit #8 was not presented to the Grievant nor signed by him.

Post Hearing Briefs were received from the Parties on October 7, 2008.

BACKGROUND

Grant County (EMPLOYER) is located in rural Northwestern Minnesota. Its economy is primarily agricultural. It has a population of approximately 6,000 people. Grant County governmental functions include a Highway Department, out of which arose the instant dispute.

The Highway Department operates out of five locations within the County and employs some seventeen (17) workers. Five workers of these workers, including the Department's mechanic, work out the Department's main facility located in Elbow Lake, which is also the County Seat.

The American Federation of State, County and Municipal Employees, Local 65 (UNION) is the exclusive representative of a bargaining unit consisting of non-supervisory employees in the Highway Department. Occupations in the bargaining unit include Maintenance Mechanic III, Heavy Equipment Operator, Highway Maintenance Lead Worker, Accountant and Highway Technician II.

The Grievant was employed as Maintenance Mechanic III in May of 2002 and was assigned to work in the Elbow Lake equipment repair facility. The Grievant's position is the sole mechanic position and involves skilled mechanical work in the maintenance and repair of vehicles and related equipment. Work responsibilities included diagnosis, repair and testing of a wide variety of mechanical equipment.

Although the Grievant's work activity was mainly in the Elbow Lake repair facility, he was required to travel to the other Highway Department facilities and work sites throughout the County to perform equipment maintenance and make repairs. The Grievant diagnosed and tested motorized equipment by operating it on streets and highways. He also operated motorized equipment while transporting it to and from the repair facility and to and from equipment vendors. The Grievant also operated motorized equipment while picking up parts and supplies and on occasion while engaged in snow removal. The motorized equipment operated on public streets and highways by the Grievant ranged from small trucks to large heavy trucks and earth moving equipment.

Because of the need to operate motorized equipment on streets and highways, a requirement of the Maintenance Mechanic III position is a valid Class A drivers license and a Commercial Drivers License (CDL). Also required is certification to perform annual Federal Department of Transportation (DOT) truck safety inspections. In March of 2005, the Grievant participated in a review and update of the Maintenance Mechanic III job description, which included the CDL and DOT certification requirement.³

In March of 2003, the Grievant lost his driving privilege due to an arrest for driving under the influence of alcohol (DWI). The Employer issued the Grievant a written reprimand for not having the required driving qualification to perform his job and arrangements were made for him to take time off until he was able to obtain a permit to drive. The reprimand issued to the Grievant warned him that failure to have a valid CDL could result in more severe discipline.⁴ The Grievant, within several weeks, obtained a limited driving permit and was able to continue working.

³ Exhibit #3.

⁴ Exhibit #4.

In September 2006, the Grievant again lost his driving privilege due to being charged with Third Degree Driving While Impaired.⁵ The Employer placed the Grievant on suspension for five days, but arranged for him to use vacation and compensatory time so as to receive a full paycheck and continue full benefits. The Grievant was again warned that having a Commercial Drivers License (CDL) was a requirement of his position and not having it could involve other disciplinary action up to and including termination. The Grievant was directed to keep the Employer informed of when he would have a driving permit, the expectation being it would be in a short time.⁶

Having heard nothing further as to when the Grievant would have a driving permit, the Employer by letter dated November 20, 2006, notified the Grievant that it was reviewing the possibility of terminating his employment for not possessing the driving qualification required of his position. The Employer scheduled a meeting with the Grievant and his Union representative on November 29, 2006 to review the matter.⁷

At the November 29, 2006 meeting, the Employer confirmed what had been learned from the County Attorney. This was that the time period the Grievant had for contesting his license revocation had expired, with the result being that his standard driving privileges would be suspended for 180 days and his CDL privileges would be suspended for at least one-year⁸. In consideration that the Grievant would not be able to meet the qualification requirements for his Maintenance Mechanic III position for at least one-year, the Employer issued the Grievant a notice of termination to be effective December 8, 2006.⁹

⁵ Exhibit #7.

⁶ Exhibit #6.

⁷ Exhibit #13.

⁸ The Grievant's CDL privileges were actually suspended from September 10, 2006 through March 13, 2008, a period of 18 months.

⁹ Exhibit #14.

Upon being notified of his termination, the Grievant filed a grievance. However, action on the grievance was suspended pending the outcome of court action regarding the DWI charges against him. The Grievant entered a plea of guilty to the DWI charge on August 13, 2007.¹⁰

Thereafter the Parties were not able to resolve the disputed matter, which brings it to the instant proceeding.

EXHIBITS

1. Collective Bargaining Agreement - 2004-2005.
2. William Saathoff offer of employment – April 22, 2002.
3. Job Description – Maintenance Mechanic III.
4. Letter of Discipline to William Saathoff, March 14, 2003.
5. Warrant of Commitment – State of Minnesota v. William Saathoff, 4/15/03.
6. Letter of Discipline to William Saathoff, September 8, 2006.
7. Criminal Complaint – State of Minnesota v. William Saathoff.
8. Letter of Discipline to William Saathoff, October 16, 2006.¹¹
9. MS 169A.52, Test Refusal or Failure; License Revocation.
10. MS 169A.53, Administrative and Judicial Review of License Revocation.
11. MS 171.165, Commercial Driver’s License, Disqualification.
12. 49 CFR, Section 383.51, Disqualification of Drivers.
13. Letter of Intent to Discipline William Saathoff, November 20, 2006.
14. Letter of Termination to William Saathoff, November 29, 2006.
15. Blank.
16. Blank.
17. Blank.

¹⁰ Exhibit #23.

¹¹ The record shows that there is no proof that this letter was either executed or received by the Grievant, as it contains no signatures.

18. Notice of Filing and Order and Order, State of Minnesota v. William Saathoff.
19. Order and Warrant of Commitment, State of Minnesota v. William Saathoff, August 13, 2007.
20. Various correspondences between the Parties and Arbitrator Toenges.
21. MS 171.04, Persons Not Eligible for Driver's Licenses.
22. Driver's License Record of William Saathoff – 5/10/97 to 8/17/07.
23. State of Minnesota, Notice and Order of [License] Revocation – William Saathoff.

POSITIONS OF THE PARTIES

THE EMPLOYER SUPPORTS ITS POSITION WITH THE FOLLOWING:

- The Grievant, employed on April 22, 2002, was a good mechanic but made poor choices.
- On March 9, 2003, the Grievant was charged with driving while impaired (DWI) and plead guilty on April 15, 2003. The Grievant was sentenced to probation, to undergo APA and suffered temporary loss of his driving privileges.¹²
- The Employer issued the Grievant a reprimand dated March 14, 2003. The reprimand included notice to the Grievant that having a Commercial Drivers license (CDL) was condition of employment and lack thereof hindered his full functioning as a Maintenance Mechanic III.¹³
- The Grievant applied for and obtained a limited driving permit. The Employer directed the Grievant to take vacation and compensatory time off until the driving permit was obtained.¹⁴
- On September 2, 2006, the Grievant was again charged with DWI.¹⁵
- Because the September 2, 2006 incident was the second DWI within ten years, the Statute provided for a class A drivers license revocation of 180 days.¹⁶

¹² Exhibit #5.

¹³ Exhibit #4

¹⁴ Exhibit #4.

¹⁵ Exhibit #7.

- A valid drivers license and CDL is a requirement of Grievant's job as a Maintenance Mechanic III.¹⁷
- Without a valid drivers license and CDL, the Grievant is not qualified to perform the full job requirements of Maintenance Mechanic III.¹⁸
- As a Maintenance Mechanic III, the Grievant is required to operate light, medium and heavy motorized equipment requiring a Class "A" driver's license and a CDL.¹⁹
- Operation of light, medium and heavy motorized equipment is necessary in the testing, diagnosis, and transportation of motorized equipment, field equipment repairs, snow removal and other emergencies.²⁰
- The Grievant participated in the development of the Maintenance Mechanic III job description. Therefore, he had had full opportunity to be aware that a current valid CDL and Class "A" driving license was a qualification requirement.²¹
- On September 8, 2006, the Employer met with the Grievant and left with the understanding that the driving license revocation was to be for a short time. The Grievant was suspended for five days, but was allowed to use vacation and compensatory time in order to receive a full paycheck and full benefits.²²
- At the September 8, 2006 meeting, the Grievant was given notice again that if loss of his driving privilege should extend beyond three weeks, other disciplinary action could be involved, up to and including termination of employment. The Grievant was directed to keep the Employer informed of the status of his driving privileges.²³
- On November 20 2006, the Employer sent the Grievant a letter setting up a meeting for November 29, 2006 with the Grievant and his Union representative. The stated purpose of the meeting was to discuss the

¹⁶ Exhibit #9.

¹⁷ Exhibit #3.

¹⁸ Exhibit #3.

¹⁹ Exhibit #3.

²⁰ Exhibit #3.

²¹ Exhibit #3.

²² Exhibit #6.

²³ Exhibit #6.

possibility of termination; to give the Grievant an opportunity to hear the evidence against him; and to give the Grievant an opportunity to present his side of the story.²⁴

- On November 29, 2006, the Employer sent the Grievant a letter informing him that he would be terminated effective December 8, 2006, as a result of not having the required driving licenses. The Grievant was given the alternative of tendering a resignation, but declined.²⁵
- The Grievant entered a motion before the court to “dismiss the [DWI] charges due to law enforcement’s alleged lack of “probable cause.” The Court issued an Order denying the Grievant’s motion, dated July 9, 2007.²⁶
- On August 13, 2007, the Court issued an “Order & Warrant of Commitment,” regarding the September 2, 2006 DWI charges, wherein the Grievant entered a plea of guilty of third degree DWI.²⁷
- The Grievant’s CDL was not reinstated until March 13, 2008.
- The CBA Management’s Rights language reserves the Employer’s right to determine the penalty for misconduct. An Arbitrator should hesitate to substitute his judgment and discretion for that of Management.
- The Grievant, in losing his CDL, lost the ability to carry out the requirements of his position, which justifies his discharge in this instance.
- The grievance should be denied.

THE UNION SUPPORTS ITS POSITION WITH THE FOLLOWING:

- The real issue is not whether any discipline is warranted, but what it should be.
- The discipline imposed in September 2006, a five-day suspension must be the only discipline.

²⁴ Exhibit #13.

²⁵ Exhibit #14.

²⁶ Exhibit #18.

²⁷ Exhibit #19.

- Any second attempt to discipline the Grievant must fail due to the well-recognized principle of double jeopardy.
- It is double jeopardy to first suspend the Grievant and then discharge him for the same offense.
- Grievant was a well-respected and hard working mechanic with a clean record, except for an off duty DWI in 2003 and 2006.
- The CBA language setting forth the forms of discipline applies to types of discipline and is not meant to imply a sequence of events.
- The CBA language that states discipline can be “one of more of the following forms does not mean that the discipline can be repeated over and over for the same offense.
- The Employer must chose one form of discipline, based on the offense, one time and one time only.
- It is generally accepted that once discipline has been imposed and accepted, additional discipline cannot be imposed for the same offense.
- The Employer having issued a five-day suspension and then two months later discharging the Grievant after receiving great benefit from the employee’s work is classic double jeopardy.
- The Employer, finding a way to work around the Grievant’s lack of driving privileges for two or three months, should not be heard to say that it cannot have him in the workplace at all.
- The testimony at the hearing was clear that the County Engineer knew from the start that a second DWI meant that the Grievant would be without a CDL for a year. The County Engineer had cause to know this from helping a technician get his license reinstated.
- The Employer should not be able to take advantage of the Grievant’s fine skills as a mechanic for three months without a CDL and then say they could not afford to have him working in the shop because he didn’t have it.
- It was appropriate for the Grievant to challenge the DWI charge in Criminal Court due to the consequences of losing his job.
- If the Employer could keep the Grievant employed from September to December (three months), why couldn’t the Employer continue to accommodate him longer, until he could get his CDL reinstated?
- The Grievant now has a CDL and all the qualifications necessary.

- The CBA requires “just cause” for termination. In the end however, does the Grievant deserve termination due to poor choices?
- The Grievant requests reinstatement without back pay up until the date his CDL was reinstated, March 13, 2008.

DISCUSSION

In-as-much as the Parties have jointly stipulated, in their Post Hearing Briefs, that there is “just cause” for discipline, the remaining issue before the Arbitrator is: What is the appropriate level of discipline?

It is noted that the Employer’s basis for discharging the Grievant does not include his off the job conduct or his DWI conviction. The record shows that the Grievant was a good mechanic. The Employer’s basis for discharge of the Grievant is that he did not possess the Class A and CDL driving licenses required for his Maintenance Mechanic III position.

The threshold issues are:

1. Is a Class A driver’s license and a CDL inherent in and a necessary component of the Maintenance Mechanic III position?
2. If so, would the time period the Grievant was without the required licenses be an unreasonable accommodation to be expected of the Employer?

State and Federal laws require the driver’s licenses at issue to operate motorized equipment on public streets, roads and highways. The record shows that the ability to operate motorized equipment on the streets, roads and highways is necessary to perform the full duties of the Maintenance Mechanic III position.

- It is necessary to diagnose problems and to determine whether repairs corrected the problems.
- It is necessary for the mechanic to pick up and deliver equipment from job sites, other Highway Department facilities, contract repair facilities and equipment vendors.
- It is necessary for the mechanic to service equipment and make repairs at work sites in the field.

- It is necessary for the mechanic to pick up and deliver parts and supplies.

The record shows that the Employer accommodated the Grievant for a short period in 2003, the first occasion that his driving privileges were revoked. The record shows that the Grievant took time off for some or all of the time he was without the required driving licenses. The Grievant was reprimanded and put on notice that not having the required license could result in more severe discipline.

When the Grievant lost his driving privileges in 2006, the Employer again provided an accommodation. Although the record refers to the Grievant's time off as a suspension, the Grievant was actually on paid leave, an accommodation that allowed him to continue receiving a full paycheck and benefits.

At the onset of the 2006 license revocation, the Employer expected the revocation period to be of a short duration, like it had been in 2003. When the Employer realized that the duration of the driving license revocation was going to be at least one-year, the Employer was not willing to make an accommodation of this duration and discharged the Grievant. Subsequently, a new mechanic was employed who met all the qualification requirements of the Maintenance Mechanic III position.

The Grievant contended and Union witnesses testified that the Grievant could do the mechanic job, notwithstanding his inability to drive motorized equipment on streets, roads and highways. They contended this was possible by having other employees do the necessary driving. The Employer witnesses counter testified that, although it was possible to have other employees do the necessary driving, and this was done while the Grievant was being accommodated, it created unacceptable inefficiencies, duplication of work and added to the cost of operations.

The Grievant contended that he could do road testing in the parking lot so he wouldn't need to drive on the public streets and highways. The Employer countered that, although this may be workable in some situations, it is axiomatic that there are some types of diagnosis that requires greater speed and distance testing in a more typical operational environment.

The Maintenance Mechanic III job description under “Activities” states: “assist in snow removal or with other emergencies as needed.”²⁸ The Grievant described snow removal activity he had performed as clearing the parking lot around County buildings, which could be accessed with driving only a short distance on public streets.

The Grievant contends that he is being treated more harshly than another employee (a technician), who was allowed to continue working for some years after his driving privileges were revoked. The record shows that, although this situation occurred, it was corrected when Hagen became County Engineer in 2002. The record shows that since Hagen became County Engineer, the driving requirement has been uniformly administered.

The Grievant also contends that the requirement for a CDL to operate large motorized equipment is not uniformly administered because the County Engineer, who does not have a CDL, operated a snowplow to clear a snowdrift on a County road. The record indicates this was a one-time incident. No background was given as what circumstances were involved.

The Grievant also argues that his discharge should be set aside in favor of his five-day suspension. The Grievant contends he has been subjected to “double Jeopardy” by being first suspended for not having the required licenses and then later discharged for the same reason.

The record shows that the Grievant was noticed via a letter dated September 8, 2006 that it was the Employers understanding, from information provided by the Grievant, that he would be “*without a CDL for a short time.*”²⁹

The Grievant was suspended from work five days, from September 11, 2006 through September 15, 2006. Although this was labeled a suspension, the Grievant

²⁸ Exhibit #3.

²⁹ Exhibit #6.

received full pay and benefits for the five days. The Grievant was informed he could use vacation and comp time to insure a full paycheck and; *“No vacation, sick leave or medical benefits will be lost for these 5 days.”*³⁰

The September 8, 2006 letter to the Grievant also reminded him of the CDL requirement for his position and put him on notice that, *“If loss of your CDL should occur for any extended time, or beyond three weeks, it shall be addressed at that time and could involve other disciplinary action up to and including termination of your employment. This is the second occurrence.”*³¹

Lastly, the September 8, 2006 letter to the Grievant included the following condition: *“I am requesting you keep us informed of any results of court decisions.”*³²

FINDINGS

The Arbitrator finds a Class A and a CDL license is inherent in and a necessary qualification for the Maintenance Mechanic III position. The Grievant’s contention that he can perform the Maintenance Mechanic III duties, without the ability to operate motorized equipment on public streets and roads, is contradicted by substantial evidence in the record. Being able to operate motorized equipment is necessary for all of the reasons noted in the preceding section.

Expecting the Employer to accommodate the Grievant for the period he was without the specified licenses (in excess of one-year) is not reasonable. To accommodate the Grievant would have required other employees to perform that part of the Grievant duties he could not. This is inefficient and a duplication of work. In effect, this involves two employees performing a job that should require only one. Although

³⁰ Exhibit #6.

³¹ Exhibit #6.

³² Exhibit #6.

the Employer did accommodate the Grievant for a short time, doing so for a period of one-year or longer is unreasonable for both operational and economic reasons.

Both Employer and Grievant witnesses testified that from September to December 2006, when the Grievant did not have a license to drive, the Foreman and other employees did the work the Grievant could not. Also equipment was taken to outside shops for repair and service.

Road testing equipment to diagnose problems and to determine if repairs were corrected requires a skilled mechanic. It is not something an inexperienced worker can perform in an efficient or accurate manner. It may be true that the Grievant, as a passenger, could still make the diagnoses and determine if repairs corrected the problem, but this requires the time of two employees rather than one. As such it is inefficient, a duplication of work and increases the Employer's cost of operations.

The Grievant's contention that he could do necessary road testing in the parking lot is also contradicted by substantial evidence in the record.³³ Although it is likely some testing can be done in the parking lot, there is testing that requires the motorized equipment be operated under load and speed conditions typical to normal usage.

The Grievant's contention that he was able to perform the snow removal function prescribed in the Maintenance Mechanic III job description, without the driving licenses, falls short of what the job description states. Although clearing parking lots may be typical of what the Grievant has done in the past, the job description references other circumstances where the Maintenance Mechanic III is subject to driving during severe weather and related emergencies. The job description states that the Maintenance Mechanic III is to be "*available in severe weather conditions for field equipment repairs and assist in snow removal or other emergencies.*"³⁴ A fair reading of this provision clearly implies that the mechanic must be able to travel to

³³ Testimony of witnesses Amundson, Christians, Melby, Hagen and Torgrimson.

³⁴ Exhibit #3, Description of Activities: Item #L.

field locations where equipment repairs are needed. It also clearly implies that the mechanic is to be available to fill in for an equipment operator or operate an added piece of equipment when needed due to severe weather conditions.

The Grievant's contention that he is being treated differently than another employee (a technician), who was allowed to continue working after losing driving privileges, is not supported by the record. The record shows that, although the situation involving the technician existed for some time, it was addressed and corrected when Hagen became County Engineer in 2002.³⁵ The record shows, the driving license requirement has been uniformly applied by Hagen during his administration, the only exception being the short term accommodations provided to the Grievant in 2003 and 2006. Hagen testified that, if the Grievant had been able to obtain the required driving licenses or a work permit by November or December 2006 he would not have been discharged.

The Grievant also contends that he is being treated differently based on an allegation that the County Engineer, not having a CDL, used equipment requiring a CDL to remove a snowdrift. Grievant witness, Bryan Melby's testimony that Hagen "took a truck and plowed a drift off a County Road," is the only reference in the record to this matter. There is no explanation in the record of why Hagen may have done so. One can speculate that it was an emergency situation and Hagen took reasonable action under the circumstances. Even if not an emergency, the Arbitrator does not find a single incident, such as is alleged, a controlling precedent in the instant case.

The Grievant contends that he has been subjected to "double jeopardy," by first being suspended for not having the required driving licenses and then discharged for the same reason. The record shows that, when the Grievant lost his driving privileges due to his 2006 DWI, both the Grievant and Employer had the expectation that he would be able to obtain a driving permit after a short time as he had done in

³⁵ Per testimony of Hagen, technicians are not required to have a CDL.

2003. The Grievant testified that he didn't "recall knowing that he had 30-days to challenge the license revocation and "wasn't aware that State and Federal laws had changed on how long his license was to be revoked."

When the Grievant informed the Employer of his DWI and license revocation in September 2006, the Employer requested the Grievant keep the Employer informed of any court decisions [in reference to the status of his drivers licenses]. The Grievant offered no new information to several follow-up requests by the Employer.

Sometime after the time period passed, during which the Employer expected the Grievant would again have the required driving permit, the Employer received information from the County Attorney regarding circumstances surrounding the Grievant's license revocation. The Employer learned that the 30-day time period the Grievant had to contest his license revocation had elapsed. This meant that the Grievant's Class A license would be suspended for 180 days and the Grievant was disqualified from restoration of his CDL for at least one-year.³⁶

Having heard nothing further from the Grievant, the Employer, via a letter dated November 20, 2006, arranged a meeting with the Grievant and his Union representative to review the license matter and to allow the Grievant an opportunity to respond to the possibility that he would be discharge for not meeting the qualification requirement of his position.³⁷

At the November 29, 2006 meeting it was confirmed that the Grievant had not exercised his right to challenge the his license revocation within the time limit, the effect being that his class A license revocation would be 180 days and the CDL revocation would be at least one year. Upon confirmation that the Grievant would be without the required driving CDL license for at least one-year, the Employer, via a

³⁶ Exhibits #7, 9, 10, 11, 12, 18, 19, 21 and 22 – (Ultimately, the Grievant's CDL was suspended for a period of 18 months (9/10/06 through 3/13/08)

³⁷ Exhibit #13.

letter dated November 29, 2006, discharged the Grievant effective December 8, 2006 for not having the necessary qualifications to perform his job.³⁸

The Arbitrator does not find the facts in the instant case constitute double jeopardy. The five-day suspension given the Grievant in September 2006 was based on the understanding, of both the Grievant and Employer, that the Grievant would be able to obtain a driving permit within a short time period as he had done in the 2003 DWI license revocation. The suspension was actually a leave with pay that allowed the Grievant to continue with full pay and benefits while he was waiting for a permit that would allow him to drive on the job.

Further, in correspondence dated September 8, 2006, the Grievant was put on notice; *"Please keep in mind that a CDL is a requirement of your position. If, loss of your CDL should occur for any extended time, or beyond three weeks, it shall be addressed at that time and could involve other disciplinary action up to and including termination of your employment."*³⁹

When it was learned that the Grievant's license revocation was to be of a year or longer, a different and more serious fact situation existed. Based on this new fact situation, the Employer determined the Grievant's lack of the qualifications, required for his position, was beyond what could be reasonably accommodated. In accordance with the conditions set forth in the notice to the Grievant on September 8, 2006, the Grievant was discharged.

The Grievant's suspension in September 2006 was based on what the Grievant told the Employer, which was the license CDL suspension would be *"for a short time."*⁴⁰ In November 2006, after hearing nothing further from the Grievant, a meeting was arranged with the Grievant and his Union representative, where it was confirmed that the Grievant would not possess the required CDL qualification requirement for

³⁸ Exhibit #14.

³⁹ Exhibit #6.

⁴⁰ Exhibit #6.

his job for at least one-year. This was a dramatic increase in the duration that the Grievant would not be able to perform the full requirements of his job. It was dramatically different than what was understood by the Employer when the five-day suspension was issued in September 2006. This serious change in circumstances was the basis for the Employer's discharge of the Grievant.

The Arbitrator finds that the Employer's discharge of the Grievant comports with the double jeopardy principle cited in the Parties Post Hearing Brief, that increased discipline can be warranted where the "*offense was more serious than it looked at first.*"⁴¹

Lastly, the Grievant argues that the Employer took advantage of him for some two or three months while he was getting equipment ready for winter operations, notwithstanding his lack of a CDL. The Grievant argues that, when the winter preparation was done, the Employer claimed he could no longer work without a CDL. The Arbitrator does find sufficient evidence in the record to support this allegation.

The Employer was on record from the start (September 8, 2006) that the Grievant could not work as a mechanic without a CDL, but was willing to allow him a "short time" to obtain a driving permit, like he had done previously. The Employer showed compassion in arranging for the Grievant to receive full pay and benefits, even though he was supposed to be serving a disciplinary suspension. Further the record shows that the Employer allowed the Grievant considerably more time than was originally specified to obtain a driving permit. It was after the Employer found out that the Grievant had not exercised his right of challenge, and the time required for him to again have a CDL would be more than a year, that the Employer discharged him.

⁴¹ The Grievant cites the "Grievance Guide, 10th Edition, BNA, 2000 at page 14: "It is well recognized principle that discipline should be reasonably prompt and that a penalty once announced should not be increased *absent evidence that the offense was more serious than it looked at first.*" The principle of double jeopardy has been applied by arbiters to prohibit the imposition of two successive penalties for the same offense, such as recorded warning and a suspension. [Emphasis Added]

While it can be argued that the Employer benefited from the Grievant working further into the fall season where he prepared equipment for winter operations, it can also be argued that permitting him to do so reduced the work efficiency of other employees who performed the Grievant's driving duties.

AWARD

Discipline of the Grievant was for "just cause" and discharge is a reasonable course of action, considering that the Grievant lacked the necessary qualifications required of his job and would not be able to acquire them for more than one-year.

The Grievance is denied.

CONCLUSION

The Parties are commended on the professional and through manner with which they presented their respective cases. It has been a pleasure to be of assistance in resolving this grievance matter.

Issue this 12th day of October 2008 at Edina, Minnesota.

ROLLAND C. TOENGES, ARBITRATOR