[Note: For privacy reasons, Grievant's name has been redacted from Internet copies as of 2-5-07]

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

STURGEON BAY CITY EMPLOYEES,
LOCAL 1658, AFSCME, AFL-CIO

and

CITY OF STURGEON BAY (SANITATION
DEPARTMENT)

Case 75
No. 54409
MA-9672

Appearances:

Mr. Gerald D. Ugland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Pinkert, Smith, Weir, Jinkins, Nesbitt, Hauser & Weber, by Mr. Jeffery M. Weir, appearing on behalf of the Employer.

ARBITRATION AWARD

The Employer and Union above are parties to a 1996-1998 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the discharge grievance of [L.O.]. The undersigned was appointed and held a hearing on November 14, 1996 in Sturgeon Bay, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. A transcript was made, both parties filed briefs and reply briefs, and the record was closed on April 8, 1997.

Issues:

The parties stipulated to the following:

1. Was the grievant discharged for just cause?

2. If not, what is the remedy?

Relevant Contractual Provisions:

ARTICLE 27 - DISCIPLINARY PROCEDURE

No employee who has completed probation shall be discharged or suspended, except for just cause. An employee who is dismissed or suspended, except probationary and temporary

employees, shall be given a written notice of the reasons for the action and a copy of the notice shall be made a part of the employee's personal history record, and a copy sent to the Union. An employee who has been suspended or discharged, may use the grievance procedure by giving written notice to his or her steward and his or her department head within five (5) working days after dismissal. Such appeal will go directly to the appropriate step of the grievance procedure.

A. Suspension: Suspension is defined as the temporary removal without pay of an employee from his or her designated position.

1. Suspension for Cause: The Employer may for just cause suspend an employee. Any employee who is suspended, except probationary and temporary employees, shall be given a written notice of the reasons for the action and a copy of such notice shall be made apart of the employee's personal history record and a copy shall be sent to the Union. No suspension for cause shall exceed three (3) calendar days.

B. Usual Disciplinary Procedure: The progression of disciplinary action shall be written oral reprimand, written reprimand, suspension, and dismissal. The Union shall be furnished a copy of any written oral reprimand, written reprimand, suspension or discharge.

C. Removal From Record: All disciplinary action taken under this paragraph shall be removed from the individual employee's record after six (6) months.

Facts:

Grievant [L.O.], who had recently been reclassified to light equipment operator but was still working as a refuse truck driver, was discharged effective May 8, 1996 following a positive result on a drug test. The grievant had one previous discipline on his record, given to him following an April 1, 1996 incident.

In the April 1 incident, the grievant had been instructed to retrieve garbage from the house of a person under police surveillance, and turn it over to the police for analysis. He had done so, but had mentioned the fact of this collection to a friend. It appears that the suspect in question subsequently became aware of the fact of the collection, which compromised the investigation. The grievant was given a written warning for his indiscretion. The written warning was not

grieved, and the grievant conceded that he had told another individual about the investigation. Although the written warning accuses the grievant of telling the suspect about the investigation, there is no evidence that he in fact did so. As to whether he knew or should have known to keep such a matter confidential, the Employer witness, City Engineer John Kolodziej, testified to the effect that such requests by the police were not unusual, that other employes had previously done similar work, and that it was a matter of common sense as well as widespread knowledge in the department that such requests were to be kept confidential. The grievant, as well as John Lynch, another truck driver, testified that neither had ever heard of any policy concerning confidentiality of such requests, nor had they ever received any training to this effect.

Prior to the incident involved here, the grievant had no other discipline on his record, but it is undisputed that from March, 1995 to May, 1996 the grievant was under an occupational commercial driver's license, because of convictions resulting from driving while under the influence of alcohol. There is no dispute that the conduct which led to the restricted commercial driver's license was not engaged in on the job. Among the stipulations on the restricted license were driving only within Door County, and an hours restriction. The grievant testified without contradiction that when he answered a posting about March, 1996 for the maintenance worker/light equipment operator position, he informed Kolodziej that if his restricted driving hours were a problem for that position, he could get them changed. Kolodziej, according to both the grievant and Lynch (a steward), told the grievant at that time that his hours would not be a problem. The grievant was subsequently given the new position, but because the truck driver position had not been filled, the grievant was still working on that job at the time the incident arose which led to his discharge.

In late 1995 the City, in order to comply with the Omnibus Transportation Employee Testing Act of 1991, was required to implement a drug and alcohol testing program. The City duly passed a complex drug and alcohol testing policy, amounting to some 39 pages. There is no dispute that all employes affected were present at meetings at which this was discussed, they were given copies, and the grievant among others signed a statement of familiarity with it. The policy provides in pertinent part as follows:

> IV PROHIBITED CONDUCT
>
> Federal Regulations prohibit employees from engaging in the following conduct:
>
> . . .
>
> 6. Reporting for duty, remaining on duty or performing a safety-sensitive function if the employee tests positive for controlled substances; or
>
> . . .

VI TESTING PROCEDURES

The City will enter into an alcohol and drug testing agreement with an independent agency (hereinafter referred to as the Laboratory). Testing may be done on both urine and breath (blood alcohol may also be required). All drug and alcohol testing will be conducted in conformance with the procedures and rules established by the Federal Omnibus Transportation Employee Testing Act of 1991 and its implementing regulation. The Laboratory will handle taking the sample (in standard collection kits) from the regular hours of 8:00 A.M. until 5:00 P.M. (Mon. thru Fri.) and will also be available during non-regular business hour and days.

. . .

B. TESTING FOR CONTROLLED SUBSTANCES

For purposes of this Policy and the Federal Regulations, the City of Sturgeon Bay will utilize, a 5-panel drug screen consisting of the following drugs:

a. Tetrahydrocannabinol (Marijuana drug)
b. Cocaine
c. Amphetamines
d. Opiates (including heroin)
e. Phencyclidine (PCP)

. . .

2. Results of a Positive Test

Any employee who tests positive for controlled substances is subject to discipline, up to and including discharge. (Refer to Appendix A) As with an alcohol misuse violation, the City of Sturgeon Bay is required to act upon a positive drug test result in the following manner:

a. Remove the employee from the safety-sensitive position. This removal will only take place after the employee has been allowed to meet or speak with a Medical Review Officer (MRO) in order to determine that the positive drug test did not result from

the authorized use of a controlled substance;

b. Refer the employee to the City of Sturgeon Bay EFAP for assessment and subsequent compliance with recommended rehabilitation after a determination of a drug problem has been made;

c. Employee must be evaluated by a substance abuse professional or MRO and determined to be fit to return to work prior to their release of the employee;

d. Employee must have a negative result on a return-to-duty drug test. Follow-up random testing to monitor the employee's continued abstinence from drug use will be required if the employee is determined as needing rehabilitation as specified by a substance abuse professional.

. . .

APPENDIX A

PROGRESSIVE DISCIPLINE FOR DRUG AND ALCOHOL ENFORCEMENT

Pursuance (sic) to the Federally mandated Omnibus Transportation Employee Testing Act of 1991, the City of Sturgeon Bay has developed and implemented a drug and alcohol testing program that is aimed at protecting the safety of the employee and his/her co-workers. The following progressive discipline is specifically outlined in order to ensure a fair and consistent application of this policy.

. . .

CONTROLLED SUBSTANCES

1st Offense	Suspension for balance of day + 2 (two) day suspension + mandatory EFAP assessment + 1 (one) year random testing in addition to required

	follow-up testing
2nd Offense	Review on a case by case basis (possible discharge after review)

In early and mid-April, the grievant went on vacation, returning to work about April 17th. Subsequently, he was off sick for several days, during which time his name came up on the City's drug testing contractor's random rotation for drug screening. The requirement to report for screening was put into effect when he returned to work on April 29th, and the grievant reported for testing and was tested.

On the evening of May 6, the grievant received a telephone call from Bellin Drug Testing management, a division of Bellin Hospital which had subcontracted for the testing. The grievant was informed that he had tested positive for THC, the active component in marijuana. On the same day, Bellin placed a call to Kolodziej and left him a message to the same effect. The following day the grievant reported for work, and Kolodziej, who had been out, returned to work at approximately 10:30 a.m. He returned the call to Bellin's lab at approximately 12:55 p.m., and was informed that the grievant had tested positive for THC. No documentation was provided at that time. Kolodziej immediately called the foreman to have the grievant removed from work. A discussion then took place, at which the grievant admitted having used marijuana while on vacation in California. He placed the date of this use at April 10th. There is nothing in the record to indicate that the grievant had used marijuana at any other time.

Kolodziej suspended the grievant pending investigation. He was allowed to drive home unaccompanied. On May 10th, the grievant returned to Bellin voluntarily to be tested again. It is undisputed that this test showed no trace of THC or any other prohibited drug in his system.

The parties dispute the adequacy of the chain of custody of the grievant's initial drug test. Documents in the record indicate that the handling of samples and reports may have been something less than clear or perfectly consistent with normal rules governing such handling. But in view of the fact that the grievant admitted using marijuana to Kolodziej, and of the fact that there is no dispute in the record concerning the date of such use, I find the arguments over handling of the sample to be immaterial.

On May 15, Kolodziej formally advised the grievant that he intended to propose that the grievant be discharged, by letter in the following terms:

> This letter will serve as your official notice of my intentions to the City Council that you be dismissed from employment by the City of Sturgeon Bay. This decision is based upon the following course of events which are part of your personnel record.
>
> 1. Since March 1995 you have been operating vehicles

under a CDL Occupational License. This license specifically placed the following restrictions: "Occupational restriction permitted to operate all owned and non-owned vehicles Monday to Friday from 6 A.M. to 4:30 P.M.; Within Door County in pursuit of his occupation as a Sanitation Eng. For the City of Sturgeon Bay. Absolute Sobriety Required."

I reviewing your order (copy enclosed) absolute sobriety means no alcohol or controlled substances before or during operation, is a condition of the occupational license for 2nd and subsequent OWI convictions. This was your second conviction (first offense March 1993), and therefore no controlled substances may be taken before operation or a motor vehicle. On April 29, 1996 you tested positive for a controlled substance. The records show that you operated City equipment with a controlled substance in your system. This positive result is in my opinion a direct violation of the court order. At this time, I am not certain whether this information is required to be turned over to DOT officials, however it is clear in the Federal Regulations that the City or the Medical Review Officer must turn these records over on request by the Secretary of Transportation, any DOT agency, or any State or Local officials with regulatory authority over the employer or any of its drivers. DOT penalties indicate that a one year disqualification of your CDL may be imposed. As you are aware your job requires holding a CDL.

In addition the time restriction by the court order placed the Department of Public Works in a specific disadvantage because you were not available for work outside the specified times. During winter snow events and other overtime situations a hardship was created upon the City and your fellow employees who were required to fill a void by your absence.

2. Your personnel file contains a written reprimand, dated April 15, 1996, resulting from activities which occurred April 1, 1996.

3. As part of the City Drug and Alcohol Testing Policy you

> tested positive for a controlled substance. Section V para. 3 indicates that the employee testing positive for a controlled substance will be subject to disciplinary action up to and including discharge.
>
> 4. By your own admission you indicated that you spoke with Dr. Mike Meyer the Medical Review officer from Bellin Drug Testing Labs at 3:45 PM Monday, May 6, 1996, at which time he indicated you had tested positive for a controlled substance. The City was informed of this fact at 12:50 P.M. Tuesday, May 7, 1996, at which time you were immediately removed from your position and placed upon unpaid administrative leave. You reported to work on Tuesday May 7, 1996 at 7:00 A.M. and proceeded to operate City equipment under the knowledge that you had tested positive for a controlled substance, and did not inform your supervisor of this fact. This is another violation of City Policy and Federal Rules and Regulations.
>
> In accordance with the collective bargaining agreement you have the option of requesting a hearing regarding this action through the grievance procedure defined in article 23.

On or about the same day, the grievant visited Joe Krebsbach, an AODA counselor with Door County Counseling Services, the City's Employee Assistance Program manager. Krebsbach wrote on May 16th to Kolodziej in the following terms:

> I have met with [L.O.] to further assess his drinking and using situation. At this point I believe that as [L.] is able to show he has THC (cannabis) out of his system, through a negative urine screen, he is fit to return to work.
>
> I believe the motivation to maintain his position with the City of Sturgeon Bay will help [L.] address his chemical use issues. With he help of a 4-6 month treatment program that has a strong focus on relapse prevention, long-term sobriety would be a strong possibility for [L.].
>
> For safety reasons, in order to have some assurance that [L.] is maintaining sobriety, it would be recommended that [L.] be required to take random urine screens for a minimum of one year. Should he again test positive, immediate dismissal from his position

would be the best course of action.

If you have any questions regarding the situation, please feel free to contact me.

On May 20th, the grievant requested by letter to Kolodziej to attend the upcoming personnel committee meeting, with representation. A letter in the record dated May 24th from

Ugland to Kolodziej is undisputed in the record as to the course of events there listed. In the letter, Ugland stated that the personnel committee meeting concerning the grievant had been scheduled for May 23, but was postponed. Ugland requested in the letter that the grievant be returned to work immediately because, in Ugland's terms, he had complied with "all expectations" set by Kolodziej's May 15 letter.

In the event, the personnel committee did not discuss the grievant's situation until July 1, 1996, at which time it conducted an inquiry and voted to discharge the grievant effective May 8, 1996. Kolodziej testified that he recommended discharge on that occasion because:

> I felt there was more than enough evidence for -- to prove just cause, that we had a management right to dismiss this employee from employment not just for the positive drug testing but because of the previous disciplinary action and because of what we felt were violations of his CDL license. Compounding that with the severity and the safety issue of an individual continuing to operate with testing positive with a drug in his system, showing up for work with that drug in his system is a serious, serious violation which we reiterated numerous times when we presented the drug and alcohol policy, and so putting all of those together and the safety issue of an operator with marijuana in his system, I felt that it was justifiable. 1/

The Employer's Position

The Employer contends that arbitrators have generally used the so-called "Daugherty Criteria" in determine whether discipline comports with elements of due process fairness, and couches its arguments in those terms. The Employer contends that the rules and policies related to drug testing were mandated under federal law concerning employes holding commercial drivers licenses, and were not disputed. The City further contends that the City's policy on cooperation with law enforcement officers and furnishing garbage to the officers was also not challenged by the Union. The City contends that [Grievant] indicated that he was in fact aware of these rules, and

1/ Tr. p. 60.

that the alleged misconduct was proven by the grievant's drug test and by the grievant's failure to contest that he tested positive for THC. The City notes also that the grievant did not protest the disciplinary letter resulting from the April 1, 1996 incident. The City argues that by testing positive for a controlled substance, the grievant also violated the restriction on his commercial driver's license that he observe "absolute sobriety", a requirement still in effect on May 7, 1996 even though the restrictions were to expire during May of that year. The City notes that the grievant continued to operate a garbage truck on May 7th even when he knew he had tested positive for drug. The City contends that there are therefore several violations of the rules inherent in the grievant's conduct during April and May, 1996, not just a single incident.

The City contends that the discipline was in line with the severity of misconduct, because the Union has argued in prior proceedings that disciplinary action is governed by the just cause provision of the collective bargaining agreement and that it did not agree to the disciplinary portion of the drug testing policy, and consequently cannot reasonably claim that the City must limit itself to the terms contained within that policy. The City further argues in that context that there were several issues which arose from the drug test, including the grievant's continuing to work after receiving notice of the results, and the positive drug test itself was only one of these. The City also argues that there is no evidence that any other employe has been treated differently by the City in similar circumstances.

In its reply brief, the City contends that it stretches credulity for anyone to believe that the fact of garbage picked up by law enforcement agencies in the process of an investigation would not be kept confidential. The City also notes that Lynch testified that everybody on the garbage truck had done this work at one time or another. The City contends that if a matter is to be kept confidential, it matters not to whom the grievant revealed the information, or whether the suspect obtained that information from an intermediary by chance or directly by design from the grievant. The City further argues that the grievant violated principles other than the original non-use of drugs by his violation of his commercial driver's license restrictions and also by operating in a "safety sensitive position" after he had knowledge that he had tested positive for drugs. The City further argues that there was no excessive delay in the City's discussion of the discharge on July 1, 1996, and that the Union's claim as to impropriety of that delay should not be given credence, because no objection was previously raised by the Union concerning that delay.

The City requests that the grievance be denied.

The Union's Position

With respect to the April 1 incident, the Union contends that the grievant was never trained to maintain confidentiality and that no rule or policy existed within the department which required confidentiality in such investigations. The Union further contends that the written reprimand appears to have been based, by its own terms, on the misperception by Kolodziej that the grievant had directly told the suspect involved that his garbage was being held for law enforcement analysis, which is not supported by the record.

With respect to the drug test incident, the Union contends first that the grievant acted responsibly following his being informed by telephone that he had tested positive for THC. The Union contends that in reporting to work the following day, the grievant was acting reasonably in view of his perception that the drug would by then have completely disappeared from his system, a perception confirmed by voluntary test three days later. The Union contends that the grievant did not, therefore, violate any rule other than the drug-free requirement itself, because he could reasonably have believed himself to be free of the drug when he returned to work a number of days after his vacation usage. The Union contends further in this respect that the grievant could reasonably have presumed that the City would be advised of his results contemporaneously with the call to the grievant, and that the City would make adjustments on the following day if it believed them necessary. The Union argues in this respect that the grievant, contrary to language in the drug policy which refers to employes not being allowed to return home in their own vehicle following a positive result on a drug test, was in fact allowed by Kolodziej to drive himself home.

The Union argues that thereafter, the grievant complied with every term in Kolodziej's May 15 letter, but was still not allowed to return to work. The Union argues that the Employer's use of several aspects of the same incident as claiming several violations of rules by the grievant constitutes a form of double jeopardy.

In two reply briefs, the Union contends that Kolodziej did not object to the grievant's restricted work hours until the termination was being considered, and that he had specifically rejected an offer by the grievant earlier to adjust those work hours if needed. The Union also contends that the grievant had every right to assume that the Employer's agent informed the Employer at the same time as informing the grievant that he had tested positive, and that the grievant should not be expected to understand the finer points of a 39-page complex policy. The Union argues it was reasonable for him to conclude that any remaining trace of marijuana in his system would have dissipated by that time, an assumption consistent with the result of his re-test three days later.

Citing an award by Arbitrator Daniel Nielsen in Kenosha County, the Union argues for a somewhat complex remedy, requesting that the following be required in a remedy:

> A. That the employer offer [L.O.] reinstatement to status of employment which he enjoyed on May 7, 1996 prior to being suspended and retroactively terminated. That this reinstatement be retroactive to the date of termination.
>
> B. That the employer reimburse [L.O.] for lost wages and benefits which resulted from his suspension and termination.
>
> C. That the employer make [L.O.] whole.

If the Arbitrator finds that Mr. [O.] did test positive for THC, the Union concludes that the Arbitrator should order the following additional remedy:

D. That [L.O.]'s continued employment be conditioned upon cooperative participation in treatment as prescribed by a qualified Alcohol and other Drug Abuse agency.

E. That [L.O.]'s continued employment be conditioned upon receiving frequent random drug testing as prescribed by Department of Transportation regulation for first time and that the results must negative (sic) according to the criteria of the Department of Transportation.

Discussion

With respect to the Employer's use of the "Daugherty Standards" at least a brief note is appropriate. I agree that Arbitrator Daugherty's analysis is sometimes helpful in thinking through whether just cause exists for a given discipline. Other arbitrators, however, have noted that the stream of cases on which Arbitrator Daugherty's analysis was based did not involve a hearing on the facts with witnesses appearing before the arbitrator, but rather a process more akin to an appellate court's review. This is one of several reasons why I decline to apply these standards mechanically.

I find that the City could reasonably expect the grievant to know that the content of an investigation into a suspect's garbage should be kept confidential, regardless of its failure specifically to train employes or promulgate a specific policy on the matter. Some requirements are so obvious by their nature that no such training should be specifically required before compliance can be expected. Furthermore, the written warning given to the grievant was not out of line with the offense, and was not so severe that the Employer's failure to train or to have a clear policy should be regarded as grounds for concern over injustice.

The grievant therefore had one discipline on his record when the incident arose which immediately lead to his discharge, as well as having hanging over him the consequences of earlier off-the-job conduct which, as of that date, still affected his ability to drive commercial vehicles without restriction.

But I find the inconsistencies in the City's handling of the drug testing incident troubling. The grievant forthrightly admitted using marijuana in his May 7 interview with Kolodziej. Kolodziej then allowed the grievant to drive home, an implicit recognition of the grievant's claim that the drug had for practical purposes disappeared from his system. This may also have reflected the delay between the April 29 testing and the May 7 interview; but the grievant's view of his

condition was also buttressed by his voluntary retesting (by the same facility) on May 10. Meanwhile, Kolodziej in his testimony admitted that the grievant had in fact met the drug test policy's conditions for reassignment for work, following his interview with drug counsellor Joe Krebsbach immediately following Kolodziej's letter. Yet, a full six weeks later, the City discharged the grievant, at a time when by all accounts the grievant was in compliance with the written requirements of the drug policy for a first offense.

Meanwhile, I do not find that the Employer can reasonably claim that the grievant had engaged in more than a single offense under the drug policy, in the circumstances present here. There is no evidence to combat the grievant's assertion in his interview with Kolodziej that his drug use had occurred on a single occasion, while he was on vacation, in a place remote from the Employer. There is no evidence in the record to counter testimony from two Union witnesses that the hours restriction on the grievant's license was said to be immaterial by Kolodziej a matter of weeks before the incident involved here, at a time when the grievant explicitly offered to get the hours changed if needed. There is no evidence that the commercial driver's license had been lifted, or that the grievant was even undergoing prosecution for his use of marijuana while on vacation. While the grievant may, indeed, have violated the "absolute sobriety" rule on that license, it is a matter of speculation whether he would in fact have lost that license or have had the restrictions extended; there is no evidence in the record to indicate that either event occurred after this incident.

The implication that the City overreacted is, however, particularly emphasized by the City's own drug policy language. That language does not provide for discharge upon a first job related use of controlled substances. Instead, it specifies that a first offense subjects the employe to being "suspended for balance of day plus two day suspension plus mandatory EFAP assessment plus one year random testing in addition to required follow-up testing."

I find that despite the time which elapsed after the grievant's vacation before the testing, it is clear that the grievant did violate the drug policy. But I find nothing in this record to justify imposition of a penalty higher than the first-offense penalty which the Employer itself has written. In this context I note that the prior written warning for improperly disclosing information is an unrelated offense. The discharge is therefore reduced to the specified penalty for a first offense under the drug and alcohol policy, but I will incorporate the additional requirements requested by the Union, in view of the grievant's previous difficulties in maintaining an unencumbered driving license.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. The City did not have just cause to discharge [L.O.], but did have just cause for lesser discipline amounting to suspension for the balance of May 7th and a further two days' disciplinary layoff.

2. The Employer shall, forthwith upon receipt of a copy of this Award, make the grievant whole for losses suffered by virtue of the discharge, by payment to him of a sum of money equal to wages and benefits he would have earned but for such discharge, less wages and benefits for the balance of May 7, 1996 and two further days' suspension, and also less any interim earnings. The grievant shall be returned to work with his full seniority and the Employer shall correct its records accordingly.

3. The grievant's continued employment shall be conditioned upon cooperative participation in treatment as prescribed by a qualified alcohol and other drug abuse agency, for the period of time required in the Employer's drug and alcohol policy.

4. The grievant's continued employment shall be conditioned upon receiving frequent random drug testing for one year. The results must be negative according to the Department of Transportation's standards.

Dated at Madison, Wisconsin this 20th day of June, 1997.

By Christopher Honeyman /s/
Christopher Honeyman, Arbitrator