

parties waived the contractual arbitration panel set forth in Article 13 and stipulated that the instant grievance is properly before the undersigned Arbitrator for final and binding decision. The parties further stipulated that this matter does not involve contract arbitrability or any other procedural issues.

APPEARANCES

For the Employer

Ann K. Bloodhart, Associate General Counsel
Sydnee Woods, Associate General Counsel
Steve McLaird, Assistant Director Bus Operations
Jeff Wostrel, Heywood Garage Operations Manager
John L. Cook, Assistant Manager Garage Operations
Marcia Keown, Human Resources
Ben Jones, Law Clerk

For the Union:

Kelly A. Jeanetta, Attorney
Unnamed Grievant, former Bus Operator
Dorothy Maki, Union Vice-President

THE ISSUE

The parties stipulated to the following issue, *“Did the Employer have just and merited cause to discharge the Grievant, and if not, what is an appropriate remedy?”*

BACKGROUND

Metropolitan Council, hereinafter the Employer, is the regional planning agency serving the Twin Cities seven-county metropolitan area plus Sherburne County providing essential services to the region including the operation of the region's largest bus and light rail system known as Metro Transit. Amalgamated Transit Union Local No. 1005, hereinafter the Union, is the collective bargaining representative of approximately 2,500 employees that includes 1,400+ bus operators. The Union has represented this unit since the 1930's.

On November 24, 2010³, the Employer issued the Grievant a written Notice of Discharge (Employer Exhibit 8). The grounds for discharge stated in the Notice were “*Violation of Metro Transit Operating Policy – Adherence Code*” and “*Overall Record*”. According to the Employer, its policy—Procedure 4-7d (Employer Exhibit 3)—justified the discharge action since this was the Grievant’s fourth Adherence Code violation in a rolling calendar year.

The discharge was a direct result of the Grievant receiving a Notice of Violation on November 9 from Transit Control Center (TCC) Supervisor Joseph Kallina, for “*sleeping, loitering*” (Employer Exhibit 6). Following an investigation, the Grievant received a written notification from Assistant Manager Garage Operations John Cook dated November 15 that the investigation had concluded that he had violated the Employer’s policies and procedures—(1) Metro Transit Operating Policy-Adherence Code and (2) Overall Record (Employer Exhibit 5). Further, the Employer put the Grievant on notice that it intended to discharge him and apprised him of a Loudermill hearing scheduled for November 16 (Employer Exhibit 7). During this Loudermill hearing, the Grievant unsuccessfully sought to have his discharge rescinded resulting in him being formally discharged on November 24.

The Grievant filed a grievance on November 24 contesting his discharge (Joint Exhibit 2). After a Step 1 meeting on November 24, Heywood Garage Operations Manager Jeff Wostrel denied the grievance in a December 2 written memorandum (Employer Exhibit 16). A Step 2 meeting was held on December 16 which resulted in Assistant Director of Bus Operations Steve McLaird denying the grievance in a memorandum dated December 21 (Employer Exhibit 17). A Step 3 grievance hearing was held on January 6, 2011 wherein Deputy Chief of Bus Operations Julie Johanson denied the grievance in a memorandum

³ Unless otherwise indicated, all dates are in the year 2010.

dated January 21, 2011 (Employer Exhibit 18). Thereafter, the Union filed for arbitration. The undersigned Arbitrator was notified in writing on May 16, 2011 by Union Counsel Roger A. Jensen that I had been chosen as the neutral arbitrator in this matter.

RELEVANT CONTRACT PROVISIONS

ARTICLE 5 GRIEVANCE PROCEDURE

Section 1. *Metro Transit reserves to itself, and this Agreement shall not be construed as in any way interfering with or limiting, its right to discipline its employees, but Metro Transit agrees that such discipline shall be just and merited.*

Section 2. *No employee shall be suspended without pay or discharged until the employee's immediate superiors have made a full investigation of the charges against that employee and shall have obtained the approval of the applicable department head. No discipline, excepting discharge without reinstatement, shall be administered to any employee that shall permanently impair the employee's seniority rights. When contemplating disciplinary action, Metro Transit shall not give consideration to adverse entries on an employee's disciplinary record involving incidents occurring more than thirty-six (36) months prior to the date of the incident which gives rise to the contemplated discipline. Prior to a suspension of more than two (2) days, the ATU must be notified. If a case of discipline involves suspension or discharge of an employee, and such employee is not found sufficiently at fault to warrant such suspension or discharge, the employee shall then be restored to their former place in the service of Metro*

Section 3. *Any dispute or controversy, between Metro Transit and an employee covered by this Agreement, or between Metro Transit and the ATU, regarding the application, interpretation or enforcement of any of the provisions of this Agreement, shall constitute a grievance.*

OTHER RELEVANT PROVISIONS

METRO TRANSIT BUS OPERATOR'S RULE BOOK & GUIDE

276 CALLING STREETS. *Federal law requires you to announce all major intersections and all transfer points. Major intersections include those with traffic signals and those which have stop signs.*

See Also Section 278 Accommodating Disabled Customers

If your bus is equipped with a working public address system, you must use it to call the streets.

Pay special attention to the needs of vision-impaired people. Some may not appear vision-impaired. Accommodate any customers request to have a particular street announced. It is also a good idea to call important landmarks as well as the required intersections. By doing so, you are providing a welcome service to new customers and those visiting our area.

278 ACCOMMODATING DISABLED CUSTOMERS. *The Americans with Disabilities Act (ADA) is federal legislation which requires public transit providers to make their service accessible to people in wheelchairs and people with disabilities. Metro Transit*

is required by law to accommodate all customers, regardless of disabilities.

e. Bus operators are required to call all controlled intersections. A controlled intersection has a stop sign or traffic light that you must observe. If a customer asks you to announce a particular intersection, please do so.

See also Section 276 Calling Streets

284 SCHEDULE ADHERENCE. Failure to follow the schedule by being early or late causes great inconvenience to both customers and your fellow bus operators.

c. Notify the TCC whenever you are more than ten minutes late leaving a terminal, with no hope of recovering the time through normal, safe operation. Inform the TCC as well if you'll be more than ten minutes late arriving at your relief point.

490-497 RULES OF EMPLOYEE CONDUCT. All Metro Transit employees, including bus operators, must know and observe the general rules of personal conduct. These rules are contained in complete form in the Metro Transit Manager's and Employee's manual. A copy of the manual is available for inspection at each garage.

491 EMPLOYEE RESPONSIBILITY. All employees are responsible for obeying the rules of employee conduct. Ignorance of these rules, or of any other special rules, bulletins and instructions issued by the agency or the Transportation Division will not be accepted as an excuse for failure to comply.

497 SERIOUS OFFENSES UNDER THE RULES OF CONDUCT. The following are some of the offenses which are considered serious. Violations may result in severe disciplinary action, including but not limited to suspension or discharge.

f. Sleeping or otherwise loitering on the job.

MET COUNCIL OPERATING POLICY PROCEDURE 4-7d (2005)

I Policy:

The primary focus for the Metropolitan Council's Operating Policy is to develop the capacity of the workforce to meet the mission of the Council. The Metropolitan Council will use the Operating Policy in communicating the agency mission and purpose, to clearly define performance expectations, and provide feedback to employees to support work efforts linked to work unit and agency business goals.

II. Procedure:

The Operating Policy is a Bus Operator tracking tool and is the primary policy for employee assessment. It encompasses responsibilities, tools, and discipline. In addition to the procedures in this Policy, the Council has established various Recognition Programs to promote and recognize superior performance.

With the Policy, and Recognition Programs Metro Transit recognizes its outstanding employees, provides assistance for employees to improve and disciplines those who do not meet job responsibilities. The Policy shall become effective August 13, 2005.

The Policy is designed to encourage both managers and employees to look at overall performance and to quickly identify areas for improvement.

The Policy and Recognition Programs encourages consistent administration of

recognition and discipline among facilities and management teams. While still retaining some flexibility, each employee's performance can be measured through objective means in the Transit Information System (TIS).

The Operator's Rule Book and Guide describes fundamentals to the operator's job. They include good judgment, good problem solving skills, good decision making skills, attention to safety, striving for excellence and dependability. The Guide further states that the operator's behavior is critical not only to the customer but to all citizens, stakeholders and policy makers. Metro Transit is committed to helping all employees attain these fundamentals. The Operating Policy does so by placing emphasis on tools that are available to strengthen necessary skills. The tools broadly address the whole person—health and wellness, attitude, human relations, and knowledge. In turn, it is the whole person that shows up for work each day healthy, amiable, trained and ready to provide a comfortable, safe ride for every customer.

Manager Discretion

The Operating Policy is designed to promote consistency and equal treatment. Managers have discretion to depart from the Policy to take into account mitigating and aggravating factors. The Drug and Alcohol Policy, Sexual Harassment and Inappropriate Behavior Policy, Falsification to a Manager's Inquiry or an Official Document, Driving With a Suspended License, pedestrian accidents, serious safety infractions or customer service complaints, etc. are representative of situations which would be dealt with outside of this Operating Policy. In some situations, termination may be justified on the first offense.

Discipline. *Employees who continually fail to meet the responsibilities of the job are disciplined through a 3-step progressive discipline process. Discipline milestones are shown in Appendix B. In some situations, termination may be justified on the first offense*

Procedural Issues:

A written warning in any of the aforementioned categories will result in one (1) debit. Two (2) written warnings in any of the aforementioned categories, including movement from a warning to a final in any given category will result in two (2) debits. Three (3) written warnings in any of the aforementioned categories will result in three (3) debits and will be just cause for termination, provided that at least one of the three (3) warnings must have been a Final Warning. (Example: A written warning in Customer Service, a written warning in Safety, and then a final warning for Adherence Code; or a written warning in Customer Service, and a final warning for Adherence Code.)

The date of the first warning in any of the three (3) aforementioned areas will be the trigger mechanism for determining the number of debits any employee has at any given time

THRESHOLDS FOR WARNINGS

Adherence Codes (Appendix C) — within a rolling calendar year:

1. Class A — written warning
2. Class A — final written warning
3. Class A — termination

1. Class B — verbal warning
2. Class B — written warning
3. Class B — final written warning

4. Class B — termination

- 1. Class A & 2 Class B — final written warning
- 2. Class A & 1 Class B — final written warning
- 2. Class A & 2 Class B — termination
- 1. Class A & 3 Class B — termination

Any repeat of the same coding of a violation within a rolling calendar year will, in management's discretion, trigger the next step in the discipline process.

Class A Violations

- 16A. Sleeping which interferes with job responsibilities

Class B Violations

- 10B. Bus, Unassigned
- 11B. Calling Streets
- 12B. Directions, failure to follow
- 44B Schedule adherence, less than 5 minutes

FACTS

The Grievant was initially employed as a part-time bus operator in May 2007. He became a full-time bus operator in June 2008 after successfully completing his one-year probationary period. The Grievant acknowledged receiving the Metro Transit Bus Operator's Rule Book & Guide and Metropolitan Council Procedure 4-7d, which he signed for on May 6, 2007 and June 28, 2007, respectively.

On November 9 the Grievant was supposed to begin his final work day route (668 West) at the intersection of 2nd Street and 1st Avenue North at 5:11 p.m. culminating in a return to the Heywood Garage, hereinafter the Garage, at 6:19 p.m. The Grievant fell asleep at the terminal (route debarkation point) and proceeded to head back to the Heywood Garage without notifying the TTC. According to the Grievant, he woke up an hour after his route was supposed to start and determined that it was too late to start his route. He also figured that the "follower" bus would have picked up all the passengers that he would have normally picked up. He then decided to head for the Garage so that

he could be there at the time his route normally ended in order to give his sister the car keys she needed.

According to Cook, the “follower” bus operator had notified the TCC that his bus was getting overloaded and customers had not seen the “lead” bus. TCC then called the Grievant who was in the process of pulling into the Garage. During this conversation, the Grievant admitted falling asleep, not completing his assigned route and returning to the Garage without notifying the TCC.⁴

The TCC can monitor a bus’ location when the bus operator logs onto the system whenever they are active, which is what they are supposed to do. In addition, the bus is logged off automatically whenever the ignition is off. If the bus is restarted, the bus operator must log on again. Assistant Director Bus Operations Steve McLaird testified that the TCC could have known that the Grievant never started the 668 West route if it had been specifically monitoring him. There are 700+ buses in operation during the time period the Grievant was supposed to be making his route. With only five dispatchers on duty and priority given to accidents, mechanical problems and emergency situations, the TCC would not have contacted the Grievant directly, thus waking him up, absent independent evidence there was a problem. When the TCC was alerted that the “follower” bus had an overloading problem coupled with customer reports that they had not seen the “lead” bus, it did contact the Grievant.

As stated earlier herein, the November 9 incident was the fourth time in the previous rolling one-year calendar year that the Grievant engaged in conduct that violated the Employer’s policies. On January 17 the Grievant received a Notice of Violation (Class A—16A) for sleeping on duty at the terminal (route debarkation point) in St. Paul and

⁴ The Grievant’s signed response on the Notice of Violation issued by Kallina. Employer Exhibit 6.

failing to call the TCC center (Employer Exhibit 14). Rather than calling the TCC to seek direction, the Grievant took it upon himself to abandon this route and deadhead via I-94 directly to his next scheduled route in Minneapolis.

According to the Grievant's signed remarks in the Violation, his sick infant son, who has lung and respiratory issues, kept him up the previous night. It was after midnight and the end of his work day. Since he had a 20-minute layover, he moved to the "peanut seat" thinking he could rest his eyes before starting out, never intending to sleep. When he awoke, there was already another 16A bus in front of him so he knew he could not make up the lost time. He added that he was in such a rush to get to his next assigned route that he failed to call the TCC. The Grievant testified that he thought he could sleep on the bus if it did not affect his route, and was never told otherwise. Also, he had been told by TCC in past situations that he called in too often, citing a situation where he repeatedly kept calling the TCC when his bus was running 10 minutes late at the various stops on his route.

The Grievant received a Final Record of Warning issued by Assistant Transportation Manager Linda Bechtold dated February 16 advising the Grievant that the January 17 Violation was the third violation in a rolling calendar year and the next violation would result in disciplinary action including discharge (Employer Exhibit 14). [The Grievant had a previous Class B Violation (44B schedule adherence, less than 5 minutes) issued on August 22, 2009 and a Class B Violation (12B direction, failure to follow) issued on January 1, 2009.]

On April 3 the Grievant was involved in another incident that resulted in him receiving Notice of Violation listing two Class B violations (Employer Exhibit 13). The first violation involved 10B—bus unassigned. The Grievant was scheduled to drive a hybrid bus

because the route would go down the Nicollet Mall in Minneapolis.⁵ The Grievant took it upon himself to take a different non-hybrid bus because it had a driver's seat more comfortable for his sore back. The Grievant did not log in so the TCC, not knowing that the route was covered, had to send a replacement bus to cover his route.

The second violation involved 12B—directions, failure to follow. Once the Grievant arrived at the terminal (route debarkation point) he was told by another bus operator to wait at 66th and Nicollet bus stop for a replacement bus. He was also told to call the TCC, which he never did.⁶ In fact, the TCC called him and told him to wait at the 66th & Nicollet bus stop for his replacement bus (Employer Exhibit 24). The Grievant never did wait at the 66th and Nicollet bus stop; rather, he proceeded another five blocks before being finally overtaken by the replacement bus (Employer Exhibit 23).

The Grievant testified that he has been told at various times to pick out his own bus from the available fleet. However, during cross-examination, he agreed that this was only when he was not assigned a bus. He also testified that he was never told that only hybrid busses were allowed on the Nicollet Mall.

Although the Grievant's actions involved two violations, which could have been grounds for his discharge, the Employer only charged him with one violation for reporting purposes. [The Violations were reduced to one violation (Class B—10B bus, unassigned) after a Loudermill hearing was conducted on May 17.] The Grievant did receive a Final Record of Warning for this incident dated May 3 and issued by Bechtold putting the Grievance on notice that he could be discharged if he received a fourth violation during a

⁵ The Employer has an agreement with the City to use only hybrid buses because of the numerous outdoor-seating restaurants and the heavy pedestrian traffic on the Mall.

⁶ This conversation was on a DVD supplied by the Employer. Employer Exhibit No 23.

rolling calendar year (Employer Exhibit 13). The warning cited the three violations in the previous rolling calendar year.⁷

The Grievant received another Notice of Violation (Class B—11B, calling streets) for his failure in calling out key streets and intersections on his 16A route on September 14.⁸ Since this was his third violation in a rolling calendar year he received another Final Record of Warning issued by Cook dated September 30 (Employer Exhibit 9). The Warning cited the two previous rolling calendar year violations and warned the Grievant if he received another violation in his current rolling calendar year (January 17, 2010-January 17, 2011) he could be discharged.⁹

The Grievant filed a grievance over this September 14 Violation (Employer Exhibit 10). It was resolved in the first step of grievance processing where the grievance was denied and not appealed to Step 2 (Employer Exhibit 10). The parties including the Grievant agreed to view a video of the bus operation during the time period that the violation occurred to determine if the Grievant had indeed failed to call out streets. This video was not available so the parties including the Grievant agreed to view a random 20 minute video segment from the last bus the Grievant drove the day before the November 16 Grievance meeting, which was November 13.

According to Wostrel and his comments on the Step 1 grievance meeting summary, the video showed the Grievant was moving his lips but no audible sounds were detected. The following are Wostrel's comments, "*This DVD was first viewed by John Cook and Russ Dixon*"¹⁰ *They agreed that only 7th and Nicollet were heard called very softly, one*

⁷ 4/3/10 Class B Violation—10B bus unassigned, 1/17/10 Class A Violation—16A sleeping, loitering and 8/22/09 Class B Violation—44B schedule adherence, less than 5 minutes.

⁸ The actual Violation document authored by Bechtold was not entered into evidence.

⁹ 4/3/10 Class B Violation—10B bus unassigned, 1/17/10 Class A Violation—16A sleeping,

¹⁰ Dixon is the Union Steward

time each. I watched the DVD and only because I knew what he called did I hear it. This does not meet the ADA¹¹ requirement and consequently I have denied the grievance.”

The Grievant was given employee counseling by Bechtold and Cook following the September 14 street calling violation. According to the Employee Counseling Record generated by Cook the Grievant was advised that, *“Violations such as sleeping on the bus, failing to follow directions and failing to Call Streets cannot be tolerated. The responsibility of improving your record is all yours. You must accept this responsibility if you are to avoid future disciplinary action.”* The Grievant was further advised that if he continued this pattern of conduct the consequences would be, *“Further discipline up to and including discharge.”* Finally, the Grievant was advised of various wellness programs that the Employer had available, and offered to refer the Grievant to EAP (Employee Assistance Program), which he never followed up on.

The Grievant had another incident involving sleeping while on duty. He received a 16A Notice of Violation for sleeping while at his route debarkation point and starting his route 20 minutes late on October 21, 2008. The Grievant also had another incident where he was cited for not calling out streets. There is no record that he received a violation for this conduct; however, he was warned on December 11, 2008 by Cook that if he engaged in similar conduct, he would be disciplined (Employer Exhibit 12).

The Grievant had also been cited for attendance failures during his tenure. According to the Employer’s Attendance policy employees who incur seven absences in a rolling calendar year will receive a Record of Warning and a counseling session (Employer Exhibit 26).¹² The Grievant received Records of Warning on June 27, 2010, January 31,

¹¹ Americans with Disability Act.

¹² During a rolling calendar year, 10 absentee occurrences result in a Final Record of Warning and 13 absentee occurrences could result in termination.

2010, November 20, 2009 and December 12, 2009 for accumulating seven absences in a rolling calendar year (Employer Exhibit 15). The Records of Warning were followed up by employee counseling sessions (Employer Exhibit 15).

As stated earlier, there were grievance meetings held on November 24, December 21 and January 6, 2011. During each of these meetings the Union pleaded with the Employer to reduce the discharge to a suspension and return the Grievant back to work under a Last Chance Agreement (LCA). The Union cited the Grievant's lack of proper nightly sleep due to his diagnosed sleep apnea problem as the cause for his falling asleep during the past year. The Union further cited that the Grievant was diagnosed with sleep apnea on May 4 and given a CPAC mask in June to wear at night. This mask was not fitted properly causing the Grievant to involuntarily remove it during his sleep.

During the hearing, the Grievant testified that a person had fitted him with the wrong full-face mask and set the air pressure too low causing him to be even more deprived of oxygen. This caused him to involuntarily remove the mask during his sleep. He further testified that after his discharge but before the first grievance meeting he was fitted with the proper equipment (just a nose mask) and the air pressure was increased. The Grievant also testified that his sleep apnea study revealed that he quit breathing 13 times, which was equivalent to only receiving four hours of sleep during an eight hour sleep period.

The Grievant further testified that he informed the first step grievance participants, Wostrel, Cook and Dixon, that he had obtained a new mask and showed them this documentation. Since his discharge the Grievant also took further steps to correct his sleep apnea. He was scheduled to have his adenoids and tonsils removed in January

2011.¹³ The Grievant also acknowledged that prior to the first step grievance meeting, he never apprised the Employer that he had been diagnosed with sleep apnea. He felt it was a personal issue and never affected him when he drove.

Wostrel was the Employer official responsible for the Step 1 grievance decision. Wostrel, who also has sleep apnea and has worn a CPAC mask for 14 years, testified that the Employer was unaware of the Grievant's sleep apnea problem prior to his discharge. He felt that the Grievant should have informed the Employer of this fact so that it could assist him in receiving the necessary medical treatment to enable him to safely and effectively perform his job. Also, the Grievant should have returned to the place where he received his mask and had it refitted if he was having problems.

Wostrel further testified that the bus operators are not allowed to sleep at any time that they are on the job. Also, when the Grievant realized that he had fallen asleep, he should have immediately notified the TCC that he could not complete his scheduled route. Also if the Grievant was so tired, he should have engaged in some activity to keep himself awake rather than closing his eyes. The Grievant could have notified the TCC of his tiredness, and been relieved of duty. Wostrel acknowledged, however, that this would have resulted in an absenteeism occurrence.

Wostrel also testified that the Employer never considered the Grievant's sleep apnea defense because of his inability to follow directions and other Adherence Code violations for which he was cited repeatedly during his tenure together with his poor overall work record including attendance issues.

¹³ The surgery never took place because he had no medical insurance after his discharge. He finally obtained public assistance and had the surgery scheduled for this past July, but was postponed because of the State government shutdown. He is in the process of rescheduling the surgery.

Wostrel testified further that the Grievant had lost his credibility as bus operator. By this, he was not referring to the Grievant's integrity, but rather to his reliability. Wostrel cited the fact that the Grievant had been put on notice and counseled repeatedly that he would be disciplined including being discharged if he did not improve his work performance. Wostrel added that the Employer gave the Grievant a break when it charged him with only one violation for the April 3 incident when he could have been discharged for having four violations in a rolling calendar year. Wostrel also testified that there have been only a handful of employees that have been terminated for rule violations.

McLaird was the Employer official responsible for the Step 2 grievance decision. He testified that he looked at the Grievant's overall employment record. He did not feel a LCA was appropriate because of the Grievant's short work history, his poor decision making, his failure to follow directions and his engaging in repetitious violative conduct in spite of warnings and counseling. McLaird also testified that he looked at the Grievant's absenteeism record that included one no show, four late and three sick occurrences in the Grievant's last rolling year calendar period.

EMPLOYER POSITION

The Employer's position is that it had just cause to discipline the Grievant on November 24, 2010. The Employer argues that bus operators are thoroughly apprised of the Employer's rules and policies and must follow them. The Grievant repeatedly violated these rules and policies and was terminated per the policies after he incurred four violations in a rolling calendar period. The Grievant could have been discharged in April 2010, but the Employer gave him a second chance by combining two independent violations into a single violation.

The Employer further argues the Grievant's sleep apnea defense is a red-herring. Throughout the Grievant's tenure, he exhibited poor decision making and made the same mistakes over and over. The evidence is clear that the Grievant's overall work history and absentee record were sufficient grounds for his termination. His work history demonstrated that he was unwilling to follow directions. The Grievant repeated the same violations that he had been previously cited for in spite of his being repeatedly counseled and being warned multiple times that he would be discharged if he incurred further violations.

UNION POSITION

The Union's position is that the Employer did not have just cause to discharge the Grievant. The Union argues that the Employer should have considered the Grievant's sleep apnea medical problem in its termination decision. The Grievant's sleep apnea is not a red-herring. But for the sleep apnea, the Grievant would never have fallen asleep and not incurred the fourth violation leading to his discharge.

The Union further argues that the Grievant has recognized the error of his ways and has undertaken positive steps to get his sleep apnea under control. A LCA would give the Grievant an opportunity to demonstrate that he is sincere in making positive changes in his work performance. It is for these reasons that the grievance should be sustained.

OPINION

The issue before the undersigned is whether the Employer had sufficient grounds to terminate the Grievant on November 24, 2010; and if not, what is an appropriate remedy.

This issue presents a well-settled two-step analysis: first, whether the Grievant engaged in activity which gave the Employer just and merited cause to discipline him; and second, whether the discipline imposed was appropriate under all the relevant

circumstances. It is the Employer's burden to show that the Grievant engaged in conduct warranting discipline and that the appropriate discipline was termination.

The facts are generally uncontroverted except the Union would argue that the Grievant should be given a discipline short of discharge. The Employer's policies and work rules are contained in its Metro Transit Bus Operator's Rule Book & Guide and the discipline for violating those policies and rules is contained in the Metropolitan Council Procedure 4-7d. It is uncontroverted that the Grievant violated the Employer's rules warranting discipline. The question remains was the discharge justified under all of the circumstances herein?

The discharge would stand as the appropriate discipline under normal circumstances in view of the Grievant's record of four violations of the Employer's rules and policies in a rolling calendar year. The discharge is further supported by the Grievant continually violating the same rules during his tenure, e.g., sleeping, not calling out streets and failure to follow directives. The evidence also disclosed that the Grievant's absenteeism record was less than desirable; however, seven absentee occurrences would not be independent grounds for discharge.

If this was the whole story, the Employer would be justified in terminating the Grievant and I would have no problem upholding this decision. There is, however, more to be considered. Lesser disciplinary action may be appropriate if there are mitigating circumstances surrounding the discharge. By its own admission, the Employer did not consider the Grievant's diagnosed sleep apnea when it became aware of this evidence during grievance processing. The Union argues that but for the Grievant's uncorrected sleep apnea, he would not have fallen asleep in January and November and accumulated four violations leading to his November 24 discharge. The Union further argues that the Grievant has taken positive steps to address his sleep apnea and recognizes that he has

to change his work habits. Because of this, the Grievant should be given one last chance to demonstrate that he will be a changed employee if reinstated.

The Union makes a valid argument. We may never know if sleep apnea was a factor in the Grievant's sleeping episodes. However, if sleep apnea was a contributing factor in the Grievant sleeping episodes, it would be unfair to for the Employer to administer its harshest penalty. It appears that the Grievant never deliberately intended to fall asleep thereby failing to carry out his route assignments. Each sleep incident occurred near the end of the Grievant's work day while he was at his debarkation point awaiting the scheduled time to start his next bus route. The Grievant's sleep apnea could very well have contributed to the Grievant being so tired that he unintentionally fell asleep as he waited to begin his scheduled departure. Under these circumstances, reinstatement would be an appropriate remedy.

On the other hand, if the Grievant's sleep apnea did not contribute to his sleeping episodes, the Employer was entirely justified in terminating him. This poses a dilemma: penalize the Grievant for a rules violation by discharging him for an incident arguably caused by a medical condition or reward him for engaging in conduct warranting termination.

There is a solution to this dilemma; that is to rescind the Grievant's discharge but not reward him to the extent normally applicable in discharge cases. As a result, the Grievant's discharge is to be converted to a lengthy suspension without loss of any seniority. He is, however, being reinstated without back pay, In addition, the Grievant's reinstatement is subject to his successfully passing a DOT physical to be administered at the Employer's direction and expense. The Grievant should also be given sufficient

training to reacquaint him with his bus operator responsibilities and/or any changes in the Employer's operating rules and policies.

Further, the Grievant's work record will be restored to the point that existed as of the November 24 discharge date. Upon reinstatement, the Grievant will retain three violations of record, the exact dates to correspond with his reinstatement date and the last three violation periods prior to his termination. These are November 9, September 24 and April 3, 2010. For example, if the Grievant is reinstated effective September 1, 2011, the rolling calendar year violation dates will be September 1, 2011, July 16, 2011 and January 23, 2011.¹⁴ Further, the initial rolling calendar year under this scenario will commence on January 23, 2011, and a fourth violation of the Employer's rules and policies before January 23, 2012 could result in the Grievant's termination. In addition, his absenteeism record will be similarly adjusted.

AWARD

IT IS HEREBY ORDERED that the grievance be and hereby is partially sustained.

IT IS HEREBY ORDERED that the Grievant be reinstated without back pay or any loss of seniority subject to the conditions set forth in this Decision. Further, any reference to his discharge is to be expunged from his personnel file.

The undersigned Arbitrator will retain jurisdiction in this matter for forty-five (45) days from the receipt of this Award to resolve any matters relative to implementation.

Dated: August 12, 2011

Richard R. Anderson, Arbitrator

¹⁴ There are 46 days between November 9 and September 24 and 174 days between September 24 and April 3.