

BEFORE THE DART TRIAL BOARD

IN THE MATTER OF:

MATTHEW MEZA,	§	
Grievant	§	
	§	
And	§	DART CASE NO. 2906-U-ATU
DALLAS AREA RAPID	§	
TRANSIT,	§	
Employer.	§	

**DECISION AND AWARD OF
THE TRIAL BOARD HEARING OFFICER**

1. PRELIMINARY:

This grievance came to be heard before the Trial Board Hearing Officer, Ruben D. Campos, on June 3, 2010 at DART headquarters in Dallas, Texas. Both parties appeared and presented testimonial and documentary evidence. Mr. Matthew Meza (“Grievant”) was represented by Mr. Kenneth Day, President and Business Agent for the Amalgamated Transit Union, Local 1338. DART was represented by Ms. Tammy Barrow, *Esq.*, counsel for DART.

2. THE ISSUES:

It was stipulated that the issues before the Hearing Officer are whether DART had “just cause” to discharge Grievant and, if not, what is the appropriate remedy? (R. 7).

3. DART POLICIES AT ISSUE:

- HEM § 7.14;
- MD-15

4. POSITIONS OF THE PARTIES:

A. DART: In summary fashion, DART contends as follows:

Grievant was discharged for violating DART’s MD-15, the maintenance department’s absence control policy. Under this policy, employees are given 80 hours of unscheduled absences during a rolling (retrospective) twelve month period. They are not required to produce documentation or give notification of these absences. This is in addition to any

entitlements such as FMLA leave or worker's comp leave. (R.8). After they exhaust the 80 hours, they are subject to progressive discipline, leading up to discharge. Grievant had an absence on December 11 and 14, and he failed to produce any medical documentation on his return to work. If he had done so, his absence would have been excused. DART submits that the discharge was for just cause and that it should be sustained.

B. UNION ON BEHALF OF GRIEVANT: In summary fashion, the Union contends as follows:

Grievant had been approved for FMLA leave. Under the procedures, he had received a prior certification for intermittent FMLA leave for the period from June 15, 2008 through June 15, 2009. (R.10). Grievant submits that because he called in sick on December 11 through December 14, 2008, his absence was covered under the FMLA approved leave. (R. 10). Grievant also challenges DART's practice of coding as unexcused, absences in excess of the allowed paid leave even when a doctor's slip is presented. Grievant submits this conflicts with MD-15. (R.11). Grievant requests that he be reinstated and made whole. (R. 11).

5. SUMMARY OF EVIDENCE¹:

A. DART's Policies.

Grievant began working for DART in 2004 and, at the time of his discharge, he was employed as a bus mechanic. (R. 89). Mr. William Brown is the Senior Manager for the East Dallas Division. Grievant was under his chain of command. (R. 13). As he explained the application of MD-15, after an employee has exhausted the 80 hours allowed, the employee receives a documentation of counseling the first and second times the employee is absent, a reprimand on the third absence, and a discharge on the fourth.

Although DART has a leave without pay policy under which a manager can approve leave without pay for five days (R. 72; HEM §7.14), Mr. Brown has never approved leave without pay. (R. 71, 74). He explained that he has not approved such leave even though employees have requested it because they sought more than five days' leave—a length needing HR approval. (R. 73). Mr. Brown was not familiar with the managers' practice in the transportation department of

¹ References to the record are intended to be representative samples of the testimony, exhibits, and/or other evidence pertaining to an issue, allegation, or other matter. Therefore, the portions of the record that are referenced or cited are not necessarily the only evidence supporting a finding of fact, conclusion, or other determination by the Hearing Examiner. Also, where there was conflicting testimony on the same issue, the Hearing Officer's resolutions of credibility support his findings, conclusions, or other determinations. Additionally, all of the evidence presented was considered even though not specifically reference in this decision.

automatically approving five days' leave without pay. (R. 75; HEM § 7.14). Mr. Brown testified that in his department, employees are not "offered" leave without pay; they must request it. (R. 77-8).

Under DART's policies, employees are deemed to be AWOL if they do not call in on a timely basis or if they fail to present a doctor's note after an absence. (R. 57). With respect to calling in, DART's policies require an employee who is going to be absent to notify DART in advance by calling the call-in center thirty minutes prior to the start of the work shift. (R. 57, 58; HEM, MD-15 EB, F). A late call prior to the start of the shift results in a counseling. However, if the employee calls in at any time after the start of the shift, s/he is issued an AWOL. (R. 57-8).

Grievant did not dispute knowledge of the policies at issue herein. He confirmed that as a mechanic, he was required to call in thirty minutes prior to his shift. (R. 91). Grievant also acknowledged that if he did not call in and report that he was going to be absent, the absence resulted in an AWOL. (R. 110). He further acknowledged that upon his return to work, he was required to fill out an absence report. (R. 91).

However, Mr. Brown testified that if the employee calls in sick and upon returning to work, provides a doctor's slip, the absence is not excused if the employee has exhausted all paid sick leave or vacation. (R. 33). He acknowledged that this practice is not contained in MD-15. (R. 33). In accordance with the practice he described, Mr. Brown charges employees with an AWOL even if they bring in documentation when they do not have any paid leave left. (R. 67). However, his review of DART Ex. 1, p. 1 evidenced that he had not charged Grievant with an AWOL simply because he did not have any paid leave left. (R. 67). Additionally, if an employee has been charged with an AWOL after reporting sick and the employee is later approved for FMLA within a fifteen day period, the AWOL designation can be changed. (R. 68). He also testified that on one occasion, he had taken an AWOL off of Grievant's record when his investigation revealed that DART had erroneously concluded that Grievant had failed to call in within thirty minutes. (R. 68).

B. Grievant's Previous Discipline.

The facts demonstrate that as a result of various absences, Grievant had worked his way up the various levels of discipline set forth in MD-15 prior to the December 11 and 14 absences that

precipitated his discharge. The Hearing Officer notes, parenthetically, that the facts could suggest an unduly strict application of DART's policies in some of these particular instances. (See, the examples cited in 29 CFR § 825.303 reflecting necessary flexibility when unforeseen circumstances prevent timely notice, which examples have been incorporated into DART's new FMLA policy in § 7.22 F 2 and 3). However, Grievant did not challenge the resulting categorizations or discipline at the time they were issued, and the Hearing Officer does not revisit the propriety of the discipline issued with respect to the pre-December, 2008 absences.

Grievant was absent on January 22, 2008 (and written up on January 28, 2008) because of a late call and absence due to his wife being in the hospital. (R. 44-5, 54). Grievant testified that he had transported his wife to the hospital. (R. 99-100). He called in at 11:14 p.m.—fourteen minutes after the start of his 11 p.m. shift. (R. 45, 100). He supplied medical documentation, but his absence was only partially excused—for seven hours and forty-five minutes. (R. 45; 55-6; 100; 101-2; Union Ex. 1—p. 4; DART Ex. 1—p. 13). Mr. Brown issued a documentation of counseling based on Grievant's calling in fifteen minutes late. (R. 46). According to Mr. Brown, Grievant was in compliance after he called in, but not before. (R. 56). Grievant does not dispute calling in late. (R. 100).

Grievant also received a documentation of counseling dated May 20, 2008 for a .25 hour "absence" on May 14, 2008 which was characterized as AWOL. (R. 49; 102; DART Ex. 1—p. 9). He actually called in three minutes after the start of the shift but he was charged with fifteen minutes. (R. 53). The rest of that day was treated as sick leave, *i.e.*, 7.75 hours. (R. 50). He provided an absence report. (R. 50). Mr. Brown testified that although Grievant called in sick, he did not request FMLA. (R. 51). At the time of this absence in May, Grievant had not yet been approved for FMLA; approval occurred in June. (R. 59-60). Grievant does not recall the reason for his absence or whether he turned in medical documentation for that absence. (R. 103). According to Mr. Brown, the FMLA would not have come into play because Grievant called in late fifteen minutes. (R. 51).

On the January 22 and May 14 occasions, Mr. Brown relied on MD-15 E b to treat the absences as partially excused and partially AWOL. (R. 46, 51). According to Mr. Brown, pursuant to a twenty-nine year practice, he could charge Grievant for fifteen minutes even though he had called in only three minutes late because he did not call in at least thirty minutes

prior to the start of his shift. (R. 52). On the other hand, Ms. Evelena Garrett (a Union officer and longtime employee) is not aware of any policy that states that if an employee calls in late and reports FMLA, s/he will be coded for a partial late call. (R. 125).

A. Grievant's FMLA Certification

After the May incident, Grievant was certified for intermittent FMLA leave. Ms. Mercy Flores, the leave of absence specialist who coordinates DART's FMLA program, testified that Grievant was approved for intermittent FMLA leave for the period from June 15, 2008 through June 15, 2009. (R. 80, 81; 90). He had been approved for one to two days per month and one to two days per month for episodes of incapacity. (R. 81). However, Grievant was exceeding the approved number by six days—taking eight days in a month. (R. 81-2). Consequently, Grievant was requested to provide paperwork for recertification of his FMLA leave because he had been utilizing more days than what was approved. (R. 81).

Ms. Flores described how Mr. James Duff advised Grievant by letter that he was required to submit the certification documentation by December 3, 2008 and that if he did not do so, the certification would end. (R. 83; DART Ex. 2, p. 3). The letter actually stated that the “leave **may** not be approved beyond December 3, 2008” if he failed to provide the documentation. (emphasis added)(*Id.*). Grievant did not recall whether he received Mr. Duff's letter. (R. 103). However, the letter was sent by certified mail, and the record shows that Grievant received it on November 27, 2008. (R. 84, 87). Grievant testified that the signature on the return receipt card appeared to be his. (R. 103). Grievant admits that he never submitted the recertification documents that were requested by DART's letter. (R. 106).

Grievant testified that he did not recall receiving DART's letter advising him that his FMLA coverage had ended. (R. 104-5). Grievant did not recall having made the statement contained in Mr. Hubbell's grievance response to the effect that he *had* received the letter, but that it had arrived after the December 11 and 14 absences. (R. 105-6; Jt. Ex. 1). However, he does not dispute the attribution of the statement to him. (R. 106).

B. The October 28th Incident.

Mr. Brown described the October 28, 2008 incident for which Grievant was disciplined. According to Mr. Brown, Grievant had been working the 11 p.m. to 7:30 a.m. shift. (R. 61). Grievant had been given an unexcused absence when he reported for a four hour training (from 8 a.m. to 12 p.m.), but did not report for work at 12:30 p.m. after the training ended. (R. 40-1; 61-4; DART Ex. 1—p. 4). Grievant did not show up at work from October 28 until November 3. (R. 42). He filled out the request form on November 3. (R. 42, 95). Grievant filled out an absence report on November 3, 2008. (R. 95). He entered information on it indicating he had been sick due to stress and requested that it be covered by FMLA. (R. 96, 97, 98, 114; DART Ex. 1—p. 4). His previous FMLA certification had been for stress, as well. (R. 98-9). Since Grievant's absence was a no-call/no-show, it was categorized as an AWOL. (R. 42, 63, 65-6; DART Ex. 1—p. 4). According to Mr. Brown, the absence charged was for October 28, 2008 since he was supposed to work an eight hour shift rather than just the four hours corresponding to the training. (R. 42-3). Mr. Brown does not dispute that Grievant was ill; he relied on the fact that Grievant did not call in. (R. 66, 79). This absence occurred prior to the December 3 cancellation of Grievant's FMLA. (R. 44).

According to Grievant, on the 27th of October, he worked his full shift—from 11 p.m. (Oct. 27) to 7:30 a.m. (Oct. 28) and then reported for his training class at 8 a.m. (R. 92, 94, 117-8). Since the class ended at noon, he had been on duty for about twelve hours when he finished the class—without adjusting the work shift for his lunch break. Grievant testified that the training took the place of his regular shift which would have started at 11 p.m. on October 28, and his next regular tour of duty would have been at 11 p.m. on October 29. (R. 118-19). After the training session ended, he went home. (R. 94). He testified that he had not been instructed to do anything else. (R. 94). According to Grievant, the instructor, Mr. Reggie Pugh, never told him to report to work. (R. 111, 115). He had previously attended training for four hour sessions on several occasions. (R. 94). Grievant further testified that no one had been disciplined for not reporting to work following a four hour training session. (R. 94). When he went home that day, he did not believe he was required to report for work. (R. 97). He did not call in to report that he was not returning to work after his shift. (R. 110).

Significantly, Grievant did not recall whether he failed to report for work because he believed that he was released for the day or whether it was because he was ill. (R. 112). He could

not testify as to whether he had told Mr. Hubbell that he was not ill that day or if he had followed the previous practice by leaving, as indicated in Jt. Exhibit 2, p. 4. (R. 112-3).

Rex Pugh, the maintenance training specialist who conducted the class, disputed Grievant's account. Mr. Pugh testified that after the four hour class, he instructed the employees to talk to their supervisors about making up the other four hours of their normal eight hour shift. (R. 128, 129). He was absolutely sure he had done this. (R. 129, 130-1). He did not know if the other employees went back to their departments. (R. 128, 129).

Grievant did not challenge the November 4, 2008 reprimand that was issued for the October 28, 2008 absence. (R. 71; 109). He admits that the reprimand was mailed to his address of record. (R. 113; DART Ex. 1, p. 2). At the reply meeting held after the issuance of the Notice of Proposed Discharge, Grievant stated that he had not received a reprimand. (R. 16-7). However, when Mr. Brown investigated the issue, he discovered that the postal service attempted to deliver the certified mail containing the reprimand on three occasions and that Grievant had not claimed it. (DART Ex. 1—p. 2; R. 17-8, 21). Mr. Brown had sent the reprimand to Grievant's address of record, one which Grievant had confirmed was correct. (R. 28).

B. The December 11 and 14 Absences.

Mr. Brown issued a December 22, 2008 Notice of Proposed Discharge to Grievant after Grievant called in sick on December 11 and 14, 2008. (R. 14; p. 9—Jt. 2). It is undisputed that Grievant did not provide any medical information to excuse the absences. (R. 27). According to Mr. Brown, Grievant's failure to provide the medical information upon his return to work violated the attendance policy. (R. 14, 39). Under MD-15, an employee must complete an employee request for excused absence form and supply the medical verification. (R. 32). If the employee complies, the absence is excused. (*Id.*).

According to Mr. Brown, the December 11 and 14 absences were not covered by FMLA leave. (R. 18). He had received a letter from risk management indicating Grievant was not approved for that period due to a necessary recertification. (R. 18; DART 2). As described by Mr. Brown, the letter had been sent to Grievant advising Grievant that if he did not supply the required documentation, he would not be certified for FMLA leave past December 3, 2008. (R. 22). Also, Mr. James Duff had advised Mr. Brown that Grievant had not complied with the

request that he provide the information by December 3. (R. 22). Mr. Brown checked with risk management and was told that Grievant had not been recertified. (R. 27). Consequently, December 11 and 14 were not considered as FMLA leave. (R. 27). Mr. Brown also ascertained that Grievant had exhausted the 80 hours and that he was already at the fourth step of discipline. (R. 15). Grievant had previously been sent a reprimand by certified mail and had received documentation of counseling for other absences. (R. 30-1; DART Ex. 1—pp. 1 and 9). Based on his review of the circumstances, Mr. Brown proceeded to discharge Grievant for violating MD-15. (R. 28).

Mr. Brown testified that at the reply meeting, Grievant did not assert that the absences on December 11 and 14 should have been covered by FMLA. (R. 71). According to Mr. Brown, Grievant did not ask for FMLA leave when he called in on December 11 and 14. (R. 35, 71). However, Mr. Brown also testified that he believes Grievant filled out a doctor's request form. (R. 35, 36). Moreover, Mr. Brown further testified he did not know if Grievant requested FMLA. (R. 38). Grievant's form indicated he had been sick due to stress. (R. 37).

In contrast, Grievant testified he did advise Mr. Brown that the absences for which he was going to be discharged should have been covered by FMLA. (R. 106). However, he does not recall if he made any effort to ascertain why the absences were not covered by FMLA. (R. 107). Grievant was aware that absences charged against him could be rescinded if later shown to be covered by FMLA. (R. 109).

Evelena Chris Garrett, the Executive Vice-President of the Union, has been employed by DART for 16 ½ years. (R. 120). She testified that employees in maintenance have been excused for FMLA after calling in late (within the 30 minute limit). (R. 123). She elaborated that in 2009, Derek Slate, a maintenance employee in South Oak Cliff, had called in thirty minutes after his start time. After the filing of a grievance, the AWOL was removed. (R. 121, 124). In 2009, Mr. Michael Williams did not call in at all; he was on FMLA and the AWOL was later removed. (R. 121, 124). Michael Banks also failed to call in while utilizing FMLA and received a documentation of counseling for an AWOL. After a grievance was presented to Mr. Brown and his review of the matter, Mr. Brown removed the AWOL. (R. 121). This occurred in December, 2009. (R. 121-2). Mr. Brown removed the AWOL when he found out the others referenced had been excused. (R. 122). Ms. Garrett admits that the situations involving Williams, Slate, and

Banks were resolved as settlements of grievances. (R. 124). Ms. Barrows could not recall if the settlements were non-precedent setting. (R. 125).

6. ANALYSIS AND CONCLUSIONS:

The facts herein lead the Hearing Officer to conclude that DART did not have just cause to discharge Grievant. In reaching this determination, the Hearing Officer notes that just cause is negated by the combined weight of several elements.

On December 11 and 14, 2008, Grievant called in sick. DART does not dispute that he was ill. Also, there is no contention that he called in late. Although Mr. Brown contends that Grievant did not request FMLA for those absences, his testimony in this regard was somewhat self-contradictory, tending to evidence the possibility that Grievant did request FMLA coverage. Accordingly, the Hearing Officer credits Grievant's testimony that he did request FMLA coverage for these absences. Grievant admits that he did not produce any medical verification to validate his need for FMLA as required by DART policy. However, as noted below, it appears that he was not given sufficient time to correct this deficiency.

Solely as a guiding principle, the Hearing Officer notes, parenthetically, that the Department of Labor's regulations interpreting the FMLA provide various time frame's for complying with an employer's request for documentation of the need to take FMLA leave. Thus, an employee is generally given fifteen calendar days after an employer's request to provide documentation for certification of FMLA leave. 29 CFR § 825.305(a). Even then, this period is subject to extension when it is "not practicable" and the employee has made diligent, good faith efforts to comply. *Id.* In this case, the Hearing Officer relies on Mr. Brown's testimony that under DART's practice, an employee may have an AWOL removed if s/he later provides FMLA verification within fifteen days of the occurrence and the FMLA is approved. (R. 68).

In this respect, the Hearing Officer also credits Ms. Evelena Garrett's testimony regarding DART's removal of AWOLs from employee records when it is later shown that the absence was due to an event covered by FMLA. The Hearing Officer notes that Ms. Garrett's testimony concerned settlements of grievances. The Hearing Officer would normally be extremely reluctant to give weight to such settlements because to do so would discourage on-the-job resolutions of grievances since the parties would be concerned that the settlement would be characterized as some type of an admission in a later arbitration case. However, in this context,

the factual context is undisputed. Mr. Brown testified that he had removed AWOLs from employees' records when they later presented verification of FMLA status. (R. 68). Grievant himself admitted that he was aware that DART would remove the AWOLs upon confirming FMLA eligibility and that he, too, had previously benefited from DART's practice in this regard. (R. 109). Therefore, Ms. Garrett's testimony regarding the settlements of other grievances is merely a reaffirmation of what was already undisputed.

As noted above, Mr. Brown testified that if an employee has been charged with an AWOL after reporting sick and the employee is later approved for FMLA *within a fifteen day* period, the AWOL designation can be changed. (R. 68). Grievant was charged with an AWOL for his December 11 and 14 absences for illness. He failed to provide the appropriate verification on his return to work. Less than fifteen days later (on December 22, 2008), Mr. Brown issued the Notice of Proposed Discharge.² There is no evidence as to any conversations about obtaining such verification between December 14 and December 22. There is no evidence that Grievant could not have or would not have obtained the verification within the fifteen day period.

DART relies heavily on the fact that Grievant's FMLA certification had been terminated, effective December 3. However, the fact that one FMLA certification has ended does not mean that another certification could not be obtained within the time limits provided by DART policy. In other words, if the occurrence qualified for FMLA leave, the fact that a previous certification had terminated should not automatically preclude certification of the new event as FMLA leave (provided all of the requirements are met).³ To hold otherwise would result in an employee having less FMLA rights if s/he had previously requested and obtained FMLA certification which had expired or terminated than if the employee had never obtained FMLA leave. Therefore, the fact that Grievant's FMLA had been terminated would not by itself preclude a new certification of his December 11 and 14 absences.

The Hearing Officer also notes the evidence regarding Mr. Brown's failure to give *any* consideration to the possibility of a leave (five days or less) for Grievant under Section 7.14 of HEM. The Hearing Officer notes that previous Trial Board cases and the testimony herein

² It is not evident from the record whether Grievant had been placed on administrative leave prior to the issuance of the notice of proposed discharge.

³ This is not a situation where the employer has previously denied the certification of an event based on a failure to meet the eligibility criteria.

evidence a practice of routinely granting of five days of unpaid sick leave by managers in the *transportation department*. (E.g., *Michael Ingram/DART*, Case No. 2743-U-ATU). In Grievant's maintenance department, however, the managers do not appear to have adopted this practice under HEM §7.14 for reasons that were not explained in the record. Since the issue was not fully presented and argued, the Hearing Officer does **not** rule that the same managerial practice of granting five days leave on a routine basis under HEM § 7.14 should have been applicable to Grievant or that it is applicable to the Maintenance Department.

However, as noted by this Hearing Officer in *A.D. Phillips/DART*, Case No. 2828-U-ATU, provisions in HEM such as §7.14 exist "side-by-side" with provisions in supplements (such as TD-27) in a linguistic context that gives all of them the same degree of viability. As was the case with TD-27 in the *A.D. Phillips* case, here, MD-15 (the provision at issue herein) is found in a section named "Hourly Employment Manual *Supplement* Maintenance Department (MD)". Thus, it is named a "supplement" to HEM and referred to as a supplement. The word "supplement" refers to "something that completes or **makes an addition.**" (emphasis added). *Webster's New Collegiate Dictionary*, P. 1162. There is no language in HEM that was brought to the attention of the Hearing Officer that would preclude application of HEM § 7.14 to the Maintenance Department. To the contrary, HEM §1.1A provides: "This manual applies to **all** hourly Dallas Area Rapid Transit employees." Of course, "all hourly employees" would include the maintenance department employees such as Grievant. Similarly, Section 7.14 appears to be all-inclusive in its scope: "**No employee** may demand leave without pay as a right." (emphasis added). The Hearing Officer believes that if Maintenance Department employees were intended to be excluded from the operation of Section 7.14 and be accorded different leave rights, it would have been relatively simple to so specify in Section 7.14. No such language is evident.

Clearly, HEM §7.14 is a source of authority for the requesting and granting of leaves for, among other reasons, to "recover from an illness or disability not believed to be of a permanent or disqualifying nature ..." (§ 7.14 B2). Consequently, it has been used by managers in the transportation department to grant the five working days of leave without pay. (§7.14; E.g., *A.D. Phillips, supra.*)

Certainly, HEM §7.14 provided an option for Mr. Brown in considering how to classify the absences for illnesses he did not dispute. As noted above, the Hearing Officer is not ruling that HEM § 7.14 should have been utilized to grant Grievant a reprieve herein or that its