BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**SUPERIOR CITY EMPLOYEES'
UNION LOCAL NO. 244, AFSCME,
AFL-CIO**

and

**CITY OF SUPERIOR
(PARKS DEPARTMENT)**

Case 152
No. 54785
MA-9792

Appearances:

Ms. Mary Lou Andresen, Human Resources Director, City of Superior, on behalf of the City of Superior.

Mr. James E. Mattson, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of Superior City Employees' Union Local No. 244, AFSCME, AFL-CIO

ARBITRATION AWARD

Superior City Employees' Union Local 244, AFSCME, AFL-CIO, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the City of Superior, hereinafter the City, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The City subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on May 28, 1997 in Superior, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by August 11, 1997. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties could not agree on a statement of the issues and have left it to the Arbitrator to frame the issues to be decided.

The City would state the issue as follows:

Did the City violate the AFSCME Local #244 Working Agreement by releasing Michael Peters from employment?

The Union would state the issues as being:

Did the Employer discharge the Grievant for Just Cause?

And if not; the appropriate remedy is for the Employer to reinstate the Grievant to his original position and to make the Grievant whole for any and all lost wages and benefits.

The Arbitrator frames the issues to be decided as follows:

Did the City have just cause to discharge the Grievant, Michael Peters?

If not, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions of the parties' Agreement are cited or relied upon:

ARTICLE 3
MANAGEMENT RIGHTS

The City possesses the sole right to operate the City Government and all management rights reside in it, subject only to the provisions of this Contract and applicable law. These rights include:

. . .

B) To establish work rules and schedules of work.

. . .

D) To suspend, demote, discharge and take other disciplinary action against employees for just cause.

. . .

G) To take whatever action is necessary to comply with State or Federal law.

. . .

ARTICLE 10
DISMISSALS

10.01 The City of Superior agrees that it will act in good faith in the discipline or discharge of any employee. No employee will be disciplined or discharged except for good cause.

. . .

10.03 All disciplinary action and discharges shall be subject to the grievance and arbitration procedure of this Agreement.

. . .

ARTICLE 26
MISCELLANEOUS PROVISIONS

. . .

26.18 Commercial Driver's License: All full-time employees must possess a valid Class B Commercial Drivers' License by January 1, 1992, and maintain a Class B Commercial Drivers' License for the duration of the employment.

BACKGROUND

The City maintains and operates a Parks and Recreation Department as part of its Public Works Department. The Grievant had been employed by the City for approximately seventeen years in its Parks and Recreation Department as a Skilled Laborer. In the late fall and winter months, the Grievant was responsible for preparing and maintaining cross-country ski trails in the City's parks, and during the other months worked on stump removal and tree trimming operations. The Director of the Public Works Department is Jeff Vito and the Director of the Parks and Recreation Department is John Shepherd, who team manages that department along with the Parks and Recreation Administrator, Mary Morgan. Shepherd had been the Grievant's immediate supervisor since 1986.

In January of 1995 the City implemented its present "Drug and Alcohol Testing Policy" pursuant to regulations of the Federal Department of Transportation. Said policy provides, in relevant part,

THE CITY OF SUPERIOR, WISCONSIN

DRUG AND ALCOHOL TESTING POLICY

. . .

POLICY

All employees are expected to report for duty free from the effects of illegal drugs and/or alcohol.

The use, possession, sale, distribution, transportation, being under the influence of illegal drugs or alcohol while on City property, operating City equipment or vehicles while on duty or performing assigned job duties is strictly prohibited and will not be tolerated.

Persons operating City vehicles shall not consume alcohol within four hours before operating the vehicles.

No driver shall report for duty, operate City vehicles, or perform safety sensitive functions having any detectable or measurable amount of alcohol in his/her system.

DISCIPLINE

Any person found to be in violation of this policy is subject to discipline up to and including termination of employment. This process shall be subject to the grievance and arbitration procedure.

An employee that receives a confirmed positive test report for illegal drugs and/or alcohol is subject to discipline up to and including termination of employment.

A driver who receives a confirmed positive test report of a concentration of any reliably measurable amount up to .039 will not be allowed to operate City vehicles for a minimum of 24 hours of receiving that result. A driver who receives a second confirmed alcohol test report of a concentration of 0.02 or above within two years of the first confirmed positive alcohol test will be subject to discipline up to and including termination of employment.

FEDERAL HIGHWAY ADMINISTRATION DRUG/ALCOHOL TESTING PROVISIONS

In accordance with Federal Highway Administration drug and alcohol testing regulations, the City has implemented a drug and alcohol testing program effective January 1, 1994.

The City recognizes the concerns of employees in the area of drug testing in the workplace. In order to guard against inaccurate test results, the testing will be conducted in accordance with very strict procedures as required by Federal Highway Administration and U.S. Department of Transportation drug testing regulations. All drug test results that are initially positive will be confirmed by a second test of the original urine sample. Any confirmed positive test result will be reviewed by the City medical review officer to verify a positive or negative finding.

Alcohol testing will be conducted according to Federal Highway Administration and U.S. Department of Transportation alcohol testing regulations. All breath alcohol tests that are initially positive will be confirmed by a second test. Alcohol tests will be performed only on testing equipment approved by the U.S. Department of Transportation.

PERSONS SUBJECT TO TESTING

All employees required to possess a valid commercial driver's license (CDL) in accordance with the working agreement between the City and AFSCME Local #244 and other city employees whose job duties include operating and/or are in readiness to operate City trucks that have a gross vehicle weight rating or a gross combination weight rating of 26,001 pounds or more: or are required to be placarded for hazardous materials regardless of the weight rating, are subject to drug/alcohol testing.

All applicants, including persons currently employed by the City applying for a position where job duties include operating the vehicles described above will be required to take a drug/alcohol test if a job offer is made. The job is contingent upon a negative drug/alcohol test report.

. . .

EMPLOYEE/APPLICANT RIGHTS

All persons subject to the testing provisions of this policy who receive a confirmed positive drug test report have the right to request, at employee or

applicant expense, a test of the split urine sample. Such request must be made to the Medical Review Officer within 72 hours of when the person has spoken to the Medical Review Officer regarding a confirmed positive drug test result.

If the test of the split urine sample is negative, no adverse action will be taken against the employee and an applicant will be considered for employment.

The City will not discharge an employee who, for the first time, receives a confirmed positive test report for drugs or a confirmed positive alcohol test of .04 or above unless:

1. The employee refuses to meet with a qualified chemical use/abuse evaluator for the purpose of recommendations for an educational, counseling or treatment program for drug and/or alcohol use/misuse.

2. The employee refuses to participate and cooperate in an educational, counseling or treatment program as recommended by the evaluator or fails to successfully complete the program.

3. The employee receives a confirmed positive test report for drugs or an alcohol test result of a concentration of .02 or above upon completion of the program.

Costs of the evaluation and/or recommended educational, counseling or treatment program are at employee expense or pursuant to a health benefit plan.

Upon reinstatement the employee is subject to UNANNOUNCED FOLLOW UP DRUG/ALCOHOL TESTING A MINIMUM OF SIX TIMES WITHIN THE FIRST 12 MONTHS after reinstatement. Additional follow-up testing may be conducted for up to 60 months from the time of reinstatement.

The employee is also subject to all other required drug/alcohol tests. A positive test on any subsequent test will result in disciplinary action up to and including termination of employment.

. . .

Under that policy, the City tests in the following situations: pre-employment screening, post-accident testing, probable cause testing, random testing and as part of a scheduled treatment program.

In May of 1995, the Grievant tested positive for marijuana. Under the City's policy, an employe who tests positive has the option of having a split sample test done to make sure that there was not a false positive, said test being at the employe's expense. The Grievant did not avail himself of that option. As a result of testing positive on the drug test, the Grievant was sent to a Substance Abuse Professional (SAP) for evaluation and assessment of his problem.

The Substance Abuse Professional for the City's Employe Assistance Program (EAP) is Bob Lyman, a licensed Clinical Social Worker who is also an SAP and is affiliated with a local hospital. Based upon his evaluation of the Grievant, Lyman concluded that he was marijuana dependent and recommended he complete an outpatient program for substance abuse. Also as a result of having tested positive for marijuana, the Grievant was immediately removed from any safety-sensitive duties, including the operation of any safety-sensitive equipment or driving a vehicle for the City, and temporarily demoted from his Skilled Laborer position to Laborer I until he completed the counseling (although he continued to receive the Skilled Laborer rate for paid time off such as vacation and sick leave).

The Grievant successfully completed the outpatient program and tested negative in early October of 1995. Lyman recommended that the Grievant be reinstated to his former duties and that he be given at least twelve random drug tests over the subsequent two year period in addition to the random testing pool that he was in.

The Grievant stayed clean over the next fourteen months, but in the end of September of 1996, an incident occurred in his personal life that apparently caused him great emotional stress. The incident occurred on a Saturday evening and so distressed the Grievant that he went seeking a friend who had also gone through the outpatient program for marijuana dependency and who had experienced problems similar to what the Grievant was then experiencing. The Grievant went to a bowling alley where he thought his friend might be, but the latter was not there. While at the bowling alley, the Grievant ran into another acquaintance who offered the Grievant marijuana, which the Grievant accepted and smoked. The Grievant testified that he did not call the EAP's Crisis Hotline because the information he had through a brochure indicated that after regular office hours and on weekends one could only leave a message on an answering machine, and he was not aware until he heard Lyman testify at the hearing that one could be given an "800" number where he could be connected with a counselor.

The Grievant smoked the marijuana on Saturday evening and on Monday was subjected to a random test at work for which he tested positive for marijuana use. Upon being notified of the positive results of the Grievant's test, the City's Human Resource Analyst, then Cammi Gulbranson, issued the Grievant the following "Notice of Intent to Release From Employment":

> October 7, 1996
>
> TO: Michael Peters, Skilled Laborer-Park Division
>
> FROM: Jeff Vito, Public Works Director
>
> RE: Notice of Intent to Release from Employment
>
> This will serve you with notice that the City of Superior intends to release you from employment as a Skilled Laborer in the Parks Division of Public Works effective October 9, 1996.

> The basis for this release is a second confirmed positive drug test for marijuana provided through a random drug test performed on October 1, 1996. You tested positive for marijuana the first time on July 13, 1995 through a random drug test, you chose to seek counseling through St. Luke's Employee Assistance Program, completed the recommended program and returned to regular duty October 31, 1995 after receiving a clear return-to-duty drug test collected on October 27, 1995. The EAP counselor recommended that you have 12 follow-up tests over a two year period in addition to the regular random, reasonable suspicion and post accident testing. The only follow-up test that you have received since was collected on August 9, 1996 and was clear. During your voluntary participation in the EAP program, you worked and were paid at the Laborer wage rate because of the requirement that you could not operate any equipment.
>
> The City intends for your last day of employment to be on Wednesday, October 9, 1996. You are suspended without pay effective immediately and are ordered not to come to the garage for any reason. If you wish to get any personal belongings from the garage you must do so by arranging this with my office at 394-0334. You will have until 4:30 p.m. on Wednesday, October 9, 1996 to meet with management in response to these charges. You must call my office to schedule such a meeting. You may bring a representative to this meeting.

The Union's president, Chuck Miller, requested a meeting with the Public Works Department Director, Vito, to discuss the situation pursuant to the notice of intent to release. On the morning prior to that meeting, they met briefly to discuss alternatives to terminating the Grievant. Vito indicated he would consider the matter. At the meeting attended by the Grievant, Miller, Vito and Gulbranson, the Grievant was allowed the opportunity to present any additional information and make a statement on his own behalf.

> On October 9, 1996, the Grievant was issued the following termination notice:
>
> October 9, 1996
>
> TO: Michael Peters, Skilled Laborer-Park Division
>
> FROM: Jeff Vito, Public Works Director
>
> RE: Notice of Release from Employment
>
> This will serve you with notice that the City of Superior is releasing you from employment as a Skilled Laborer in the Parks Division of Public Works effective October 10, 1996.

> The basis for this release is a second confirmed positive drug test for marijuana provided through a random drug test performed on October 1, 1996. You tested positive for marijuana the first time on July 13, 1995 through a random drug test, you chose to seek counseling through St. Luke's Employee Assistance Program, completed the recommended program and returned to regular duty October 31, 1995 after receiving a clear return-to-duty drug test collected on October 27, 1995. The EAP counselor recommended that you have 12 follow-up tests over a two year period in addition to the regular random, reasonable suspicion and post accident testing. The only follow-up test that you have received since was collected on August 9, 1996 and was clear. During your voluntary participation in the EAP program, you worked and were paid at the Laborer wage rate because of the requirement that you could not operate any equipment.
>
> We met with you and your representative Chuck Miller on Tuesday, October 8, 1996. We considered the information you provided us at that meeting and have concluded that the City will proceed with your release from employment. Your last day of employment is Thursday, October 10, 1996. You were suspended without pay through October 10, 1996 and are ordered to not come to the garage for any reason. If you wish to get any personal belongings from the garage you must do so by arranging this with my office at 394-0334. You should contact the Human Resources Department at 394-0210 to arrange for a payout of any accrued benefits you may be owed.

The Grievant was terminated from employment with the City.

After testing negative the second time, the Grievant had been sent to Lyman for evaluation and assessment and Lyman recommended that he again be placed in an outpatient program. There were no openings in the outpatient program until February of 1997. Being out of a job, and needing to make house payments, the Grievant took on a number of odd jobs to make ends meet. Due to the irregular hours of those jobs, the Grievant felt that he could not complete the eight to nine-week outpatient program. That program only permits five excused absences during its course, and the Grievant felt he would be sure to exceed that number because of his irregular work hours. While he was made aware that there were other sources of funding to pay for the counseling program itself, the Grievant did not feel that he could afford to give up his odd jobs in order to attend the outpatient treatment program which ran at two different times during the day Monday through Thursday for eight to nine weeks. Therefore, as of the date of the hearing, the Grievant had not entered an outpatient program subsequent to his having tested positive in October of 1996.

The Grievant grieved his termination, which grievance was denied through the steps of the parties' grievance procedure and the parties proceeded to arbitration of the dispute before the undersigned.

POSITIONS OF THE PARTIES

City

The City takes the position that it had just cause to discharge the Grievant. In support it its position, it asserts that it adopted a Drug and Alcohol Testing Policy in January of 1995 to meet the requirements of the Federal Department of Transportation regulations that require mandatory drug and alcohol testing of employes who possess a Commercial Driver's License (CDL). All employes in this bargaining unit are required under the Agreement to possess a CDL. The policy was created by the City together with the Union and Kerr Transportation. Also in January of 1995, Kerr Transportation trained the City's employes and their supervisors on the policy, including the consequences of testing positive for drugs. The Grievant attended that training and received a copy of the policy.

The Grievant tested positive for marijuana in July of 1995 and chose to be evaluated by a SAP. As a result, the SAP recommended the Grievant receive outpatient chemical dependency counseling, which he did, and the Grievant was also demoted from a Skilled Laborer to a Laborer with a commensurate pay cut until he completed the counseling. After completing the counseling, the Grievant was returned to his former position and duties in October of 1995. The SAP recommended that the Grievant be subject to twelve follow-up drug screenings over the next two years in addition to the other testing to which the employes are subject. On October 1, 1996, the Grievant tested positive for marijuana on a random test. The Grievant was given the opportunity to explain his actions and did so in a meeting with management on October 8, 1996. That information was considered in making the decision to release the Grievant from his employment.

The City next asserts that the Grievant was treated consistent with how other employes have been treated under the policy. An employe who had tested positive for drugs prior to implementation of the policy was released from employment when he again tested positive on a follow-up test under the present policy. The other employes who tested positive for a first time under the policy were also given the opportunity to receive counseling and were demoted for the duration of the counseling. If either of those employes test positive again, they will also be released from employment.

The City also cites a California Court of Appeals decision as holding that: (1) an employer does not have an unlimited duty to accommodate such a condition and cannot be an "insurer of recovery", nor should an employer be required to tolerate unsafe conditions or "forced to enable substance abuse to continue indefinitely"; (2) an employe with a drug or alcohol problem should not be permitted to "dodge discipline" by repeatedly entering rehabilitation programs and demanding accommodation; and (3) an employer may not be forced to rescind a discharge by the employe's seeking to attend another treatment program after previous programs have failed and the employe has been warned that discharge will result for such failures.

The City also argues it has followed due process in this case. The Grievant received a copy of the policy and went through the training on the policy, and was therefore informed of the consequences of testing positive on a drug test. The drug testing policy itself was established in cooperation with the Union as required by the federal DOT regulations. The policy has been consistently applied to all employes covered by the policy since being adopted in January of 1995. The Grievant was given the opportunity for a reasonable program of recovery after testing positive for marijuana the first time and was punished by being demoted. The second time he tested positive he was released from employment after being given an opportunity to explain his actions to management. The decision to release the Grievant was "fair, complete and objective."

In its reply brief, the City argues that the Grievant's decision to use marijuana again, rather than seeking assistance, was not rationally sound. The City's EAP has a 24-hour crisis line to assist in these kinds of situations. While the Union argues the Grievant had a clean work record, his termination was not based on work performance, but on violating a federally regulated policy. The Grievant admits he did not follow through on treatment plans, albeit because he could not afford it. There are, however, minimal-cost alternatives, such as Alcoholics Anonymous or Narcotics Anonymous, to which he did not avail himself. The Union's argument that the Grievant should be directed to return to a "comprehensive rehabilitation program" is likely beyond the scope of the Arbitrator's authority. Case law establishes that an employer is not required to have this potentially unending responsibility and the City has no compelling interest in forcing such decisions on an unwilling person. Lastly, unlike the Grievant in this case, the grievant in the KENOSHA COUNTY award cited by the Union entered the treatment program the day after his discharge and successfully completed each phase of the program.

The City concludes that the Grievant was aware of the City's policy relating to the use of drugs and chose to violate it at least twice. Thus, it had just cause to terminate his employment.

Union

The Union takes the position that the Grievant should be returned to work, made whole, and directed to enter a comprehensive rehabilitation program.

The Union cites the testimony and letter of Lyman as establishing that a relapse is not unusual for persons having chemical dependency and that the likelihood of a relapse decreases with time. Lyman's April 4, 1997 letter addressed the Grievant's actions and problems and described the Grievant as cooperative and compliant with the rehabilitation program he was directed to follow. The Grievant was open about his relapse and regretted losing his job, and informed Lyman about the huge amount of stress in his personal life that triggered his relapse. Lyman indicated in his letter that the Grievant planned to contact the Treatment Center to start treatment and had made the initial assessment at the Treatment Center, but that due to his having to work odd jobs to make ends meet, he did not complete the treatment. In his conversation with Lyman in April of 1997, the Grievant was open to entering and completing a relapse program and undergoing random drug testing if he were to regain his job.

The Union notes that the Grievant gave detailed testimony regarding the personal problems he was encountering at the time of his relapse and how he had sought out a friend who had gone through treatment with him for support. Unfortunately, the Grievant did not find his friend and instead encountered an acquaintance who offered him marijuana. The Union concedes that the Grievant's decision to use the marijuana was not rationally sound, but argues that the emotional reasons, social stresses and the psychology of relapse must be considered. While Lyman could not predict the chances of preventing further relapses, his letter and his testimony indicated that the Grievant's open willingness to follow through with the prescribed treatment, and his doing so, would lessen the chances of another relapse.

The Union also argues that an issue should not be made about the Grievant's failure to follow through on treatment after his discharge. The Grievant testified that he could not complete the treatment because he had to work a number of part-time jobs to make ends meet and was not able to afford the cost of treatment. Due to his varying work hours, he also would not have been able to attend all the regular sessions. In the face of ongoing pressures, people meet their basic economic needs first and that was unfortunately the situation for the Grievant.

The Union also notes that the Grievant's conduct occurred off duty and asserts that this must be taken into consideration. Further, the Grievant was a long-term employe with a good work record. He had seventeen years with the City and not only had not received any prior discipline, but had received a number of letters of commendation noting his good work record and his extra contributions. The Union cites the award in KENOSHA COUNTY (HIGHWAY DEPARTMENT) wherein the arbitrator in that case analyzed the course of action to deal with an employe's chemical dependency. The arbitrator reasoned that the employe's successful post-discharge efforts to become and remain sober, the psychiatrist's opinion that continued therapy would speak against a relapse, the role of alcohol dependency in the employe's rule violations, and the employe's years of service, led to a conclusion that the employe should be permitted the chance to prove himself to his employer and ordered the employe reinstated subject to certain conditions. Here, the Grievant's work record was clean, there were no problems with his performance at work and a relapse in cases of chemical dependency are common. The solution in this situation is assessment, treatment and follow-up therapy, not termination, which only adds to the hardships on the employe and his family.

In its reply brief, the Union takes issue with a number of statements in the City's brief. The City's assertion that it cannot be "the insurer of recovery" is an overstatement. Suffering a relapse does not mean the employe is hopeless. The City can be supportive and take actions that encourage recovery, and with the passage of time, the chances of a relapse diminish. The Union argues that the City's expression of concerns about safety at work are not supported by any evidence that were such problems regarding the Grievant. The City's suggestion that the Grievant "dodges discipline" by repeatedly entering rehabilitation programs is overly cynical. The issue is not dodging discipline (months without reliable income is sufficient punishment); rather, it is helping an employe. The Union also disputes the City's characterization of its actions in terminating the Grievant as "fair, complete and objective". The City does not understand the objective nature of relapse in the chemically dependent and without that understanding, the City could not take a complete and objective action regarding the Grievant.

The Union concludes that justice requires that the Grievant be returned to work. The Grievant is a long-term employe with a good record and he wants to overcome his problems with chemical dependency and return to work. The solution is not to fire such employes, but to support them as they struggle to overcome their problems. The Union requests that the Grievant be returned to work, made whole for lost wages and benefits and directed to return to a comprehensive rehabilitation program.

DISCUSSION

It is initially noted that to a large extent there is no dispute as to the relevant facts in this case, both with regard to the offenses committed and the Grievant's work record.

While the Grievant does not deny that he smoked marijuana on the second occasion, he offered as an explanation that he was under great stress at the time and had sought out help from a friend who he felt could help him with his personal problems, but was unable to contact that friend and ultimately smoked the marijuana. The Union essentially has argued that the City should have been more compassionate and attempted to work with the Grievant to help him overcome his problem, especially considering his clean record and lengthy employment with the City. Conversely, the City has essentially argued that it has acted in a reasonable manner, having given the Grievant the opportunity for treatment after the first incident and reinstated him to his former duties upon the successful completion of that treatment, but that it cannot be asked to risk further incidents of marijuana usage by the Grievant given its responsibility for ensuring the safety and welfare of the public and the Grievant's fellow employes. It also argues that its actions with regard to the Grievant are consistent with the manner in which it has treated other employes under its Drug and Alcohol Testing Policy implemented in January of 1995.

While the Arbitrator might feel that the City could have acted with more compassion in this case, compassion is not the test under the parties' Agreement. Article 10 requires that the City have just cause for terminating an employe. Generally speaking, the two determinations to be made in that regard are (1) whether the employe committed a disciplinable offense, and if so, (2) did the offense merit the discipline that was imposed. In this case, there is no question as to the first determination, the Grievant having admitted that he committed the offense. Determining an answer to the second question requires consideration of the seriousness of the offense, the employe's work record, other mitigating circumstances that might exist, and how the employer has treated other employes who have committed the same or similar offenses. It is in this area that problems arise.

First, it must be recognized that the City's Drug and Alcohol Testing Policy does not supersede the "just cause" provision in Article 10 of the parties' Agreement; rather, it must be read in conjunction with those provisions. Certainly, the parties can agree that certain offenses constitute just cause for immediate dismissal, but they have not done so with regard to these circumstances. The applicable section of the policy provides that after an employe who tested positive for drugs a first time is reinstated to his position following counseling, he will be subject to unannounced follow-up testing and that, "A positive test on any subsequent test <u>will result in disciplinary action up to and including termination of employment</u>." (Emphasis added).

Thus, the policy itself does not provide for automatic termination upon testing positive for drugs a second time in this situation. On the one hand, the City seems to recognize that is the case as it notes it gave the Grievant the opportunity to give an explanation to management. The City then claims that after considering his explanation, management made its decision to terminate the Grievant. However, beyond his having tested positive for drugs a second time, the City offered no further basis or explanation for its decision to terminate the Grievant. The City is in effect treating the policy as though termination is an automatic consequence of testing positive for drugs a second time. That conclusion is consistent with the City's assertion that the Grievant was treated the same as other City employes who have tested positive a first time, in that it asserts they too will be terminated if they test positive a second time.

Having concluded that neither the policy, nor the parties' Agreement, provides for termination as an automatic consequence in this situation, management must first decide on the level of discipline it will impose in these circumstances. It is that exercise of discretion by the City in determining the level of discipline it will impose that is subject to the "just cause" standard in the parties' Agreement. Exercising that discretion requires that the City consider the circumstances of each case.

In the Grievant's case, there is no question that he has tested positive for marijuana twice and he has admitted that he in fact used that substance. The Union stresses his use of the substance occurred while he was off duty, however, the federal regulations require that there not be a trace of controlled substances in the employe's body such that the employe tests positive. If an employe tests positive for a controlled substance, he cannot perform any safety-sensitive functions. The federal regulations do not give any consideration to that employe's work record, or why or when he used the controlled substance; if he tests positive, he must be removed from safety-sensitive functions. This does not require a finding, however, that mitigating factors that are otherwise appropriately considered in determining this aspect of just cause, may be ignored in management's decision with regard to the level of discipline it will impose.

There are a number of such mitigating factors in this case that must be considered in deciding whether the Grievant's offense merited his dismissal from employment. At the time of his dismissal, the Grievant had worked for the City seventeen years and had a clean work record, with letters of recommendation and no prior discipline until July of 1995, when he tested positive for marijuana on a random test for the first time. The Grievant's immediate supervisor, Shepherd, testified that he was a conscientious worker and valuable employe and had never acted in disregard of others' safety on the job. While Morgan did not supervise the Grievant directly, she testified that he had been a good employe. After testing positive the first time, the Grievant willingly went through the assessment and counseling and successfully completed the program and returned to his former position in October of 1995. The Grievant tested negative in any follow-up testing until he again tested positive for marijuana in a random test on October 1, 1996. The Grievant gave an unrebutted explanation of the circumstances that led to his "relapse" on the Saturday evening immediately preceding the random test on Monday, October 1st. The Grievant's testimony regarding those circumstances was credible, and while they do not excuse his smoking the marijuana, they do at least indicate that it was not his intent to "fall off the wagon" and that he had made some attempt to seek help before it happened. The

Grievant could have called the phone number in the EAP brochure rather than seeking out his friend on Saturday evening, but as far as he knew, there would have been no one to talk to about his problems. The EAP brochure states, "Leave a message after hours", and lists regular hours of "7:30 a.m. - 4:30 p.m. Monday through Friday." While Lyman testified regarding an "800" number one can call after hours, the brochure does not mention that one would be given such a number if they called after regular hours, and the Grievant credibly testified he was not aware there was such a number before he heard Lyman's testimony. The Grievant's explanation as to why he had not entered the rehabilitation program after his discharge is also credible. The Grievant no longer had a regular job, and could not afford to keep up his health insurance. While there might have been other sources available to cover the cost of the counseling, he could not afford to give up work to attend and he would have been unable to maintain the required regular attendance at the counseling sessions, which were held Monday through Thursday, due to the varying hours of his part-time jobs. It was also the Grievant's unrebutted testimony that he was advised in the late fall of 1996 that there were not any openings in the counseling program until 1997, and that when he checked in January of 1997, he was told there were no openings until February.

Given the Grievant's lengthy employment with the City, a work record that was not only clean, but which included letters of commendation, his having successfully completed the counseling program the first time and stayed clean for approximately fourteen months, and his willingness to participate in further counseling, it is concluded that dismissal from employment upon his testing positive for marijuana a second time was too severe of a penalty and that therefore the City did not have just cause to impose that level of discipline in this case.

Remedy

The Union requests that the Grievant be reinstated and made whole for his lost wages and benefits and directed to enter a counseling program. To reinstate the Grievant with full backpay and benefits would ignore the fact that the Grievant committed a serious disciplinary offense and would also ignore the Drug and Alcohol Testing Policy that provides that testing positive for a controlled substance in these circumstances "will result in disciplinary action. . ." Regardless of the circumstances, it was the Grievant's decision to smoke the marijuana that led to the events that took place and he must bear part of the burden of the consequences of his actions. At the same time, it was the City's failure to give appropriate consideration to the mitigating factors in this case that resulted in its decision to terminate the Grievant's employment, and it must therefore also bear part of the burden. Given the seriousness of the offense and the fact that the Grievant is receiving a "third chance", it is concluded that the City and the Grievant should share the burden of the consequences to the extent that the City will be required to: (1) offer the Grievant immediate reinstatement, with his continued employment subject to his participating in the rehabilitation counseling program under the City's EAP program (including the random testing) as soon as possible upon his reinstatement, and his successful completion of that program, and (2) make the Grievant whole for all lost wages and benefits he would have received for the six month period immediately following the date of his discharge (which is approximately one-half the time he has been off work) at the Laborer I wage rate for the hours he would have worked. The backpay amount is also to be offset by the amount of wages the Grievant received from other work during that six month period.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The City did not have just cause to discharge the Grievant, Michael Peters. Therefore, the City is directed to offer the Grievant immediate reinstatement with his continued employment subject to his participating in, and successfully completing, a rehabilitation/counseling and treatment program, including required or recommended random tests. Upon successful completion of that counseling program, the Grievant is to be returned to his former duties as a Skilled Laborer. The City is also directed to make the Grievant whole as to lost wages and benefits he would have received for the six (6) month period immediately following the date of his discharge, to be paid at the Laborer I wage rate for the hours he would have worked during that period, less the amount of wages the Grievant was paid during that period for performing other work.

The Arbitrator will retain jurisdiction in this matter for the purpose of resolving any disputes as to the implementation of the remedy awarded, and will relinquish jurisdiction sixty (60) days from the date of this Award, unless he is advised in writing before then that there is a problem or dispute with regard to the remedy.

Dated at Madison, Wisconsin, this 31st day of October, 1997.

David E. Shaw /s/
David E. Shaw, Arbitrator

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