`IN RE ARBITRATION BETWEEN:

CITY OF CROSBY, MN

And

TEAMSTERS LOCAL 346

DECISION AND AWARD OF ARBITRATOR

BMS 25-VP -0097

JEFFREY W. JACOBS

ARBITRATOR

November 6, 2024

IN RE ARBITRATION BETWEEN:

City of Crosby, MN

And

IBT #346

DECISION AND AWARD OF ARBITRATOR
BMS 25-VP-0097
James Lueck grievance

APPEARANCES:

FOR THE UNION:

Tim Andrew, Attorney for the Union
James Lueck, grievant
Clarence Laffin, former City Employee
Brian Nelson, former City Firefighter
Les Kundo, Union Representative

FOR THE CITY:

Tim Sullivan, Attorney for the City
Matthew Hill, City Administrator

PRELIMINARY STATEMENT

The hearing was held on August 13, 2024 at the Crosby City offices. The parties presented testimony and documentary evidence at that time at which point the record was closed. The parties submitted post-hearing briefs on October 22, 2024.

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement, CBA, covering the period from January 1, 2022 to December 31, 2024. Article 4 sets forth the grievance procedure.

ISSUES PRESENTED

The parties agreed upon the following statement of the issue: Whether the City of Crosby had just cause to terminate the grievant due to his loss of CDL driving privileges? If not, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 3

DISCIPLINE AND DISCHARGE:

Section 1. the Employer will discipline employees for just cause only. Discipline does not need to be progressive. Examples of when progressive discipline would not be necessary include bit are not limited to cases of serious or gross misconduct, drinking or fighting on Employer property while on duty, gross safety violations, use of illegal drugs, gross insubordination etc.

Section 2 Discipline will be in one or more of the following forms:

a. Oral reprimand
b. Written reprimand
c. Suspension
d. Demotion
e. Dismissal/Discharge

ARTICLE 7

LICENSE RENEWAL:

When an employee is required to have a commercial driver's license and renew their license. Said renewal must be provided to the City Administrator, which shall require delivery of a photocopy of the Department of Transportation physical card showing an active, commercial driver's renewed license. In the event the driver's license is revoked or terminated for any reason, proof of the same must be delivered to the City Administrator immediately. All employees operating City vehicles must have appropriate driver's license as required by Minnesota Statutes.

ARTICLE 20

CONDITIONS OF EMPLOYMENT

Section 1. All matters relating to hours of work, and/or conditions of employment not covered by this Agreement, shall be governed by past practices, which are ascertainable over a reasonable period of time.

RELEVANT PORTIONS OF CITY POLICY AND THE JOB DESCRIPTION

Position details – Working foreman

This position is responsible for all Public Works activities that includes streets, parks, cemetery, water, sewer, storm drain utilities and City owned buildings. In addition, the position will be responsible to supervise public works employees and provide work assignment and direction to both full time and part-time employees and respond to infrastructure emergencies as needed. This position must be able to operate all equipment of public works.

Licenses/certifications

This position will require the acquisition and maintenance of the following additional certifications/licenses:

- Class B CDL
- Water Operator License C & D

Position details - PW Driver, PW Laborer, PW Mechanic PW Water and Sewer Operator City Exhibits 3, 4, 5, & 6)

Licenses/certifications (all)

This position will require the acquisition and maintenance of the following additional certifications/ licenses:

- Class B CDL

PARTIES' POSITIONS

CITY'S POSITION

The City took the position that there was just cause for the grievant's discharge In support of this position the City made the following contentions:

1. The City pointed to the stipulated facts set forth herein and noted that the grievant lost his CDL license as the result of a DWI offense in July 2024. The City also noted that the CBA and City policy requires that the grievant possess a valid CDL as a condition of employment with the City of Crosby. See Article 7 set forth above.

2. The grievant's CDL privileges were revoked as the result of the DWI offense on July 12, 2024. The City acknowledged that the grievant's "regular" driver's license was reinstated as of August 27, 2024, but not his CDL license. As stipulated above, the grievant does not possess a valid CDL as of the date of the hearing and the City asserted that his CDL will not be reinstated until at least July 2025. He is therefore unqualified for the position he held due to the loss of that license.

3. The City also pointed to the Job Description for the position of working foreman, which at all times relevant was held by the grievant and noted that the job requires that "This position must be able to operate all equipment of Public Works." That includes several vehicles that require a CDL. The City also noted that the grievant acknowledged that he is required to operate various vehicles requiring a CDL and that he has operated those in the past.

4. The it asserted that the mere fact that the grievant does not drive these types of vehicles very often in the course of his duties is not material nor controlling – he must have the ability to operate all such vehicles and that without a valid CDL he is unable to lawfully operate those vehicles.

5. The City acknowledged that it had hired a person to fill the vacancy in the Water and Sewer Department, but noted that the job required both a CDL and a valid Class C water license. Despite good faith efforts to find an applicant that had both licenses, the sole person who had a valid Class C Water license did not also possess a valid CDL at the time of hire.

6. The individual was the only person who held a valid license to operate the City's Water and Sewer Plant, which is the central function of that position. Thus, the fact that he did not have a valid CDL at the time of his hire did not establish laxity of enforcement of the City's requirement that certain individuals hold valid CDL licenses.

7. The City also noted that the grievant was that person's direct supervisor and was aware that he did not have a valid CDL yet raised no concerns over it until he was terminated due to the DWI offense that is the subject of this action.

8. The City's main argument is that the grievant lost his CDL, he is required to have a CDL as a condition of employment and that without it he is simply not qualified to perform the essential functions of the position – one of which is to occasionally drive vehicles that require a CDL to operate. The City Council deliberated this thoroughly and decided that to terminate the grievant's employment since he was no longer qualified to hold any position in the Public Works Department and that demoting him to another position would mean displacing an employee from their job.

9. The City countered the Union's claim that there are other employees in Public Works without CDL's who have been allowed to work without one. The first of these was a Mr. Laffin who was convicted of DWI in 2008 and was allowed to drive with the same sort of interlock device now in place for the grievant's personal vehicle. In Mr. Laffin's case the City signed a form that allowed him to drive for the City. The City pointed to the significant difference in that Mr. Laffin's CDL was active in 2015 when he was hired and that the only restriction was the interlock device. The City argued that this distinguished his situation from the grievant's since the grievant's CDL is not active and will not be until July of 2025.

10. The second such employee brought up by the Union as Mr./ nelson who worked as a paid on call firefighter and was also convicted of DWI in June 2024 and lost his CDL as the result. However, the Chief wanted him to continue to work as a firefighter and the City signed the exemption form the State of Minnesota requires in order for him to continue to drive vehicles that require a CDL.

11. The City pointed out though that paid on call firefighters are not required to hold a CDL as a condition of their employment. The City argued that this is also a distinguishing factor. The City also noted that signing that form is discretionary with the City and that there is nothing in state law nor in the CBA that requires the City to do that. The mere fact that it has done so in some cases does not mandate that it be done in any other case.

12. The City also acknowledged that there are several other employees in Public Works, whom the grievant supervised, that do not currently hold a CDL. In one case an employee holds a CDL, but lacks an air brake certification.

13. The City pointed out that the grievant was also well aware that these individuals lacked a CDL when they were hired and that the grievant was even on the hiring committee that interviewed those two individuals. Further, the grievant was directed to "move forward with additional CDL training for staff along with additional licensure at the Water Plant." The City asserted that the grievant has been lax in doing so. Thus, even though those individuals do not possess CDL's or the required air brake certification, they are actively working on getting that licensure. Moreover, while they were hired without CDL's they did not lose them due to a criminal offense.

14. The City pointed to the oft quoted 7 tests of discipline first articulated by Arbitrator Daugherty in *Grief Bros. Cooperage*, 42 LA 555, 558 (1964). See also, *Enterprise Wire Co.*, 46 LA 359 (Daugherty 1966) and asserted that all were met in this case. Here there was no question that the grievant lost his CDL and that having one is a condition of employment. Further, Article 7 of the CBA expressly requires that the grievant "have the appropriate driver's license as required by Minnesota Statutes." It has been agreed that he does not possess a CDL and that many City owned vehicles require that to operate them.

15. The City further asserted that the City's personnel policies require employees who are required to drive as part of their job to maintain a good driving record, and further provide that, in the event an employee loses or receives restrictions on their license, "[t]he City will determine appropriate action on a case-by-case basis." That does not require that the City sign the form for the State nor does it require that the City make an exception for the grievant to drive even though others within his department do not currently have such licensure. Here the grievant is the first person to lose his CDL license during his employment. That too distinguishes his situation from those relied upon by the Union. Those individuals were hired without a CDL, but are actively working to get it.

16. The City asserted too that it is common knowledge, particularly among CDL holders, that being charged with DWI carries automatic consequences with respect to CDL privileges and Minnesota arbitrators have routinely upheld termination decisions when an employee loses a CDL that is required for the employee to perform the duties of their position.

17. The City cited *Teamsters Local No. 320 and City of Champlin*, BMS Case No. 10-PA-0029 (Befort 2010), where the arbitrator denied a grievance related to the termination of a public works employee who lost his CDL following an off-duty DWI. There too, the union claimed that the employer had previously accommodated other employees who had lost their CDL and argued that the City must do the same as the Union requests here.

18. The arbitrator agreed with the City's argument that "it is not obligated to excuse the performance of essential job functions or to create a new job for an employee who no longer is able to perform his regular duties." Arbitrator Befort ruled as follows:

> The crucial question posed in this case, however, is not whether the City can find some productive tasks for an employee to perform that do not involve the operation of large vehicles, but whether the City is obligated to excuse an employee's inability to perform an essential function of his position. The City's job description for the Public Service Worker position requires employees to maintain a valid CDL. Even more significantly, the parties' collective bargaining agreement requires that a CDL 'shall be required of all bargaining unit Employees.' … In the analogous world of disability discrimination, it is well-settled that an employer need not reallocate or excuse the performance of an essential job function. The same rule should apply in this context.

19. The City asserted that this CBA also requires that All Employees operating City vehicles must have the appropriate driver's license as required by Minnesota Statutes. There is no question that a CDL is required for the grievant to operate certain vehicles and that this requirement is a condition of his employment.

20. The City also cited *Watonwan County and AFSCME Council #65*, BMS Case No. 09-PA-0528 (Remington 2009), which also involved termination following loss of CDL privileges due to off-duty criminal conduct and *City of Minneapolis and Minneapolis Foremen's Association*, BMS file # not listed in the award summaries (Befort 2018). Both cases arose due to the loss of the employee's CDL and both resulted in the denial of the grievances.

21. The City also cited *Metropolitan Council and Rodney Pierre*, BMS (Jacobs 2016) were the arbitrator ruled that "On this record, it was shown that the veteran failed to pass the CDL tests required of a bus operator and was thus appropriately disqualified from employment under the Veteran's Preference Act due to incompetency.") and *Metro Transit and Larry Hotchkiss*, BMS (Jacobs 2012) where the arbitrator again ruled that "the evidence shows that [the employee] lost his CDL as of June 15, 2012, that it has not been reinstated and that his CDL will not be reinstated until at least May of 2013. Thus, there is no question that the veteran is currently 'incompetent' for office under the VPA."

22. See also *Grant County and AFSCME Local 65*, BMS Case No. 07-PA-0717 (Toenges 2008); Ernst Enters., 103 BNA LA 782 (Doering, 1994), *ATC/Vancom of Cal. LP*, 111 BNA LA 244, 248 (McKay, 1998) Greater Cleveland Transit Auth., 121 BNA LA 327 (Skulina, 2005) Elkouri and Elkouri, *How Arbitration Works* 16.3.E, 8th Ed. (2016) and cases cited therein for similar results. The City maintained that the vast weight of arbitral decisions from Minnesota and around the Country demonstrate that the loss of the licensure necessary to perform the job results in the loss of the employment for what that license is necessary.

23. The City noted that this case was originally set as a Veteran's Preference matter and that the same rationale must apply here that the grievant is now "incompetent" for office since he no longer holds a valid CDL.

24. The City countered the Union's defenses and asserted that they do not prevail. As noted above, there is no authority for the proposition that the City is required to grant the exemption that it has granted to others. The City also asserted that the exercise of discretion in this regard cannot be characterized as disparate treatment since the grievant is the first person to have lost his license in this situation. As noted, the grievant is in Public Works and is required to hold a valid CDL – whereas Mr. Nelson from the fire department did not.

25. The Union also asserted that the grievant could simply assign others to drive a vehicle he is not qualified to operate, but his position description requires that he be able to operate those vehicles. He is not entitled to re-write his position description to suit his current ability to operate those vehicles.

26. The City also countered the claim that the City has been lax in enforcing the requirement that others hold CDL licensure. The City noted that those employees do not hold the same position as the grievant and that they are not required to "operate all of the equipment in the Public Works Department" – as does the grievant. They also did not lose their licenses during their employment due to a DWI, but instead were hired by the City with the full knowledge of the grievant and the Union and are actively seeking to gain that CDL.

27. As noted above, the grievant knew about all of the other employees referenced by the Union, including the person hired to run the Water and Sewer department yet raised no issue with their lack of a CDL until he himself was fired.

28. Lastly, by way of analogy, the City noted that employers are not required to excuse employees suffering from a medical disability from the essential functions of their jobs yet here the grievant seeks just such an accommodation due to the loss of his CDL. There is no authority for such a proposition.

The City seeks an award denying the grievance in its entirety.

UNION'S POSITION

The Union took the position that there was not just cause for the grievant's discharge and that he should be reinstated to his position as a Working Foreman as of August 27, 2024. In support of this position, the Union made the following contentions:

1. The Union stipulated that the grievant was arrested and charged with DWI and lost his CDL as a result. The Union also acknowledged that all 7 of the City's Public Works employees, including the grievant require the acquisition and maintenance of a CDL.

2. The Union asserted though that despite this written requirements in the Position descriptions, 2 of the 6 other Public Works employees do not have a CDL. A third employee has a CDL, but lacks an air brake certification. The Union noted that all of the City's large dump trucks have air brakes which renders that employee unqualified to drive such a vehicle. The Union noted though that these 3 employees regularly drive those types of vehicles and that they were hired in December 2021, while the grievant was on deployment with the US military. The City was aware that the 3 employees referenced herein did not have CDL's or the air brake endorsement.

3. The City knew that these employees lacked those licenses yet took no steps to assure that they got those licenses. The grievant was on deployment and did not return to the City until March 2022.

4. The Union also noted that the grievant undertook to find out how the employees in the Public Works department without CDL's or the airbrake endorsement could get proper licensure, but that he has only $2,500.00 of authority to spend on such training. The cost of the training necessary to acquire a CDL is approximately $3,480.00 – well above grievant's spending authority.

5. In addition, the City has hired other workers to operate portions of the Public Works department without proper license. The Union pointed out that one employee was hired in April 2023 as the City's Water and Sewer Operator, which also requires a CDL, yet he did not possess a CDL either. The City was also well aware of that employee's lack of a CDL yet hired him anyway and thus far have taken no steps to assure that he acquires and maintains a CDL either even though he has been with the City for 16 months as of the date of the hearing.

6. The Union also pointed out that under Minnesota law, a person who's regular driver's license has been reinstated with an ignition interlock device after a DWI offense, may drive an employer owned vehicle that is not equipped with an ignition interlock device if the employer provides written consent, and a form is filed with the State of Minnesota.

7. The Union asserted that on at least three prior occasions, the City has agreed to allow City employees with an ignition interlock restriction to drive City owned vehicles by filling out the proper paperwork to the State and allowed them to drive City vehicles even though those individuals lost their CDL's as the result of a DWI offense.

8. The Union asserted that these facts, which were unrefuted by the City, shows that it has not applied its policies in an even handed and non-discriminatory way. The Union cited Arbitrator Daugherty and his 7 tests of discipline and noted that the 6th of such tests requires that the City has failed to meet that clear requirement.

9. The Union acknowledged that the City has the right to set the standards and qualifications for its jobs, but that it also has the obligation to enforce them even handedly and without discrimination. Here literally half of the employees the grievant supervises do not have CDL's, even though all of their job descriptions require it. As such the City cannot demand strict compliance with its CDL requirements.

10. The Union also asserted that the grievant does not actually need a CDL to perform the vast bulk of his job duties. As a lead person, he drives a pickup truck typically to work sites, which does not require a CDL to operate.

11. Where a snow emergency exists the grievant typically operates a bucket loader to load the dump trucks, which are operated by other City employees. The Union remained adamant that the bucket loader does not require a CDL and cited provisions from the Federal Motor Carrier Safety Regulations at 49 CFR, Section 383.5 and asserted that the definition of a bucket loader of the type owned by the City does not require a CDL to operate. See also 49 CFR Section 383.3 that specifically provides that off road motorized construction equipment does not meet the definition of a "motor vehicle" and "commercial motor vehicle" as used in Section 383.5 and 49 CFR 390.5. The CFR goes on to provide that Off-road motorized construction equipment is outside the scope of these definitions when (1) operated at construction sites; or (2) operated on a public road open to unrestricted public travel, provided the equipment is not used in furtherance of a transportation purpose.

12. The City was thus simply wrong when it argued that the bucket loader requires a commercial driver's license, hereinafter, CDL, to operate.

13. The Union also countered the City's claim that the grievant might have to fill in to drive a snow plow in a snow emergency and that if one of the other drivers is absent, the grievant would still need a CDL to operate a plow.

14. The Union cited Minn. Stat. 171.02 as follows:

> Subd. 5. **Exemption for certain backup snowplow drivers.** Pursuant to the waiver authorization set forth in Public Law 104-59, section 345, subsection (a), paragraph (5), a person who operates a commercial motor vehicle for the purpose of removing snow or ice from a roadway by plowing, salting, or sanding is not required to hold a commercial driver's license if the person:
>
> (1) is an employee of a local unit of government with a population of 3,000 or less;
>
> (2) is operating within the boundaries of the local unit of government;
>
> (3) holds a valid class D driver's license;

15. The grievant meets all of those requirements and thus in a snow emergency, would not be required to have his CDL to operate a snow plow.

16. Further, in the spring, fall and summer months he rarely if ever drives a dump truck. The grievant also testified that when he has driven those large truck, it was for a minor repair, such as filling a pot hole and that he could just as easily drive a pick up truck for that job, which again does not require a CDL.

17. Moreover, the Union pointed to the provisions of Article 20, section which provides that "all matters relating to hours of work and/or conditions of employment not covered by this Agreement, shall be governed by past practices, which are ascertainable over a reasonable period of time." As noted, the City has a longstanding past practice of allowing employees who either do not have a CDL or who have lost it for various reasons, including DWI charges to operate City vehicles that require a CDL by filling out the state of Minnesota exemption form which allows such an employee to operate a City vehicle.

18. The Union pointed to a former City firefighter who was granted such an exemption when he lost his license due a DWI charge as well as a person who was hired without a CDL because he too had lost his CDL for a short period of time due to a DWI charge.

19. The Union asserted that this longstanding practice is now binding pursuant to the provisions of Article 20 and must be enforced now.

20. The Union also countered the claim that the grievant was somehow remiss in his duties to ensure that those in his department had their CDL's. The Union noted that the grievant took all the necessary steps to find out where these employees would get their CDL or the air brake certification, as the case may be, and informed the City Administrator of that information as well as the affected employees, yet the City has taken no steps to follow through on that. The City administrator has known for many months that 2 employees in the Public Works department did not have their CDL's and that one other employee lacks air brake certification.

21. The Union noted that shortly before the hearing the City Administrator told the City council that those Public Works employees were "lined up to take their CDL exams." However he also acknowledged that as of the date of the hearing none of those employees had been informed of that yet. The Union raised the question of whether the comment to the council was in fact false.

22. Further, the Union asserted that these charges were not part of the original termination and cannot be added now. The Union cited the well established rule that "a discharge must rise or fall based on the reasons given at the time of the employees termination…it is improper to add to the reasons for termination after the termination has occurred." Citing *Carolina Telephone*, 1992 BNA LA Supp. 106855 (Nolan, 1992). Here the claim that the grievant did not perform his duties was never part of the charge and cannot be brought up now.

23. The Union countered the City's claim regarding the grievant's separate bargaining agreement and CBA and asserted that the fact that the grievant is in his own separate bargaining unit – of one – does not matter in light of the clear provisions regarding past practices and the clear fact that the City has allowed so many employees to work without CDL's even though they have been operating City vehicles since their date of hire.

24. In addition, the CBA under which the grievant is working is relatively new. It also incorporates the past practice provisions in Article 20 as well which clearly contemplate that past practices that have developed between the parties under the previous non-supervisory CBA were the only past practices in existence when the contract was signed and must be enforced. This includes the past practice of excusing the lack of a CDL requirement in Public Works job descriptions.

25. The Union also countered the claim that as a supervisor the grievant must be held to a higher standard of conduct. The Union asserted that this is like any other off duty conduct case and that the real issue here is laxity of enforcement of the CDL requirements.

26. Lastly, the Union pointed to several other employees who were charged with DWI offenses yet were granted exemptions because the Fire Chief wanted to do that. The Union argued that this only shows disparate treatment by the City by demonstrating favoritism towards some employees by granting them the exemption and an arbitrary denial of the State's exemption towards others.

The Union seeks an award sustaining the grievance and order the grievant reinstated with back pay and contractual benefits to August 27, 2024, which is the date he had his driver's license conditionally reinstated by the State of Minnesota

MEMORANDUM AND DISCUSSION

The parties stipulated to certain facts as follows:

1. That the Union's grievance regarding the termination of Grievant is timely and arbitrable under the terms of the operative CBA
2. That the position description of PW Working Lead position at all relevant times has required the acquisition and maintenance of a Class B Commercial driver's License (CDL).
3. That Grievant was arrested on July 5, 2024 and was charged with DWI and an Open Bottle violation stemming from that arrest. This arrest occurred while Grievant was off duty.
4. That the State of Minnesota canceled the Grievant's driver's license and disqualified his CDL privileges for a period of at least one year, effective July 11, 2024.
5. On August 27, 2024 the State of Minnesota conditionally reinstated Grievant's driver's license (but not his CDL) subject to an ignition interlock restriction.
6. That grievant does not possess a CDL as of the date of the hearing.

There was clear evidence that the grievant lost his CDL as the result of a DWI and Open Bottle offense which occurred in July 2024 and that his CDL was revoked on July 12, 2024. He will be eligible to have that reinstated after a year, but as of the date of the hearing in this matter he does not hold a CDL. He does however have his regular driver's license reinstated and can drive his personal vehicle and a vehicle that does not require a CDL to operate as of August 27, 2024.

The grievant is also in a bargaining unit by himself and the evidence was clear that the CBA covers just him. It was also clear that the CBA and City policy requires that the grievant hold a valid CDL in order to drive certain City vehicles. He has driven those in the past, but does not drive them regularly.

There was evidence that in some cases, such as during snow emergencies, persons who do not hold a CDL license are permitted to operate certain vehicles that may otherwise require a CDL to operate.[1] That statute allows persons to operate a snow plow under some circumstances and the grievant could have been asked to drive a snow plow under the circumstances set forth in the statute without a CDL.

There was clear evidence that in the past the City has hired individuals in the Public Works Department to operate City vehicles that require a CDL to operate, but that these individuals did not have a CDL at the time of hire. At least 2 employees as of the date of the hearing in this matter do not have valid CDL license for all matters. One has a CDL, but lacks an airbrake certification.

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[1] See Minn. State 171.02 Subd. 5, which provides as follows: Exemption for certain backup snowplow drivers. Pursuant to the waiver authorization set forth in Public Law 104-59, section 345, subsection (a), paragraph (5), a person who operates a commercial motor vehicle for the purpose of removing snow or ice from a roadway by plowing, salting, or sanding is not required to hold a commercial driver's license if the person:

(1) is an employee of a local unit of government with a population of 3,000 or less;
(2) is operating within the boundaries of the local unit of government;
(3) holds a valid class D driver's license; and
(4) except in the event of a lawful strike, is temporarily replacing the employee who normally operates the vehicle but either is unable to operate the vehicle or is in need of additional assistance due to a snow emergency as determined by the local unit of government.

As noted above, there are other Public Works employees who do not currently hold a CDL yet are allowed to operate City vehicles that require a CDL. The evidence showed that those employees were hired even though they did not have a CDL and that the grievant was aware of that yet did not object to their hire even though he was set to be their direct supervisor. Some City vehicles have air brakes and require the driver to hold that certification. One other Public Works employee has a CDL, but lacks a valid air brake certification. Again, he was hired even though the City and the grievant knew that as well.

There was considerable dispute about whether the grievant was responsible for making sure those individuals took the necessary steps to promptly get their required CDL or air brake certification. It was clear that the grievant did in fact undertake every reasonable step to get the information to those individuals so they could take the necessary steps to get their licensure. The evidence showed that the grievant does not have the budgetary authority to pay for the training and testing required though and that he expressed that to the City Administrator.

On the record, the evidence fell short of the City's claim that the grievant bore any direct culpability for the fact that those individuals under his supervision were not appropriately licensed. Contrary to the City's assertion, the grievant did make the City Administrator aware of his efforts, but simply did not have the money in his budget nor the authority to sign those employees up for the training. He was required to wait for the City Administrator to grant that authority. As of the date of the hearing, those individuals had not gotten their CDL's or other certifications although the process had apparently been started. The basis for the termination must thus rest on the loss of the CDL and whether there exists a valid claim for some form of reinstatement based on the Union's claims and defenses. Those will be discussed more below.

The evidence showed that one other person in the Water and Sewer Department is also required to hold a CDL, but was shown not to have one, even though his position description requires it. It was shown that driving CDL required vehicles is not one of the main functions of that person's job, but he is still subject to that requirement. As the City asserted through, the grievant is that person's direct supervisor and was aware that the did not have a CDL when he was hired.

It was unclear whether the City's liability insurer is aware of this or what might result if there were to be some sort of mishap or accident involving those vehicles while being operated by persons without a CDL even though the City was well aware that they did not hold a valid CDL. That however is left to the City and its insurer in the hopes that the City never has to face than eventuality.

More to the point, the evidence also showed that at least one other City employee also lost their CDL as the result of a DWI driving offense. That individual was allowed to operate fire equipment though without it and the City agreed to sign a particular form required by the State of Minnesota that allows a person without a CDL to operate certain vehicles. See Union Exhibit 4. It was clear that this is discretionary with the City and that there is no requirement in either state law or the CBA that requires the City to sign this exemption form. See Union Exhibit 3, entitled Ignition Interlock Device Program Employment Exemption Application and Minn. Rule 7503.1775.

The grievant was allowed to address the City Council following his arrest for DWI and the City determined to terminate his employment for failure to have a valid CDL. The matter was grieved through the appropriate steps of the grievance procedure to arbitration and the parties agreed that the matter was properly before the arbitrator. It is against that general factual backdrop that the analysis of the matter proceeds.

Despite a relatively clear set of facts the analysis was somewhat more complicated than it might at first appear. As noted above, the crux of the City's case is that the grievant lost his CDL and will not get it back until at least July of 2025.

The grievant is required by both CBA and policy to hold a valid CDL as a condition of his employment and the fact that he no longer has one can only mean that he is no longer qualified for the position.

The fact that he does not frequently need a CDL and may be able to drive a snow plow during snow events does not, in the City's eyes, compel reinstatement. Neither is there any requirement that the City sign the Ignition Interlock Exemption Application, even though it has done so in the past for other employees.

The Union, on the other hand, made a claim that the City has not enforce the requirement that Public Works employees hold a valid CDL and has hired several employees knowing full well that those people did not have a CDL or as in the one case, a valid air brake certification and they were never disciplined at all. They may well be operating large vehicles that require a CDL without such licensure, exposing the City to considerable liability and placing the public at risk that large vehicles are being operated by people without the proper licensure.

That latter piece was troublesome to say the least and is best left for a discussion between the City and its liability insurer and is not a matter in dispute here.

The question is first whether there is such disparate treatment as to warrant a mitigation of the discipline. Disparate treatment requires a showing that one employee is being treated differently from other similarly situated employees who have committed the same or very similar infraction. Here, there was clear evidence that not all Public Works employees have CDL's even though they are required to by the terms of their employment. See excerpts from the position descriptions above.

There was also clear evidence that some have been hired without a CDL and remain without it to the date of the hearing – meaning that these employees have been allowed to work for many months without proper licensure. This too was troublesome, but on this record there were dissimilarities between the grievant's situation and those others.

The employee in the fire department was shown to be different since his position does not require a CDL as a condition of employment. Under those circumstances, the Fire Chief exercised his discretion to grant the exemption and allow that employee to drive a fire truck on occasion.

A review of the applicable state law in this regard shows that the decision to grant the exemption is within an Employer's discretion and is not required. Thus, the fact that it granted the exemption for the Fire Department employee does not compel that same result here.

The other employees were shown to be somewhat different in that they are part of a different bargaining unit, although it should be noted that this factor alone was not enough to counterbalance the disparate treatment claim. What was sufficient was the evidence that those individuals were hired without a CDL as opposed to losing it as the result of a DWI and that the grievant knew of their situation yet raised no objection to it. The Union is essentially arguing that there is lax enforcement of the requirement that these employees have CDL's as a condition of their employment, yet the grievant is part of that very laxity, since he knew that employees were hired without CDL's and allowed them to drive those vehicles despite that.

This latter factor also figured largely into the claim of lax enforcement as raised by the Union. As noted, the Union claimed that the "requirement" of having a CDL has not been enforced at all, as evidence by the clear fact that at least 2 other Public Works employees do not have a fully valid CDL and/or airbrake endorsement yet are still employed and presumably still driving City vehicles

The notion of lax enforcement is based on the notion that a supervisor on behalf of an employer is treating one employee or set of employees better or less harshly than others. The problem with that argument here is that the grievant IS the supervisor and he never objected to those other employees being hired nor raised any concern about their lack of CDL. Clearly, he knew they did not have CDL's since he was working so diligently to get them lined up for the training to obtain a CDL.

The City cited several other prior awards that uphold terminations in very similar situations. The decision by Arbitrator Befort in *City of Champlin* was based on very similar facts and his analysis was compelling here as well. There, as here, the job description was clear and required a CDL. There was also a claim that the employee could be re-assigned to a different position in the interim between the loss of the CDL and its eventual reinstatement. While the CBA in that case was somewhat clearer in its requirement of a CDL, this CBA contains language that also compels the same result. Article 7 simply says "All employees operating City vehicles must have appropriate driver's license as required by Minnesota Statutes."

On these facts, that language, when coupled with the position description, means that the grievant needs a CDL to be qualified for employment. Losing it means that the person is no longer qualified to perform the required duties and the mere fact that they might be able to perform most of them without it does not compel a different result.

Other cases, such as *Watonwan County* and *Minneapolis Foremen's Association* proceeded on whether there was a nexus to the City employment. Here that was a clear fact and the loss of the CDL was a nexus to the employment itself. Arbitrator Befort's analysis in *Minneapolis Foremen's* was also compelling in the face of a similar argument that the grievant could continue to perform most of his duties without the CDL. He further upheld the City's decision not to issue an Interlock Exemption in that case for reasons that are similar to these. It was also noted that the Befort decision cited herein involved the City of Minneapolis where there were likely a multitude of other positions to which the grievant could have been assigned that did not require a CDL. Here that is not the case. The City of Crosby is a far smaller jurisdiction with far fewer employees. The analysis that Arbitrator Befort used is even more compelling in this context.

Likewise the *City of Champlin* decision also by Arbitrator Befort was similar in that it involved a loss of a CDL as well as the claim that the City in that case accommodated two other employees who had also lost their licenses due to driving offenses.

Further, the Union's argument that the grievant could be assigned to another position that does not require a CDL would effectively mean placing the grievant in a different bargaining unit or compelling the City to make accommodations that fall outside of an arbitrator's jurisdiction to compel. Here, both the CBA and the policy are clear even though the City has been less than strict about its requirement that its employees hold a CDL.

Likewise any claim to place the grievant in a different position is problematic as well since doing so would mean displacing another employee in a different bargaining unit. On this record that would be outside of the contractual jurisdiction of the arbitrator.

The Union also claimed that under Article 20 any past practices continue and that there is a past practice of allowing employees to work without CDL's and to grant the Ignition Exemptions where such facts occur. This argument did not prevail. The evidence showed that the City has no obligation to grant the Ignition Exemption under State law and is clearly a matter of discretion by the City. As Arbitrator Harry Shulman wrote many years ago:

> There are other practices which are not the result of joint determination at all. They may be mere happenstance, that is, methods that developed without design or deliberation. Or they may be choices by Management in the exercise of managerial discretion as to the convenient methods at the time. In such cases there is no thought of obligation or commitment to the future. Such practices are merely present ways, not prescribed ways, of doing things. Being the product of managerial determination in its permitted discretion such practices are, in the absence of contractual provision to the contrary, subject to change in the same discretion." Elkouri and Elkouri 6th Ed at p. 636 citing to Ford Motor Co., 19 LA 237, 241 (1952).

This case falls squarely it the category that Arbitrator Shulman was referencing. The decision to grant the Ignition Exemption, while it might well have made sense here, was within the City's discretion to decide and cannot be disturbed or overturned by an arbitrator in this setting.

While this case frankly came close to the discharge being overturned, the facts fell short of it. The City's claim that the CDL is required for this grievant was compelling and consistent with the vast bulk of arbitral precedent from Minnesota and other locations.

This is not a savory result since the grievant was shown to be an excellent employee whose job performance was not questioned. He is also a US military veteran who drives large vehicles for the military as well and is thoroughly capable of doing so for the City. The problem through is the loss of a CDL which under both the CBA and the applicable City policy is a requirement of the job. The Union's claim of disparate treatment, lax enforcement and the notion that the City could grant the Ignition Exemption simply fell short on these facts. Accordingly, the grievance must be denied and the discharge upheld due to the loss of the CDL license.

AWARD

The grievance is DENIED.

Dated: November 6, 2024

Jeffrey W. Jacobs, arbitrator