

IN THE MATTER OF ARBITRATION

BETWEEN

State of Minnesota, Dept. of Human Services,

Employer

**BMS Case No.: 14-PA-0630
(TF Discharge Grievance)**

and

OPINION AND AWARD

AFSCME Council 5, AFL-CIO

Union

**A. Ray McCoy
Arbitrator**

Appearances:

For the Employer

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For the Union

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JURISDICTION

The collective bargaining agreement between the Minnesota State Employees Union AFSCME Council 5, AFL-CIO and the State of Minnesota, July 1, 2011 through June 30, 2013 (hereinafter "Agreement" or "CBA" was in force and effect at all times relevant to this grievance/arbitration. Article 17-Grievance Procedure states:

"The arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the provisions of this Agreement. He/she shall consider and decide only the specific issue or issues submitted to him/her in writing by the parties of this Agreement, and shall have no authority to make a decision on any other matter not so submitted to him/her. The arbitrator shall be without power to make decisions contrary to, inconsistent with, or modifying or varying in any way the application of laws, rules, or regulations having the force and effect of law. The decision shall be based solely upon the arbitrator's interpretation and application of the express terms of this Agreement and to the facts of the grievance presented." (Agreement at p. 47)

The Minnesota Department of Human Services (hereinafter "Employer") discharged the Grievant on March 22, 2013 for failure to notify the Employer of the fact that her driver's license had been suspended and restricted. The Employer said the Grievant's actions violated MSOCS Policy 9145: Transportation. AFSCME Council 5 (hereinafter "AFSCME" or "Union") filed a timely grievance challenging the discharge on April 11, 2013. A Step 3 grievance hearing was held on August 22, 2013. The Employer rejected the Union's third step grievance. The Parties notified the arbitrator of his selection to hear this matter on August 13, 2014. The Parties selected December 15, 2014 for the hearing of this matter. The hearing was held on that date at the Minnesota State Operated Community Services offices located at 3200 Labore Road, Suite 104, Vadnais Heights, MN 55110.

Both sides had a full and fair opportunity to present testimony, examine witnesses and present supporting documentary evidence. The Parties provided oral closing arguments in lieu of post-hearing briefs. The arbitrator closed the record on that

date. The Parties agree that the grievance is properly before the arbitrator for resolution.

RELEVANT CONTRACT PROVISIONS AND POLICIES

ARTICLE 16 – DISCIPLINE AND DISCHARGE

Section 1. Purpose. Disciplinary action may be imposed upon an employee only for just cause.

Section 5. Discharge. The Appointing Authority shall not discharge any permanent employee without just cause. If the Appointing Authority feels there is just cause for discharge, the employee and the Local Union shall be notified, in writing, that the employee is to be discharged and shall be furnished with the reason(s) therefor and the effective date of the discharge. The employee may request an opportunity to hear an explanation of the evidence against him/her, to present his/her side of the story and is entitled to union representation at such meeting, upon request.”

MSOCS Policy 9145

All staff that are required to drive a vehicle to perform duties acting within the scope of their employment must have an active and valid Class D driver’s license. It is the responsibility of each driver to report any restrictions placed on a state issued driver’s license to their supervisor immediately. Staff may request a temporary relief from an essential job requirement form (Attachment V).

State of Minnesota Policy on Drivers’ License and Record Checks

This policy applies to employees in state agencies who drive a state vehicle (or other equipment requiring a driver’s license).

II. DEFINITIONS

D. **Driver license loss.** In this policy, the term “driver’s license loss” refers to suspension, revocation, cancellation, disqualification, restrictions that preclude the employee from performing current job duties, or expiration.

III. DRIVERS LICENSE REQUIREMENT

State employees must have an active, valid, appropriate driver's license if they drive a state-owned or leased vehicle; otherwise they will not be considered acting within the scope of their employment. Driving without an active, valid, appropriate driver's license shall constitute just cause for disciplinary action, up to and including discharge. Agencies are responsible for verifying at least once each year that their employees have appropriate driver's licenses.

V. DRIVER'S LICENSE REVOCATION OR SUSPENSION

Employees whose jobs require the use of a state vehicle shall immediately inform their supervisor of any driver's license loss affecting their ability to perform their job. Failure to do so shall constitute just cause for disciplinary action, up to and including discharge.

VIII. RESPONSIBILITIES

Employees whose job duties require an active, valid/appropriate driver's license or who drive a state vehicle must:

- c. Notify their supervisors no later than the beginning of the next shift after losing their driver's license through suspension, revocation, cancellation or disqualification.

ISSUE

As per the Agreement, the Parties submitted the following issue in writing to the arbitrator for resolution: Did the Employer have just cause to discipline the Grievant. If not, what would the appropriate remedy be?

FINDINGS OF FACT/UNDISPUTED FACTS

The Department of Human Services employed the Grievant as a human services technician. As such, the Grievant's duties included the following: (1) responding physically and therapeutically to individuals with challenging behaviors; (2) lifting, moving or positioning non-ambulatory or ambulatory individuals; (3) Administering medications; (4) responding to medical emergencies, including first aid and CPR; (4) transporting and accompanying individuals to medical appointments, community outings, recreational activities and spiritual events; and (5) assisting individuals to complete tasks related to work, recreation and the activities of daily living. The Grievant worked with vulnerable adults who needed, among other things, to be assisted with the activities of daily living including being driven to doctor's appointments and any other events outside of their living facility. Having a valid driver's license is a job requirement for human services technicians.

On January 10, 2013, the Grievant submitted a request for temporary relief from an essential job requirement. On the form provided by the Employer to request the temporary relief, the Grievant was required to describe the essential job requirement that she was restricted from performing. The Grievant wrote that she was restricted from driving vulnerable adults until approximately February 4, 2013. The Employer denied the request and launched an investigation.

The Grievant's driver's record shows that she pled guilty to driving under the influence on January 29, 2012. The Grievant had been convicted of the same offence on July 31, 2004. The record also shows the Grievant's license was suspended for approximately a seven day period for failure to pay the fine associated with the conviction. The suspension is also dated January 29, 2012. As a result of the two convictions for driving under the influence, the Grievant lost her driving privileges and could only drive if she enrolled in the Minnesota Ignition Interlock Device Program. In order to enroll in the program, the Grievant had to pass a DWI knowledge test, pay a \$680 reinstatement fee and apply for a new class D driver's license. The new class D

driver's license prominently displays the letter "Y" to indicate that the ignition interlock must be installed on any car used by the driver.

POSITIONS OF THE PARTIES

The following is a summary of the Parties' respective positions as largely reflected in their opening and closing statements, witness testimony and exhibits.

Employer's Position

The Employer discharged the Grievant for just cause for failure to notify her supervisor of suspended and restricted status of her driver's license. The driving restriction imposed upon her prevented her from driving vulnerable adults which was an essential function of her position. Her conduct is particularly egregious given her role at the Department of Human Services. The Grievant was responsible for the care of individuals with physical and or developmental disabilities. The Employer offers specialized supports for individuals with disabilities. The Grievant worked with vulnerable adults with high medical and behavioral needs as a human services technician. Her job included driving residents to routine and emergency medical appointments. The Grievant was required to maintain a valid driver's license. Because of her two convictions for driving under the influence, the State revoked the Grievant's driver's license. She could only drive by enrolling in the vehicle interlock program. It wasn't until January 2013 that she let her supervisor know of her restricted license. The Employer could not legally allow the Grievant to drive vulnerable adults even with the vehicle interlock device.

The Employer launched an investigation and determined that the Grievant failed to immediately notify her supervisor of the change in her driver's license. The Grievant admitted during the investigation that she did not immediately notify her supervisor of the restrictions on her driver's license. The Employer launched its investigation following the Grievant's submission of a form requesting temporary relief from an essential job function. On the form the Grievant noted that she was restricted from driving vulnerable adults until February 4, 2013. She submitted the request on January 10,

2013. The Employer's investigation included looking into the Grievant's driving record in order to determine whether she informed her supervisor of the restrictions on her license in a timely fashion. The Employer interviewed the Grievant who was represented by her Union at the investigatory meeting. The investigation was conducted by the Grievant's supervisor, Larry Bunnell and Kari Matson, personnel representative. The investigative report prepared by Bunnell and Matson found that the Grievant admitted to failing to notify her supervisor and that her conduct violated Employer policies, specifically the MSOCS Policy 9145: Transportation and the MSOCS Vehicle Use Agreement. The Grievant is required to have an active and valid Class D driver's license and must report restrictions on their licenses immediately. The Grievant did not notify her supervisor immediately. The Grievant violated the vehicle use agreement policy because she did not maintain an active and valid driver's license and failed to notify her supervisor immediately of the restrictions on her license. The suspension and restriction on the Grievant's license meant that she failed to maintain a valid driver's license. The Grievant was aware of and notified of each of the policies and her responsibilities as reflected in the policies. The Grievant stated that she was not aware that her driver's license was suspended or restricted.

During the third step grievance meeting, the Union argued that the discharge should be overturned because the Grievant's driving privileges were unrestricted at the time of discharge. The Grievant did not notify her supervisor of her restricted license until January 2013 even though her license was suspended and then restricted in 2012. The Grievant's license was suspended/restricted on January 29, 2012. The Grievant was out on leave at that time. The Grievant returned to work on September 12, 2012 and should have immediately reported the restriction on that date. The Grievant did not report the restriction and continued to work until she went out on a medical leave beginning October 17, 2012.

The Employer has discharged other employees for failure to notify their supervisor of a restriction or change in the status of their driver's license that prevented them from carrying out an essential job function. The Employer provided notice of its policies to the Grievant. The Employer conducted a fair and thorough investigation into

the Grievant's misconduct. The Union failed to provide any evidence either at the Loudermill hearing or the arbitration hearing to support its claim that the Grievant did not notify her supervisor of the restriction on her license. Trust is paramount and the Grievant destroyed that trust. The expectation that employees maintain the ability to operate a vehicle given the job duties and the kind of emergencies that can arise is reasonable. The Employer has terminated at least six (6) other employees for failure to notify and given its commitment to the vulnerable adults it serves takes that failure to notify very seriously. The Grievance should be denied.

Union's Position

The Employer did not have just cause to discharge the Grievant. The Employer's investigation was not fair and thorough. The investigation consisted of only one interview and that interview was of the Grievant. The Employer failed to meet its' burden that the Grievant failed to notify her supervisor of the restriction on her license in a timely manner. The Grievant did notify her supervisor of the restrictions on her driver's license and informed her supervisor of all of the personal problems that led up to the driving under the influence conviction. The Grievant also told several of her co-workers about her personal problems and the restrictions on her license. The Employer witnesses have no direct knowledge that the Grievant failed to notify her supervisor. The Grievant had a lengthy leave in 2012 and again in 2013. The Employer does not always discharge an employee for failure to notify of a license restriction. The Employer did not prove the Grievant violated MSOCS Policy 9145. Discharge is not the appropriate remedy. The Grievant did her due diligence to notify her supervisor. The Grievant should be reinstated and made whole.

OPINION AND AWARD

The Employer discharged the Grievant for failure to notify her supervisor of a suspended and restricted drivers license that precluded her from carrying out an essential function of her job as a human services technician. The restriction on the license is undisputed. The Grievant, due to a history of driving under the influence of

alcohol, was required to enroll in an ignition interlock program in order to have any driving privileges as all. If a person's driver's license has the capitol letter "Y" on it, this means, according to the State of Minnesota Driver License Restriction Codes, that the owner of that license must only drive cars with the ignition interlock device installed. An ignition interlock is a small device with a camera that is installed in a vehicle to measure an individual's alcohol concentration level. If the Grievant had such a device installed in her personal vehicle she would have to blow into the device so that the concentration level of alcohol in her system could be measured and her photo taken in order to start her vehicle. If the device detects alcohol the car will not start. The device also collects random breath samples while the vehicle is being driven. The length of time that a person must be on the ignition interlock device program depends on the number of prior offenses on the driving record and the length of time the participant has lost their driving privilege. (Er. Ex. 20)

The Grievant's driving record shows that her license was suspended from September 28, 2012 until October 8, 2012. It also shows that the Grievant's driver's license was revoked on February 5, 2012 and that the revocation was to last for one year. In order to avoid being unable to drive for the year of scheduled revocation, the Grievant applied to and was enrolled in the ignition interlock device program. The program allowed the Grievant to continue to drive as long as the vehicle she used contained the ignition interlock device. The Grievant started the ignition interlock program on April 24, 2012 and completed the program on February 12, 2013. The Grievant was on a personal leave of absence from her job when she pled to driving under the influence. (Er. Ex. 19)

The MSOCS Vehicle Use Agreement, which the Grievant signed on February 9, 2011, required the Grievant to: "Notify the supervisor no later than the beginning of your next scheduled shift after losing your driver's license through suspension, revocation, cancellation, disqualification or expiration." (Jt. Ex. 5) The Grievant returned to work on September 12, 2012 from that personal leave of absence. (Er. Ex. 9) The Grievant should have notified her supervisor on September 12, 2012 that her license had been suspended for a short period of time, revoked but reinstated with restrictions

when she passed the entrance requirements for enrolling in the ignition interlock device program. The Grievant did not report this information upon her return to work on September 12, 2012. The Employer did not learn of the restriction until January of 2013, approximately one month before the Grievant was to complete the program.

The Grievant's work history shows that she returned from a medical leave on November 12, 2012, more than six (6) months after she enrolled in the ignition interlock device program (Er. Ex. 9) The Grievant's work history also shows that the Employer issued her an oral reprimand on December 6, 2012 for arriving late to work on September 24, 2012 and for her failure to report to work on October 1, 2012. The Grievant's own work history record therefore shows that at the very least she had an opportunity to inform her supervisor of the restriction placed on her driver's license when she received her oral reprimand on December 6, 2012. Of course, she could have informed her supervisor of the restriction when she arrived late to work on September 24, 2012 and even earlier on September 12, 2012 when she returned from her personal leave of absence. Since the Grievant enrolled in the vehicle interlock program on April 24, 2012 and thereby had her driving privileges reinstated but on the condition that the ignition interlock was in place on vehicles she drove, it is clear that she had numerous opportunities to inform her Employer of the restriction.

Testimony revealed that the Grievant admitted during the investigation that she did not immediately inform her supervisor of the restriction on her driver's license. At the hearing of this matter, however, the Grievant simply stated that she had in fact informed her supervisor. The arbitrator finds that the Grievant's testimony lacked credibility. The Union failed to offer any evidence, other than the Grievant's assertion that she had in fact informed her supervisor of the restrictions on her license. The Grievant said she even informed her co-workers of the restriction on her license. The Union did not call a single witness to corroborate the Grievant's assertion.

The Grievant's job is to provide support to vulnerable adults. Those adults cannot drive themselves to regular medical appointments or any other activity in the community. The Grievant's position description, offer letter and the Employer policies identified above all make clear that maintaining a valid drivers license is critical to the

performance of the Grievant's duties. Planning appointments and daily activities of the vulnerable adults the Grievant is charged to support means that her ability to drive might be needed at any given time and may not be a scheduled activity. The need for the Employer to know that it can count on the limited staff available to provide this critical function is abundantly clear.

More than one witness testified that the Grievant either said she did not know of the restriction on her driver's license or that she admitted not informing her supervisor. Had the Grievant informed her supervisor then proving so should have been at the forefront of every interaction the Grievant had with the Employer through the investigation, Loudermill hearing, Third Step Grievance hearing and the arbitration of this matter.

The investigation report claims that the Grievant admitted that she did not inform her supervisor. The Third Step Grievance form filed by the Union simply argues that the Grievant's privileges were unrestricted at the time of discharge. (Jt. Ex. 7) The Union did not argue that the discharge was improper because the Grievant immediately informed her supervisor of the restrictions on her ability to drive and therefore carry out an essential job function.

It is most curious that only at the arbitration of this matter does the Union argue that the Grievant did in fact notify her supervisor. Moreover, it is curious that the Union presented nothing in the way of documentation or witness testimony to support the Grievant's assertion that she did notify her supervisor. More than one witnesses testified that the Grievant, in fact, admitted not informing her supervisor. The record can only be interpreted to point to the Grievant's failure to notify her supervisor in a timely manner.

The most damaging evidence against the Grievant's assertion is the simple fact of her conduct as indicated by her driving record and the procedures required to enroll in the driver interlock program. It is clear that the Grievant pled guilty to driving under the influence and therefore understood that some consequences would follow such as suspension of her license for failing to pay the fines leveled against her. The Grievant failed to pay the fine and that failure led to a temporary suspension of her driver's license. The Grievant paid the reinstatement fee to have the suspension lifted. That

took place on October 8, 2012. In order to enroll in the ignition interlock program, the Grievant would have had to complete several entrance requirements including the completion of several documents and the payment of a fee in excess of \$600.00. In short, it is incredible to think the Grievant did not know or was unaware or unable to report the suspension and restrictions.

The very fact that the program includes the installation of an interlock device on her vehicle or on any vehicle she intended to drive means it would have been appropriate for the Grievant, though not required, to notify her supervisor prior to her return to work. The Grievant had to know that when she returned to work she could have been required to drive a vulnerable adult that very day. The need to drive a vulnerable adult could arise at any moment. It is obviously imperative that the Grievant make arrangements to inform her Employer of her inability to perform a basic job duty as soon as reasonably possible but certainly immediately upon return to work given her specific job duties. A simple assertion that she did inform her supervisor fails to rise to the level of a credible defense in light of the overwhelming evidence against her. Moreover, when asked by her advocate whether she felt she violated the vehicle use agreement and specially the portion of the policy requiring employees to maintain a valid drivers license, the Grievant responded: "My understanding was that my license was valid and that I was able to drive." (Taped Testimony) It is simply absurd to think that having to blow into a device simply to start a car and being restricted for 365 days from driving a car that did not have such a device represented a valid/appropriate driver's license and that she was eligible to drive vulnerable adults with such a restriction. Such testimony plainly lacks credibility.

The Grievant submitted a variance form to the Employer on January 10, 2013 in an effort to get the Employer to excuse her from performing the essential function of driving vulnerable adults. (Er. Ex. 11) It was in January of 2013 that the Employer discovered the restrictions on the Employer's license. Coming just one month prior to the end of the one year restriction on her license, it is not possible for the arbitrator to conclude that the Grievant informed her supervisor of the restriction in a timely manner as required by the policy.

The Employer satisfied its burden of proof that the Grievant engaged in conduct that violated its policies. In this case, Policy No. 9145 (Transportation); Section A (Use of Vehicles) (1): "All staff that are required to drive a vehicle to perform duties acting within the scope of their employment must have an active and valid Class D driver's license. It is the responsibility of each driver to report any restrictions placed on a state issued driver's license to their supervisor immediately..." (Jt. Ex. 4; See also Jt. Ex. 5: Vehicle Use Agreement)

The Union called the Grievant as its only witness to support its argument that the Grievant had not violated the policy. The Grievant testified: "I let my supervisor know right away that I was on this ignition interlock. I explained everything to him." The Grievant also testified that she told every one of her co-workers because they all asked. She said while I was embarrassed, I explained everything to them. However, the Union failed to call even one of the Grievant's co-workers to support her position that she openly discussed the restrictions on her driver's license with her supervisor or anyone else. The Grievant's testimony is simply inadequate and unsupported by anything in the record and therefore cannot overcome the overwhelming weight of the evidence produced by the Employer. Nor did the Union submit any evidence in support of its attempt to argue that discharge was too harsh a discipline in this case.

AWARD

The Grievance is denied. The Employer's discharge of the Grievant stands.

Respectfully submitted,

A. Ray McCoy
Arbitrator

February 6, 2015