

IN THE MATTER OF ARBITRATION BETWEEN

SEIU LOCAL 284

(Union)

And

WEST ST. PAUL, MN.

(Employer)

DECISION AND AWARD

(Kathy Maloney discharge)

BMS CASE # 16 PA 0740

ARBITRATOR:

JAMES N. ABELSEN

HEARING:

July 26, 2016

POST HEARING BRIEFS RECEIVED:

September 23, 2016

APPEARANCES:

FOR THE UNION:

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INTRODUCTION

This matter came on for hearing on July 26, 2016 at the offices of the Employer in West St. Paul, Minnesota. The matter under consideration was whether or not the Employer had just cause to terminate the employment of the Grievant Kathy Maloney, a bus driver with ISD # 197 and a member of SEIU Local 284. The discharge was based on what the Employer claims was a willful violation of their work place driving and safety rules.

At the hearing, over the objection of the Union, the Employer offered evidence tending to establish that the Grievant had also misappropriated funds from the coffers of an informal employee group known as the "Sunshine Club". This alleged misappropriation occurred during the Grievant's employment, but was not discovered by the Employer until after the Grievant had been terminated.

The Union objected to the introduction of this after acquired evidence as being irrelevant and inadmissible in a hearing challenging the Grievant's termination for her performance as a bus driver. The parties were directed to submit briefs on the admissibility of this evidence, the briefs were received on August 22, 2016, and a ruling granting the Union's motion to exclude this evidence was issued September 6, 2016. (Attachment A).

ISSUE PRESENTED

The issue presented by the parties was whether the Employer had just cause to discharge the Grievant, Kathy Maloney and, if not, what is the appropriate remedy?

RELEVANT FACTS AND BACKGROUND

The Union and Employer are parties to a Collective Bargaining Agreement covering the period of time July 1, 2015 to June 30, 2017. All facts and all actions of the parties leading to this grievance occurred during the time this Agreement was in force.

The Grievant, Kathy Maloney, was a long term bus driver for ISD # 197. In December, 2015, her employment was terminated for what the Employer contends was a willful violation of their work rules by driving her bus through a crowded fast food parking lot, striking equipment

on one vehicle, which then caused damage to another vehicle, and which also jeopardized the safety of others who were in the immediate area.

On the day of the incident, the Grievant was early for a scheduled pick-up which gave her time to stop for lunch. District time records indicate that she had ample time to stop at the District office for her break but she chose instead to go to a nearby fast food establishment. There were no students on the bus during that time but she was accompanied by another transportation employee who was acting as a monitor. Instead of parking the bus on the street or in an open area, the Grievant turned into the parking lot of the fast food establishment. She apparently misjudged distances and hit a truck parked in the lot, knocking a ladder and other equipment off the truck and into another parked vehicle. The damages sustained were \$1,086 for the bus, \$1,495 for the ladder and equipment, and \$4,120 for the damaged automobile.

Following the incident the Grievant was placed on paid administrative leave while the District investigated. During the investigation interview the Grievant admitted to the driving mishap, she acknowledged that she had been given a copy of the Driver and Monitor Manual, and acknowledged that she was familiar with the Manual and knew that buses were not allowed to "... park or stop in private or public parking lots unless designated as an authorized stop."¹ The investigation concluded with a finding that the Grievant willfully violated District driving rules which led to the vehicle damages, and put herself, her passenger, and the District, at great risk.

In addition to this incident, the Grievant also had what the Employer considered a less than exemplary employment record. She had been verbally reprimanded in 2012 for making false accusations against another employee, in 2013 she was cited for insubordination, and in March of 2015 she had been given a "final warning" for violation of District policy prohibiting cell phone use while in control of a bus.

Following the parking lot investigation, and taking into account the Grievant's past record, the Employer terminated the Grievant's employment effective December 9, 2015. Shortly thereafter the Union filed a grievance claiming the Employer failed to "follow the steps of progressive discipline" and also violated Article XIII of the Collective Bargaining Agreement which requires that discipline be for "just cause".²

¹ Emp Ex 10 at 13

² Emp Ex 17

EMPLOYER'S POSITION

The District believes they have articulated a legitimate non-discriminatory reason for discharging the Grievant. They offered what they believe to be persuasive evidence to support that decision, and they believe that their decision to discharge the Grievant was fair in that particular situation, and in light of all the facts and circumstances surrounding the incident.

In particular, they note that the District has well known work rules which prohibit drivers from doing precisely what the Grievant did when she drove into the fast food parking lot. She was in an unauthorized area,³ and she acknowledged that she was aware of the rule prohibiting her from being there. In addition, it appeared she was driving too fast for conditions, and was operating her vehicle in an unsafe and careless manner, all of which are grounds for dismissal.⁴ And finally, they note that this behavior was preceded by other past disciplinary actions including a final warning several months earlier advising the Grievant that any further infractions would be grounds for immediate termination.⁵

The Employer believes that under all these circumstances the decision to discharge the Grievant was for "just cause" as required by the Collective Bargaining Agreement. She willfully violated District safety policies, drove into a crowded parking lot, caused significant property damage, and created a serious risk of harm to herself and others. All this evidence was admitted by the Grievant or was otherwise unrefuted. This, they argue, is a just and fair basis for the Employer to discharge the Grievant.

UNION'S POSITION

Notice requirements in the Collective Bargaining Agreement were violated.

The Union notes first that the party's Collective Bargaining Agreement requires that an employee who is being suspended or discharged must be notified of the proposed action "together with a statement of the reason(s) for discharge or suspension".⁶ In this case the

³ *Emp Ex 10 at 13*

⁴ *Id. at 38 & 40*

⁵ *Emp Ex 13*

⁶ *Emp Ex 20 Article XIII Sec. 1, Subd. 2*

Employer's termination letter, which provides the reason for the discharge, references two things: the Grievant's admitted intent to stop at Wendy's for lunch, and her knowing that parking in the Wendy's lot would be a violation of District rules.⁷

The Union points out however, that at the arbitration hearing the Employer offered additional reasons for the termination, including traveling too fast for conditions, driving in an unsafe manner, engaging in unsafe activities and driving carelessly or recklessly while operating a school bus. These are all separate violations from the stated reason for the discharge, and therefore, argues the Union, these reasons cannot be added at the hearing to strengthen the employer's position. (Citing *Chevron-Phillips Chem, Co*, 120 LA 1065, 1073 (Neas, 2005)). In essence, they argue, the Employer's case must rise or fall on what the Employer initially said was the reason for termination – her intent to stop at Wendy's for lunch, and her knowing that parking in an unauthorized place was a violation of District rules.

Employer failed to establish Just Cause

The Union next argues that the Grievant's termination was not for "just cause" in that the district (1) failed to follow progressive discipline principles, (2) has not been consistent in its discipline of employees who violated the identical or similar rules, and (3) that no sufficiently exacerbating factors existed that would warrant skipping one or more steps in the progressive discipline process.

Failure to follow progressive discipline. The Union contends that the Employer failed in its obligation to follow the progressive discipline process when it skipped suspension and instead immediately terminated the Grievant. They acknowledge that the Grievant had a less than perfect employment record and that she had been disciplined in the past, but these previous disciplines were unrelated to her driving. In addition, the Employer's reliance on the "final warning" letter is misplaced, since that warning letter related only to cell phone use. The appropriate and "just" next step in progressive discipline for a long term employee like the Grievant, for a first time driving offense, would be a suspension, not termination.

⁷ Emp Ex 16

Inconsistent discipline for similar violations. The Union presented evidence detailing other District bus driving accidents from 2013 through 2016.⁸ Those records clearly show that many drivers have violated District driving rules over the years that did not result in discipline of any kind, let alone termination. And in those instances where discipline was imposed, the Employer followed the progressive discipline process. This evidence, they argue, clearly shows that in many cases where identical or similar rules have been violated, it was only in the Grievant's case that the Employer ignored the progressive discipline process and went directly to termination.

No justification for ignoring the progressive discipline process. As noted, according to the Union's reading of the termination notice given to the Grievant, she was being discharged for (1) driving into the fast food parking lot for lunch, and (2) knowing that that was a violation of policy. Not until the hearing did the Employer mention anything about the extent of the damages, nor did they consider the fact that other accidents by other drivers had resulted in considerably more damage. In addition, the Employer failed to offer any credible and admissible evidence to show the Grievant was driving carelessly, recklessly, too fast, or otherwise irresponsibly.

What the Union believes happened is that the grievant violated a policy, and unfortunately, was involved in an accident. And others who have had similar accidents were not discharged, but were more appropriately and leniently disciplined consistent with the principle of progressive discipline.

DISCUSSION AND ANALYSIS

Termination notice requirements of the Collective Bargaining Agreement.

The language in the Collective Bargaining Agreement referred to by the Union provides that an employee subject to discharge must be given "...a statement of the reason(s) for discharge..." And in this case, they argue, the only reason(s) given in the notice were that the Grievant violated the rule that "buses will not park or stop in private or public lots unless

⁸ Union Ex 1

designated as an authorized stop”, and that she was aware of that rule. Since that is what the notice said, they argue that it is inappropriate to base the Grievant’s termination on reasons which were added after the fact, such as driving too fast, driving in an unsafe manner or driving carelessly.

The fact is however, that the written notice to the Grievant contains a number of reasons for her termination other than entering an unauthorized parking lot and knowing that was a violation of District rules. The notice also says: (a) “the bus you were driving struck a ladder that was secured to a rack on the top of a van”, (b) “the rack and ladder were dislodged from the van”, (c) “(the rack and ladder) were projected onto the vehicle next to it sending it through the rear windshield”, (d) “you admitted to the(se) events”, (e) “you were familiar with the (Driver Manual)”, (f) “it was your understanding that buses could not park in public parking lots”, (g) “your actions were in direct violations of procedures set forth in your Manual”, (h) “you put yourself, your passenger and the District at great risk”. And they concluded that her employment was being terminated (i) “due to the severity of this incident and the disregard for procedures”.⁹

In addition, the specific reasons cited by the Union as being added without notice, such as traveling too fast, driving carelessly, etc., are not really separate and distinct reasons for the termination. They would more accurately be characterized as a cause, or the specifics of why the parked vehicle was hit, and why the ladder and rack were dislodged, and why the other car was damaged, and why people were at risk.

But regardless of how things are characterized, it seems clear that when the Grievant received her written notice of termination, there could be little doubt in her mind as to why she was being terminated. And that is what the written notice requirement is intended to do.

Determining just cause.

To some, the concept of just cause might seem to be a fairly simple concept that most fair minded people could easily understand. But the problem of course, is that everyone has their own idea of what is just and fair and reasonable in any given situation. And in spite of many attempts to do so, there really is no clearly articulated, universally accepted, and easy to apply

⁹ Emp Ex 16

definition of the term. So it still remains a somewhat elusive concept that is continually being sliced and diced by the courts, arbitrators and academics.

Over the years decision makers have described their thought process in determining just cause in a variety of ways. To some, an employer's decision to terminate was acceptable as long as management did not abuse its discretion in imposing such a penalty since they knew best, based on their experience, what the company needs were. Others have focused on whether or not the penalty was unfair or arbitrary or capricious – a more reasonableness approach. And yet others have used language like overly harsh or excessive. So over time, the definition of just cause has not become clearer. If anything it has been made more complex, and unfortunately but understandably, more subjective.

That being said, what seems to be a fair and well-reasoned way of looking at just cause cases is a process suggested by the *Steelworkers Trilogy* (see 46 LRRM 2414, 2416, 2423 (1960)). Those opinions seem to suggest that a reasonable and appropriate way of evaluating an employee's behavior and an employer's decision to terminate the employee, is to consider and apply what was referred to in the *Trilogy* as the "common law" of a particular business (in this case the business of public education), or of a particular business location (in this case ISD # 197).

This "common law" is essentially the general understanding or general knowledge the parties have as to what their business is all about, what the expectations and needs of the various stakeholders are, what is and is not appropriate behavior for both the employer and the employees, and what the unique needs and challenges of both parties are. Those understandings and expectations cannot always be articulated in a collective bargaining agreement, but they are the common understandings, the common knowledge, and therefore the unwritten "common law" of a particular business. These things are essentially what the parties have taken into consideration, or at least were well aware of, when they created their Collective Bargaining Agreement.

So it is the written Agreement, along with this unwritten common law, which together can help determine what is, or is not, fair, reasonable, and just. And in a termination case like this, it is therefore entirely appropriate, if not necessary, that the decision reflect these "common law" things. Things such as: the effect the decision will have on the operations of the District or department, the effect on the morale of the District or department, the effect on the various stake

holders, including the students and the community, and the effect the decision may have on future employer / employee relations.

To use this approach in determining Just Cause, where the Collective Bargaining Agreement is applied in the context of the common law of the organization, seems a reasonable and fair way to judge the "Justness" of the Employer's decision. And as long as the decision is reasonable, in light of the nature and severity of the offense, the Grievant's history and her awareness of the Employer's rules, and the effect this will have on the various stakeholders, the Employer's decision can then be considered to be fair and for Just Cause.

FINDINGS

1. The Employer has clear and well known rules concerning the requirements and expectations for school bus drivers and what behavior can result in discipline. The Grievant admitted that she knew those rules and the possible consequences of violating those rules.
2. The Grievant intentionally ignored the rule prohibiting the stopping or parking of a school bus in a public or private parking lot, by driving her bus into the parking lot of a crowded fast food restaurant at a busy time of the day. As she entered the lot she knocked equipment off a parked vehicle, which equipment then hit and caused damage to another parked vehicle.
3. By entering a prohibited parking lot and causing the damage she did, the Grievant showed a blatant disregard for the rules of the District, caused financial harm to the District, and endangered the safety of others.
4. In addition to this incident, the Grievant had been disciplined in the past. In 2012 she was reprimanded for making unfounded accusations against another employee. In 2013 she had been given a warning for insubordination, and a few months prior to this incident she had received a written final warning for using a cell phone on the bus with students present.
5. Other District drivers have had accidents which caused property damage. Some of those drivers were disciplined, including one termination, and others were not. However no other property damage accidents were reported where District rules were

knowingly disregarded and the safety of others was jeopardized, and the driver had an employment record as poor as the Grievant.

6. The Grievant's disregard of District rules, her carelessness or lack of driving skills, the property damage she caused, her endangerment of others, and her past discipline issues all support the conclusion that the Employer has articulated a legitimate, non-discriminatory reason for their decision. They have supported that decision with convincing evidence, and the decision was fair and for Just Cause, as required by the Collective Bargaining Agreement.

DECISION AND AWARD

Based on the record as a whole and for the reasons cited herein, the grievance is denied.

Date: 10/21/2016, 2016


James N. Abelsen, Arbitrator

IN THE MATTER OF ARBITRATION BETWEEN

SEIU LOCAL 284

(Union)

BMS CASE # 16 PA 0740

And

**Ruling on Union's Objection
to Admissibility of After-
Acquired Evidence**

**INDEPENDENT SCHOOL DISTRICT NO. 197,
WEST ST. PAUL, MN.**

(Employer)

This motion arose out of an arbitration hearing conducted by the undersigned on July 26, 2016. The matter under consideration was whether or not the Employer had just cause to terminate the employment of the Grievant Kathy Maloney, a bus driver with ISD No. 197 and a member of SEIU Local 284.

In December, 2015, the Grievant was terminated for what the Employer contended was a willful violation of their work rules by driving her bus through a crowded fast food parking lot, striking and causing damage to another vehicle, and jeopardizing the safety of others who were in the vicinity.

At the July 26th hearing, the Employer offered evidence and testimony tending to establish that the Grievant had also misappropriated funds from the coffers of a group known as the "Sunshine Club", which is a group of bus drivers who raise money through contributions and candy sales to buy gifts for drivers who suffer a loss of some kind, and to pay for an annual holiday party for the drivers. The Grievant was the person responsible for managing the Fund and had complete control of all Fund finances.

Following the Grievant's termination, but prior to the Grievance hearing, the Employer began hearing concerns about how little money there was in the Sunshine Fund, particularly after a new driver took over management, lowered prices, and the Fund became more profitable. The Employer investigated those concerns, and as part of that process attempted to meet with the Grievant to get her side of the story.

For a number of reasons the meetings never took place. And on July 8, 2016, after continued attempts to arrange a meeting, the Employer advised the Union that they would take the position that the misappropriation of funds would be considered as an additional basis for discharge and would be presented at the arbitration hearing.

On July 18, 2016, the Union responded that they were advising the Grievant not to meet with District officials since she had already been terminated, and because she was no longer an employee of the District she would not be afforded the public employee protections from criminal prosecution set forth in *Garrity v. New Jersey*, 385 U.S. 493 (1967).

The grievance hearing was held on July 26th, and, as The Employer had so advised the Union, they offered into evidence, over objection, testimony from four bus drivers regarding the Sunshine Fund. The essence of the testimony was that the Grievant collected all money, banked all money in an account that only she controlled, would occasionally spend Fund money on personal items with no evidence of repayment, and that after her replacement took over prices were reduced and the Fund balance increased. The testimony was clearly intended to convey the message that funds were misappropriated. No one specifically alleged that, no one accused the Grievant of anything illegal, no one had evidence of obvious wrong doing, and no one had raised any concerns in the past about how the Fund was operated. Nevertheless the message was clear.

This testimony from the Grievant's fellow bus drivers was presented for the first time at the hearing. And after all had offered their testimony on that issue, and the Union's objection was noted, the parties were asked to submit briefs on the admissibility of this evidence.

Issue

Based on the facts described above, is evidence of the Grievant's alleged misappropriation of funds admissible in her termination hearing, when that alleged misconduct is of a different nature than the conduct which led to her termination, and was not discovered by the Employer until after the Grievant's termination.

Employer's Position

The District first argues that there is no absolute bar on after-acquired evidence such as this being admitted and considered in arbitration, and in fact, they argue, the opposite is true. "(Evidence discovered after taking disciplinary action) may be admissible, if relevant, as support

for the originally charged discipline.” (citing Elkouri & Elkouri, *How Arbitration Works* at 8: 78-89 (7th Ed. 2012)). They argue that the unrefuted testimony of the witnesses clearly shows there was a misappropriation of the Sunshine Club funds, and the fact that the Grievant failed to testify or attend any meetings to discuss the issue can only lead to the conclusion that the misappropriation did in fact take place. This, they argue goes to her trustworthiness as an employee, which relates back to her lack of trustworthiness in driving recklessly through a fast food parking lot in disregard of District rules. That being the case, argues the Employer, this after-acquired evidence showing the Grievant to be untrustworthy is relevant, and should be admitted as support for the original charge.

The District also argues that this misappropriation of funds is, on its own, a separate basis for discharging the Grievant and on that basis the evidence should be admitted. While the Employer acknowledges that as a general rule a discharge made for one explicit reason ordinarily cannot be justified in arbitration for an entirely different reason, they argue that there is well recognized authority for the proposition that “... this rule (on not admitting after-acquired evidence) does not apply where the employee has fair opportunity to defend against the additional ground and the grounds would be reason for another discharge immediately following a reinstatement by the arbitrator”. (*Pullman-Standard*, 47 LA 752, 753 (McCoy, 1966)). Because the Grievant chose not to respond to the allegations of misappropriating funds, this evidence of misconduct is uncontroverted and as such it has essentially been proven. And since this misappropriation would, standing alone be grounds for the Grievant’s immediate discharge, this evidence should be admissible.

Finally, the Employer argues in the alternative, that this evidence of misappropriation should be admitted for the purpose of deciding the appropriate remedy, if the ultimate decision in this proceeding is that the Grievant’s discharge was not for just cause. They cite a number of court cases, arbitration decisions and treatises in support of the proposition that after-acquired evidence is admissible for purposes of determining an appropriate remedy, should the arbitrator find that an employer’s decision to terminate an employee did not meet the just cause standard. (See Elkouri at 8-83-88 and cases cited therein).

Unions Position

The Union argues first, that it is improper for the Employer to be allowed to add evidence of an alleged wrongful act, (i.e. misappropriation of funds) as additional justification for terminating the Grievant for violating District driving rules. This, they believe, is an example of the kind of employer behavior rejected in *Safeway, Inc.*, 105 LA 718, 722 (Goldberg, 1995), which held that an employer "...may only rely upon those facts as they existed or as they were known at the time of the termination.... This so called after-acquired evidence cannot be used to bootstrap the basis for an earlier termination decision." They also cite as authority *Southwest Airlines*, 122 LA 856, 864 (Jennings, 2006) wherein it was held that "... management's rationale for a discharge could not be buttressed by negative information learned only after the discharge was implemented." Since the alleged misappropriation of funds is substantially different than the reason for the Grievant's termination, the Union argues that any evidence and testimony related to this added on charge should be excluded.

The Union also argues that in reality, the Grievant really had no reasonable opportunity to respond to the Employer's allegation of misappropriation of funds. When this add on issue was presented to the Grievant, she was no longer an employee of the District and therefore she did not have the protections of *Garrity v. New Jersey* 385 U.S. 493, 499 (1967), a Supreme Court decision which prohibits the use of compelled statements in any subsequent criminal matter. The Union's concern is that since the Employer is alleging possible criminal activity, any comments or evidence provided by the Grievant during the Employer's investigation could be used against her, since at the time of their investigation the Grievant was no longer an employee. For that reason, and based on the advice of her attorney and the Union, the Grievant opted not to participate in the District's investigation and therefore could not adequately address the District's allegations.

Finally, the Union argues that since the Grievant could not safely and adequately address the misappropriation charges, the theory that after-acquired evidence is admissible to determine an appropriate remedy would apply if, and only if the Grievant is reinstated. As a reinstated employee, she would then have the *Garrity* protections and could safely participate, and would willingly participate, in the Employer's investigation.

Discussion

General Rule on Admitting After-Acquired Evidence

As a long standing general principle, an employee's post termination misconduct is not appropriately considered in determining whether or not the employer had just cause for termination. As first espoused in *Forest Hill Foundry*, 1 LA (BNA) 153, (Brown, 1946), "... whether or not there is just cause for termination is to be determined at the time of the discharge and what was known by the employer at that time". That general principle has been restated many times over the years, using language such as "... the discharge must rise and fall upon those (original) facts, and so called after-acquired evidence cannot be used to bootstrap the basis for an earlier termination decision." *Safeway, Inc.*, 105 LA 718, 722 (Goldberg, 1995).

Exceptions to the General Rule

As with many general principles there are often exceptions. And one of those exceptions to the general rule is when the employee's conduct, which is uncovered after discharge, is similar to or comparable to the conduct which gave rise to the employee's termination. Such evidence can then be admissible, if relevant, as support for the originally charged discipline. (See *Safeway Stores*, 95 LA (BNA) 63, (Levak, 1990); and *Bi-State Development Agency*, 125 LA (BNA) 54 (Daly, 2008).

Another exception is that after-acquired evidence may be admitted, even if the evidence is not similar to or comparable to the original charged conduct, if the evidence is of such a nature that the employer would have terminated the employee solely on the basis of that evidence. (see *Union Tank Car*, 123 LA (BNA) 1473 (Dilts, 2007), and *Summers v. State Farm Mutual*, 864 F2d 700). And others have added to that, the proviso that evidence of this unrelated misconduct may be admitted, as long as the evidence was established in a process that allowed the employee to fairly test the allegation. (*U.S. Sugar Corp*, 112 LA (BNA) 967, (Chandler, 1995).

A third exception, or variation on the second, is that while this after-acquired, unrelated, and fully disclosed evidence may be admissible, such evidence is to be allowed only for purposes of fashioning an appropriate remedy, which may or may not be supportive of an employer's decision. (*Pittsburgh Conduit*, 33 LA 807, (McCoy, 1959); (*Lennox Hill Hosp*, 102 LA 1071 (Simons, 1994).

Facts in this Case to be Considered in Determining Admissibility

As noted, there is an historic and general rule on the non-admissibility of after-acquired evidence and a number of exceptions to that rule. And depending on the circumstances, these exceptions are sometimes adopted by fact finders and sometimes not. And at other times other qualifiers to the exceptions are added based on the type of business, the severity of the conduct, the individual circumstances, and the parties own unique set of facts. Which essentially means, as one commentator has said, "...the general rule has been swallowed up by the exceptions". So while other decisions are instructive, this case, like most of the others, has its own unique set of facts which will necessarily shape the decision.

If the facts in this case are looked at in a light most favorable to the Grievant, her management of the Sunshine Club funds was extremely careless or cavalier, and clearly would not have been tolerated had the Employer been involved with the Club and was overseeing the funds. But the Employer was not involved. And the fact that the amounts were relatively small, and the fact that the Grievant was a friend of her coworkers, and there was enough money available to meet the needs of the group, is most likely what allowed this behavior to go on unchecked.

So in looking at this fund handling behavior and its relevancy to the Grievant's discharge, there are several important considerations. The first is that this alleged misuse of funds is of a completely different nature than the behavior which led to her termination. She was terminated for her driving and for violation of District rules, which is a legitimate basis for proposing the discharge of a bus driver. But misusing the driver's Sunshine fund is totally unrelated to the Grievant's driving of a school bus. This after-acquired information has nothing to do with bus driving.

A second important point is that the Sunshine Club was at best, only indirectly connected to the School District. The Sunshine Club was not established by, operated by, or overseen by the School District. And the use or misuse of funds did not involve District monies, and had no effect on any school programs, any students, or on the community. In addition, the Employer can only offer as evidence, poor management of the funds, an incident or two of inappropriate purchases, and a good deal of innuendo, rumor and concern. So it would be hard to imagine that because of the Employer's lack of connection to the Club, and the lack of hard proof of misappropriation, that

the Employer would, or even could use this evidence as the sole basis for terminating the Grievant's employment.

A final important point is that this allegation was brought to the attention of the Grievant and her Union after she had been terminated and the grievance process was well underway. The Employer acted in good faith by notifying the Union as soon as they were aware of the situation, they fully disclosed all the information they had, and they attempted to interview the Grievant to get her side of the story. But on the advice of her Union and her attorney, the Grievant chose not to meet. That advice was given in good faith, and was based on sound legal grounds. It was not intended to subvert the process; rather, it was intended to protect the Grievant from any possible criminal repercussions, but it had the effect of making it difficult if not impossible for the Grievant to tell her side of the story. And whether that was her free choice or a Sophie's choice, the fact is she did not, or believed she could not respond to the allegations.

Requirements in this case for Admissibility of Employer's After-Acquired Evidence

Based on these facts, and fully appreciating the general rule and the exceptions to that rule on admitting after-acquired evidence, it would seem fair and appropriate in this particular case to admit the evidence offered by the Employer only if both of the following are found to be true:

First: That the conduct is either (a) clearly related to the original basis for the Grievant's discharge, or (b) it is of a nature and severity that if it were presented on its own it would clearly be a basis for which the Employer would terminate the Grievant; and

Second: That the Grievant and the Union have been given clear notice of the after-acquired evidence and have been given opportunity to investigate and adequately prepare and present a response and defense.

Findings

On the basis of these facts, and the requirements for admissibility stated above, I find as follows:

- (a) The after-acquired evidence of the Grievant's alleged misappropriation or use of Sunshine Club funds is unrelated to the original basis for her termination.
- (b) The evidence offered by the Employer is clearly sufficient to establish lack of accountability and poor fund management, and may be sufficient to establish misappropriation of Sunshine Club funds. Nevertheless, there is insufficient connection or nexus between the Employer and the Sunshine Club to justify a disciplinary action as drastic as termination of the Grievant based on this allegation alone.
- (c) On the advice of the Union and her attorney the Grievant opted not to cooperate in the Sunshine fund investigation or to testify at her termination hearing for fear of losing her *Garrity* protection. That advice was sound and given in good faith. Therefore the Grievant may have been able to "prepare" a response and defense, but was unable, because of her reliance on sound legal advice, to "present" a response and defense.

Ruling

Based on the foregoing, the motion of the Union to exclude all evidence and testimony alleging or implying that the Grievant misappropriated Sunshine Club funds is GRANTED.

Dated: September 4, 2016


James N. Abelsen, Arbitrator