ARBITRATION OPINION AND AWARD

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IN THE MATTER BETWEEN

KANSAS CITY AREA TRANSPORTATION AUTHORITY
Employer

and

FMCS Case No. 06-04280
Discharge (Creason), MO

AMALGAMATED TRANSIT UNION
LOCAL 1287
Union

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## ARBITRATION BOARD

**Neutral Board Member:** Robert B. Moberly
**KCATA Board Member:** Fern M. Kohler, Deputy General Manager
**ATU Board Member:** William L. Wilson, President

## REPRESENTATIVES

**For KCATA:** Jeffrey M. Place, Esq.
**For ATU:** Scott A. Raisher, Esq.

Pursuant to the contract between the above parties, the above-named Arbitration Board was appointed to decide the above dispute. An arbitration hearing was conducted in Kansas City, Kansas, on October 11, 2006, at which time the parties were given full opportunity to present evidence and arguments. Both parties filed briefs, the last of which was received on December 1, 2006.

## ISSUES

The parties stipulated to the following issues:

(1) Did the Authority have just cause to discharge Grievant Michael Creason?

(2) If not, what should be the remedy?

The parties further stipulated that the matter is properly before the arbitration panel for a final and binding decision.

## FACTS

KCATA (hereinafter "Authority") provides mass transit service in the Kansas City metropolitan area through a fleet of buses. ATU Local 1287 (hereinafter "Union") represents various hourly employees of the Employer.

Grievant was employed in the Authority's Maintenance Department. He began employment in 1994 as a Class B Service Worker, and at the time of his discharge he was a Stockman in the parts storeroom. On March 29, 2006, the Authority suspended Grievant without pay "pending an investigation regarding whether you had misappropriated KCATA funds, using your KCATA procurement card, which was issued solely to allow you to purchase approved safety shoes from an approved vendor." On April 4, 2006, the Authority issued a "Notice of Termination of Employment" to Grievant, stating in pertinent part as follows:

"The investigation has now concluded, with the following findings:

> 1. You were provided sufficient instruction on requirements related to proper use of the shoe allowance procurement card. Specifically:
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> > a. The Labor Agreement . . . states in section 3.11:
> >
> > 'The Authority will provide a procurement card in the amount of one hundred dollars ($100) . . . for the purchase of steel toed/slip

resistant safety shoes/boots. The card shall be used to purchase approved safety shoes/boots **only**. An approved shoe/boot list and approved vendor list with at least three vendors shall be mutually agreed upon by the Authority and Union . . . "

b. On October 12, 2005 a notice was posted on the Union bulletin board located in the Vehicle Maintenance area, which detailed the shoe program. The notice included the statement that the shoe cards were to be used **only** to purchase safety shoes/boots.

c. A memo provided to you with the procurement card stated that the card may **only** be used with specific shoe retailers. You met with Store Room Supervisor Terry Aulgur, Union representative Tommy Hernandez, and me on March 29, 2006. At that time you acknowledged receiving the memo and understanding it.

2. The shoe card bears the words "Metro" and "purchasing card" prominently on its face, making it obvious that the card was a KCATA issued card, and not a personal credit card.

3. At the March 29, 2006 meeting, I asked if you had your procurement card for the shoes, and you pulled the card out of your wallet. I asked you what the card was for, and you stated it was to purchase safety shoes.

I showed you a copy of the Commerce Bank invoice for charges made to the safety shoe procurement cards. The invoice indicated a $100.00 purchase at Rogers Sporting Goods in Liberty, Missouri, on February 27, 2005, with your procurement card, identified by your name and card number. After reviewing the invoice, you acknowledged using the card as part of a $122.00 purchase for fishing equipment. You also acknowledged that you had to pay $22 in cash since the $100 procurement card did not cover your total purchase.

KCATA considers the intentional misappropriation of funds an offense so serious that it merits immediate termination of employment. You are hereby discharged from KCATA, effective immediately."

It is undisputed that on February 27, 2006, Grievant used the $100.00 shoe procurement card for fishing equipment rather than shoes. Grievant, however, testified that he used the card by mistake. He testified that he fishes 50-70 times a year; that he carries four to six credit cards at any given time; that at the sporting goods store, it was crowded with a long line; that he was talking with a friend and wasn't paying a lot of attention; that he thought he was using a Citi card

for miles; that when he gave the clerk the card, the clerk said he owed $22.00 more; that he assumed that the card was maxed out by his wife, so he put it back in his wallet and gave the clerk the additional $22.00; and that the clerk bagged the items and he left. He testified that he knew the Metro card was for shoes, but thought it was locked except for authorized vendors; that he heard through the grapevine on the floor that the cards were locked and limited to authorized vendors; that he had no intention to steal; that he was honest in his subsequent meeting with management; and that he has never been accused of dishonesty on the job.

As stated in the termination notice, management representatives met with Grievant and his Union representative on March 29, 2006. On April 1, 2006, Grievant arranged for the sporting goods store to refund the $100.00 back to his purchasing card. Between March 29 and April 3, management representatives met to discuss unauthorized use of shoe cards by Grievant and another employee. It was concluded that discharge was appropriate in both cases because the employees had intentionally misappropriated KCATA funds. However, subsequent discussions between management and the Union president resulted in an agreement to recommend a five-day suspension for both employees. Initially, both employees agreed to settle. However, Grievant later declined to accept the settlement, apparently because in a previous case where Grievant failed a drug test upon returning from vacation, the arbitrator ruled against Grievant after he had signed a settlement agreement. Since Grievant did not accept the settlement offer, the Company issued the termination notice set forth above.

Section 1.12(e) of the Labor Agreement states that "warning slips shall not be considered after twelve (12) months for the purpose of progressive discipline, but may be considered in reviewing the employee's record only for determining whether moderation of discipline is

warranted." In the twelve months prior to Grievant's discharge, he had received three written attendance warnings and a final attendance warning with a two-day suspension.

Further facts will be stated in the Discussion.

## POSITION OF THE AUTHORITY

The Employer contends that Grievant intentionally misappropriated KCATA funds; that Grievant had ample notice of KCATA's rules and expectations; that KCATA'S early settlement offer does not invalidate the discipline; that the fact that the cards were not "locked" did not give Grievant a license to misuse KCATA'S funds; that Rule 50 does not apply to the facts of this case; and that declining to discipline employees who purchased socks was not "disparate treatment." In conclusion, the Employer asks the Arbitration Board to find that Grievant intentionally used KCATA's funds for personal purposes, and then claimed ignorance when confronted with his misdeed. The Authority also argues that KCATA had just cause to discharge Grievant under Rule 4 for stealing, and requests that the Arbitrator deny the grievance in its entirety.

## POSITION OF THE UNION

The Union contends that arbitrators require a higher standard of proof when the charge involves moral turpitude or criminal conduct; that the Authority failed to prove theft or intentional misappropriation of Authority funds, since Grievant lacked an intent to steal and the Authority failed to prove that the "property" is exclusively that of the Authority; that the Authority failed to give employees the required notice of the consequences of an employee's unauthorized use of the card or that such use constituted theft; that discharge was excessive in

light of Grievant's length of service, work record, and the lack of corrective discipline; that Grievant's decision not to sign the settlement agreement should not be held against him; and that if any discipline is warranted, it should be no more than a warning. In conclusion, the Union requests that the discharge be set aside and that all lost pay and benefits be restored.

## DISCUSSION

The Authority's termination notice accuses Grievant of "intentional misappropriation of funds, an offense so serious that it merits immediate termination of employment." At the arbitration hearing and in its brief, the Authority also points to Rule 4 of its Discipline Code, which states that "stealing from the Authority" is punishable by discharge for the first offense.

It is undisputed that Grievant used the shoe procurement card to buy fishing equipment. It also is undisputed that he knew the intended purpose of the card was to buy shoes. However, Grievant contends that he used the card by mistake. The question here is whether or not Grievant "intentionally" misappropriated the funds as charged in his termination notice, or was guilty of "stealing" funds, which also normally requires a finding of intent.

The burden of proof in cases involving moral turpitude and criminal acts, such as stealing and intentionally misappropriating funds, normally is greater than the "preponderance of evidence" standard often used in arbitration cases involving less serious charges. In a previous arbitration case involving these same parties, Arbitrator Frank J. Murphy applied a "clear and convincing" standard in a case involving the charge of stealing. As stated by Arbitrator Murphy:

> "In the arbitration of the discharge of an employee, the Company has the burden or responsibility of proving that the employee committed the offense for which he was discharged and of showing that the offense merited the penalty of discharge. The weight or degree of evidence required by arbitrators in a discharge case is greater than that required for lesser penalties such as suspension because of the serious nature of the penalty. Arbitrators generally require a higher degree of

> proof when the discharge is for a criminal act and one involving moral turpitude because of its effect on the future employment of the employee and on his reputation.
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> . . .
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> In the present case the alleged offense is stealing of a lube tank. Although no criminal charges have been filed in regard to it, the misconduct in question is of a kind which carries the stigma of general social disapproval and has actual or potential adverse effects on future employment of the Grievant. Thus, proof should be clearly and convincingly established by the evidence. Reasonable doubt raised by the evidence should be resolved in favor of the accused."[1]

The Arbitrator has thoroughly reviewed the evidence and arguments in this case, including the excellent briefs and the cases cited therein. After doing so, the Arbitrator finds that there is not clear and convincing evidence that Grievant stole or intentionally misappropriated Authority funds. As noted in *Southern California Edison Co.*:[2]

> "There is no question that the theft of Company property is an act which constitutes just cause for discharge, but the mere taking of Company property does not necessarily prove the intent to steal that which is taken, and circumstances may well arise where the taking of Company property for personal use without compensation to the Company does not necessarily demonstrate an intent to steal. Such intent must be gathered from all of the facts and circumstances surrounding the act which is involved."

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[1]KCATA & Division 1287 ATU, Discharge of Keith Bryant (Arbitrator Frank J. Murphy, February 19, 1981, pp. 10-11).

[2]61 LA 803, 807 (Heibling 1973).

The facts and circumstances in *Southern California Edison Co.* led the Arbitrator to conclude that "there was no intent to steal" the gasoline involved.[3] Similarly, the facts and circumstances of this case lead this Arbitrator to conclude that there was no intent to steal or misappropriate funds from the shoe card. The record does support a finding that Grievant used the funds for an improper purpose (buying fishing equipment instead of shoes), but the weight of the evidence is that Grievant did so negligently rather than intentionally. There is insufficient evidence to discredit Grievant's account of the transaction. To some extent, Grievant's version is possible because the Metro card is the same size, shape and content of other credit cards. While the front of the card makes clear that it is the Metro card rather than, say, a Visa or Mastercard, the back of the card is very similar to other cards, including a metallic stripe, a signature block and the name of the bank. It is not out of the question for an employee to hastily remove this card from his wallet and offer it to a clerk by mistake, especially in a busy store. Grievant obviously is familiar with credit cards, and he likely would know that if he intentionally used the shoe card to buy fishing equipment, the transaction would be recorded with his name and card number on a statement that would be sent to and reviewed by the Authority.

Further, the Grievant and Union had previously agreed that the shoe cards should be "locked" in the future, except for authorized shoe vendors. Unfortunately, due to implementation difficulties, the system could not be put in place by the time of this incident in February 2006. However, the Authority and Union were trying to lock the cards before the incident, and there is no reason to discredit Grievant's testimony that he had heard through the grapevine on the floor that the shoe card was in fact locked and could only be used at authorized vendors. If Grievant

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[3] *Id.*

thought that the card was locked and could only be used for shoes at authorized vendors, there would be no reason for him to intentionally submit such card for fishing equipment at a sporting goods store. These circumstances support Grievant's testimony that his use of the card was a mistake rather than an intentional act.

Finally, it should be noted that Grievant has worked for the Authority for more than eleven years, and has worked in the storeroom containing valuable bus parts for more than six years. There is no evidence that Grievant's honesty has ever been questioned in the past, and the Arbitrator is reluctant to conclude that Grievant was dishonest on this occasion based on the evidence presented here.

The Authority cites *Pepsi-Cola General Bottlers*[4] in support of its position. In that case, the Arbitrator found "by clear and convincing evidence, that Grievant knowingly cashed the Company check at issue here, although he had notice the proceeds were not his to keep, and then converted these proceeds to his own use." Moreover, management "gave the Grievant the opportunity to locate and restore the money," and checked with him "at least monthly as to the status of the missing refund." The amount of the check was $2, 570.00. Arbitrator Goldstein concluded that Grievant endorsed the check, deposited it into his account, and had "guilty knowledge." Since the contract allowed discharge for a first instance of theft, the Arbitrator sustained the discharge.

The *Pepsi-Cola* clearly is distinguishable from the instant case. Most significantly, the Arbitrator found by clear and convincing evidence that Grievant knowingly committed a theft with "guilty knowledge." In the instant case, as discussed above, it is found that Grievant lacked

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[4]117 LA 681 (Goldstein 2002)

an intent to steal or misappropriate funds.

Since the Authority did not prove by clear and convincing evidence that Grievant intended to steal or misappropriate funds, the Arbitrator must find that the Grievant's discharge was without just cause. However, a question remains as to the appropriate remedy. The Union contends that Grievant should be put back to work with back pay and benefits. The Arbitrator agrees that the Grievant should be put back to work, but disagrees that Grievant should receive back pay and benefits. The entire affair was caused by Grievant's negligence in using the shoe card to purchase fishing equipment. It is therefore unclear to the Arbitrator why he should receive pay for time not worked when his actions precipitated the discipline.

Moreover, Grievant was given the opportunity to accept a 5-day suspension and rejected it even though it was clear that he used the shoe card in an improper fashion. The Union contends that Grievant's decision not to sign the settlement agreement should not be held against him. The Union states that Grievant thought the agreement required him to waive his right to grieve any future discipline, based on his understanding of a prior arbitration award.

The Arbitrator has carefully reviewed the proposed settlement and the prior arbitration award, both of which were introduced as joint exhibits. I find no basis for concluding that either of them required Grievant to waive his right to grieve future discipline.

The proposed settlement agreement stated that "In consideration for receiving suspension time rather than discharge, neither the Union nor the Employee will grieve or challenge this discipline in any way, and both waive all rights to grievance arbitration on this matter." It is apparent on the face of this sentence that it applies only to "this discipline," and Grievant and the Union were waiving rights to grievance arbitration only on "this matter." It further is clear that

"this discipline" and "this matter" refer only to the shoe card incident in question, and not to future discipline. The proposed settlement makes no reference whatsoever to waiving discipline for future matters.

The Union points to another part of the agreement stating "any future misappropriation of funds will result in termination." However, this language does not constitute, either expressly or impliedly, a waiver of Grievant's right to challenge the merits of future charges of misappropriation through the grievance procedure. The Company still would carry the burden of proving just cause through the grievance procedure, including arbitration, for any future termination.

The arbitration award in question arose from a 2003 incident when Grievant was discharged for testing positive for marijuana during a random drug test. Grievant admitted using marijuana while on a two-week fishing vacation. He signed a Return to Work Agreement which required rehabilitation, and which also stated that the first 40 hours of lost wages due to rehabilitation "will be treated as a disciplinary suspension." Upon returning to work, Grievant filed a grievance challenging the 40-hour suspension. Arbitrator Anthony Salucci denied the grievance, noting that Grievant as well as the Union signed the agreement which "contained a provision of 40 hours of no pay."[5] Arbitrator Salucci did not hold that Grievant waived his right to challenge future actions through the grievance procedure. He only held that since Grievant signed a settlement agreement about the particular dispute involved in the arbitration, he could not then challenge the validity of that particular settlement in arbitration. Settlement agreements

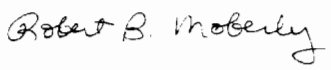
[5]KCATA & ATU Local 1287, FMCS Case No. 04-01389 (Michael Creason - Discipline) (Arbitrator Anthony Salucci, June 4, 2004)

commonly contain such a provision, and they normally are not construed to prevent a Grievant from challenging future disciplinary actions.

In light of the above findings and discussion, the Arbitrator concludes that the Authority did not have just cause to discharge Grievant. However, the Authority did have just cause to discipline Grievant for the negligent and improper use of the shoe procurement card. Accordingly, Grievant shall immediately be reinstated, and the time between his discharge and reinstatement shall be considered a disciplinary suspension.

## AWARD

The Authority discharged Grievant without just cause.



However, the Authority had just cause to discipline Grievant. The Authority shall immediately reinstate Grievant, with no loss of seniority, but without back pay. The time between Grievant's termination and his reinstatement shall be considered a disciplinary suspension.

## ARBITRATION BOARD

Robert B. Moberly, Neutral Arbitrator
February 12, 2007

Fern M. Kohler
Authority Member

Assent:

William L. Wilson
Union Member

Assent:

_____ _____

Dissent:

_____ _____

Dissent:

_____ _____