BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**CITY OF RACINE**

and

**LOCAL 67, AFSCME, AFL-CIO**

Case 525
No. 55036
MA-9974

*(Grievance of Gerald Bugni)*

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Appearances:

**Mr. Gualalupe G. Villarreal**, Deputy City Attorney, City of Racine, 730 Washington Avenue, Room 201, Racine, Wisconsin 53403, appearing on behalf of the City.

**Mr. John P. Maglio**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 625, Racine, Wisconsin 53401-0624, appearing on behalf of the Union.

## ARBITRATION AWARD

The City of Racine, hereinafter referred to as the City, and Local 67, AFSCME, AFL-CIO, hereinafter referred to as the Union, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a request for arbitration the Wisconsin Employment Relations Commission appointed Edmond J. Bielarczyk, Jr., to arbitrate a dispute over the termination of employment of an employe. Hearing on the matter was held in Racine, Wisconsin on October 12, 1997. A stenographic transcript of the proceedings was prepared and received by the undersigned by November 13, 1997. Post hearing written arguments were received by the undersigned by December 29, 1997. Full consideration has been given to the evidence, testimony and arguments presented in rendering this Award.

## ISSUE

During the course of the hearing the parties agreed upon the following issue:
"Did the Employer have just cause to terminate the grievant?"

"If not, what is the appropriate remedy?"

## PERTINENT CONTRACTUAL PROVISIONS

### I. MANAGEMENT AND UNION RECOGNITION

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E. Management Rights. The City possesses the sole right to operate City government and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this contract and the past practices in the departments covered by the terms of this Agreement unless such past practices are modified by this Agreement, or by the City under rights conferred upon it by this Agreement, or the work rules established by the City or Racine. These rights which are normally exercised by the various department heads include, but are not limited to, the following:

1. To direct all operations of City government.

2. To hire, promote, transfer, assign and retain employees in positions with the City and to suspend, demote, discharge and take other disciplinary action against employees for just cause.

3. To lay off employees due to lack of work or funds in keeping with the seniority provisions of the Agreement.

4. To maintain efficiency of City government operations entrusted to it.

5. To introduce new or improved methods or facilities.

6. To change existing methods or facilities.

7. To contract out for goods or services, however, there shall be no layoffs or reduction in hours due to any contracting out of work.

8. To determine the methods, means and personnel by which such operations are to be conducted.

9. To take whatever action must be necessary to carry out the functions of the City in situations of emergency.

10. To take whatever action is necessary to comply with State or Federal Law.

11. Overtime: The City has a right to schedule overtime work as required in a manner most advantageous to the City and consistent with the requirements of municipal government and the public interest. Part-time and seasonal employees shall not be assigned overtime unless all regular employees are working overtime or are unavailable. This shall not apply to full-time or part-time recreation supervision employees in the Recreation Division of the Park and Recreation Department.

In addition to the Management Rights listed above, the powers of authority which the City has not officially abridged, delegated or modified by this Agreement are retained by the City. The Union recognizes the exclusive right of the City to establish reasonable work rules. The Union and the employees agree that they will not attempt to abridge these Management Rights and the City agrees that it will not use these Management Rights to interfere with rights established under this Agreement or the existing past practices within the departments covered by this Agreement, unless such past practices are modified by this Agreement, or the City under rights conferred upon it by this Agreement, or the work rules established by the City of Racine. Nothing in this Agreement shall be construed as imposing an obligation upon the City to consult or negotiate concerning the above areas of discretion and policy.

F. Settlement of Prohibited Practice Problems. In the event either party desires to file a prohibited practice charge with the Wisconsin Employment Relations Commission against the other party for any reason authorized by State Law, it shall so notify the other party in writing by certified mail summarizing the specific details surrounding the potential charge. Such charge may not be filed for a period of thirty (30) days following delivery to the other party of said written notice and upon receipt of this notice the parties agree to meet and confer in an attempt to resolve the dispute during the thirty (30) day period.

G. Solution of Safety Problems. One Union representative designated by the President of Local 67 shall serve on the Mayor's Safety Committee. The Union President and the steward or Union representative shall conduct regular safety meetings with City management personnel including Administrative Managers (or their designee) and the City Safety Officer.

H. Contract Interpretation. In the event a question arises with respect to the interpretation of the terms and conditions of this Agreement where the contract is either ambiguous involving a question of interpretation or is silent with respect to a particular matter involving a group of employees, two (2) representatives of the Union shall meet with the Administrative Manager or his designee to clarify the area of the conduct in question. The Administrative Manager (or his designee shall receive an oral answer within five (5) working days. If the answer is unsatisfactory to the Union, the Union shall present its position with respect to the interpretation of the contract in writing and then review the contract clarification with the Administrative Manager (or his designee) and the Personnel Director. Both the Administrative Manager and the Personnel Director (or their designees) must be present at this clarification meeting. Following this meeting, the Administrative Manager and/or Department Head and the Personnel Director shall advise by letter the Union of their interpretation of the contract. In the event either party desires to process the interpretation questions further, either party may proceed to arbitration as provided under the terms of this Agreement within thirty (30) calendar days. This paragraph shall not be used to circumvent the grievance procedures.

I. Successor and Assignments. In the event the Employer decides to promote, assign, transfer or contract work situations which would affect the conditions of employment of members of the bargaining unit, the appropriate Administrative Manager (or his designee agrees to meet with the President of Local 67 and three (3) other representatives of the Union to completely explain the changes and to receive suggestions from the Union before implementation.

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**MEMORANDUM OF UNDERSTANDING**

It is hereby agreed by the undersigned parties, the City of Racine (Employer) and the AFSCME, AFL-CIO, Local 67 (Union), that the Employer's Drug and Alcohol Policy which was adopted by the Common Council on December 20, 1994 and shall be enforced as a work rule to applicable members of the Union, is modified for this bargaining unit only as follows:

1.) The Employer shall not discharge an employee for testing "positive" the first time under the new policy unless a dischargeable offense occurs which is directly related to a positive drug or alcohol test. The above sentence shall not apply to employees who have previously tested positive while employed or as the result of a pre-employment physical

examination. The first sentence shall also not apply to seasonal employees who test positive when being tested to move into regular employment.

2.) The Employer shall pay for the cost of the random testing but not the cost of the "split sample" or subsequent testing unless the tests prove "negative".

3.) The Employer shall not pay for the cost of "reasonable suspicion" testing unless such testing proves "negative".

4.) The Employer shall not test an employee who posts from one safety-sensitive position to another, but will test all employees posting from a non-safety sensitive position to a safety-sensitive position.

5.) No employee shall suffer any lost wages or benefits if the ultimate results rendered result in a negative finding.

6.) The City recognizes the right of the Union to grieve any and all disciplinary actions taken subject to the just cause standard.

**FOR THE CITY:** **FOR THE UNION:**

_____ _____

_____ _____

## BACKGROUND

The City has employed Gerald Bugni, hereinafter referred to as the grievant, since April 17, 1978. He commenced his employment as a truck driver and, as a requirement of his position, he is required to maintain a valid Commercial Driver's License (CDL). The City is informed by the State of Wisconsin the driving privilege status of an employe with a CDL. In early 1991 the City was informed by the State that the grievant had lost his regular driving privileges as a result of a first offense Operating a Vehicle While Under the Influence of Intoxicant (OVWI) but he was able to maintain his CDL. On August 6, 1993 the grievant was convicted of a second OVWI and as a result he lost his CDL privileges. Thereafter, the grievant was placed into a position which did not require a CDL, a seasonal bridge tender position. In October 1994 the grievant was incarcerated for a third conviction of OVWI but continued to work for the City under Huber Law privileges. On October 16, 1994 the grievant returned to the Racine County Jail where he failed an alcohol test administered by Racine County which demonstrated the grievant was intoxicated. When the City was informed of this, it immediately

suspended the grievant for five (5) days for drinking on the job. The suspension was not grieved. Thereafter, until November, 1996 the grievant continued to work as a seasonal bridge tender. On March 20, 1997 the grievant became eligible to reinstate his CDL which would allow him to resume the duties of a truck driver. Under City policy he was required to submit to a drug test because he was transferring from a position which did not require a CDL to one which did require a CDL. On April 9, 1997 the grievant took the drug test and on April 14, 1997 the grievant was informed by the testing agency he had tested positive for cocaine. On Monday, April 14, 1997 the grievant informed the City of the test results. He was told to punch out of work and report immediately to the Employe Assistance Program (EAP). The grievant did not see William Dyess of the EAP until the following day, Tuesday, April 15, 1997. Dyess informed the grievant that he must test negative for drugs at the assessment center and then would be tested again at the City's testing facilities. Dyess scheduled the grievant for a 4:15 p.m. appointment with the center, which the grievant kept. However, the Center scheduled the grievant for an appointment on April 16, 1997 which the grievant did not keep, the grievant rescheduled the missed appointment but failed to attend that appointment.

Employes of the City are informed that if they fail a drug test they must pass a retest before they can return to work. Further, that the retest need not be taken until such time as the employe feels their system is rid of the controlled substance and employes have been allowed to use vacation time to cover the absence.

At the hearing the grievant testified that he missed the first scheduled appointment because of his niece being in a car accident and he missed the second scheduled appointment because his home in Michigan was in danger of losing a basement wall and he went there to repair the damage. The grievant further testified that during this time he believed he was on approved vacation, that upon his return from Michigan he had a second drug test which demonstrated he was free of controlled substances and that on April 29, 1997 when he presented it to the City the City refused to accept these results.

The grievant's supervisor, Jeff Fidler, testified that he was told by the grievant the matter would be cleared up by Friday, April 18, 1997 and further, he informed the grievant that if the matter was not cleared by Friday he needed to know because if the grievant was not going to be able to do bridge tending duties the following week he needed to know so he could have time to train an employe to do the job. Fidler also testified he had no contact with the grievant prior to April 29, 1997.

On April 24, 1997 the City sent the following letter to the grievant:

Mr. Gerald Bugni
1100 Romayne Avenue
Racine, WI 53402

Dear Mr. Bugni:

This letter is to inform you that it is the City of Racine's intention to terminate your employment.

You have made no contact with the City or your assigned counselor for more than three (3) days to indicate your whereabouts or your status.

You have received at least three (3) OWI's, have been charged with possession of a controlled substance in the State of Michigan and have now tested positive for drugs when the City tested you for reinstatement as a Truck Driver.

It is apparent to the City that you have been afforded numerous opportunities to get your life in order without success. The City deems you to be a liability and your continued employment would be contrary to good public policy and the public interest.

You will have until the close of business on Friday, May 2, 1997 to submit, in writing, any mitigating circumstances as to why the City should not carry out its intended action.

Upon review of any forthcoming documentation, the City will inform you of its final decision.

Any questions concerning this letter may be directed to the undersigned.

Respectfully,

James C. Kozina /s/
James C. Kozina
Personnel Director

On May 1, 1997 the grievant submitted the following letter to the City:

Mr. James Kozina
Personnel Director
City of Racine
730 Washington Avenue
Racine, WI 53403

Dear Mr. Kozina:

This letter is in response to your letter dated April 24, 1997.

Having tested positive on my Pre-employment alcohol and drug test, I went to see Mr. Dyess that same day, I got the result, he was not in so I saw him on Tuesday, Apr. 16th. The same day I had an appointment with a Counselor at All Saints Healthcare. I told the Counselor, Al Herrling, what happened at work. He wanted me to come the next day to see about financial help for their Intensive Counseling since our insurance only covers $950.00.

In the meantime, my niece was in a car accident, my sister-in-law wanted me to go with her the next day to see about her car, so I had to cancel my appointment at All Saints.

That same night I got a call from the caretaker of my house in Upper Michigan. He said - The corner of my basement foundation was buckling + from all the melting snow. I called a few friends for a ride, found one to take me, but they couldn't stay so I had to wait until the next weekend for a ride home.

I was told I was using vacation and I had 13.3 days. I thought it would be alright, that's what took so long, as soon as I came back I took the test as asked and tested negative.

I am very sorry for the inconveniences I have brought the City of Racine. I am now asking for another chance. I am in a counseling program and am going to A.A.

Thank you.

Gerald J. Bugni /s/
Gerald Bugni
Employee #4141
Clock #1217

cc: Doug Dresen, Local 67 President
Guadalupe Villarreal, Asst. City Attorney
Richard Jones, Commissioner of Public Works
Joseph Golden, Street Superintendent of Public Works
John Maglio, Staff Representative, AFSME, Council 40

On May 6, 1997 the City sent the following letter to the grievant:

Mr. Gerald Bugni
1100 Romayne Avenue
Racine, WI 53402

Dear Mr. Bugni:

I have reviewed your letter to me dated May 1, 1997 concerning any extenuating circumstances as to why the City should not carry out its intended action to terminate your employment.

I have found nothing in that letter to dissuade the City's position and therefore you are terminated effective Tuesday, May 6, 1997.

The reasons for your termination are as follows:

1.) A history of drug and alcohol abuse which has included charges of possession of a controlled substance in Michigan; at least 3 OWI's; a previous suspension by the City of Racine for violation of Work Rule N which relates to the use, possession and consumption of alcohol and non-prescribed drugs during working hours; and, most recently, a positive drug test when you went from a non-CDL position to a position which requires a CDL.

2.) Your absence without notice of 3 or more days; failure to inform any City representative or your counsellor of your whereabouts; cancellation of or ignoring all appointments and instructions given to you since your reinstatement as a Truck Driver; failure to follow the proper procedures as a result of your recent drug test.

Your reinstatement would be contrary to the good of the City, its employees or the public interest.

I suggest you contact Julie Anastasio in my office to see what, if any, severance benefits may be available to you in terms of health, life and pension coverages.

Respectfully,

James C. Kozina /s/
James C. Kozina
Personnel Director

Thereafter the instant grievance was filed and processed to arbitration in accord with the parties grievance procedure.

## City's Position

The City contends the grievant's continued use and presence of alcohol and drugs while working on the job constitute just cause for termination. The City points out it is undisputed the grievant has a serious problem with the abuse of drugs and alcohol. The City asserts the totality of the grievant's off duty actions, four arrests and convictions for OVWI and one for drug possession, impacted his ability to perform his work. The City points out it has given the grievant approximately three (3) years to restore his driving privileges and this is compounded by the fact he was drinking on the job as a bridge tender. The City points out the grievant did not dispute his three (3) day suspension.

The City also asserts the grievant has not disputed the results of the drug test which demonstrated he had been operating a City truck while under the influence of a controlled substance in his body. The City contends the grievant was given an opportunity to pass a second drug test and asserts the grievant assured his supervisor the matter would be cleared up by Friday, April 18, 1997. The City points out the grievant never came in or called the City to let the City know of his whereabouts or his status with the follow-up drug tests. The City also points out the grievant failed to keep his appointment with the assessment center even though he had been informed by Dyess of the importance of a positive drug test and the importance of keeping scheduled appointments.

In noting the grievant's defense, that he had to go to Milwaukee and then was stranded in Michigan, the City points out the grievant has failed to comply with a court ordered outpatient treatment in Michigan, has failed to keep his appointment with his probation office in Michigan, and is under an active bench warrant in the State of Michigan.

The City also contends the grievant remained absent from work without leave or notification to the City and/or failed to comply with the City's drug abuse policy. The City points out the grievant failed to meet with Dyess as directed, failed to keep his second appointment with the assessment center and he failed to report his status back to his supervisor by Friday, April 18, 1997. The City points out that it was not until April 30, 1997 that the grievant reported a positive test result back to the City. The City concludes the grievant had failed to obtain permission to take vacation beyond April 18, 1997, failed to keep his scheduled appointment and failed to keep the City informed of his whereabouts for more than three (3) days.

The City concludes it had just cause to terminate the grievant and the City would have the undersigned deny the grievance.

**Union's Position**

The Union asserts that the drug test policy has been in existence since December of 1994 and that no employe had been terminated under the policy for a first time positive drug test. The Union points out this policy was distributed to all employes and that all newly hired employes receive a copy of the policy. The Union argues that under the policy a first time failure to pass a drug or alcohol test is a five (5) day suspension. The Union stresses that the alcohol test the grievant failed was administered by Racine County, not the City, and that the test was administered to the grievant prior to the parties agreement on the drug testing policy. The Union also points out the City did not refute Steward Scott Sharp's testimony that another employe had failed both an alcohol test and then subsequently failed a drug test and was not terminated by the City. The Union asserts that was a precedent setting situation and it occurred prior to the instant matter.

The Union asserts the grievant's failure to pass the drug test was his first failure under the policy agreed to by the parties and to terminate the grievant for this failure is a violation of the agreement. The Union also asserts the City's attempt to argue the grievant was terminated because of the totality of his driving record also must fail because the City was aware of this driving record when they recalled the grievant to employment. The Union also points out that even though the City was aware of the grievant's driving record they never informed the EAP officer, Dyess, of the grievant's problems and as a result the grievant never met with the EAP prior to his termination. The Union concludes that the City terminated the grievant because of his drug test failure and under the agreed upon policy the City cannot terminate the grievant for a first offense.

The Union also argues that the grievant's failure to report for a drug assessment does not demonstrate the City had cause to terminate the grievant's employment. The Union points out employes are informed they are required to pass a retest before they can return to work and that

employes have been informed they can take as much time as needed until such time as the employe feels their system is rid of the controlled substance. The Union argues that during the entire time that the grievant was away from work he believed he was on approved vacation, once he returned from Michigan he re-tested, and the City refused to accept the results of the test. The Union asserts the failure to meet with the counselor for an assessment is not grounds for termination. The Union also stresses that the grievant was on approved vacation and that any confusion on the part of the grievant is not grounds for termination. The Union asserts that a first offense is not grounds for termination.

The Union would have the undersigned sustain the grievance and to direct the City to make the grievant whole for lost wages and benefits, less a five (5) day suspension as called for in the memorandum of understanding between the parties.

## DISCUSSION

The record demonstrates that on December 18, 1995 the parties agreed to comply with the memorandum of understanding concerning the City's Drug and Alcohol Policy. Under that policy a first offense is not to result in a termination of employment unless a dischargeable offense occurs which is directly related to a positive drug and alcohol test. The policy also states that the first offense sentence does not apply if an employe has previously tested positive while employed or if a seasonal employe is being tested to move into regular employment. Herein, the record demonstrates the grievant previously tested positive for being under the influence of alcohol while he was employed as a bridge tender. The Union's claim that the County administered the test, not the City, does not render moot the fact the grievant failed a test which demonstrated he had been consuming alcohol while on duty. The policy does not require the City to administer the test. While the Union could question the validity of such a test because the City had no control over the administration of the test, the time to do so was when the test was administered and the grievant was disciplined for failing the test. The record demonstrates the grievant was disciplined with a suspension and no grievance was filed to contest the matter. Thus the undersigned concludes the record demonstrates that when the grievant failed the drug test given to him on April 9, 1997, this was not his first failure and thus the City did not violate the policy when it terminated his employment.

The undersigned also notes here that the record demonstrates that for the past several years the grievant has filled a seasonal position as a bridge tender because he was unable to retain his CDL. Thus, on April 3, 1997 when he obtained CDL driving privileges, he attempted to move from a seasonal position to a regular position. In so doing he was required to take the April 9, 1997 drug test. The first paragraph of paragraph 1 of the Drug and Alcohol policy also provides that the first sentence of paragraph 1 does not apply to employes who apply to move from a seasonal to a regular position. The undersigned concludes that because the grievant was

attempting to move from a seasonal position into a regular position the City did not violate the policy when it terminated the grievant's employment.

The record also demonstrates that Fidler testified that on April 16, 1997 the grievant contacted him about whether he was on paid vacation and that Fidler informed the grievant he was, directed the grievant to let him know by Friday (April 18, 1997) whether the matter was cleared up and further, directed the grievant to keep him posted on the matter (Tr. pg. 107). The record demonstrates that the grievant failed to contact Fidler by April 18, 1997. Fidler's testimony was not refuted by the Union and therefore the undersigned concludes that when the grievant failed to contact his supervisor as directed the City had just cause to discipline him.

The record also demonstrates that the grievant was directed by Dyess to participate in the EAP. The record further demonstrates the grievant canceled a scheduled second appointment with the assessment center, that he canceled the rescheduled second appointment, and that he never attended a second appointment with the assessment center. Even if the undersigned where to credit the grievant's testimony that he was stuck in Michigan until April 28, 1997, there is nothing in the record which would demonstrate a rational reason why the grievant failed to schedule and failed to attend a second appointment at the assessment center upon his return to the Racine area. Nor is there anything in the record which would demonstrate the grievant needed all the time he was gone to rid his system of the controlled substance. Had the grievant presented such evidence the undersigned would view the duration of the grievant's absence as necessary to cleanse his system of the controlled substance. However, absent such evidence, the undersigned finds that when the grievant failed to reschedule and attend the second assessment center appointment and failed to inform the City he was stuck in Michigan the City had just cause to discipline the grievant.

The Union has also argued that the City did not terminate a Parks Department employe who had failed an alcohol test and also failed a drug test and that as the City did not dispute the matter it stands as a precedence in the instant matter. However, the instant matter is distinguishable because the grievant was directed to keep his supervisor posted on the matter and there is no evidence the Parks Department employe failed to comply with attending the City's EAP.

Therefore, based upon the above and foregoing and the arguments, evidence and testimony present the undersigned concludes the City did not violate the first sentence of paragraph 1 of the Drug and Alcohol Policy because this was not the first test the grievant had failed and because the grievant was attempting to move from a seasonal to a regular position. The undersigned also finds the City had just cause to terminate the grievant's employment when the grievant failed a drug test which demonstrated he had a controlled substance in his system while he was working, failed to follow his supervisor's directive to keep him informed on the matter, and failed to attend a second EAP appointment. The grievance is therefore denied.

## AWARD

The City had just cause to terminate the grievant's employment.

Dated at Madison, Wisconsin, this 25th day of March, 1998.

Edmond J. Bielarczyk, Jr. /s/
Edmond J. Bielarczyk, Jr., Arbitrator

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