

ARIBTRATION OPINION AND AWARD

In the matter of the arbitration between:

SCHOOL DISTRICT

and

Union

Case No.: Groty 7

GR: (Termination)

ARBITRATOR – C. KEITH GROTY

Appearances:

Employer

Assistant Superintendent
Transportation Supervisor
Assistant Superintendent
Teacher Aide

Union

Business Rep
Steward
Grievant
Grievant
Witness
Witness
Witness

Hearing Held: September 30, 2003 and November 4, 2003

Time: 10:00 a.m.

Place: Offices, School District

Briefs Filed: December 5, 2003

Statement of the Issue

Whether the grievants were discharged for just cause as required by contract Article XIII, Section A.

Pertinent Contract Clauses

Agreement

2001-02, 2002-03, 2003-04

ARTICLE XIII

Discipline-Discharge

- A. *Dismissal, suspension and/or any other disciplinary action of an employee who has satisfactorily completed the probationary period shall be only for just and stated causes, which shall be given to the employee and Union in writing. When the Board feels disciplinary action is warranted, such action must be initiated within ten (10) working days of the occurrence of the condition giving rise to the action, or within ten (10) working days of the date that the Board became fully aware of the conditions giving rise to the discipline. The right to discipline or terminate probationary employees who are terminable at will rests solely with the employer and shall not be subject to the grievance procedure. The employee shall have the right to defend against any and all charges. Among the charges that shall be deemed sufficient for dismissal, suspension and/or other disciplinary action, but not restricted to these, are the following:*
- 1. Unauthorized or excessive absence from work;*
 - 2. Commitment or conviction of any criminal act;*
 - 3. Conduct in violation of Board policy;*
 - 4. Immoral conduct;*
 - 5. Disorderly conduct during working hours or on the employer's premises;*
 - 6. Insubordination or willful violation of Board's rules;*
 - 7. Bringing intoxicants/controlled substances (Controlled Substances Act) or consuming intoxicants/controlled substances on any school property or reporting for work under the influence of intoxicating liquor or controlled substances;*

8. *Willful neglect of duty;*
 9. *Negligence or willful damage to employer's public property, waste, or misappropriation of public supplies or equipment.*
 10. *Failure to comply with written health and safety rules and regulations provided to the employee;*
 11. *Deliberate falsification of records;*
 12. *Dishonesty;*
 13. *Unsatisfactory work performance;*
 14. *Abuse of break time;*
 15. *Theft or misappropriation of school or other property;*
 16. *Harassment of students or employees, sexual or otherwise;*
 17. *For bus drivers, failure to pass a drug or alcohol test;*
 18. *For bus drivers, having six or more points on the employee's driving record or when the District has difficulty obtaining fleet insurance for said driver.*
- B. *All dismissals and suspensions will be without pay and without Board paid benefits.*

Statement of the Facts

The grievants, bus driver and bus aide, were suspended for one day March 11, 2003 and terminated on March 12, 2003 based on an incident that occurred on March 10, 2003. They were terminated for "willful neglect of duty" when they left a four (4) year old child on their bus for one (1) hour and twenty (20) minutes following their morning bus run and while they were taking their duty break. The child, from the Early Development Program, was to be delivered to the school at approximately 9:30 a.m. and released to a classroom teacher or teacher's aide. The

student was eventually brought to the school around 11:00 a.m. after being discovered by the bus driver, after she returned to the bus from her break.

The grievants testified that upon discovering their mistake they attempted unsuccessfully to contact their supervisor at his office telephone. Since they did not know his cell phone number, they contacted him in his office upon completing their afternoon run. By this time the supervisor had learned of the incident and had left a message for the grievants to meet him at 1:30 p.m. to discuss the incident. The supervisor conducted interviews with the grievants separately and also interviewed the classroom aides and teachers for the student. After further discussions among the administrative team, it was decided to suspend the grievants for March 11, 2003 while they completed their investigation. The grievants were then terminated from employment on March 12, 2003.

Following their termination, a formal grievance was filed dated March 17, 2003 alleging that the disciplinary action was too severe and requesting the grievants be reinstated to their jobs with a lesser disciplinary penalty.

Findings and Conclusions

The Union argues that the grievants made a mistake and were not “willfully neglectful” of their job duties and responsibilities. While the seriousness of the mistake is acknowledged, the grievants testified that they were very sorry for the mistake and thankful that the child was not injured.

The Union produced a series of witnesses who testified that occurrences involving the leaving of students unattended on a bus had occurred with the employer in the past. One incident was reported to have occurred in approximately 1981, when the driver was given a three (3) day suspension. When that driver committed the same offense in 1983, his employment was terminated. Another witness testified that approximately seven (7) or eight (8) years ago, she left a student on her bus. For this she received a verbal warning. On cross examination, this witness testified that at the time of her incidence there were no aides on the busses, no car seats were being used on the busses, there was very little in-service training, about checking for students being left on the bus as there is today. In addition, requirements are now clear that a “walk through” must be done to make sure that no students are left on the bus. A third witness was called who testified that in the early 1990’s, she left a child who was sleeping on her bus for about forty-five (45) minutes. For this she received a verbal consultation from her supervisor.

Based on the testimony of these witnesses, the Union argues that the standard of discipline which has been used with this employer and which should be imposed in this case is not termination, but some form of discipline which reinforces the seriousness of the offense and attempts to correct future behavior.

The Employer argues that the grievants acted with “willful neglect” in violation of the procedures of the District. Specifically, aides and drivers had been instructed in their training that they were required to do a ‘walk through” of their bus to be assured that all students had been unloaded.

It is argued that the negligence of the grievants placed the young disabled child in harms way, and should be treated with “zero tolerance.” The zero tolerance standard, it is argued, is reasonable and supportable as an industry standard which is being set and enforced by school boards across Michigan and the Nation.

In explaining the circumstances surrounding the incidence, grievant (aide) testified that she walked through the bus looking for book bags left by the students. She found one book bag and took it to a teacher. However, the book bag was on the driver’s side of the bus, and in her hurry to get it to the teacher, she forgot to check the other side of the bus where the sleeping child was left. Returning after her break at approximately 10:45 to 10:50 a.m., the driver discovered the child on the bus. She walked to the back of the bus to find the child just waking. After

picking up the aide, they took the child to the school and released her to a classroom aide. It is argued, therefore, that the aide followed the prescribed procedures by walking through the bus but, by mistake, failed to notice the sleeping child who was left behind.

There is no question that leaving a young disabled child on a school bus unattended for over an hour in sub-freezing temperature could have not only placed the child in harms way, but in the could have been fatal. The Employer is obligated to react to such “mistakes” promptly and severely to assure the on-going safety of the children under their care. The question before the arbitrator, however, is whether or not the imposition of a “zero tolerance” policy is the appropriate level of discipline for these two grievants.

The arbitrator is persuaded that the District has in the past not established nor enforced a zero tolerance policy for drivers who left children on their busses. While these occurrences happened some years in the past and not under the present administration, they raise questions concerning the appropriateness of the enforcement of a new policy without adequate notice to the employees, particularly those of long service.

The key question in the resolution of this case concerns the establishment of the “zero tolerance” policy by the Employer. While there is nothing in the contract that would prohibit the Employer from the establishment of such a policy, it must

be done in an appropriate manner in light of evidence of a prior practice. Even though the evidence establishes that the training standard in place under the present supervision requires a walk through of the bus in order to ensure that all students have been unloaded, there is nothing in the record placing employees on notice that violation of such a standard would be treated with the most severe form of discipline an employer can impose, discharge. Further, where an aide has been placed on the bus with specific responsibilities of caring directly for the students, it is not reasonable and fair to hold both the bus driver and the aide to the same discipline where there is a difference in length of their employment with the employer and their duties and responsibilities are different.

In the present case, the aide was directly responsible for the care of the students while in transit and for assuring that students were properly unloaded. While the testimony of the transportation supervisor stated that both the driver and the aide were responsible for these functions, it is clear that the principle responsibility fell to the aide. Further, the bus aide, had less than two years of employment with the District. For these reasons, the arbitrator believes the punishment of termination is not unreasonable.

The arbitrator finds, however, that grievant (bus driver) has a different status for which discipline by termination is too severe. Clearly she shared the responsibility with the bus aide to make sure that all the students were off the bus.

However, her primary responsibility was to drive the bus. In addition, the bus driver had thirteen (13) years of regular service, four (4) years of substitute service prior to that, and a clean disciplinary record. These factors must be taken into account when reviewing the severity of the discipline.

Finally, while having the right to establish a zero tolerance policy, the Employer was obligated to place the long-service employees on notice that the standards were changing. It is unfair treatment of long-service employees to set a new standard as severe as zero tolerance without advance notice. It was unreasonable to expect the employees to know that a “zero tolerance” policy was established without notifying them. Nothing in the record establishes that the Employer in instituting more comprehensive training, particularly concerning bus walk throughs, ever notified the employees that termination would occur for leaving a student on the bus. The evidence presented shows that the zero tolerance standard is only a “trend” in the supervision of school bus transport and not yet established as such a clear policy across the industry to reasonably expect all drivers and aides to know this was the discipline to expect for the violation. For these reasons, grievant should not have been terminated, but should have received a lesser, but severe penalty.

Award

The Grievants were negligent in their duties and responsibilities when they left a four (4) year old disabled student on their bus. The bus aide having the direct responsibility for assuring that students were off the bus, and who, in this case, conducted the bus walk through is primarily responsible for the violation. For this reason, and because of her short service, the arbitrator denies her grievance.

Grievant (bus driver), while having a responsibility to see that the bus is unloaded properly, relied inappropriately on the bus aide's walk through and inspection. She, therefore, deserves to be disciplined for the infraction. However, based on her long service and the level of her involvement in the negligence, the imposition of a new "zero tolerance" standard was too severe a discipline for her. The arbitrator, therefore, directs that she be reinstated as a bus driver effective with the date of this award but with no back pay or benefits prior to this date.

C. Keith Groty, Arbitrator

Date