

BEFORE THE DART TRIAL BOARD

**In the Matter of the Trial Board
Hearing of**

General Curley

Grievant

And

DALLAS AREA RAPID TRANSIT

Employer

RE: Grievance No: 3056-U-ATU

BEFORE:

Ruben R. Armendariz, Trial Board Hearing Officer

APPEARANCES:

For the Grievant:

Kenneth Day, President/Bus. Agent, ATU Local 1338
Evelana "Chris" Garrett, Vice President-ATU

For the Employer:

Peter R. Brannan, Senior Assistant General Counsel IV
Robert Reeves, Senior Manager-South Oak Cliff

Marti Durston, Trial Board Coordinator

Place of Hearing:

Dallas Area Rapid Transit
1401 Pacific Avenue
Dallas, Texas

Date of Hearing:

July 28, 2011¹

Date of Award:

October 27, 2011

¹ The transcript of the Trial Board Hearing was received on October 14, 2011.

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DISCUSSION, OPINION AND AWARD

This matter was heard on July 28, 2011, in Dallas, Texas. The parties to this proceeding agreed the grievance was procedurally and substantively arbitrable and properly before the Hearing Officer. They were afforded full opportunity to be heard, to examine and to cross-examine witnesses and to introduce evidence bearing on the issues. Based on the entire record, my observation of the witnesses, after examination of all the exhibits, arbitral citations provided and consideration of the arguments of the parties, this Hearing Officer makes the following findings and renders the following Discussion, Opinion and Award as follows:

ISSUE

Parties stipulated and framed the issue as follows:

Did DART have just cause to discharge General Curley, the grievant herein? If not, what should be the appropriate remedy?

STATEMENT OF THE CASE

This is a discharge grievance. General Curley, the grievant herein was hired by DART on April 23, 2005, as a bus operator and was later promoted to an operator/instructor. His immediate supervisor was Jose Carranza, Manager of South Oak Cliff Bus Operations and Robert Reeves, Senior Manager for South Oak Cliff Bus Operations.

In or around March 2009 grievant was arrested by the police of the City of Cedar Hill and was later charged with "Intoxication Assault with a Motor Vehicle." Grievant orally informed Carranza and Reeves of his arrest. Grievant was issued a SCRAM device that was attached to his leg to monitor intake of alcohol. Grievant informed Carranza and Reeves that he had to wear the SCRAM device on his person. On March 31, 2009, however, the SCRAM device malfunctioned and grievant was re-arrested at work by the DART police. According to grievant, he continued to verbally notify Carranza and Reeves

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and apprise them of the status of his pending case with the criminal courts and upcoming court dates.

On June 9, 2009, Grievant was issued a "Notice of Criminal Activity" by Reeves, that was signed by Carranza on behalf of Reeves. It stated the following:

"Employees of DART are expected to exhibit high standards of personal conduct both on and off the job, and to avoid conflicts of interest or even the appearance of conflicts of interest. Conduct that is illegal or would reflect negatively on DART may be the basis for discharge. DART periodically reviews Texas Department of Public Safety Criminal Records for employee criminal activity.

On the latest review, your name appeared indicating that you have the following criminal activity:

Intoxication related offense 05-01-09

By this letter, you are being given a directive to report in writing to your Manager/Sr. Manager any plea, indictment, conviction, and/or disposition as it relates to the above criminal matter, past, or future criminal activity.

In addition, you must also:

1. Inform your supervisor within 24 hours of any changes in your driver's license status;
2. Report a DWI/DUI arrest to your section manager within five working days of the date of the arrest;
3. Avoid open arrest warrants for any reason;
4. Report a DWI/DUI conviction to your section manager within 24 hours of said conviction;
5. Notify management, in writing, within 5 working days of any criminal drug statute conviction, plea of guilty, or nolo contendere to a criminal drug statute violation occurring inside or outside the workplace; and
6. Report within 5 working days any future criminal activity, including but not limited to, an arrest; indictment, conviction, probation, deferred adjudication, Divert Court, revocation or any other activity involving the criminal justice system.

Further, this letter hereby notifies you that misconduct is any conduct, during or off working hours that could have an adverse effect on DART or on the confidence of the public in DART. Misconduct includes criminal offense(s) and convictions.

Failure to timely report any criminal activity or follow the above directives will be considered insubordination and will subject you to disciplinary action, up to and including termination of employment for violation(s) of one or more of Hourly Employment Manual including but not limited to section(s) 8.3 H., K., O., 9.9, and/or 10.6 A-C."

On August 20, 2010, grievant had a conversation with Reeves and told him that he was going to court and would take a plea of deferred adjudication for "aggravated

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assault with a deadly weapon." Grievant told Reeves that it doesn't come with a conviction or a suspension of drivers license. On August 27, 2010, grievant went to court and plead to deferred adjudication for "aggravated assault with a deadly weapon." Grievant stated that he then met with Reeves the same day and told him that he had plead and that he should be getting paperwork from Human Resources stating that he took a plea for aggravated assault with a deadly weapon.

On October 6, 2010 Reeves contacted grievant and asked him for copies of his conditions for probation. Grievant retrieved a copy from his car and gave it to Reeves. Grievant left but was recalled back to Reeves office. Reeves told him that he was being placed on administrative leave. Reeves told grievant that the conditions require grievant to have an interlock device on all vehicles he drives. Grievant states that on October 7, 2010 he obtained a modification to the conditions that required the interlock device to be installed only on his private vehicles. Grievant gave Reeves a copy of the modification and Reeves said to wait at home until he heard from them.

On November 16, 2010, Reeves issued grievant, a "Notice of Discharge - Unacceptable Conduct," that stated:

"On October 6, 2010, you were placed on administrative leave with pay pending the outcome of this investigation. This is to inform you that I am discharging you from your employment with Dallas Area Rapid Transit (DART) for violating the following provisions of the Hourly Employment Manual (HEM) and the Bus Operator Rule Book:

HEM SECTION 8.1 Employee Conduct

- A. Employees of DART are expected to exhibit high standards of personal conduct both on and off the job and to avoid conflicts of interest or even the appearance on conflicts of interest. Conduct that is illegal or would reflect negatively on DART may be the basis for discharge.
- B. Where evidence supports a violation of this section, disciplinary action may be taken independently of and prior to any legal actions or convictions.

HEM SECTION 8.3 Employee Conduct (Revised 10/011/02)

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- E. Indifference towards work is exemplified, but not limited to, the following violations:
(5) Discourteous or irresponsible treatment of the public or other employees.
- H. Safety violations are exemplified, but not limited to, the following:
(7) Endangering of one's own-safety or that of others by careless or irresponsible actions or negligence.
- I. Dishonesty is exemplified by, but not limited to, the following violations:
(5) Failure to tell the truth, the whole truth, and nothing but the truth.
- K. Insubordination is exemplified by, but not limited, to the following violations:
(5) Failure or refusal to follow the orders or instructions of a supervisor or higher level management official in the employee's direct line of supervision.
- O. Misconduct is any conduct, during or off working hours, that could have an adverse effect on DART, or on the confidence of the public in DART ... misconduct includes criminal offense and convictions.

On June 9, 2009, you were issued a Notice of Criminal Activity letter for an Intoxication related case. The letter instructed you to report all future criminal activity, including an arrest, indictment, conviction, probation or other activity involving the criminal justice system.

On September 30, 2010, Robert Reeves, Senior Manager of South Oak Cliff Bus Operations received an email from Human Resources inquiring whether you reported an August 27, 2010, plea of guilty to the offense of Aggravated Assault with a deadly weapon. My investigation revealed the Intoxication related case was refilled as Aggravated Assault with a deadly weapon.

You plead guilty to the offense of Aggravated Assault with a deadly weapon on August 27, 2010. The Court made an affirmative finding of a deadly weapon and specifically identified the deadly weapon as a vehicle. This finding is significant because the essential and primary responsibilities of your employment as a bus operator is to professionally operate a vehicle and transport customers. Before September 30, 2010, Mr. Reeves spoke with you previously about your case and asked you to bring in paperwork outlining the terms of your case. You said you would provide the paperwork upon completion of your plea bargain.

Mr. Reeves, prompted by the September 30, 2010, email from Human Resources, called you in on October 6, 2010 and asked you why you hadn't presented to him the paperwork. You then left and returned shortly with paperwork stating the Conditions of Community Supervision. Mr. Reeves asked you why you hadn't given him the paperwork earlier. You stated that you had forgotten the terms of your Notice of Criminal Activity stating you must notify management in writing within 5 working days of any plea, deferred probation or other activity involving the criminal justice system.

In reviewing the conditions of your probation for the Aggravated Assault case,

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you also failed to report that you are required to have an ignition interlock device on any privately owned vehicle that you operate. DART believes the Court ordered device you are required to have on any private vehicle you operate is to ensure the safety of the public and yourself by preventing you from driving if you have consumed any alcohol. DART believes it is just as important, or even more, considering the nature of our business which is transporting the public in a commercial vehicle, that you not be allowed to continue to operate a bus under these circumstances.

While investigating this matter I also learned that in your initial case of Intoxication Assault a Court issued you various conditions of bond. From approximately August 11, 2009 through September 20, 2009 one of your bond conditions included: "Only operate a vehicle equipped with a Mechanism with a BAC of .030 for the duration of this bond, or until the Court allows you to have the Mechanism removed" The Court removed this interlock device-condition on September 20, 2009. However from August 11, 2009 through September 20, 2009 you operated a DART bus and transported customers for approximately 43 days in violation of your conditions of bond. You did not inform Mr. Reeves of this interlock device requirement and knowingly placed DART at risk of liability and more importantly jeopardized the safety of DART passengers and the public.

You were scheduled to meet with me on November 5, 2010 at 11:00 a.m. in my office to give you an opportunity to reply orally and/or in writing to the proposed discharge.

In attendance at the hearing were you, Bryan Blanks - ATU Local 1338 and I. At the reply hearing you and/or your representative presented the following information:

- As long as you would maintain a valid driver's license and keep us informed of your situation you would be ok.
- You stated that you gave me paperwork indicating you needed to have an interlock to drive a vehicle.
- You forgot to give me the paperwork in a timely manner; it was just a mistake on your part.
- The scam is the interlock device.
- You have been in rehabilitation and have passed 2 randoms.
- You didn't have to have the home device with you.

Upon review of the information provided these are my findings:

- A SCRAM device is not the same as an interlock. A SCRAM measures alcohol but will not prevent you from operating a vehicle if you have consumed alcohol.
- You were in violation of your bond by operating a bus. They do not have ignition interlocks installed on them.
- I, nor my manager at the time, Mr. Jose Carranza were shown any paperwork indicating you had to have an interlock on any vehicle you operate before you provided me with Conditions of Community Supervision on October 6, 2010.

After consideration of the information provided and the completion of my investigation it remains my decision to discharge you from employment with Dallas Area Rapid Transit effective at the close of business today, November 16,

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2010.

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On November 22, 2010, grievant filed a Step 2 appeal with Tim Newby, Assistant Vice-President Bus Operations. Newby issued a Step 2 denial response on December 16, 2010. On December 23, 2010, grievant appealed the grievance to Frank Jennings, Vice President-Transportation and Step 3 Hearing Officer. A hearing was conducted on January 2, 2011 with Jennings, Lisa Fields, the grievant, DeBoss Christian and Bryan Blanks, ATU Representative. On January 11, 2011, Jennings issued a Step 3 response and denied the grievance.

This matter was then submitted to this Trial Board Hearing Officer for decision.

POSITION OF DART

DART argues they had just cause to issue grievant a Notice of Discharge for Unacceptable Conduct. Grievant failed to follow the requirements of the "Notice of Criminal Activity" letter.

DART argues grievant placed the Company in a precarious position. If for some reason there was an open records request or somebody found out that an employee has a requirement by the court to have an interlock device installed on a vehicle when they drive a vehicle and they don't have one, the public will lose all confidence in DART. Grievant failed to provide information of his bond conditions to his manager so that DART can make the decision to either allow grievant to drive or to not drive. That option was never presented to DART. DART did not receive the conditions of the bond, the deferred adjudication, the conditions of supervision. Grievant entered into a plea agreement on August 27 and never provided management with a copy of the terms and conditions as required by the Notice of Criminal Activity letter. DART never knew the charges against him of "Intoxication Assault" had been dismissed. DART learned grievant is charged with "Aggravated Assault with a Deadly Weapon."

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DART argues that in January 2011 grievant obtained a letter from the judge that it was the intention of the court to require an ignition interlock device on only grievant's personal vehicle. This is not just something that a person carries around with him as grievant argued. The judge further said that as long as DART is aware of his legal situation, then it's DART's responsibility to ensure grievant is safe to operate a vehicle. DART was not aware of his legal situation because he violated the notice of criminal activity letter.

DART argues the indifference towards work safety violations, dishonesty, insubordination and misconduct is sufficient for a finding of just cause.

DART requests the grievance be denied.

POSITION OF GRIEVANT/UNION

Union argues DART did not have just cause to discharge the grievant. There should be no question regarding grievant's trustworthiness. The whole case hinges on whether or not grievant was somehow or another unsafe in operating a DART vehicle and whether he was dishonest. The burden of proof is not on the employee but rather on DART. There is no dispute grievant was arrested in March 2009. Grievant notified his manager and it is unrebutted in the record. DART didn't do anything in March when grievant told him of his arrest. DART did not issue a Notice of Criminal Activity nor did they place an importance on grievant on that very first day until June 9, 2009. If they had, there would have been a clear understanding of his obligations on the very first day when he left the managers office - of the importance to notify management in writing of any status changes.

Union argues grievant didn't hide anything from DART. DX-1, pg.22 and pg.3 are document's DART obtained, grievant did not provide it to them. DART has the ability to obtain these documents but yet they want to place the onus on the grievant to come in

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and report. Grievant worked over a year without any incident until Reeves received the e-mail on September 30, 2010. Reeves questioned grievant on October 6 and requested the paperwork on his deferred adjudication. Grievant went to his car and retrieved the documents for Reeves. But grievant had notified Reeves on August 27 of his plea and Reeves never requested the documents until October 6.

Union argues nothing has been received from the court that grievant violated some conditions of his bond but yet DART chose to state in the discharge notice that he violated certain conditions of his bond. Union argues that this raised a question and the Court was contacted. The judge issued a letter dated January 25th that it was never the intent of the court to require the ignition interlock device to be on installed on grievant's work vehicle. Jennings requested this letter to reinstate grievant but he retired.

Union requests the grievance be sustained. Grievant be reinstated and made whole for loss of wages and benefits.

DISCUSSION AND OPINION

In matters of discipline and discharge, DART has the burden of proof. DART argued in its' Notice of Discharge that grievant failed to provide the conditions of his bond upon arrest to his manager in March 2009 and the conditions of the plea agreement he agreed to on August 27, 2010.

Pre-Notice of Criminal Activity Letter (06/09/2010)

According to grievant, he testified that he orally notified Carranza and Reeves of his arrest and gave frequent status updates to them regarding his criminal matter. At no time, did Carranza or Reeves initially request the updates to be provided to them in writing.

Grievant testified on his initial visit with Reeves, he gave him a copy of his bond conditions and Reeves said, "I don't need that. Just keep me informed." (TR pg. 107)

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Reeves testified that he was never given any documents but it appears to the Hearing Officer that Reeves did not know at that time that he was supposed to receive copies of any updates on grievant's criminal matter or that grievant was supposed to update him in writing. Company argued in the Notice of Discharge that grievant was dishonest and insubordinate, yet the Hearing Officer credits the grievant's version of events and does not find any evidence to support the allegations prior to the issuance of the Notice of Criminal Activity Letter. It was incumbent upon management to accept the conditions of the bond from grievant when he initially offered it to Reeves. The Hearing Officer finds grievant did orally notify Carranza and Reeves of his status on his criminal matter. The Hearing Officer finds there was no intention by the grievant to be dishonest or insubordinate to his managers.

Post-Notice of Criminal Activity Letter (06/09/2010)

On June 9, 2009, Reeves issued grievant a "Notice of Criminal Activity" letter. In this letter, it clearly informs grievant of his duties and obligations requiring him to give management a written status update within five days of any actions. To notify management, in writing, within 5 working days of any criminal drug statute conviction, plea of guilty, or nolo contendere to a criminal drug statute violation occurring inside or outside the workplace; and Report within 5 working days any future criminal activity, including but not limited to, an arrest; indictment, conviction, probation, deferred adjudication, Divert Court, revocation or any other activity involving the criminal justice system.

Grievant worked as a bus driver for several months without incident. Grievant informed Reeves in late August 2010 that he was going to plead and receive "Deferred Adjudication for an "Aggravated Assault with a Deadly Weapon" felony-class 2 charge.

On August 27, 2010 grievant plead and received deferred adjudication on an

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"Aggravated Assault with a Deadly Weapon" charge, a felony class 2 and was placed on probation for five years. Grievant did inform Reeves that same day of his plea but did not inform Reeves as to its' terms to include probation. It was not until September 30, 2010 that Reeves received e-mail from HR notifying him that grievant's intoxicated case had been changed to an Aggravated Assault with a Deadly Weapon charge. Reeves questioned grievant on October 6, 2010 and requested the paperwork from the court. Grievant retrieved the documents from his car and gave them to Reeves. Reeves called him back to his office and placed him on Administrative Leave. According to Reeves this is the first time that he became aware of the conditions on the bond and the plea agreement grievant entered into with the court. The Hearing Officer finds grievant was negligent in not providing the plea agreement to Reeves within the required five days. But, the Hearing Officer also finds Reeves was negligent in not accepting the bond conditions from grievant in March 2009 when it was initially offered to him and negligent in not requesting the plea agreement from the grievant when he orally told him on August 27, 2010. Additionally, grievant obtained an "Order Modifying the Conditions of Community Service on October 7, 2010. This modified order relates to the interlock device that is required to be installed on grievant's personal vehicle.

Much confusion arose over the interlock device. Company argued in the Notice of Discharge that grievant violated his bond conditions by not installing the interlock device on company buses he drove. Grievant testified that he had the interlock device in his backpack and was intended for installation on his private vehicle only; not on a work vehicle. Grievant argued this within the grievance procedure and at Step 3 Jennings told him that if could produce a letter from the court, he would reinstate him. Grievant obtained a letter on January 25, 2011, from Judge Robert D. Burns III that provided a further clarification that stated, "It was not the intent of the court to require him to have

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an ignition interlock device on his work vehicle. It was the intention of the court to require an ignition interlock device on his personal vehicle...." However, Jennings retired from DART. Based on this letter, the Hearing Officer finds that it was not the intent of the court for grievant to place an interlock device on any DART bus that he was driving. Thus, grievant did not violate his conditions of the bond as alleged in the Notice of Discharge. The Hearing officer further finds grievant was not dishonest, or intentionally insubordinate. All of the witnesses testified grievant was a good employee.


It is therefore, the Opinion of the Hearing Officer DART may have had cause to discipline grievant but did not have just cause to discharge him. The lack of just cause does not totally absolve grievant of his responsibility for his failure to fully report the status of his criminal charges. Other factors militate against an award of back pay or other monetary relief. Grievant was negligent in not providing the plea agreement in writing within five days, but he did orally report it to Reeves within the five days. Reeves failed to immediately request the paperwork from him. Thus, the record evidence reveals Reeves was also negligent as was grievant. Under these circumstances, it is the Opinion of the Hearing Officer that the Notice of Discharge be rescinded and reduced to a time served suspension. Grievant shall be immediately reinstated to his former position without back pay.

THE AWARD²

For the reasons stated above, the grievant's appeal is sustained in part and denied in part. The Notice of Discharge is rescinded and reduced to a time served suspension. Grievant shall be immediately reinstated to his former position without back pay.

Issued at San Antonio, Texas, the 27th day of October 2011.

For the Trial Board:


Ruben R. Armendariz, Trial Board Hearing Officer

² Section 8.9.J of the HEM.