

**BEFORE THE DART TRIAL BOARD**

In the Matter of the Arbitration	*	
between	*	
	*	
<b>HASTON VON ELDER</b>	*	
Grievant	*	Grievance No. 3036-U-ATU
and	*	
	*	
<b>DALLAS AREA RAPID TRANSIT</b>	*	
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

**For Grievant:** Kenneth Day, President and Business Agent for ATU, Local 1338; Evelana "Chris" Garrett, Executive Vice President; Haston Van Elder, grievant

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

**Date of Hearing:** March 24, 2011

**Date Hearing closed:** April 15, 2011<sup>1</sup>

**Date of Award:** May 5, 2011

**Type of Grievance:** Disciplinary Discharge-Unacceptable Conduct

**AWARD SUMMARY**

Grievance denied - grievant failed to report a DWI arrest as required by DART regulations. Evidence established that grievant arrested for DWI on August 16, 2009. Fact that grievant believed he had been arrested for disorderly conduct is no defense to DART driver requirement to report such arrests within five days.

*Edward B. Valverde*

Edward B. Valverde, Esq. - Arbitrator - TBHO

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<sup>1</sup> The record was closed upon receipt of the transcript on April 15, 2011.

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### DISCUSSION, OPINION and AWARD

This matter was heard on March 24, 2011 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, and consideration of the arguments presented by the parties, the TBHO issues the following Discussion, Opinion and Award.

#### ISSUES

Did DART have just cause to discharge grievant? If not, what is the appropriate remedy?

#### BACKGROUND SUMMARY

Haston Van Elder (Van Elder or grievant hereinafter) was an employee of DART for over 17 years working as a bus operator. On August 16, 2009 Elder was arrested at his residence for what he recalled was a domestic dispute with his son. At the time of the arrest Elder admits he was sitting in his vehicle in the driveway.

On an annual basis the Human Resource Department makes a criminal check of safety-sensitive employees on the anniversary month of the employee. Grievant, a bus operator, held a safety-sensitive position so a criminal check was performed in about April 2010. That check revealed an arrest for DWI.

The Hourly Employment Manual (HEM) Section 8.3 identifies conduct that is unacceptable that can subject an employee to disciplinary action. Section 8.3 H identifies as a safety violation an employee's failure to report a DWI/DUI arrest or ticket to the section manager within five working days of the date of the arrest. (HEM 8.3 H.1.d) Said unacceptable conduct will subject the employee to discharge. To further emphasize the need for employees to report such arrests, HEM Section 9.9.4. restates the requirement that employees report a DWI/DUI arrest or ticket to the section senior manager or designee within five working days of the date of the arrest or ticket; and that

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failure to do so within that timeframe is grounds for discharge. The 2010<sup>2</sup> annual check was the first time that management became aware of Van Elder's DWI arrest. On May 26 pursuant to DART policy, grievant was placed on administrative leave with pay during the pendency of an investigation into the matter.

In response to the investigation grievant submitted two statements to management. The first, an unsigned statement dated May 28 states in relevant part "I have never had nor have I been ever convicted of a DWI. My Drivers License are [sic] clear with no conviction of a DWI or tickets." (ATU Exh. 1) Then, on June 3 Van Elder provided a signed statement stating, "I have no knowledge of being arrested for a DWI at any time, ever." (ATU Exh. 2)

By letter dated June 10, Leonard Hatcher, Manager, East Dallas Bus Operations notified Van Elder that he was proposing the discharge of grievant for violation the HEM (Sec. 8.3 and Sec. 9.9) and DART's Bus Operator Rule Book (BORB). BORB III.12.40 restates the requirement that an operator arrested or issued a ticket for DWI/DUI shall report the event to the section senior manager or designee within five working days of the event. The letter further stated that after review of several criminal documents it was Hatcher's decision to propose discharge of grievant. Van Elder was then advised of his right to respond to the charge by meeting with Robert Reeves, Sr. Manager. (Joint 2, p. 9-10)

On Thursday, June 17 Van Elder, with Union representative Kenneth Day, met with Reeves. At that meeting grievant told Reeves that: (1) he was not aware that he had been charged with DWI, (2) he was never booked in jail, (3) he never posted bond and (4) this must be some kind of mix-up.

#### Notice of Discharge

By certified mail letter dated June 25 Reeves notified Van Elder he was discharged for unacceptable conduct. The unacceptable conduct identified in the letter included grievant's failure to report his DWI arrest within five working days of the arrest to management and for dishonesty, i.e., failure to tell the truth about the arrest. Reeves

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<sup>2</sup> All dates herein after refer to 2010 unless otherwise noted.

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stated that investigation of the matter (that included acquiring a copy of the arraignment sheet from Dallas County) revealed that grievant was arrested for DWI on August 16, 2009 and that bond was posted the following day. Grievant had been provided an opportunity to provide documents refuting these events but none were provided. As a result, Reeves' decision was to discharge grievant effective June 25.

### The Grievance Process

Van Elder and ATU representative Day timely filed an appeal (grievance) on June 28. Due to the nature of the grievance (discharge), it was filed at Step 2. A Step 2 hearing was conducted on July 13 by Tim Newby, Assistant Vice-President, Bus Operations. At that hearing grievant stated that he had been arrested in August 2009 when police were called to his residence due to an altercation between he and his son. That at the time of the arrest, he was sitting behind the wheel of his vehicle in front of the house and did not know he was being arrested for DWI. Grievant further stated that after the arrest, he was asked to submit to a blood and alcohol test, but the reading was inconclusive; that he had not been convicted of DWI<sup>3</sup> and still had a valid commercial driver's license.

By certified mail letter dated July 20 Newby notified grievant he was discharged citing the following findings:

Section 8.0 H.I.D. of the Hourly Employment Manual (HEM) states "Failure to follow DART or departmental safety rules procedures, and regulations. An employee who is required to maintain a valid Texas driver's license as a condition of employment will be subject to discharge for violation of this section H.1 if he/she; fails to report a DWI/SUI arrest or ticket to the section manager within five working days of the date of the arrest."

On May 23, 2010, Human Resources notified Cynthia Brooks, former Sr. Manager Bus Operations, that a yearly criminal review revealed that you had been arrested in August 2009 for a DWI.

The Arraignment Sheet associated with your arrest indicated that you had gone before the Magistrate on August 17, 2009 for Driving While Intoxicated and that your bond had been set at \$500.00. There was also paperwork from the Dallas County Sheriff's Department indicating that you were arrested and booked into jail on August 16, 2009

<sup>3</sup> At the time of hearing Van Elder's DWI hearing had already been held and the charge was dismissed on procedural grounds. However, the District Attorney's office intended to refile the charge.

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and released on August 17, 2009.

Newby then denied the grievance and advised Van Elder of his right to appeal the decision to Step 3 Hearing Official Mr. Frank Jennings, Vice President, Transportation.

Van Elder and the Union appealed Newby's decision to Step 3. A Step 3 hearing was conducted on July 30. By certified letter dated August 5 Jennings issued his Step 3 appeal decision, denying grievant's appeal. The letter began with a recitation of those present at the hearing and the statements and arguments made by the Union and Van Elder. Included in those arguments were the following additional facts: (a) Grievant admitted he failed to report an arrest, (b) the arrest was for disorderly conduct; that a court date for the disorderly conduct was scheduled for August 12, (c) that grievant's church had bonded him out of jail, (d) that grievant did not have to sign for anything to be released and (e) that his driver's license was still valid.

Jennings then recited that grievant had appeared before a magistrate while under arrest on August 17, 2009 for the offense of DWI and said magistrate informed him in clear language of the accusation against him and any affidavit filed in support of the charge. Jennings then stated that after consideration of all the circumstances, arguments made at hearing and grievant's written appeal, he found the discharge was justified and denied the grievance.

Van Elder 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 management had just cause to discharge grievant. The basis for this finding follows.

For DART employees represented by the ATU, the HEM sets forth the terms and condition of employment. Here, as cited above, there are several provisions in the HEM that require a safety-sensitive employee, e.g., a bus operator, to provide notice to management of any arrest or the issuance of any ticket for DWI/DUI. Throughout the

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grievance process and continuing through the hearing of this matter grievant denied that he had ever been arrested for DWI. Due to this adamant denial, management sought to acquire verification of what HR had reported – that grievant had been arrested for DWI. As part of that process, management acquired a document from the Dallas County Sheriff's Department that identified grievant as having been booked into jail on August 16, 2009 and released from jail on August 17, 2009, a copy of the statutory warning (for obtaining breath or blood specimen) completed by the arresting officer and a copy of the arraignment sheet signed by the magistrate.

The statutory warning document is a document completed by the arresting officer that, in relevant part advises the arrestee that he is under arrest for an offense "arising out of acts alleged to have been committed while you were operating a motor vehicle...while intoxicated," that he is requested to provide a specimen of his breath and/or blood that will be analyzed to determine the alcohol concentration or the presence of a controlled substance in his body, and that if he refuses to provide the specimen his license would be suspended for a minimum of 180 days. Although the arrestee is not required to sign the statutory warning the officer must certify that he informed the arrestee both *orally* and *in writing* of the consequences of refusing to submit to the taking of a specimen or providing a specimen, and the officer is required to sign the form. The document presented by management contains the officer's signature. (DART Exh. 2)

Likewise, the arraignment sheet is a legal document completed by the magistrate that identifies the arrestee, identifies the date and time of the arraignment, contains what is commonly known as the "Miranda Warning", informs the arrestee of his right not to make a statement, of the opportunity to consult with counsel, of his right to bail, of the offense that he is charged with having committed, who is charging him with that offense and the amount of bond. The magistrate is required to certify that he/she has done all of the above and is required to sign and date the document. Review of the arraignment sheet reveals that the Dallas Police charged Van Elder with DWI, that a bond of \$500.00 was set by the magistrate, contains the date issued as August 17, 2009 and reflects the signature of the magistrate. Thus, there are two legal documents signed by a law enforcement officer and a judicial official, respectively, that state Van Elder was

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informed that he was arrested for the offense of DWI. On cross-examination grievant admitted that he was provided with a copy of the statutory warning and that he was arraigned by a magistrate, but stated he could not recall whether the magistrate informed him that he was being charged with DWI. (Tr. 45-48) Thus, the legal documents were not rebutted by grievant. Accordingly, the TBHO finds that grievant was informed that he was arrested on August 16, 2009 for the offense of DWI. Additionally, it is determined that the HEM provisions and the BORB are clear and unambiguous - failure to notify management within five days of an arrest for DWI can result in discharge of said employee. The grievant's situation is further aggravated by the fact that he denied having been arrested for DWI, denied that he was booked into jail, and denied that a bond was required for his release from jail. All of these denials have been proven false. Accordingly, DART has established that just cause exists to support its decision to discharge grievant.

Union contention that management failed to establish that grievant was unsafe is rejected. Here, the HEM and BORB require that employees who are arrested for DWI must report those arrests within five working days - and failure to do so can result in discharge. There is simply no requirement that management prove the arrest for DWI made the employee unsafe. Union argument that grievant's violation of the rule does not require automatic discharge is also rejected. Here, grievant not only failed to report the DWI arrest, he continuously denied that he had been arrested for DWI. In the face of these unsustainable denials, management was justified in considering these denials in deciding what the appropriate discipline should be. Under these facts, the TBHO finds that management exercised its discretion appropriately. Finally, Union's argument that grievant told management what he believed to be the truth (that he had not been arrested for DWI) is not sustainable when considering the objective, documentary evidence establishing that grievant was informed as to the reason for his arrest. Accordingly, the Union's arguments are rejected.<sup>4</sup>

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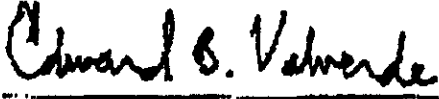
<sup>4</sup> No evidence was presented that grievant was treated disparately.

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**Award**

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

Dated: May 5, 2011.



Edward B. Valverde, Esq. - Arbitrator - TBHO