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In Re the Arbitration Between:

**BMS 11-PA-0849**

West St. Paul, Independent School  
District No. 197,  
Employer,

and

**GRIEVANCE ARBITRATION  
OPINION AND AWARD**

International Union of Operating  
Engineers, Local 70,  
Union.

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Pursuant to **ARTICLE XII** of the collective bargaining agreement between the above parties effective July 1, 2009 through June 30, 2011 the above matter was brought to arbitration.

James A. Lundberg was appointed by the parties to serve as the neutral arbitrator from a list of arbitrators provided by the Minnesota Bureau of Mediation Services.

The parties stipulated that no procedural issues have been raised and the matter is properly before the arbitrator for a final and binding decision.

A grievance was submitted on November 1, 2010.

A hearing was conducted on August 9, 2011.

The parties submitted briefs by U.S. mail on September 6, 2010 and the record was closed upon receipt.

**APPEARANCES:**

**FOR THE EMPLOYER**

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Kennedy & Graven  
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**FOR THE UNION:**

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**ISSUE:**

*Whether the Employer had just cause to terminate the employment of the grievant? If not, what is the proper remedy?*

**FACTUAL BACKGROUND:**

Grievant was hired by the Employer, Independent School District 197, as a Building and Grounds Worker on December 11, 2001. The job description includes the following custodial duties: mopping, sweeping, dumping trash, cleaning glass, vacuuming, changing light bulbs, reporting maintenance needs to the Lead Custodian/Building Engineer; locking and un-locking doors in buildings according to scheduled activities, setting-up and cleaning-up for special events, and picking up trash outside the building and shoveling entries as required. Grievant does not have a history of disciplinary problems on the job. There is also no evidence that the Employer had any problems with the grievant performing her job, until after she experienced an on the job injury. On September 5, 2008 the grievant injured her right shoulder, while vacuuming at work.

The September 5, 2008 injury was initially diagnosed as probable rotator cuff tendonitis. The diagnosis later became right shoulder impingement syndrome. The grievant received a cortisone shot at that time but continued to experience a significant degree of pain. The physician who treated grievant first recommended on October 15, 2008 that she be restricted from vacuuming or mopping until her symptoms resolved in approximately four weeks. On the 16<sup>th</sup> of October the recommendation was modified by the physician to say that grievant was unable to work effective October 15, 2008. The expected recovery time was two weeks.

Grievant returned to work at Heritage Middle School, where she worked until August 11, 2009, when she was discharged. The discharge was grieved and the termination was rescinded in December of 2009.

The grievant's symptoms continued despite the use of cortisone injections, physical therapy, anti-inflammatory medications and pain medications. As grievant's condition failed to improve, the grievant was required to submit to an "Independent Medical Examination" on March 6, 2009. The physician who performed the Independent Medical Examination determined that the grievant could return to work but with the following restrictions: no repetitive, outstretched or overhead lifting, a twenty (20) pound lifting limit to waist height, a ten (10) pound lifting limit above the waist and a twenty (20) pound pushing and pulling limit.

The grievant continued to have trouble and was taken "off duty" based upon her physician's "Clinic Report of Workability" dated May 7, 2009.

A series of medical reports<sup>1</sup> taking grievant off duty or placing limitations on her work activities and her hours of work followed, until November 24, 2009, when a third physician was consulted by the grievant. The November 24, 2009 recommendations indicated that grievant could return to work with no right hand lifting greater than five (5) pounds, no overhead work, no use of the arms in outstretched position repetitively and no repetitive pushing or pulling with her right arm.

Based upon the November 2009 restrictions, the Employer structured a light duty full time position at Henry Sibley High School. The job duties included: restroom cleaning (fixtures, toilets, glass), cleaning all drinking fountains, cleaning low height windows, monitoring

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<sup>1</sup> As time passed the grievant's condition did not improve, her physicians continued to place her on restrictions and the Independent Medical Examiner began asserting that grievant was exaggerating her symptoms.

lunchroom garbage receptacles, scraping gum off tables/desks and operating an auto scrubber. The position was created on or about December 17, 2009.

Grievant's physician continued to indicate that grievant should be off duty, while the information obtained from the Independent Medical Examination was that grievant could work at the light duty assignment that had been created. The light duty work was reviewed by a Workers Compensation Qualified Rehabilitation Consultant (QRC) in February of 2010 and by May 17 of 2010 the Employer notified the grievant that it was able to accommodate her restrictions and she was expected to return to work on a full time basis. The grievant continued to be off duty based upon her physician's orders but was directed to submit to an additional Independent Medical Re-Evaluation on September 20, 2010. The Independent Medical Examiner reviewed a light duty assignment dated July 26, 2010 and indicated that the activities were more restrictive than the limitations suggested by grievant's physician.

The medical records indicate that the grievant may be a candidate for arthroscopic shoulder surgery. However, the grievant has not chosen surgery as a treatment option and it is not certain that arthroscopy will relieve her pain.

By letter dated October 6, 2010 grievant was informed that she was expected to return to work with restrictions. The School District said they would accommodate her restrictions and she was expected to begin full time work on October 11, 2010.

The grievant sent the Employer an e-mail stating that she had a doctor's appointment on October 11, 2010 and she would return to work later on the 11<sup>th</sup> of October, if released by her doctor.

The grievant was released for work on October 11, 2010 with a four (4) hour restriction. Grievant testified that when she appeared at work she was told that she would have to work an

eight (8) hour day or would be discharged. Grievant agreed that she would work eight (8) hours per day. She started working on October 12, 2010 and performed the light duty assignment created for her. She continued to perform the light duty assignment on October 13, 14 and 15 in an acceptable manner. On October 18, 2010 the grievant reinjured her right shoulder while riding on an auto scrubber, which is a machine used to clean floors. The grievant indicated that the injury occurred because she was unfamiliar with the scope of her assignment and was hurrying to complete the task of cleaning a hallway. In the process of cleaning the floor with the auto scrubber she twisted and hurt her right shoulder.

By letter dated October 20, 2010 the grievant was discharged. The letter signed by the Director of Business Services said:

*On Tuesday, October 12, 2010 you returned to work with light duty based on physical limitations due to a work related injury. Since that date you have left work early on Monday, October 18 and Tuesday, October 19 due to shoulder discomfort. It is apparent that you will not be able to continue your employment even with limited job duties. Consequently, since you are unable to perform light duty the District is terminating your employment effective immediately.*

The Union grieved the grievant's discharge on November 1, 2010. The matter was not resolved through the grievance procedure and was brought to arbitration for final and binding resolution.

**SUMMARY OF EMPLOYER'S POSITION:**

The Employer asserts that it has met the just cause standard for discharge established in the collective bargaining agreement. The core argument presented by the Employer is that the grievant is physically unable to perform the work of a Building and Grounds Worker.

The evidence clearly reflects the fact that grievant is unable to operate required equipment. She demonstrated an inability to operate the riding auto scrubber. In a similar case involving a Minneapolis electrician, who injured his back at work, Arbitrator Befort upheld the discharge. The work restrictions placed upon the employee prevented him from performing the essential functions of his job. *City of Minneapolis, 125 LA 558 (Befort, 2008)*.

To the extent necessary and possible, the Employer modified the grievant's work responsibilities and reasonably accommodated her injury. The Employer provided many light duty assignments designed to allow grievant's shoulder to heal. The objective of the light duty assignments was to help her transition back to full time custodial work. The light duty assignments were intended to be temporary. When grievant reached her maximum recovery, she was still unable to perform the essential functions of her job.

The Employer treated the grievant the same as other employees who have been injured. On a temporary basis job duties have been modified while employees heal. In the past all employees who have been assigned to light duty have ultimately returned to full time positions without restrictions. None of the employees have had permanent job changes or modifications.

The Employer also argues that grievant's testimony is not credible based upon her representation that she was unable to access the Employer's computerized record system, AESOP. The Employer notes that grievant claimed she was unable to log into the system on October 18, 2010 but the system reflects that she logged in several times between October 12 and October 18, 2010.

The Employer asserts that the grievance should be denied because she was terminated for just cause. The grievant is not able to perform the essential functions of her position, even with reasonable accommodations.

## **SUMMARY OF UNION'S POSITION:**

The Union argues that the plain language of the collective bargaining agreement was violated, when the Employer discharged the grievant. Not only does the contract require just cause for discipline, including discharge, but **Article VIII** of the collective bargaining agreement prohibits disability discrimination. The grievant is disabled within the meaning of the **Americans with Disabilities Act** and the **Minnesota Human Rights Act**. The Employer must reasonably accommodate a disabled person. In this case, the School District has not challenged the grievant's disability status.

The Union contends that the grievant medical condition is a disability and the Employer has not argued differently. The grievant has a physical impairment that substantially limits one or more major life activities. The medical records created by her physicians and the Independent Medical Examiner establish the fact of her disability.

A "qualified individual with a disability", under the **Americans with Disabilities Act** is an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that she holds or desires.

The evidence does not support the position that operation of an auto scrubber is an essential function of the job. The Employer's job description does not mention the use of an auto scrubber. Furthermore, the grievant claims she can operate an auto scrubber but needed more time than was allotted to become familiar with the work she needed to complete with the help of the auto scrubber. The grievant contends that she was rushing to complete auto scrubbing work and as a consequence was injured.

Co-workers often exchange work duties with one another, which along with modification of a work schedule is a common way that employers accommodate disabled workers. Under

applicable disability law, modification of duties is among the most common of reasonable accommodations that employers are to consider. **Minn. Stat. Section 363A.08, subd. 6.**

A reasonable accommodation would not impose an undue hardship on the Employer. There is no significant difficulty or expense related to adjustments that could easily be made by the Employer to accommodate the grievant's disability. Simply assigning alternative tasks that fall within the grievant's range of abilities is one accommodation that can be made. Adjusting the grievant's hours, as her physician recommended on October 11, 2010 when he released her to return to work, is another reasonable accommodation. The School District would not suffer undue hardship, if it accommodated the grievant's disability.

The re-aggravation of an existing medical condition or injury is not a sufficient basis for concluding that the grievant can no longer perform the essential functions of her job. In this situation, the Employer has made a medical determination that grievant's re-injury means she cannot perform the essential functions of her job. Furthermore, the School Districts requirement that the grievant work an eight (8) hour day, when her physician advised a four (4) hour day may have been a contributing factor to the re-injury. The Union cites both case law and statutes in support of its position.

The Union asks that the grievance be sustained. To remediate the contractual violation the Union asks that grievant be reinstated to her prior position without loss of pay or benefits and order the parties to secure appropriate medical assessment of the grievant's current medical condition and capabilities.

**OPINION:**

For roughly two years the grievant and the Employer sparred over her physical condition with Minnesota's Workers Compensation law as the fundamental point of reference. The

Employer pursued a theory that grievant could be returned to work gradually and ultimately should be able to perform any work essential to her position. The grievant was able to perform some light duty work but was unable to sustain a continuous work record after her injury. Workers Compensation arguments over the degree of severity of grievant's injury were incorporated into the medical record. However, the Employer's fundamental claim is that it has just cause to discharge the grievant, due to her inability to perform the essential functions of her job. The Union argues that grievant is disabled and the Employer has failed to reasonably accommodate the grievant's disability. The Union contends that grievant can perform the essential functions of her job with reasonable accommodation. Neither position finds overwhelming support in the record but the burden is on the Employer in a discharge case.

The collective bargaining agreement at **Article X** requires just cause for discharge. It is well established that the just cause discharge requires forewarning and an opportunity to correct unacceptable conduct in most circumstances.<sup>2</sup> In the public sector due process under the just cause standard includes a pre-discharge hearing, which is designed to provide the terminated public employee with notice of the charges against him or her, an explanation of the Employer's evidence, and an opportunity to present his/her side of the story. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532; 105 S.Ct. 1437; 84 L.Ed. 2d 494 (1985). Arguably the Employer forewarned the grievant on October 11, 2010 that she must work an eight (8) hour day or be discharged. Grievant could correct her unacceptable conduct by working twice the number of hours prescribed by her physician. The imposition of a requirement that grievant immediately return to an eight (8) hour day represented an abrupt departure from the Employer's policy of allowing an injured person to gradually move back to and "harden" to the work environment. There is no evidence of a pre-discharge hearing wherein grievant was notified of the charges

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<sup>2</sup> Conduct such as theft or violence is often considered so egregious that remediation is not possible or reasonable.

against her and given an opportunity to present her side of the story. The Employer failed to afford the grievant due process before depriving her of a property right. See *Loudermill*.

Arriving at an appropriate remedy in the case is problematic due to a genuine issue over the grievant's ability to perform custodial work given the fragile condition of her right shoulder. Reinstatement of the grievant should be done in manner that is consistent with the **Americans with Disabilities Act** and the **Minnesota Human Rights Act**.

The collective bargaining agreement at **Article XIII** prohibits discrimination based upon disability. The Union has argued that grievant is a qualified disable person within the meaning of the **Americans with Disabilities Act**. The Employer did not counter the **Americans with Disabilities Act** and the **Minnesota Human Rights Act** argument beyond claiming that grievant was unable to perform the essential functions of her job. The grievant was clearly discharged because the Employer deemed her unable to perform her job due to her disability or perceived physical impairment. **42 U.S.C. 12102 (3) (A)**. The evidence is insufficient to support a determination that the Employer has attempted to reasonably accommodate the grievant's disability.

There is an obligation in disability law to enter into an interactive process to determine whether an employee can perform the essential duties of her job with reasonable accommodation. The arbitrator finds that the Employer and grievant failed to engage in meaningful interaction for the purpose of creating some reasonable accommodation. The failure could be due to the Employer's view that only a temporary modification of work duties is necessary and/or could be due to some degree of malingering on the part of the grievant. Regardless of the cause, the evidence does not support a finding that the Employer and the

grievant seriously engaged in a dialogue for the purpose of making reasonable accommodations for grievant's disability.

The medical recommendation submitted when grievant was released to return to work clearly and unequivocally stated that grievant should be capable of performing the tasks at Henry Sibley High School that she in fact performed but the initially prescribed work day was four (4) hours. The arbitrator presumes that the grievant's treating physician is well qualified to prescribe the amount of time wherein a patient is likely to be able to sustain a given work load. The Employer did not establish a reasonable basis for requiring the grievant to work an eight (8) hour shift as of October 12, 2010, when the October 11, 2010 medical release was to a four (4) hour shift.

It is easy to understand the Employer's frustrations with the grievant, given the amount of time she spent away from work over the course of roughly two years and the grievant's refusal or reluctance to consider arthroscopic surgery to remediate the pain in her right shoulder. However, the Employer did not establish by a preponderance of the credible evidence that it afforded the grievant due process that underlies the just cause standard nor did the Employer establish by a preponderance of the credible evidence that it afforded the grievant all protections required by the **Americans with Disabilities Act** and the **Minnesota Human Rights Act**. Consequently, the discharge cannot be upheld.

The appropriate remedy in this case is to put the parties back to the position they were in on October 20, 2010. Upon reinstatement, the treating physician's recommendation that grievant work a four (4) hour day using the job protocol created for the grievant should be followed for a period of four (4) weeks. During the four (4) week period the Employer, the grievant and a Union representative shall engage in an interactive process with the objective of creating

reasonable accommodation for grievant's disability. During the four (4) week period, the grievant is directed to meet with her physician and determine whether arthroscopic surgery is appropriate treatment for her condition and, if appropriate, whether she will undergo said surgery. Grievant has had ample time, more than two years, to consider the option.

Grievant is not being directed to have surgery. However, all parties need to know whether the surgery is a viable option. If the option of surgery is viable, the parties need to know whether the grievant will opt for surgery. It is impossible for the Employer to attempt to reasonably accommodate a disability, when it is unable to fairly gauge what may ultimately be the employee's physical restrictions.

The grievant should receive an award of back pay. Interest on back pay shall be calculated at the same rate that judgment interest is calculated by the District Court of Dakota County, Minnesota.

**AWARD:**

- 1. The Employer did not have just cause to discharge the grievant.*
- 2. The grievant shall be reinstated to the position she held at the time of her discharge and shall be assigned to a four (4) hour work day for a period of four (4) weeks.*
- 3. During the four (4) week period, following grievant's return to work, the Employer, the grievant and a Union representative shall engage in an interactive process in an attempt to provide reasonable accommodation for grievant's disability.*
- 4. During the four week period following grievant's return to work, the grievant shall seek medical consultation over the question of whether surgery is an appropriate treatment for her condition. If surgery is appropriate, grievant shall determine whether*

*she will undergo a procedure. Grievant is not being ordered to have surgery but to determine whether she will have surgery in order to facilitate the interactive process.*

- 5. The grievant is awarded back pay for time lost.*
- 6. Interest on back pay shall be calculated at the same rate that judgment interest is calculated by the District Court of Dakota County, Minnesota.*
- 7. The arbitrator shall retain jurisdiction over the remedy for a period of ninety (90) days from the date of this award.*

**Dated: October 10, 2011**

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**James A. Lundberg, Arbitrator**

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<sup>i</sup> In collaboration with M. William O'Brien.