

IN THE MATTER OF
ARBITRATION

BETWEEN

KANSAS CITY AREA	)	
TRANSPORTATION AUTHORITY	)	
	)	FMCS No. 03989-A
AND	)	
	)	Ridley Discharge
AMALGAMATED TRANSIT	)	
UNION, LOCAL 1287	)	

Hearing held November 14, 2008 in Kansas City, MO

Arbitrator: William S. Hart, selected through FMCS

APPEARANCES

For the Union: Scott A. Raisher, Attorney, Jolley Walsh Hurley Raisher & Aubry, P.C.s
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For the Authority: Jeffrey M. Place, Attorney, Spencer Fane, Britt & Browne, LLP
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BACKGROUND

The Authority has an Attendance Policy for contractual employees and has been in place since July 1, 2003. The policy establishes a no-fault program that operates on a rolling six-month calendar and has four progressive disciplinary steps. The disciplinary steps consist of, first, notification of placement on attendance warning; next comes a formal written warning; this is followed by a final written warning being given along with a 2 day suspension, and on the fourth occurrence there is provision for discharge. There are attendance thresholds that when reached by an employee the disciplinary system starts. These consist of "occurrences," "days absent," and "patterned absences."

KCATA issues an attendance notice to any employee who accrues six occurrences, twelve days absent, or four patterned absences during any consecutive, rolling six month period. Once an employee receives a written attendance notice, each subsequent occurrence moves the employee to the next level of progressive discipline. Absences or occurrences "roll-off" the employee's record six months after the date of each incident, with perfect attendance for a six-month period giving an employee a completely clean attendance record.

The grievant, Angela Ridley, started working as an employee with KCATA on April 19, 2004, as a student bus operator; on completing her training, she began working as a part-time operator on May 28, 2004. Grievant was discharged by the Authority on April 30, 2008, for unacceptable attendance; her attendance having been a nearly continual problem from the time of her first being placed on an attendance notice on February 11, 2006. Much of her attendance problem had its roots in her own health as well as that of her mother and a significant amount of the absences were covered by FMLA leave time. In June 2007 Grievant was pregnant and having trouble due to her general state of health, and especially a problem with high blood pressure. She obtained a leave of absence which was to extend from June 1, 2007 until six weeks after the birth of her baby, a leave expiring on the date of return that was to be January 14, 2008, her first day of scheduled work. Except for working a few days in early October, Grievant was off work for the entire duration of her medical leave.

On her return to work Grievant continued to have some high blood pressure problems and with that, attendance problems. She was absent on January 24 and 25 because of high blood pressure and was charged with an "occurrence" and issued a

written warning. Again on February 12 through 15 and February 19 through 23, she was absent because of high blood pressure. She was allowed to use four of her benefit days to cover the February 12-15 absences, but was charged with an "occurrence" on February 19 and issued a final warning dated March 3, 2008. She was not suspended because of the lack of an available Union representative to be present at the meeting for the issuance of the final warning.

Grievant had earlier scheduled a doctor's appointment for March 31, what was then her scheduled day off, but during the quarterly "mark up" she had selected a new run that required her to work on that date. There was conflicting testimony as to when she called the Human Resources to find out if she had available FMLA leave time to cover this absence and if so what she had to do to obtain it. She was told she had about thirteen days and that she would have the FMLA papers mailed to her so she could take them to the doctor with her, which occurred, and that she should call Transportation to let them know she was not going to be in because of an FMA related absence. It is not known if she called or tried to call the dispatcher prior to her doctor's appointment.

The Agreement requires that an operator who has been absent sick or on leave "must be O.K. by 3:00 P.M. for work the following day." Following her appointment on March 31, Grievant called in at 3:15 to inform dispatch that she was O.K. to work her schedule on April 1, but was informed she had missed the 3:00 deadline. She returned to work on April 2 and had a meeting with management in which she was informed, by way of a letter to her from Human Resources, that she did not have FMLA leave time available for the absence as previously indicated. It had been discovered that she had not worked enough hours during the previous 12 months to be eligible for FMLA leave time.

Grievant was given, as a result, a last "final final warning" and given a 2 day suspension in lieu of termination for her absences on March 31 and April 1, and was also told that if she were absent again she would be discharged

On April 28, Grievant was late for her scheduled assignment. She thought she was scheduled to work a route which started at 11:37, when she was actually scheduled to work another route which had a starting time of 10:53. She was in the parking lot and getting out of her car when the dispatcher called her at approximately 11:25 and asked where she was. She explained that she was on her way up. When upstairs and checked in, the dispatcher told her to have a seat, the usual practice being for operators who miss their scheduled assignment are put on "show-up" to sit and wait for another assignment. She was later told to go home and return for a meeting on Wednesday April 30, at which she was informed that she was being discharged.

A grievance was filed by Grievant on May 6, 2008, in which it was stated, "Would like to grieve the decision to terminate based on incorrect and inconsistent information in regards to the records and FMLA. Would like to remedy by making whole lost time and wages and be reinstated."

ISSUE

Did KCATA have just cause, under all the facts and circumstances, to discharge Ms. Angela Ridley? If not, what shall be the appropriate remedy? The parties stipulated that the matter is properly before the Arbitrator for a final and binding decision on the merits.

RELEVANT CONTRACT PROVISIONS

ARTICLE I General Provisions

Section 1.12. Management – Discipline

(b) The Union further recognizes that the power of discipline is vested exclusively in the Authority, and it will not attempt to interfere with or limit the Authority in the discharge or discipline of its employees for just cause; subject, however, to the right of any employee to whom this Agreement is applicable and who may be discharged or disciplined, to present as a grievance, for action in accordance with the grievance procedure hereinafter in Section 1.13 set forth

Section 1.18. Leaves of Absence

(a) General

The Authority shall have the right to grant or deny a request for leave of absence and extensions of a leave of absence. A leave of absence shall be any excused absence from work, with or without pay and/or benefits. A request for leave (or extensions of leave) must be given to the Supervisor or Foreman and include reasons and amount of time required.

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ATTENDANCE POLICY FOR CONTRACTUAL EMPLOYEES

V. Attendance Policy Overview

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Those absences and occurrences, which are designated as eligible under the Family Medical Leave Act (FMLA), will not be considered (will not be counted) for the purpose of applying the provisions of the Attendance Policy.

VI. Definitions and Stipulations

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Occurrences – An occurrence is any failure to report for or to remain at work as assigned—full, partial and multiple consecutive day absences. Occurrences include absences not defined as authorized (see VI. Authorized Absences).

Days Absent – Days absent are the accumulation of total full days that an employee fails to report for work as assigned. Missed assignments and late arrivals, for the purpose of the policy, are not counted as days absent. Missed assignments and late arrivals are counted as occurrences only.

Patterned Absences – A patterned absence is a full or partial day absence that occurs on or adjacent to paid holidays or paydays, or adjacent to regular days off (RDOs) or vacation. However, patterned absences are not limited to the examples cited, and may include any absence/absences that constitute a recognizable and recurring pattern.

* * *

Authorized Absences – No Penalty – Contractually authorized absences include: military leave; bereavement; birthday; floating holiday; suspension; excused union business; jury duty; paid holidays on which employee is not assigned to work; vacation; FMLA-eligible/approved absences; absences due to work-related injuries; and Off OK.

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Leaves of Absence –

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Leaves of absence will be counted as occurrences and days absent for the purpose of the policy, unless designated as FMLA-eligible or otherwise specifically approved in writing by the departmental Director.

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POSITION OF THE AUTHORITY

Because of the Authority's need for regular and predictable attendance among its employees, particularly among its bus operators, it has properly promulgated a reasonable no-fault Attendance Policy. It has fully informed all of its employees, including the grievant, of their obligations under the Policy. Grievant received the benefit of progressive discipline, individualized counseling, and multiple opportunities to improve her attendance record, but failed to do so, leading the Authority to conclude that Grievant was either unable or unwilling to meet its minimum requirement of attendance among its bus operators. The record in this case demonstrates that Grievant's attendance was unacceptable, she knew it was unacceptable, and even after the Authority provided her with more than ample opportunity to correct her attendance, she failed to do so.

The Authority's Attendance Policy is reasonable, and in its operation it has lowered overall absenteeism, increased operational efficiency and reduced operational

cost. Since its implementation on July 1, 2003, Grievant is only the fourth person to have been discharged for poor attendance. The Authority recognizes that Grievant has faced a number of family illnesses, and that she suffered from significant complications to her recent pregnancy. Every employee has obligations outside the workplace and must find ways to meet those obligations while maintaining an acceptable attendance record, and the Authority is also obligated to enforce its attendance policy on an evenhanded basis. To return Grievant to work would be unfair to the hundreds of operators who responsibly manage their personal lives in order to honor their commitments to the Authority and to the public that relies on its transportation services.

The Authority properly treated Grievant's time off during her non-FMLA pregnancy leave as "days absent" and an "occurrence" under the attendance policy. Grievant missed approximately ninety-five non-FMLA-protected days of work, resulting from two extended periods of leave, between August 17, 2007 and January 10, 2008 in connection with her pregnancy. KCATA counted just twelve of those days as "days absent," and also assessed a single "occurrence" against Grievant under the lenient terms of the Attendance Policy. The Employer effectively forgave either the occurrence or the initial attendance notice by issuing a second written warning following Grievant's absences of January 24 and 25, 2008.

The Attendance Policy's leave of absence provision does not violate the Labor Agreement. The Union reads the word "excused" as used in Section 1.18(a) of the Labor Agreement as meaning that once the Authority approves any leave of absence, it cannot count the leave time under its Attendance Policy. However the Policy unambiguously states that "leaves of absence will be counted as occurrences and days absent for the

purpose of the policy,” with the exception of FMLA-eligible and specifically approved time off. The term “excused” does not necessarily mean that an extended leave of absence can carry no consequences of any kind. Rather, the fact that a leave is excused may simply mean that the employee away from work will not be considered “absent without leave” on days of the leave of absence, or be subject to other attendance infraction that usually results in the prompt assessment of stiff penalties. The Authority grants leaves of absence to accommodate employees’ personal needs and situations. In return, the Authority requires that employees, upon their return, provide regular service, and have relatively regular attendance, for a short period of time.

Grievant knew or should have known that KCATA would count her extended leaves of absence under its Attendance Policy. Grievant worked for the Authority for approximately four years, during which time she was covered under the 2003 Attendance Policy. Each employee is responsible for understanding and monitoring personal standing with respect to the Attendance Policy and employees may inquire as to their individual standing when appropriate. Grievant never made any such inquiry. Each time management personnel met with Grievant to discuss her status under the Attendance Policy, her standing was explained to her, the events that led to her standing were also explained and Grievant confirmed that she understood the Attendance Policy. She never indicated to management that she was confused about how the Attendance Policy worked, as she belatedly asserted. Grievant was similarly well informed as to the Authority’s FMLA policies and had been granted FMLA leave on several occasions, both for her mother’s care and for her own medical conditions.

Grievant asserts that KCATA unfairly counted her absences of March 31 and April 1, 2008, against her because HR Supervisor told her prior to those dates, on March 25, that she had available FMLA leave she could use to cover the absence. Evidence shows that Grievant did not actually speak to the HR Supervisor about FMLA leave availability until after the absences took place, in that the HR Supervisor was out of the office due to personal matters during the entire week of March 24 through March 28, 2008. Any resulting confusion about the issue is therefore irrelevant to the outcome of this case. Grievant did not in fact have FMLA leave time available to cover the absence and it was properly assessed against her. Even if the HR Supervisor told Grievant the day would be covered as an FMLA absence, it would not matter because Grievant also missed work on April 1 due to her failure to follow KCATA's reporting rules. Additionally, lenient enforcement of the Attendance Policy resulted in nothing more than the issuance of a second final written warning to Grievant for the absences.

The discipline in this instance was especially justified since Grievant created the conflict between her scheduled doctor's appointment and her work schedule when she voluntarily bid into a job that required her to work on the day of the appointment. Grievant could easily have avoided the entire problem by simply selecting a job that did not require her to work on Mondays. Failing to do that, Grievant could have rescheduled her appointment. Grievant's handling of this particular situation shows her lack of commitment to meeting her work schedule.

Prior to her March 31, 2008 occurrence, Grievant was already at the final warning stage of the Attendance Policy, and that occurrence could have resulted in her discharge under the Policy. Because Grievant had declined to have a Union official present when

she signed her February 19, 2008 final written warning, the Authority instead issued her a "final-final" written warning, suspended her for two days, and provided her with additional counseling regarding her status under the Attendance Policy. Even without consideration of the occurrence of March 31, Grievant still had no legitimate excuse for her April 1, 2008 absence. Grievant knew that she was obligated to call the dispatcher prior to 3:00 p.m. on March 31 in order to be eligible to return to work on April 1. This requirement is necessary for scheduling purposes. Grievant herself testified that she called the dispatch center after 3:00 p.m. on March 31st and therefore was ineligible to work on April 1, 2008.

The Union failed to grieve any of the underlying discipline in this case, but now is attempting to attack that discipline post-discharge. The contract provides that any grievance by an employee be brought to the attention of management within seven (7) days after same has come to his/her attention, otherwise it shall not be considered. Still the Union asserts it had no obligation to timely inform management of any complaints it had about the provisions of the Attendance Policy, or about the Authority's application of the Policy to Grievant, prior to Grievant's discharge. The Union claims it could not possibly review all of the attendance discipline notices it receives, or reasonably assess which warnings or notices might be sufficient to justify the filing of a grievance.

Even assuming that the Union could overlook attendance notices and written warnings, surely the same logic does not apply to disciplinary suspensions. When a performance or behavior problem is significant enough to merit an economic punishment, surely the employee involved and the Union should evaluate the decision and determine whether a grievance should be filed. The Union should not be permitted to hold a valid

objection to a suspension or final written warning and wait until the Authority moves on to the discharge stage to raise the concern. The Union's approach is prejudicial to both the Authority and to the Union's own membership by failing to address concerns before employees face the very significant disruptions caused by discharge and its attendant interruption in the employee's income.

All of the attendance discipline issued to Grievant by KCATA was fully justified, and the discharge in this case should stand. For each of the reasons stated above, the grievance should be denied.

POSITION OF THE UNION

There is no question that the Authority may implement a reasonable attendance policy to address employee absenteeism. The Authority claims that when the current attendance policy was first implemented, the Union filed a grievance challenging the policy "generally" and that the arbitrator looked at the policy as a whole and found it to be "acceptable and reasonable." However, no arbitrator has found the current attendance policy "generally" to be acceptable and reasonable. Arbitrator Stuart Smith's decision reflects the only issue presented, which was the very specific and narrow question of whether the Authority's failure to give an employee "written notice" for each "occurrence" violated the Agreement.

We are unaware of a single case involving the current attendance policy where an employee has been penalized, disciplined or discharged for having taken an approved leave of absence authorized by the Agreement. This case does not involve an employee requesting leave because she did not want to work or just wanted to take time off for whatever reason. This case is about an employee who, despite her best efforts, found

herself in a very difficult situation that was beyond her control and who was forced to request an approved leave of absence and found her job in jeopardy, and was discharged, for having done so.

The Union submits that, in view of all the facts, circumstances and mitigating factors, Grievant's discharge was not for "just cause" and cannot stand. The Union believes that the Authority, in counting as "Total Days Absent" the days that Grievant was on her approved contractual maternity leave, violated the Agreement. Had they not been counted, she would never have been discharged on April 30. Prior arbitration cases submitted by the Authority as joint exhibits concern situations that are quite different from that of Grievant and do not support a justification for her termination.

In July 2003, the Authority unilaterally implemented a new "no fault" attendance policy which it discussed with the Union prior to its implementation, but the Union neither agreed to nor approved the policy. Since the policy was presented on a take it or leave it basis and the Authority was not accepting proposed changes to the proposed plan, the Union stated that it would grieve issues concerning the policy after it was implemented and as those issues arose. Issues are being raised, and the attendance policy being challenged, such as in this case, as they present themselves in the form of grievances filed by employees that are hurt by it. The Authority claims that it is unfair to employees and the employer, to wait until the discharge to file a grievance on a matter that has occurred earlier in the attendance process. However, violations of the Agreement are not always known to the Union until the employee has been discharged and filed a grievance. It is not at all practical for the Union to try to monitor the

attendance records of employees on a daily basis as there are a great many instances of absences throughout the system, which is large with many employees.

Grievant's leave of absence was for medical reasons, because of problems with her pregnancy, and was contractually authorized; it was in writing, approved and was to run from June 1, 2007 through mid-January, 2008. Although on a leave, Grievant did try to work on a few occasions; part of a day on August 16, and several days in early October, her last day worked was October 6. She was sent to the hospital about October 9, but because she was scheduled to work on that date and was absent, she was charged with an "occurrence" and issued a written warning dated October 10, 2007. Apparently she had been placed on "warning notification" earlier in August. Grievant gave birth to her daughter on November 29, 2007. Based on her leave, she was to remain on leave for an additional six weeks following her delivery; her approved leave was scheduled to end in mid-January 2008. After obtaining a work release from the Authority's doctor, she returned to work on Tuesday, January 15, 2008.

This Grievant's case is a case of first impression in that, to the best of the Union's knowledge, the Arbitration Board has not previously addressed whether an employee on an approved contractual leave of absence can be penalized under an attendance policy. Because all her leave days counted as "total days absent," she was immediately placed on attendance warning when she returned to work. As a result, only three occurrences were required before she was subject to discharge. Because of the accumulated number of days absent, the employee remains on attendance warning for a longer period of time; Grievant would have been required to have perfect attendance for almost four months,

otherwise she was subject to discharge. The current policy has a substantial and adverse effect upon employees required to take a leave.

Although many of the facts are not in dispute, the facts relating to the March 31 doctor's appointment and April 1 absence and Grievant's conversation with Ms. Barnes of Human Resources are. The difference in recollection will require consideration of the credibility of the witnesses; and issue that frequently considers the possible existence of a bias, interest or other motive. Grievant has an obvious "interest" in the outcome of the case and in testifying as she did; however, much of the evidence available supports her testimony. On the other hand, the Authority witnesses are not entirely neutral either in that they also have an interest in the outcome of the case, they need to support and justify the decisions made by them in dealing with the events that developed.

The Union believes that Grievant's discharge is not only contrary to the provisions of the attendance policy, but is also in violation of the Agreement. There is no question that, even in the case of a discharge under a "no-fault" attendance policy that the propriety of the discharge must be evaluated in accordance with "just cause" requirements. The Authority noted that only three employees have been discharged under the current attendance policy and all of those involved individual "occurrences" and not "total days absent." None of those cases involved an approved leave of absence as did the Grievant's case.

The fact that Grievant's absences following her return to work in January 2008 were the result of her high blood pressure is a significant mitigating factor that warrants setting aside her discharge. Her time off prior to her return to work was FMLS related due to required care for her son or mother and the result of a difficult pregnancy. During

this time, the Authority knew when she was going to be off work and planned accordingly. Her attendance record does not reflect erratic or unpredictable unverified illnesses or an unreliable record of no shows, tardy and missed assignments.

The evidence reflects that Grievant's efforts to control and stabilize her blood pressure were working, that her attendance was improving and that it would likely continue to improve in the future, giving the prospect of a better attendance experience. The doctor's efforts to get her blood pressure under control were proving to be successful in that prescribing different medications and dosages was now possible, something that could not be done during her pregnancy. The record also reflects that, between February 25 and April 28 (a period of over 60 days) Grievant did not miss a single day of work because of her blood pressure.

The overwhelming evidence compels the conclusion that the Authority should not have counted Grievant's March 31-April 1 absence against her. The evidence reflects that she called Barnes in Human Resources on March 25 and was doing everything possible to address the conflict. Clearly, Grievant was entitled to believe and rely upon what she was told by Barnes, the HR supervisor responsible for providing employees with information regarding FMLA. How can she be penalized for doing so? She should not have been given a "final final warning" and suspended as a result of the incident. It should have been viewed as a simple misunderstanding and dropped. The April 28 "miss" should never have resulted in Grievant's discharge. As she acknowledged, her missed assignment on April 28 was both unfortunate and regrettable. It was not at all typical of her record and was, without question, an anomaly. The occurrence could not

be ignored and may have warranted a warning, it can hardly be characterized as the type of occurrence that either required or justified her discharge.

The discharge decision was admittedly premised upon Grievant's having taken FMLA leave in 2007. Mr. Kohler testified that his reasons for discharging her were that she had been extended numerous chances to improve her attendance and that she spent much if not most of the preceding year (2007) off, and in addition had also missed a considerable amount of time in 2006. And that they were way past the point of expecting an improvement in her attendance. The daily attendance record for 2007 shows that most, if not all, of the absences prior to June were FMLA approved. There can be no question that FMLA absences cannot be counted under the attendance policy. Grievant's use of FMLA cannot be held against her, yet that is precisely what Mr. Kohler acknowledged doing in reaching his decision to discharge her.

Mr. Phillips testified that, in late January 2008, he determined that Grievant was eligible for four more days of FMLA leave and that he decided to change four of her prior absences to FMLA (those being August 8, 9, 10 and 11, 2007). This was done without knowledge or approval of Grievant. This action provided no benefit to Grievant and simply wasted four days that she would have been entitled to use to cover other subsequent absences following her return to work from her medical leave in January 2008. Those four days of FMLA would have adequately covered all the absences she incurred after her return to work and she would not have been subject to termination at the end of April.

Grievant was not adequately informed of her status following her return from medical leave nor was she informed of the options available to her on her return to work

relative to treatment of her high blood pressure problem, its treatment and possible absences related to it. She thought there was no charge of leave time against her under the attendance policy. No one suggested to her that she might take additional medical leave time to get her blood pressure problem resolved. Knowing of either of these facts would have helped her deal with her situation and avoid termination. Grievant has a reasonably good work record, liked her job and did everything she knew to do to follow all procedures and comply with all requirement expected of her.

The Authority's counting as Total Days Absent the days that Grievant was on her approved pregnancy leave of absence violated the Agreement. The Authority acknowledged this counting to be the case and it is confirmed by the 2007 daily attendance record. All the days she was on leave are counted against her as absences. There is no question that had the Authority not counted those days, Grievant would have never been subject to discharge on April 30, 2008. In January, when she returned to work, she then had 95 total days absent and only 4 occurrences. Had the days that she was on her approved leave not been counted, she would have had well below the 12 "total days absent " and six "occurrences" required to even put her on "attendance warning." The Authority has the right to unilaterally promulgate an attendance policy, but it has a obligation to comply with the mutually agreed upon provisions of the Agreement and is subject to the seniority rules and grievance procedure. The Union submits that employees have a mutual agreed upon contractual right to go on an approved leave of absence without the time off being penalized or held against them under the attendance policy. For the Authority to do so violates the Agreement.

The Authority readily acknowledges that certain leaves, such as bereavement, court and jury duty, military, Union leaves, are “contractually authorized” in that they are set out in the contract. It will be noted that the Agreement expressly provides for maternity leave as a type of contractually authorized leave. Clearly there is nothing in the language of the Agreement that leads to the conclusion that military leave is “contractually authorized” and maternity leave is not. How then does the Authority justify penalizing Grievant for being on an approved contractual maternity leave and not penalizing an employee for being on an approved contractual military leave or Union leave? The Union submits that it cannot and should not be allowed to do so. There can be no serious argument that can be made justifying the Authority’s treating maternity leaves and military and Union leaves differently under the attendance policy. Thus, as they are all set out in the contract, the Authority cannot penalize certain employees for taking one type of leave instead of another.

It should be noted that there is not a single reference to the attendance policy in Section 1.18. There is nothing there by way of qualification, limitation or exception that suggests that Section 1.18 leaves of absence are subject to the attendance policy or that employees who are granted such leaves may be penalized under the attendance policy. While the Authority has the right to adopt and enforce a reasonable attendance policy, the terms of the Agreement will always operate as a constraint on its doing so. To hold otherwise would mean that the Authority would have the power to change the terms of the Agreement through its unilaterally revising its attendance policy. In view of the lack of any language in Section 1.18 suggesting that employees were to be subject to the disciplinary provisions of the attendance policy, the Union submits that the intent of the

provision was clearly that employees should not be subject to discipline or penalty under the attendance policy for going on a contractual leave of absence.

The Attendance Policy, although applicable to all contract employees, is not applied consistently to all contract employees, with respect to leaves of absence. Maintenance does not count as "total days absent." those days that an employee is on an approved leave of absence. The attendance record for Justin Wildmon, a new employee, shows he went on leave in July, August and September 2008 and reflects that his time on leave was not held against him under the attendance policy. One of the fundamental tenets of "just cause" requires that an employer's rules, policies and penalties must be applied consistently, evenhandedly and without discrimination.

The Authority's belated "Timeliness" and "Arbitrability" challenges are without merit and do not preclude the arbitrator from considering the issues raised by the Union. The Authority contends the Union's contractual argument and it's challenging the April 2 discipline and related issues cannot now be heard because the Union should have raised these issues much earlier, such as when Grievant was put on attendance warning or when she was suspended. Having failed to do so, the Union is now precluded from raising any of these issues. The Authority's arguments are without merit. The Authority has failed to demonstrate how or why it would be prejudiced by the Union being heard on all issues raised. All of the issues now raised by the Union were raised at both Step II and Step III of the grievance procedure without objection by the Authority. Employees have been able to go back and challenge each and every absence and each warning and related disciplinary action at the time of the discharge.

There is nothing in the record to suggest that Grievant was physically unable or incapable of working upon her return in January 2008 or following her discharge in late April. The Union would request that the grievance be sustained, that Ms. Ridley's discharge be set aside, that she be awarded full back pay and that all seniority and benefits lost as a result of the discharge be restored.

DISCUSSION

It was agreed that the issue was procedurally and properly before the arbitrator for final resolution. The question was raised, during the hearing, as to why the Union had not raised a question or filed a grievance on some of the actions that lead up to the Grievant's termination when they occurred rather than wait until termination had taken place. Usually there is a time limit for filing a grievance following an offending event taking place, as is the case with the present Agreement. Failure to file a grievance on a given act in a timely fashion precludes that action from being grieved in the future, but it does not, however, prohibit that act being grieved should it happen again in another situation or at another time. Also, some actions or events may not be a problem standing alone at the time of their happening, but can take on a different significance when combined with other events that together lead to adverse action against an employee, such as being terminated from their employment. They still may not be grieved as such, but they can be weighed for their value as a contributor to the event that is being grieved. It is therefore quite permissible for the Union to question earlier events that preceded and are closely related to the termination of Grievant, the justification of which is being grieved.

The purpose of a no-fault attendance policy is, among other things, to provide a program for putting the responsibility for employee absences on the employee and to get the employer out of the business of trying to determine what is a good reason for being away from work and what is not, on a daily basis, and allowing the employees to make those determination for themselves. Under the no-fault attendance policy employees are given a designated number of absences to use as they wish and they must decide for themselves when an absence is justified according to their own needs and priorities. Such a system gives employees a considerable amount of freedom in this regard.

At the same time the employer is permitted under the management rights clause to design and implement an attendance policy, the negotiated labor agreement makes contractual provisions for employees to obtain a leave of absence when certain types of needs arise. This puts the employer back in the process of determining the justification of extended absences by requiring approval of the employer based on the needs of the organization, as well as the needs of the employee. The present Agreement at Section 1.18 (a) provides, among other things:

The Authority shall have the right to grant or deny a request for leave of absence and extensions of a leave of absence.

It provides further:

The Authority shall grant permission for leave when good cause is shown and (except when sickness or injury prevents performance of his regular duties) when the employee is not reasonably required for the efficient operation of the system.

Many of the leaves requested by employee are for reasons that cover a time period that may be in excess of what is allowed by the no-fault attendance policy. The Agreement lists these as leaves that are contractually provided: Union leave, sick leave, bereavement leave, military leave, court and jury duty leave, and maternity leave. In addition to these

contractual leaves, the Authority approves leaves that are for other reasons which employees may find desirable or necessary and for which they can provide sufficient justification to the employer for being away from work. The problem becomes one of rationalizing the two systems so that they can work together smoothly and without conflicts such that the attendance policy does not conflict with any of the provisions of the Agreement. The Agreement is preemptive in the implementation of the attendance policy and the granting of leaves, but the Authority controls the conditions and provisions for the implementation of all leaves and absences of its employees, subject to challenge.

The Attendance Policy allows for the accounting and management of absences of employees. With the no-fault policy there is the allowable time that can be taken by an employee without explanation which is, with the present policy, six occurrences or 12 days during a running six month period. These absences can be used at the discretion of the employee. For absences beyond the limiting allocation, an attendance warning is given and additional absences are subject to disciplinary actions leading to possible termination. For time needed beyond that allowed by the no-fault policy, and to avoid the additional discipline incurred by additional absences, there are leave provisions.

These are leaves that fall into two categories, contractually authorized absences, which are types of absences which are spelled out in the Agreement to be granted employees when needed, and over which the Authority has limited control; and leaves of absence which, when requested by employees, may be approved at the discretion of the Authority. Once granted, all leaves are treated the same. All leaves have absences charged against the employee under the Attendance Policy to the extent of the no-fault allocation of absences (with the exception of FMLA absences). If the employee has 8

absences, then 4 days of leave would be charged to him; if he had no absences, then he would have 12 days of leave charged as absences. Assuming there is no penalty under the no-fault system as claimed by the Authority, if the employee was already into the disciplinary process when the leave was obtained and had no no-fault absences left, presumably there would be no absences charged and the employee would remain at that point of discipline on returning to work at the end of the leave.

It is presumed that the intent and practice is for both contractual leaves and approved leaves to be obtained only when an employee is expecting to be absent for a time exceeding that allowed under the no-fault policy. Because of the disciplinary process being activated at 12 days absences, in order to avoid that discipline being incurred, absences in excess of those allowed need prior approval from the Authority, orally if no more than 30 days, in writing for longer periods exceeding 30 days. But once approved, days, weeks, or months absent in excess of the no-fault limit are not held against the employee, they are outside the attendance policy. The Authority can track an employee's absences while on a leave, and does so without "holding it against them." There is no evidence presented of employees on leave having absences being used to penalize them in any fashion. With the exception of the FMLA leave, there is no evidence that any other leave, be it contractual or approved, has been treated differently than any other; all are deducted from the no-fault allowance provided by the attendance policy.

The Union claims that Grievant was discharged for taking a contract approved leave of absence; this is not true. Grievant was discharged for her absences taken after she returned from her leave of absence. Having taken her leave, she was closer to

discipline on her return to work than she would have been if she had not been on leave or had otherwise occasioned absences during that time, but she was not disciplined for taking the leave. The days of the medical leave were counted as absences; Grievant was not at work, therefore she was absent. It is not clear how these leave days were allegedly held against her under the attendance policy, except that the first 12 (or whatever number was needed to bring the total to 12) were deducted from those allocated to each employee as no-fault absences. Except for FMLA leave days, all leaves contractually or approved are treated the same way. The fact that she was on an approved medical leave kept her from having days 13 + from being held against her under the attendance policy. With a leave, she could be gone from work as long as the approval allowed without being subject to further penalty.

The Union argued that leave time, especially contractually authorized absences, such as union business, birthdays, jury duty, or floating holidays should not be charged under the no-fault attendance policy. The reasoning is that after a contractually authorized absence, the employee returns to work immediately subject to discipline for any additional absences they might incur. The no-fault attendance policy is intended to cover all absences an employee incurs regardless of the reason for their use, whether needed or not, used for good or poor reasons, is immaterial. It would therefore not seem unreasonable for the Authority to charge leave days, both contractual and approved, as is clearly provided in the Attendance Policy, against employees' allowed absences under the policy to the extent that an employee has additional days of no-fault time available to them at the time of taking the leave. Under these provisions, by taking a leave the

available no-fault days are used, but the additional leave days are allowed without discipline, sometimes for a quite extended period of time.

Grievant in this case was justifiably away from work for approximately 6 months. It does not seem reasonable that the employer should be required to provide an employee on returning to work, an employee who has been on an extended leave, with an additional 12 days of no-fault time available for their use, plus 2 days more under attendance warning, prior to the absence that would result in termination. To do so would be granting nearly an addition 3 weeks of working days away from work in addition to the leave time that had been taken. It is true that Grievant would not have been terminated if the leave time had not been charged against her, but it was charged against her because that is the way the system works, and she was well aware of the Attendance Policy and its provisions.

Under the terms of the Contract, management has the right to promulgate reasonable work rules and regulations and the right to modify them from time to time as the need arises. The attendance policy is outside the Agreement, it is of the construction and at the will of the employer in accordance with what is deemed the best for both operations and employees. But it must not violate any employee rights negotiated into the Agreement, and as long as it does not harm those employee rights, benefits and protections it is not in conflict with the Agreement. There are other conditions that must be met in the implementation of an attendance policy program; fair, reasonable to understand and use, fairly applied, etc., but these are considerations apart from conflict with the provisions of the Agreement.

With the exception of the FMLA leaves as provided, it is acceptable for the Authority to count leave days against the no-fault days allowed by the Attendance Policy without violating the Labor Agreement, and to do so is not unreasonable. Nor does it place a burden on the employee who, if faced with additional problems in their personal lives, new or reoccurring, can obtain an extension to their leave or obtain a new leave to recover from the added problem being experienced. The only thing that is lost in counting leave time against no-fault time is the option of the employee for taking off time from work for reasons that might not warrant an approved leave by the Authority

It is clear that there was some confusion resulting from the FLMA leave status of Grievant relative to the absence of March 31 and whether she had leave time available to cover that absence. This confusion resulted in part from Grievant having been told first that she had leave time available to cover the absence and then being informed that it had been discovered that she had no FLMA leave time available for that purpose. While Grievant claimed she was told she had this leave time available prior to the absence, the HR Representative testified that this inquiry occurred after the absence, not before it. Given the evidence and the interests of the parties, the greater credibility usually lies with the latter, in that there is no personal interest on her part in the outcome of the case.

However, as pointed out by the Union there are interests involved on the Authority's side of the argument. The managers involved do have an interest in sustaining support for the decisions that they made during the development of the situation, whether good or questionable. The evidence does contain the FMLA form filled out by the doctor and dated the day of the examination, March 31. This would

certainly suggest that Grievant had obtained that form prior to the appointment on that date.

The contract requires that a grievance be filed within seven (7) days of an action, or the discovery/awareness of the action or discipline. No grievances were filed by Grievant about any of the disciplinary actions taken against her except for her final discipline of termination. The termination grievance was timely filed and has been properly acted on by the parties through the grievance process. The disciplines leading up to the termination have all past the time limitation and are not subject to challenge by grievance at this time. Although the Union may not have been aware of these disciplinary actions, it is certain that Grievant was aware of them and had the option of filing a grievance on any one of them at the appropriate time, or she could have brought them to the attention of her Union representative at the time, but she did not. The fact that these prior events are not grieveable at this time does not prohibit them from being discussed as occurrences that led up to the event that is being grieved.

The Union argued that the attendance policy applied to all contract employees, but that it was not applied consistently in all departments with respect to leaves of absence. The testimony and evidence presented to substantiate this position was not clear and convincing in that it consisted of materials obtained from a secretary in another department (maintenance), was not clearly identified and focused only on the tally of the days absent while an employee was on leave and not on any aspect of discipline associated with the no-fault attendance policy.

Entirely apart from an attendance policy and independent of the reasons for absence, an employee that can not be expected to come to work on a regular basis can be

terminated from his or her employment, not as a matter of discipline, but simply because an employer has work to be performed and that employee is not able to do it. Such situations often happen to good employees who are willing and want to work and whom the employer would like to keep in their work place. The reasons for the absences may be quite justifiable, even regrettable, but they can not perform the work assigned them, and for which they are to be paid, if they are unable to present themselves at the work place in a condition to engage that work on a regular and reliable basis.

Grievant had had her problems with being able to be present to perform her job, but she was past her pregnancy and in the process of more aggressive treatment of her blood pressure problem. She was making progress on that problem and showing signs of an improved capability for regular and reliable attendance in the future. Her last absence was for a previously scheduled doctor appointment and her last 2 occurrences were not medically related, one being for calling in late following her doctor's appointment and the final one for arriving late for an assignment due to a misunderstanding about assigned routes.

The use by the Authority of Grievant's last four days of FMLA leave time was questioned in that had those days been available to her in early 2008, she could have used them and stayed out of trouble under the discipline of the attendance policy. Section 1.18 (a) states, "However, in any and all cases, the employer may exercise its rights under the act to designate an absence as FMLA or not, whether or not pay is requested." The context of this statement is that of the Authority granting approval of an employee's leave application; it is clear that Grievant had not requested these 4 days leave be used for the absences in question in that she did not know it had been done until after the fact. It

would appear that the use of the 4 FMLA days in this fashion may have had a significant impact on Grievant's termination.

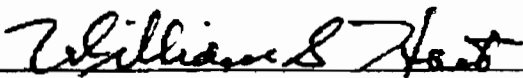
The Union argued that the last occurrences were marginal and that they did not justify termination. The call in on April 1 was 15 minutes late, but it was as soon as she could call following the completion of her doctor's appointment, circumstances were such that she could not call any earlier than she called. The last occurrence was one of missing an assigned route due to a misunderstanding about the route to which she was assigned. She had arrived for work but for a different, and later, route assignment than the earlier one she was assigned to take. The usual practice under these circumstances is to reassign the tardy employee to the bottom of the Extra Board. Although an occurrence can be given, the employee has arrived at the work place intending to work, but for some reason is tardy. The Union contends that a tardy is not grounds for a just cause termination in such a situation. Technically it is an occurrence and can be so charged. The question of just cause applies more, in this case, to a series of events than to any single event, and to circumstances.

In the present case Grievant has not been a particularly good employee nor has she been able to provide the attendance on the job needed by the employer, as evidenced in part be the fact she did not work enough to qualify for FMLA leave, and as such has not provided a strong motivation to retain her in her position as operator. On the other hand, while the Authority has tried to work with Grievant on her attendance, it has not handled her situation in the best possible manner. There has been confusion over Grievant's FMLA leave time relative to both its availability to her and its application; Grievant being told she had time when she did not, and available days being used to

cover days that would have been covered by leave time in any case. It also appears she was not as well informed as she might have been; as to her FMLA status, the delivery of notification, her discipline situation under the no-fault attendance policy or as to the options available to her relative to further medical treatment and resulting absences. Lack of representation and resulting extensions of discipline also played a part in the uncertainty/confusion in the relationship.

AWARD

For the reasons given above, the grievance is sustained. Grievant is to be reinstated, without back pay, to her position as operator with seniority at the time of her termination. Additionally, she is to be reinstated to the attendance policy under the same conditions as were present on her return from her medical leave of absence in January of 2008; that is, with an attendance warning.


William S. Hart 5/15/09

For the Union _____ approve/disapprove

For the Authority _____ approve/disapprove