

**Teamsters, Local 320,**  
**the Union,**  
**-and-**  
**University of Minnesota,**  
**the Employer.**

**ARBITRATION AWARD**

**Hensley A. D'Abreau Grievance**

**BMS Case No. 06-PA-0751**

Arbitrator: Barbara C. Holmes

Hearing Date: January 18, 2007

Post Hearing Briefs due: February 26, 2007

Date of Decision: March 19, 2007

Appearances:

For the Union: Patrick J. Kelley  
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**INTRODUCTION**

Teamsters, Local 320 (herein, the Union), as the exclusive representative, brings this grievance challenging the termination of the Grievant, Hensley A. D'Abreau. The University of Minnesota (herein, the Employer) contends that the termination was proper. An arbitration hearing was held at which both parties had a full opportunity to present

evidence through the testimony of witnesses, the introduction of exhibits and the submission of post-hearing briefs.

## **ISSUE**

Was the Employer's termination of the Grievant for violating his Last Chance Agreement proper?

## **FACTUAL BACKGROUND**

On September 20, 1994, the Grievant was hired into a full-time temporary position as a cook in one of the Employer's residence halls for students. In 1995, the Grievant obtained permanent status. During 2002 and 2003 the Grievant received 1) a Letter of Expectation on two separate occasions (May of 2002 and May of 2003) regarding his inadequate attendance record, 2) an oral warning for inappropriate use of sick leave (August of 2002), and 3) a coaching session regarding his inadequate attendance (September of 2003).

In October of 2003, the Grievant suffered a work-related back injury and was granted a 12-week leave of absence pursuant to the federal Family and Medical Leave Act (FMLA). Because the Grievant did not return to his job after his 12-week leave ended, the Employer considered him terminated. The Union grieved this termination. The grievance was resolved by placing the Grievant on a summertime on-call list. In August of 2004 the Grievant was offered a full-time position that would require him to work every other weekend. The Grievant did not accept the position because he did not

have transportation for the weekend shifts. The Employer treated the Grievant's non-acceptance of the position as a termination, which the Union grieved. In January of 2005 the Grievant was reinstated pursuant to a Last Chance Agreement. The Employer, the Union and the Grievant signed the agreement. It provided that the Grievant could be terminated if, in any 6-month period, he had three absences of the type defined as an "occurrence" under the Employer's Attendance Policy or after one "no-call, no show" for a scheduled shift.

In March of 2005 the Grievant was terminated for allegedly coming to work intoxicated. During the grievance process the termination was reduced to a 3-day suspension.

The Grievant was absent from work on June 28, 2005, July 22-24, 2005, August 22, 2005 and October 14-16, 2005. On November 3, 2005, the Employer terminated the Grievant's employment for violating the Last Chance Agreement.

### **POSITION OF THE PARTIES**

**Employer:** The Employer argues that by entering into the Last Chance Agreement, the Grievant has waived the just cause and disciplinary protections under the collective bargaining agreement. It believes that it must only prove that the Last Chance Agreement was violated. In the alternative, the Employer argues that the Grievant was terminated for just cause as required under the collective bargaining agreement.

The Employer believes that all of the Grievant's absences in June, July, August and October of 2005 qualify as an "occurrence" under the Attendance Policy. It asserts

that the Grievant has offered multiple and conflicting reasons for his absences throughout the grievance process. Although the Grievant provided his supervisor with doctor's slips after the July and October absences, these absences were not pre-approved and therefore each constitutes an "occurrence".

The Employer does not believe the Grievant's asthma and allergies qualify as a "chronic or serious medical condition", which is exempted from the definition of an "occurrence" in the Attendance Policy. The Employer relies on the definition of "serious medical condition" as set forth in the federal FMLA. The Employer also points out that the doctor's file notes for the July absence do not mention allergies or asthma as the reason for the visit.

**Union:** Regarding the interplay between the Last Chance Agreement and the collective bargaining agreement, the Union argues that just cause and due process cannot be waived. It believes that this case is ripe for arbitration under the terms of the contract.

The Union's position is that two of the four absences at issue are not "occurrences" under the Attendance Policy. Therefore, it believes that the Employer has violated the Last Chance Agreement, which requires three "occurrences" before a termination is allowed.

The Union concedes that the Grievant's absences in June and August were due to childcare issues and therefore properly categorized as "occurrences." However, it argues that it has sufficiently proven that the July and October absences were due to the Grievant's chronic asthma and allergies. Because the Attendance Policy excludes "chronic or serious medical conditions" from the definition of an "occurrence", the Union

believes that the Grievant did not have the requisite number of “occurrences” to merit a termination under the Last Chance Agreement.

The Union also argues that given the Employer’s awareness of the Grievant’s asthma and allergies, it should have investigated the matter more thoroughly. It believes that the Employer should have taken steps to accommodate the Grievant’s illness.

Finally, the Union believes that the Employer failed to uphold its duties under the Last Chance Agreement. It argues that the Employer should have warned the Grievant that his record of absenteeism was dangerously close to meriting termination. The Union also notes that the Employer did not take action after its claimed third “occurrence” but waited until the fourth “occurrence”, thereby violating the Last Chance Agreement.

## **DISCUSSION AND OPINION**

The first issue to be resolved is to determine the proper standard to use in analyzing the termination of the Grievant. Pursuant to Article XI of the collective bargaining agreement, the Employer must have “just cause” to terminate the employment of the Grievant. However, the parties have also entered into a Last Chance Agreement that applies to the Grievant’s termination. Each party has made an argument under a standard “just cause” analysis and, in the alternative, under the terms of the Last Chance Agreement.

The Last Chance Agreement contains the following language:

The terms and conditions of [the Grievant’s] employment upon his return to work shall be as set forth in the collective bargaining agreement between the University and the Union except as provided for in the Last Chance Agreement.

I do not find that it is necessary to choose between the collective bargaining agreement and the Last Chance Agreement in deciding this case because the Last Chance Agreement is actually a part of the collective bargaining contract. It amends the just cause standard of the contract *as it applies to the Grievant*. Parties to a collective bargaining contract often enter in to binding agreements that amend the terms of the contract. These agreements may apply to all members, a group of members or a single member. Similarly, the parties often resolve an individual grievance by entering into a grievance settlement, which also may modify the terms of the agreement for the individual grievant. That the agreement in this case happens to be labeled a “Last Chance Agreement” does not sever it from the collective bargaining agreement.

The effect of this particular Last Chance Agreement is to modify what constitutes just cause for the Grievant’s termination. Typically a just cause analysis involves two distinct steps. The first step is to determine whether the Employer has submitted sufficient proof that the employee actually engaged in the alleged misconduct or other behavior warranting discipline. If the alleged misconduct is established by a preponderance of the evidence, the next step is to determine whether the level of discipline imposed is appropriate, taking into account all of the relevant circumstances. *See Elkouri & Elkouri, How Arbitration Works*, pg. 905 (5<sup>th</sup> ed. 1997). In this case, the Last Chance Agreement does not modify the first step of the analysis; however, the second step of the analysis has been circumscribed. The parties have agreed that termination will be the appropriate level of discipline if the Grievant has three absences defined as “occurrences” under the Employer’s Attendance Policy. It will not be

necessary to review circumstances such as the Grievant's disciplinary history, work record, how the Employer treated similar misconduct, or other mitigating factors.

#### **A. The Alleged Misconduct**

The Employer's Attendance Policy, which is not a part of the contract, addresses sick leave usage as it affects performance. Although an employee's absence may entitle him to sick leave pay under Art. XVIII of the collective bargaining agreement, that same absence may not be acceptable under the Employer's Attendance Policy.

Under the policy, certain reasons for taking sick leave are denoted as "occurrences".

An occurrence is defined as an absence of any portion of a scheduled workday, or any block of consecutive days, without notification to, and authorization from the supervisor prior to the time the absence commences... Calling in sick just prior to the start of the shift is an example of an occurrence.

...

The following types of sick leave are not counted as occurrences (proper documentation may be required):

- Use of pre-approved sick leave, with at least 24-hour advance notice, to attend scheduled medical appointments with documentation from a health care provider stating the date and time they were scheduled to be seen. ... ;
- Use of sick leave to attend a funeral, as defined by the labor agreement or the Civil Service rules;
- Use of sick leave for injuries occurring while on duty and covered by workers compensation or for injuries occurring while on duty that result in three or less lost work days;
- Use of sick leave for hospitalization;
- An FMLA leave.
- Chronic or serious medical conditions, or other situations deemed exceptional by the supervisor and reviewed by the University Services Human Resources, which will be handled on a case-by-case basis.

If an employee has three "occurrences" within any 6-month period, supervisors are directed to monitor and review the employee's attendance.

In this case, the Last Chance Agreement references this “three occurrences in any 6-month period” standard as grounds to terminate the Grievant. The Grievant has conceded that the June and August absences were due to childcare issues and thus are “occurrences” under the Attendance Policy. The remaining July and October absences must be reviewed to determine if they qualify as “occurrences” under the Attendance Policy.

The Attendance Policy sets forth the circumstances under which an absence due to a medical problem is not considered an occurrence – pre-approved sick leave, work-related injuries, hospitalization, FMLA leave and “chronic or serious medical conditions.” The only evidence regarding an FMLA leave for the Grievant’s asthma and allergies is contained in an e-mail dated September 24, 2003, between representatives of the Employer. This e-mail documents a coaching session held with the Grievant regarding his attendance. It states:

[The Grievant] indicated the reason for his absences was usually related to allergies or asthma and that he does bring medical documentation for absences and notifies his supervisor ... in advance of his shift. ... [The Employer] stated that ... [s]ome illness may be applicable to FMLA, which then would not be considered when reviewing absences. [The Employer] to have FMLA paperwork sent to [the Grievant] to see if his condition qualifies.

But there is no evidence that the Grievant ever pursued an FMLA leave for his asthma or allergies. He was clearly aware of the program because he took an FMLA leave in October of 2003 for a work-related back injury. Therefore the exception to the “occurrence” definition for an FMLA leave does not apply to the Grievant’s absences.

There is also an exception to the “occurrence” definition for “chronic and serious medical conditions.” But the language of that exception requires that the matter be

“reviewed by the University Services Human Resources, which will be handled on a case-by-case basis.” Several representatives of the Employer testified that Human Resources must make the determination as to whether a “chronic and serious medical condition” exists *prior* to the absence occurring. Because this is a *policy* of the Employer and not language contained in the collective bargaining agreement, I find that it is within the Employer’s discretion to determine how the policy is applied. There is no evidence that the Employee obtained prior approval to classify his medical condition as “chronic and serious.”

Even without this requirement of prior approval I find that insufficient evidence was provided to show that the Grievant has a “chronic and serious medical condition.” There were only three pieces of documentary evidence submitted that mention the Grievant’s medical condition – 1) a statement from an allergy and asthma specialists clinic dated August 15, 2002, that detailed the medicines he was directed to use, 2) the Employer’s e-mail of 2003 noted above, and 3) a doctor’s file notes dated October 16, 2005. The latter was not provided until the arbitration. The Grievant also submitted a printout generated by a drug store that detailed the prescriptions he obtained during 2005. However, the only time he obtained allergy and asthma medication in 2005 was on November 8, 2005 – five days after his termination. Much more documentary evidence or testimony from a medical expert would be needed to prove that the Grievant’s medical condition was “chronic and serious.” Because of this lack of evidence it appears as if the Grievant’s claim is a eleventh-hour effort to salvage his employment.

Even if the Grievant had proved the existence of a “chronic and serious medical condition”, the July 24, 2005, doctor’s file notes list diarrhea as the chief complaint and

suggest a diagnosis of gastroenteritis (GE). This absence and the two absences already conceded to be “occurrences” would be sufficient to terminate the Grievant under the Last Chance Agreement.

I also find that the Last Chance Agreement did not require, as the Union argues, that the Employer warn or notify the Grievant that he was at risk of violating the agreement. Neither was the termination compromised because the Employer waited until the fourth instead of the third “occurrence” to terminate the Grievant.

**B. The Appropriate Sanction**

Because the parties have defined the “appropriate level” of discipline in the Last Chance Agreement, I do not have jurisdiction to require progressive discipline or consider mitigating factors. My role is akin to that of a “fact-finder”. Because I have found that the Employer carried its burden of proving that the Grievant had at least four absences defined as “occurrences” under the Attendance Policy, the termination imposed by the Employer must be upheld.

AWARD

The grievance is denied.

DATED: \_\_\_\_\_

\_\_\_\_\_  
Barbara C. Holmes  
Arbitrator