

BEFORE THE DART TRIAL BOARD

In the Matter of the Arbitration	*	
between	*	
	*	
FRANCES INGRAM	*	
Grievant	*	Grievance No. 3002-U-ATU
and	*	
	*	
DALLAS AREA RAPID TRANSIT	*	
Employer	*	

BEFORE: Edward B. Valverde, Esq. – Arbitrator – DART Trial Board Hearing Officer

APPEARANCES:

For DART: Tammy Barrow, Senior Assistant General Counsel; Robert Reeves, Senior Manager, South Oak Cliff; Demond Blanton, Lost Time Program Specialist, Risk Management; Tim Newby, Assistant Vice President of Bus Operations

For Grievant: Kenneth Day, President and Business Agent for ATU, Local 1338; Evelana "Chris" Garrett, Executive Vice President; Frances Ingram, grievant

Place of Hearing: Dallas Area Rapid Transit
1401 Pacific Avenue
Dallas, TX

Date of Hearing: November 4, 2010
Date Hearing closed: December 3, 2010¹
Date of Award: December 23, 2010

Type of Grievance: Non-Disciplinary Discharge

AWARD SUMMARY

It is determined that the Trial Board Hearing Officer (TBHO) has no jurisdiction to decide the merits of this grievance as a result of the grievant's failure to appear at the Step 2 hearing in accordance with the provisions of Section 8.8.B.7 of the Hourly Employee Manual (HEM).

Edward B. Valverde

Edward B. Valverde, Esq. – Arbitrator – TBHO

¹ Hearing closed upon receipt of the transcript.

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DISCUSSION, OPINION and AWARD

This matter was heard on November 4, 2010 at DART headquarters in Dallas, Texas. Both parties agreed the matter was properly before the TBHO for decision. All parties fully participated in the hearing and were afforded a full opportunity to be heard, to examine and cross-examine witnesses and to introduce evidence on the issues. Based on the record evidence, my observation of witnesses, examination of all exhibits, arbitral citations provided and consideration of the arguments presented by the parties, the TBHO makes the following Discussion, Opinion and Award.

ISSUES

- (1) Does the TBHO have jurisdiction to hear the non-disciplinary discharge grievance of grievant? If so:
- (2) Did DART have just cause to discharge grievant? If not, what is the appropriate remedy?²

BACKGROUND SUMMARY³

Frances Ingram (Ingram or grievant hereinafter) was an employee of DART for about 12 years working as a bus operator. On January 5, 2009⁴ while operating her vehicle, Ingram was involved in an accident that was not her fault. As a result, she suffered injury to her shoulder that required her to be off the clock beginning the following day. Ingram reported the accident and injury and sought medical treatment thereafter.

Alternative Duty and Leave Program

Because Ingram was unable to work for more than 10 consecutive workdays she was placed in the Employer's alternative duty and leave program. (Sec. 3.7 HEM) That program provides employees who are unable to perform their duty assignments for more than 10 consecutive workdays with an alternative duty assignment or a modified duty

² The issues identified herein were developed by the TBHO based on the evidence presented at hearing.

³ This summary only contains facts not in dispute sufficient to decide this matter.

⁴ All dates hereinafter refer to 2009 unless otherwise specified.

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assignment until they are ready to return to full duty. This employee benefit is temporary in nature; it is available to employees for a total of 60 workdays during any twelve-month period. However, employees who need more time to recover from their disability (injury) can submit requests for extensions of time to the Alternative Duty Extension Committee (ADEC). The ADEC is comprised of the employee's departmental vice president, the Vice President of Human Resources and the employee's representative. Extension requests must be approved by a majority of the committee members. Committee decisions are to be based on "proper documentation of demonstrable continuous improvement" in the employee's condition. (Sec. 3.7D)

Ingram submitted a total of three extension requests dated March 9, May 13 and July 23. The first two requests were granted but the third request was denied by the ADEC. By certified letter dated August 26 Demond Blanton, Lost Time Program Specialist, advised Ingram of the ADEC decision and notified her that she was expected to obtain a full duty work release assignment and contact her Senior Manager, Robert Reeves on or before September 2. If she failed to contact Reeves by that date and provide him a work release she would be subject to the HEM 5.4 Disqualification process, meaning that she could be subject to discharge. Ingram neither contacted Reeves nor provided him with a work release by September 2.

Directive to Return to Work

By certified letter dated September 3 Reeves directed Ingram to return to her regular duty assignment with a full duty release and pass the return to work physical on or before September 11. If Ingram failed any of these requirements, she would be subject to disqualification (discharge) pursuant to the provisions in HEM 5.4. Ingram failed to return to work (to her duty assignment) or satisfy any of these requirements by the deadline date (September 11). Thereafter, Ingram's immediate supervisor, Jose Carranza, Manager of the South Oak Cliff (SOC) Bus Operations issued her a notice (dated September 17) that she was being placed on administrative leave, effective immediately, with pay pending an investigation. Two of the requirements of the investigation were that Ingram direct any questions about the investigation to him and that she contact the SOC station office every day between the hours of 8:00 a.m. and 11:00 a.m. in order to

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find out any developments on the investigation. If Ingram failed to contact Carranza on a daily basis as instructed she would be placed on leave without pay for that day.

While not stated in the letter, the purpose of the investigation was to determine if there was any basis for continuing Ingram's employment, i.e., did she have any benefits (e.g., annual leave, sick leave, etc.) and was all of her paperwork in order before deciding on further administrative action. The results of the investigation would dictate the next course of action.

Notice of Discharge

By certified letter dated September 25 Carranza notified Ingram that he was proposing that she be discharged in accordance with the HEM 5.4 which deals with non-disciplinary discharges. Among other things, the letter recited the facts that this action was due to her extended absences from work beginning January 6, her continuing inability to perform her regular duty assignment, her failure to provide a full duty work release and that she had exhausted her Family Medical Leave Act balance. The letter also advised her of appointments that were scheduled for her with the Human Resources office to explore other placement opportunities and benefit options, and with Risk Management to explore disability benefit options. Finally, Ingram was told she could meet with Reeves on Friday, October 2 at 3:30 p.m. to respond orally and/or in writing about the proposed discharge; and that only after consideration of her reply would a final written decision regarding this matter issue.

On October 2 at 3:30 p.m. Ingram, with ATU Local 1338 representative Chris Garrett met with Reeves. At the meeting they told Reeves that (1) management was untimely with the notice of proposed discharge, (2) Ingram was still unable to return to full duty and she was requesting leave without pay (LWOP) and (3) Ingram was denied treatment and tests that were needed to improve her condition. After the meeting ended, Reeves conducted an investigation on the allegations made at the meeting.

By certified letter dated October 20 Reeves issued Ingram a "Notice of Employment Disqualification - Non-Disciplinary Discharge" notifying Ingram that she was being discharged for failure to return to work. The letter contained a recitation of the events

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leading to this decision and included his finding that the notice of proposed discharge had been timely issued and that Ingram's request for LWOP had been denied on October 9. The letter also stated the discharge was effective that day and that Ingram had five days from receipt of the letter to timely appeal the discharge to the Step 2 Hearing Official Tim Newby, Assistant Vice President of DART. Finally, the letter stated the discharge action would become final if Ingram did not comply with the time requirements for filing her appeal.

The Grievance Process

Ingram and her ATU representative (Garrett) timely filed an appeal (her grievance) on October 22. Due to the nature of the grievance (discharge), it was filed at Step 2. A Step 2 hearing was scheduled for November 30 at 11:30 a.m. in Newby's office. Notice was issued to Ingram by certified mail. However, Ingram did not appear at the scheduled hearing. (It was later determined that Ingram did not receive notice of the Step 2 hearing because she was out of town). Only Union representative Garrett and Newby were present at the meeting. After waiting about 20 minutes for Ingram to appear and she did not, they discussed Ingram's absence and neither knew why Ingram was not in attendance. However, when Newby was unable to establish that Ingram has been timely and properly served with notice of the hearing Newby agreed to reschedule the hearing to another date certain, December 8. Thus, the hearing was extended to Tuesday, December 8 at 9:00 a.m. in Newby's office. By certified mail letter dated December 2 Newby issued Ingram notice of the meeting. Using the United States Postal Service "Track and Confirm" tracking system, Newby received confirmation that the December 2 letter was delivered to Ingram on December 3.

On December 8 at 9:00 a.m. Newby and Garrett appeared as scheduled, but Ingram did not. Neither Newby nor Garrett knew why Ingram was not in attendance. Garrett later testified she was surprised that Ingram was not present for she had called to confirm that Ingram had received her notice of the hearing and Ingram had stated that she had. After about 20 minutes Newby terminated the meeting. Several hours later, Ingram called Garrett and told her that she was arriving for the hearing. Garrett told Ingram that the hearing was terminated several hours before. Ingram professed she must have read

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the wrong letter and became confused about the time for the hearing. Garrett later reported this to Newby, but he had already decided to treat Ingram's failure to appear at the meeting as a waiver by Ingram to further process her grievance.

By certified mail letter dated December 11 Newby notified Ingram that she had waived her right to proceed further with the grievance. The letter stated the Union and Employer had mutually agreed to schedule her Step 2 hearing on November 30 and subsequently on December 8. On both of those occasions she failed to appear and failed to notify his office that she would be unable to attend. Newby then cited Section 8.8.B.7 of the HEM that "...failure to appear at a hearing, unless due to reasons beyond the employee's control, will constitute waiver of the employee's right to proceed." Thus, Newby concluded there was no further action to take regarding Ingram's appeal of her non-disciplinary discharge.

Notwithstanding this decision by Newby, Ingram and the Union appealed Newby's decision to Step 3 on December 14. By mutual agreement between the Union and Employer, a Step 3 hearing was conducted on December 29. Present at that hearing was Ingram, Garrett, Frank Jennings, Vice President of Transportation and Sharon Hamilton from Jennings' office. By certified letter dated January 5, 2010 Jennings issued his Step 3 appeal decision, denying Ingram's appeal. The letter began with a recitation of those present at the hearing and the statements and arguments made by the Union and Ingram. (At that hearing Ingram admitted she failed to attend the scheduled Step 2 Appeal meeting because she looked at the wrong letter and didn't arrive until one and a half hours later, that the letter of proposed discharge was issued late and that she still did not have a full duty release, but would attempt to get one by Tuesday, January 5, 2010.) Jennings then recited the events that lead to her discharge (the August 25 letter from Blanton informing her of the denial of her extension and her expected return to full duty by September 2; Ingram's failure to return to work on September 2 or to provide a full duty work release on September 3; Reeves' letter directing her to provide a release by September 1; her failure to respond to the letter; being placed on paid administrative leave on September 17; the Sept 25 notice of proposed employment disqualification and the October 20 discharge.) The letter then stated Ingram's failure to appear at the Step 2

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hearing constituted a waiver of her right to proceed further with her grievance citing HEM Section 8.8.B.7. Jennings then stated that notwithstanding this assertion, based on the merits of her case, i.e., the circumstances of her case, arguments made at hearing and Ingram's written appeal, he found the discharge was justified and in compliance with the HEM. Thus, he too denied the grievance.

Ingram and the Union appealed the third step decision to the Trial Board and the matter is now before this TBHO for decision.

Discussion and Opinion

The TBHO finds that he is without jurisdiction to decide the merits of the grievance because the grievant waived her right to have her grievance heard due to her failure to timely attend the Step 2 hearing. The basis for this finding follows.

For DART employees represented by the ATU, the HEM sets forth the terms and condition of employment. It contains timeliness requirements or deadlines for all parties, Union, Employer and employee. For example, before disciplinary action can be taken, the employee's immediate supervisor must provide written notice to the employee within five days from the date the supervisor becomes aware of the incident meriting discipline; and that notice is required to have specific detail, e.g., the type of disciplinary action, the reason for the discipline, the specific incident causing the discipline, the employee's right to appeal, and the consequences for failing to timely appeal. (HEM Sec. 8.7.B.3.a-e). If management fails to comply with these requirements, the Union can have the discipline issued voided through a timely filed grievance. If management fails to make a written disposition of a grievance or appeal, that too can result in the matter being decided in favor of the grievant. (HEM 8.8.B.8) In order for an employee to timely appeal a grievance to Step 2 the grievance appeal must be submitted within five working days of receipt of the written disposition. (HEM 8.8.E.2) These examples illustrate every party in this employment relationship has requirements or deadlines they must meet or face the consequences.

In the present matter the critical sections to consider are HEM 8.8.B.7&8 that read

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as follows:

7. Failure to file a grievance or an appeal within the time limits prescribed in Subsection E of this section or *failure to appear at a hearing unless due to reasons beyond the employee's control, will constitute waiver of the employee's right to proceed.*

8. *In the event the Authority asserts waiver, it shall incorporate this contention into its written disposition of the grievance/appeal, and this contention shall not be waived by the Authority in processing the grievance or appeal to subsequent steps.* Final determination as to a waiver contention, if the party who is claimed to have waived his/her right to proceed chooses to contest this issue, shall be made at the final decision level in this procedure. (Emphasis added.)

These provisions are clear and unambiguous. The first provision cited above requires that a grievant appear at a scheduled hearing. Failure to do so will bar the employee from proceeding further with the merits of the grievance. However, there is a narrow exception to this abrupt ending to the grievance; if the grievant can present or demonstrate that the failure to attend the hearing was based on something beyond the grievant's control then the grievance can proceed further. The second provision cited above reveals that management must assert the grievant has waived his/her right to proceed by making this assertion in writing and incorporating this contention in its written disposition of the grievance or appeal. Once this is done, management cannot waive this assertion thereafter. What this means is that even though management may process an appeal to the next step or level, the waiver assertion is fixed and a part of management's position as it processes the grievance to the next steps/levels.

Applying the above interpretations of these provisions to the argument management made at the outset of this proceeding and facts as summarized above the TBHO finds he must consider the jurisdictional argument first for if Ingram waived her right to have the grievance further processed, no ruling on the merits can be made. Based on the record developed at hearing, the grievant provided no evidence that the reason she failed to attend the Step 2 hearing on December 8 at 9:00 a.m. had anything to do with anything beyond her control. Simply stated, Ingram was negligent when she applied the time for the first cancelled hearing (11:30 a.m.) for the time of the second scheduled

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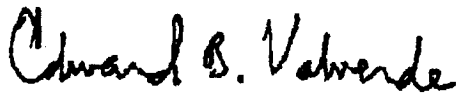
hearing (9:00 a.m.). Her negligence cannot be found to be a "reason beyond her control."⁵

Any Union contention that Jennings waived the waiver asserted by Newby by making his determination based on the merits of Ingram's grievance at Step 3 is nullified by HEM 8.8.B.8. Here, Newby made his waiver assertion in his December 11 letter and Jennings further noted that assertion in his January 5, 2010 letter. In accordance with HEM 8.8.B.8, once management asserts the waiver contention in its written disposition, that assertion cannot be waived. Accordingly, the Union's argument is rejected.

Award

Due to the findings made above, the grievance is denied.

Dated: December 23, 2010



Edward B. Valverde, Esq. – Arbitrator - TBHO

⁵ No evidence was presented establishing or suggesting that Ingram suffered from any mental incapacity.