

IN THE MATTER OF

ROY CREW

GRIEVANT

AND

DALLAS AREA RAPID TRANSIT (DART)

EMPLOYER

CASE NUMBER 3052-U-ATU

DISCIPLINARY DISCHARGE

APPEARANCES:

FOR THE UNION

KENNETH DAY

FOR THE EMPLOYER

TAMMY BARROW

BEFORE

OTIS H. KING, HEARING OFFICER

On October 20, 2011, Dallas Area Rapid Transit, hereinafter referred to as "DART," "the Authority" or "Management" and Roy Crew, hereinafter referred to as the "Grievant" or "Crew," came before the undersigned duly appointed Hearing Officer in a conference room at the DART offices at 1401 Pacific Avenue, Dallas, Texas and presented the following issue for resolution:

Whether DART had just cause for disciplinary discharge of Grievant, Roy Crew? If not, what shall be the remedy?

Both parties appeared and participated fully, presenting evidence, examining and cross-examining and cross-examining witnesses. An official record of the proceedings was kept by a Certified Reporter. Both parties made oral opening statements and both parties presented oral closing arguments in lieu of written post hearing briefs.

FACTUAL BACKGROUND

Roy Crew, the Grievant, was hired by DART for approximately seven years as a bus operator. He was an operator in the South Oak Cliff facility for routes 466 and 37. On September 2, 2010, DART received a call from a Veronica Smith, hereinafter referred to as "Smith", complaining that Grievant sexually harassed her on several occasions and that Grievant operated the bus intoxicated as a result of drinking "Bud Ice" beer from a cup. Smith stated that the Grievant operated a bus on either route 466 or 37. (DART Exhibit 2, Page 1) Approximately two weeks prior to this event, another bus operator for DART indicated that he saw Grievant putting beer in his backpack while at work.

As a result of the complaint from Smith along with the other bus operator's notification, Senior Manager Robert Reeves, hereinafter "Reeves," and Station Officer Supervisor Kenneth Suber, hereinafter "Suber," stopped Grievant's bus on September 4, 2010 at approximately 10:00 P.M. Reeves testified that he noticed that Grievant's eyes were bloodshot and that a cup found on the front window in Grievant's area smelled like beer. Suber ordered a reasonable suspicion test, in

which Grievant's screening test results were positive for alcohol at 0.090. The confirmation test issued fifteen minutes later found that Grievant tested positive for alcohol at 0.087. On September 8, 2010, Grievant was placed on administrative leave without pay pending an investigation. (Grievance Page, Page 15)

On September 8, 2010, DART issued Grievant a Notice of Intent to Discharge – Violation of Substance Abuse Program. (Grievance Package, Page 11) The reference is to Chapter 10.2, General Information. E. FTA Regulations and DART Policy of the HEM. In relevant parts, HEM states:

Employees who test positive in the circumstances of reasonable suspicion, post-incident, return to duty, and follow-up testing, or who test positive a second time under any circumstances, are subject to discharge and therefore not eligible for the substance abuse professional services or rehabilitation opportunities set forth in this chapter.

By letter dated September 14, 2010, the Grievant was issued a Notice of Discharge – Violation of Substance Abuse Program. In pertinent parts, the letter stated:

On September 13, 2010 a meeting was held in my office giving you the opportunity to reply orally and/or in writing to the Notice of Intent to Discharge letter that was mailed to you on September 8, 2010 by certified mail (7009 1410 0001 5716 4662). In attendance were you and I.

During the meeting you provided the following information:

- I was not drinking while operating the bus.
- I did a dumb thing and sprayed alcoholic cologne in my mouth.

Based on the information provided and my investigation, it remains my decision to discharge you from employment with Dallas Area Rapid Transit (DART) for violating the above stated provisions, effective at the close of business, today September 14, 2010.

(Grievant Package, Page 8)

On December 15, 2010, DART issued a Step 3 Appeal Decision as part of Grievant's appeal process. In pertinent parts, the letter states:

At the hearing, you and/or your representative indicated the following: . . . You had a couple of beers around noon and signed in at 6:00 P.M. Around 11 P.M., Mr.

Reeves stopped the bus, and asked if you had been drinking. You said no. When you were tested for alcohol, you believe the machine was malfunctioning and asked for a blood test, but you were denied. You also asked when the machine was last calibrated, but you weren't given an answer.

The discharge was found to be justified and timely. (Grievant Package, Page 2)

POSITION OF THE PARTIES

DART's Position

DART argues that the discharge was based on just cause because reasonable suspicion existed to stop Grievant during the operation of the bus. The reasonable suspicion was based on the report of another bus operator for DART who witnessed Grievant placing cans of beer in his backpack and the complaint of Veronica Smith, who indicated the Grievant operated a bus while drinking beer from a cup. Reeves saw that Grievant's eyes were bloodshot and found a cup in the window of the bus in Grievant's area that smelled of alcohol. DART additionally argues that Grievant's story is suspect. Grievant states that he sprayed alcoholic cologne in his mouth. Grievant later admitted that he had been drinking at noon prior to this 6:00 P.M. shift, but he waited almost a year later to question the calibration of the breathalyzer that was issued to him.

Grievant was tested twice, fifteen minutes apart. The final result was that Grievant tested at 0.087, which is above the Federal Transit Authority's policy and DART's policy, per testimony of Manager of the Substance Abuse Program Diane Northrop, hereinafter referred to as "Northrop." Grievant was at the Texas legal limit of intoxication of 0.09. Based upon the violation of DART's policy after testing based upon reasonable suspicion, Grievant was discharged and not eligible for substance abuse treatment or rehabilitation opportunities.

The Union's Position

The Union argues that DART did not have just cause for terminating Grievant. Grievant was alarmed that he tested positive for the reasonable suspicion test. He was not under the influence of alcohol, but the explanation for why he tested positive was that he splashed alcoholic

cologne around his mouth. Reasonable suspicion requires "specific contemporaneous or articulable observations concerning the appearance, behavior, speech or other body odor of the employee." A cup that smelled like alcohol did not fit within the determination of reasonable suspicion. A cup is not an "alcohol container" as Suber indicated in DART's Exhibit 2 page 3. Additionally, DART failed to act when another operator alleged that Grievant placed beer in his backpack. The report of an alleged "Veronica Smith" was really a report from a different female who stalked him after he ended their relationship.

Finally, the Union argues that the breathalyzer machine malfunctioned. The serial numbers on the breathalyzer machine's log sheet was scratched out without being initialed, the entry of the test given on September 4, 2010 of the log sheet indicated a malfunction of the machine due to the label "Get Cal," and the label for the calibration check of the machine was too blurry to read. The Union offered the testimony of Evelana "Chris" Garrett, hereinafter referred to as "Garrett," an employee of DART and the executive vice president of the Union. She testified regarding the validity of some of the alcohol testing performed by former employees of US Health Works, the company that conducts alcohol testing for DART employees. As a result, Grievant requests to be reinstated with seniority and back pay and be required to attend a rehabilitation program before returning to work.

DISCUSSION

Just Cause

The Hearing Officer addressed the issue of the requirements of just cause in the case of Ira D. McCorvey, No. 2703-U-ATU, where he stated the following:

One definition of discipline is: "the practice or methods of ensuring that people obey rules by teaching them to do so and punishing them if they do not." The first thing that must be considered in the Union's position is what rule is the Grievant accused of having violated?

DART has the burden of proving that it had just cause to discharge Grievant based on committing an act which justified a penalty of discharge. In the case at hand, Grievant is accused of violating DART's Hourly Employee Manual, hereinafter "HEM," Chapter 10.2. Chapter 10.6(2) states:

An employee who tests positive (verified positive drug result or alcohol concentration of 0.04 or greater) will be subject to the following:

b. If the test was reasonable suspicion, post-accident, post-incident, return to duty, follow-up, or a second positive test in any circumstances, the employee will be subject to discharge.

Neither party questions whether Grievant is an operator subject to the provisions of HEM or that Grievant's instant case falls within another reason for testing other than reasonable suspicion. However, Grievant questions that reasonable suspicion was present in issuing the breathalyzer test.

Reasonable Suspicion

As read into the record during the testimony of Northrop, "the determination that reasonable suspicion exists must be based on specific contemporaneous or articulable observations concerning the appearance, behavior, speech or body odors of the employee" (TR. Page 47, lines 8-11). The Hearing officer finds that DART met its burden of establishing reasonable suspicion. DART did not act on the complaint of Grievant's co-worker because the supervisors did not specifically witness Grievant placing beer in his backpack. However, approximately two weeks later, customer service received specific details of a report by a member of the public, again placing alcohol in the possession of Grievant during his shift. As a result, Reeves and Suber stopped Grievant during his shift to determine, if in fact, Grievant was operating a bus under the influence of alcohol. Reeves testified that he was trained on reasonable suspicion and that he witnessed Grievant's eyes to be bloodshot. Both Reeves and Suber testified that a cup found in the window of the bus smelled of alcohol. Grievant's argument that the cup was not an alcoholic container is simply one of semantics. The Hearing Officer finds that the cup is an alcoholic container. Taken all together with

an immediate alcohol testing, the evidence is sufficient to establish an articulable observation concerning the appearance of Grievant at the time of the stop.

Grievant tested positive for alcohol above 0.04, as confirmed by a third party, US HealthWorks. Grievant's story changed on various occasions as to why he tested positive for alcohol, including the spraying of alcohol around his mouth due to not having mouthwash in order to talk to a young lady on the bus, spraying alcohol around his mouth due to the smell of the bus caused by the battery, and drinking beer around lunch time before his shift. However, it is difficult to believe that a false positive could have been caused by such spraying and that any such results would not have been eliminated on the confirmation test given fifteen minutes after the initial test. Grievant indicated that he did not know Smith but later stated that Smith was actually Shandrika Graham, a former girlfriend. Grievant's testimony is contradictory.

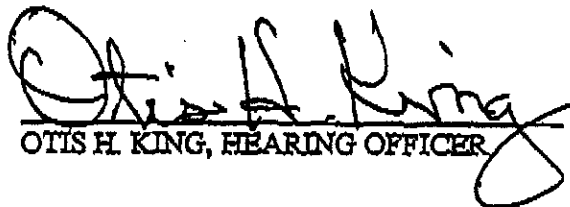
DART provided sufficient evidence that the breathalyzer machine was calibrated properly. DART's Exhibit 3 page 2 confirms the machine used based upon the corresponding serial numbers, the date and time the tests were issued, and the calibration checks performed. DART's Exhibit 3 page 4 also indicates the same notations. The Hearing Officer finds that DART's EBT Log Sheet, also identified at Dart's Exhibit 3 page 3, contains handwritten changes made that were not initialed as Grievant asserts. Although the reliability of the log sheet is questionable, DART's Exhibit 3 page 4 corresponds with DART's Exhibit 3 page 3. The issue of "Ext Cal" or "Get Cal" may be a matter of handwriting analysis, which the Hearing Officer will not decide. Additionally, the testimony of Garrett regarding problems with the breathalyzer testing conducted by US HealthWorks is not persuasive. Garrett was unable to provide testimony that US HealthWorks' current employees improperly administered alcohol tests or that Grievant's specific test was improperly administered.

DART established that it had reasonable suspicion to conduct the alcohol testing. Therefore, following a positive test based upon HEM, the violation of DART's strict policy is that Grievant be discharged. It is noted that Grievant tested well-above the FTA alcohol concentration of 0.02 and the DART alcohol concentration of 0.04. Grievant tested .087 after a fifteen minute waiting period of the initial screening test. Additionally, Grievant's initial test result was at the Texas legal limit and was therefore in violation of the State's criminal law. Grievant's positive results extend beyond DART's internal concern to include a public concern. Because the policy clearly permits discharge based upon a positive testing as a result of reasonable suspicion, it is found that DART had just cause to discharge Grievant.

AWARD

Based on the foregoing facts, information and analysis, it is the Hearing Officer's decision that the appeal should be denied. Jurisdiction is retained for limited purposes of providing the parties such further relief to which they may be entitled.

DECIDED THIS 28th day of December, 2011.


OTIS H. KING, HEARING OFFICER