BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF RACINE

and

LOCAL 67, AFSCME, AFL-CIO

Case 530
No. 55707
MA-10075

Appearances:

Ms. Christine Bishofberger, Staff Representative**,** Wisconsin Council 40, AFSCME, AFL-CIO, W237 S4626 Big Bend Road, Waukesha, Wisconsin, appeared on behalf of the Union.

Mr. Guadalupe G. Villarreal, Attorney at Law, Deputy City Attorney, City of Racine, City Hall, 730 Washington Avenue, Room 201, Racine, Wisconsin, appeared on behalf of the City.

ARBITRATION AWARD

On October 21, 1997, Local 67, AFSCME, AFL-CIO filed a request with the Wisconsin Employment Relations Commission to have a member of its staff appointed as arbitrator to hear and decide a grievance pending between the Union and the City of Racine. Following jurisdictional concurrence, the Commission appointed William C. Houlihan, a member of its staff, to hear and decide the matter. Hearing was conducted on January 13, 1998, in Racine, Wisconsin. A transcript of the proceedings was prepared and distributed on January 23, 1998. Post-hearing briefs and reply briefs were filed, the last of which was received and exchanged on March 30, 1998.

This arbitration addresses the termination of employe R.F. for failing a drug test.

BACKGROUND AND FACTS

R.F., the grievant, was employed by the City of Racine since May of 1974. He worked for a period of eight to nine years with the Solid Waste Department, and thereafter transferred to the Parks Department, where he worked until he was terminated. Mr. F.'s performance evaluations indicate that he was a good worker. Testimony of co-

workers support that conclusion. Work performance played no role in the termination of F. Rather, he was terminated because he tested positive for drug use (cocaine). On February 28, 1997, the grievant was randomly tested for drugs, pursuant to the Employer's drug policy, which is set forth below. On March 7, he was advised that he tested positive and was issued a five-day suspension. That suspension was served from March 17-21, 1997.

On Wednesday, August 6, 1997, the grievant was tested again. He tested positive and was sent a letter, dated August 12, 1997, which provided as follows:

> This letter is intended to officially notify you that it is the City of Racine's intention to terminate your employment as a result of a second positive on your random drug test.
>
> You will have until Monday, August 18, 1997 to submit to this office, in writing, any mitigating circumstances as to why the City should not carry out its intended action.
>
> Upon review of such documentation (if any) the City will inform you of its final decision.
>
> Any questions concerning this letter may be directed to the undersigned.
>
> Respectfully,
>
> James C. Kozina
> Personnel Director

The grievant did send the City a letter, essentially outlining his sense of desperation over the existence of his drug dependency, and the fact that his job is all that he has left. In it, he expresses a need to return to work to get help with his disease. That same day, August 20, the City sent a letter terminating the grievant. A grievance was filed on September 8, 1997, protesting the discharge. The grievance was denied on September 19, 1997. The matter has been appealed to the arbitration step of the grievance procedure.

The grievant has suffered with a cocaine/alcohol problem for the entire time he has been employed by the City. In 1986, the grievant was convicted of criminal possession of cocaine. He was sentenced to 30 days in jail, and probation thereafter. He

served his

sentence. His supervisor became aware of the conviction in a newspaper story, and expressed his concern in a letter to Kozina, which contained the following paragraphs:

> . . .He is an important member of a team that, because of the nature of their work (tree trimming and tree removal, working together with chain saws, 55-foot Hi-Ranger and Boom truck), it is important that they all stay alert.
>
> I feel uncomfortable assigning him in this position, uncertain of his future conduct. Maybe I am overreacting, but I repeat, this is a team effort, not that the man is working alone. . .

William Dyess, a Personnel/Affirmative Action officer employed by the City, convened a meeting with the grievant on March 5, 1986. Dyess confirmed the substance of that meeting in a letter to the grievant, dated March 6, which provided:

> This letter is to confirm our meeting on March 5, 1986, concerning and confirming the court sentence of 30 days in jail with work release and the two (2) years probation imposed on you.
>
> As stated to you at the start of the meeting, I called this meeting for the following three (3) reasons: (1) First of all, to let you know that the City of Racine is knowledgeable of the sentence imposed on you by the courts as it relates to the cocaine conviction for possession. (2) Secondly, to explain to you what we expect of you and what you can expect of the City. (3) Thirdly, to meet with you and the Employee Assistance Program (EAP) Coordinator Manuel Lopez, Local 67 Union Representative, to offer help should you express a need for such.
>
> It is unfortunate that this happened to you. However, it is the City's understanding that this won't happen again, and there is no help needed from the EAP which is available to you.
>
> Also, the City of Racine wishes to impress upon you that any further problems in this area or any other unacceptable areas will result in the termination of your employment.
>
> We certainly hope you will take full advantage of this opportunity to turn your employment life with the City of Racine around.

Should you have any questions concerning this letter, please direct them to me.

William J. Dyess

There is no indication as to whether or not the grievant participated in the EAP program at this time.

On February 29, 1991, the grievant contacted Mr. Dyess seeking EAP assistance. While the record is somewhat vague, it appears the assistance was for drug and/or alcohol dependency. The grievant was referred to, and did enter a inpatient treatment center for a 28-day period.

On February 7, 1994, the grievant again contacted Mr. Dyess, expressing a desire not to use drugs. Dyess gave the grievant a number of potential options as to treatment facilities and the grievant chose DePaul in Milwaukee. Dyess drove the grievant to the DePaul facility but it was determined that he was not sick enough for admission. The men drove back and a day or two later, Dyess had the grievant admitted on an outpatient basis with Crossroads treatment. Crossroads treatment plan did not work. In May of 1994, the grievant checked into Hazelton, Minnesota for a 28-day inpatient program. He returned to work June 3, 1994.

The City of Racine has a drug testing policy, particularly applicable to those bargaining unit members who hold commercial drivers licenses, which includes the grievant. The City is mandated to follow federal Department of Transportation regulations for drug testing. Its drug and alcohol policy, whose meaningful portions are set forth below, was adopted in February of 1995. The Employer implemented that policy following discussions with the Union. An outside agency provides a list of names to be tested. The Employer has no influence over the randomly-generated list. The program tests half of the bargaining unit members annually. If an employe tests positive, he is subject to a five-day suspension. It was Personnel Director Kozina's uncontradicted testimony that the five-day suspension for a first positive test was a product of negotiations with the Union.

Nothing in the record indicates that the Union has specifically concurred that discharge is automatically appropriate following a second positive test. However, the practice followed by this employer has essentially been to that effect. Kozina testified that every employe testing positive for the first time (six to seven people) have received five-

day suspensions. He further testified that all testing positive for a second time have been forced to resign or terminated. It was his testimony that the City has never condoned a positive drug test. Kozina recalled by name five bargaining unit employes terminated following a second positive drug test. There was a dispute as to whether some of those employes were seasonal and whether all terminations were entirely drug and/or alcohol-related. There was no testimony relative to any person testing positive who kept his job.

The City automatically sends a letter inviting the affected employe to submit mitigating circumstances. To date, no proffered circumstance or excuse has stayed termination.

As of the date of the hearing, the grievant was enrolled in an even more intensive rehabilitation program. He had enjoyed success since October of 1997. His counselor testified that he has made more progress toward rehabilitation than at any other point in his life. His counselor further testified that the grievant is a strong candidate for rehabilitation. The grievant testified credibly that he never used drugs on the job.

It was the grievant's testimony that on Friday, August 1 the frustration he experienced on the job and with his personal life lead to his renewed use of cocaine. He testified that he "gave up that day". He stayed home the following Monday and Tuesday because he knew the cocaine would continue to be in his system. He was tested on Wednesday and tested positive. It was the grievant's testimony, corroborated by co-workers, that the Employer had upgraded jobs in the tree-trimming operation. The upgrade had effectively blocked internal transfers due to the higher standards. Vacancies had been filled from without, which led to tension among workers in the unit. It was the testimony of a colleague that the conflict and stress felt on the unit created difficult working conditions. The grievant perceived a need to post out of his job. He did post successfully for an alternative position, but the test occurred prior to the time he could leave.

ISSUE

The parties stipulated the following issue:

> Did the Employer have just cause to terminate the grievant? If not, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 2 – MANAGEMENT AND UNION RECOGNITION

. . .

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 of Racine. These rights, which are normally exercised by the various department heads include, but are not limited to, the following:

. . .

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

. . .

CITY OF RACINE DRUG AND ALCOHOL TESTING POLICY

I. STATEMENT OF POLICY

The City of Racine recognizes that the use and/or abuse of alcohol or controlled substances by drivers of commercial vehicles presents a serious threat to the safety and health of the driver and the general public. It is the policy of the City of Racine that its employees who perform safety-sensitive functions be free of alcohol and drugs. In order to further the City's goal of obtaining an alcohol-free and drug-free transportation system, and to comply with the Omnibus Transportation Employe Testing Act of 1991, the City of Racine has implemented a drug and alcohol testing program which is designed to help reduce and avoid traffic

accidents and injuries to our employees and the general public, to discourage alcohol and substance abuse, and to reduce absenteeism, accidents, health care costs, and other alcohol and drug-related problems.

. . .

IV. PROHIBITED CONDUCT

City policy and federal regulations prohibit employes from engaging in the following conduct:

> I. Using, possessing, dispensing, distributing, or receiving alcohol, intoxicants, illegal drugs, or other controlled substances on City premises, or while engaged in City business;
>
> II. Reporting to work while under the influence of alcohol, intoxicants, illegal drugs, or other controlled substances in their system;
>
> . . .
>
> IV. Consuming any amount of alcohol, intoxicants, illegal drugs, or other controlled substances while on duty or within four (4) hours of reporting for duty.
>
> Any employee who violates any of the rules set forth above shall be subject to discipline, up to and including termination.
>
> . . .
>
> VI. Prohibited use of controlled substances, the unauthorized use of any controlled substance is strictly prohibited in all situations.
>
> VII. REQUIRED TESTS.
>
> . . .

> 3. Random testing. This test is used in order to eliminate risks associated with illegal or unauthorized drug and alcohol use. Random alcohol and drug testing will be conducted at any period in which an employee is ready to perform or immediately available to perform, is actually performing, or has completed performing safety-sensitive duties. The employee shall be randomly selected for testing from a pool of employees subject to testing. The testing dates and times are unannounced and will occur with unpredictable frequency throughout the year.
>
> . . .
>
> In the event an employee tests positive for either alcohol or controlled substances, the employee shall be subject to disciplinary action up to and including discharge.

POSITIONS OF THE PARTIES

It is the Employer's contention that the grievant's second positive test for cocaine, while in a safety-sensitive position, is just cause for termination. The Employer contends that it is uncontradicted that the grievant's two drug tests in March and August of 1997 were positive for the illegal drug cocaine. The grievant knew from his personal experience that it was prohibited to have an illegal drug in his system while working. The grievant received a copy of the City's drug and alcohol testing policy. William Dyess reiterated his warning to the grievant via a letter sent to him shortly after their initial meeting. The warnings were also given at each subsequent meeting Dyess had with the grievant. The grievant was warned again after the first positive drug test in March, 1997. The Employer imposed a five-day suspension and warned the grievant that termination was the next level of discipline. The grievant was aware that other employes had been terminated for continued use of drugs or alcohol.

The Employer cannot and does not accept the excuse that the work environment can be the cause and/or excuse for drug and/or alcohol abuse. The grievant acknowledged that he could transfer elsewhere if an opening developed and he had the seniority, skill and ability to perform the vacant position. In fact, the grievant was being transferred to an equipment operator position when he was tested a second time.

In its reply brief, the City advances arbitral precedent in support of its decision to terminate the grievant.

It is the position of the Union that the City failed to meet the just cause requirement for discharge. The Union contends that the City's drug and alcohol testing policy does not supersede the just cause provision of the collective bargaining agreement. The parties have not agreed that a positive test will result in immediate dismissal. The Employer's policy "Any employee who tests positive for controlled substances shall be subject to discipline, up to and including termination" does not provide for automatic termination as a result of a second failed test.

On the one hand, the City seemingly recognizes that automatic discharge is inappropriate in that it affords employes an opportunity to submit in writing any mitigated circumstances as to why it should not carry out its intended action, namely termination. However, careful scrutiny of the August 12, 1997 letter to the grievant clearly shows that in all practicality the decision to discharge had been made before the grievant was asked to provide a defense. The Union argues the City's action of "guilty until proven innocent" is in direct conflict with the just cause provision in the Agreement. At its best, "guilty until proven innocent" ignores the obligation for a full and thorough investigation, and at its worst, it undermines the integrity of the relationship between the parties.

Federal regulations do not call for the grievant's termination. They provide only that in the event that an employe tests positive for a controlled substance that he cannot perform a safety-sensitive function.

The Union contends that the grievant is a long-term employe with a good work record. The grievant has 23 years with the City. During that time, his work record was without discipline, he repeatedly scored above average in his performance evaluations, and did so notwithstanding his continuing battle with drug addiction. The Union contends that the Employer has ignored the length and quality of service the grievant has provided the City. Such disregard is unacceptable.

The Union contends that the grievant recognized the severity of his addiction and willingly sought treatment. In 1991 and again in 1994 the grievant reached out to the City for help in overcoming his drug abuse. The Union notes that the grievant felt under a great deal of stress due to the work environment and the conflict it generated. He simply "gave up" leading to his renewed use of cocaine. The Union contends that relapse is common in these cases of chemical dependency. The Union notes that the grievant's various treatments and recurring relapse is normal. The Union called an expert witness who is a professional counselor in a residential treatment house. That witness testified that stress could provoke a relapse. The Union notes that its expert indicated that the grievant had come farther in terms of his rehabilitation than ever before. The grievant's openness, willingness, and commitment to follow through with prescribed treatment lessens the probability that he will relapse.

It is the Union's view that the City has a continuing role in the grievant's recovery. Finally, the Union argues that reinstatement is an appropriate remedy. The Union cites arbitral authority for a number of the premises set forth above including the reinstatement remedy.

DISCUSSION

The City has a right to discharge for cause. It has enacted a comprehensive drug and alcohol testing policy. That policy prohibits employes "reporting to work while under the influence of alcohol, intoxicants, illegal drugs, or other controlled substances in their systems"; it spells out the consequence for violation of such rule as ". . .discipline, up to and including termination." It further sets up the drug and alcohol testing system including random tests.

The drug and alcohol policy has been distributed among employes in the bargaining unit. A portion of it has been negotiated with the Union.

In applying the policy, which is subject to the provisions of the collective bargaining agreement, the City has consistently suspended employes who test positive for five days for the first instance. Furthermore, the City has consistently discharged employes who tested positive a second time. The Union previously contested the City's discharge of an employe who tested positive twice (CITY OF RACINE AND LOCAL 67, AFSCME, AFL-CIO, WERC Case No. 525, No. 55036, MA-9974, 3/25/98, Arbitrator Bielarczyk.) In that dispute, the parties argued over whether or not the positive drug test was the first or second applicable to the grievant. The arbitrator concluded that it was the second, and summarily sustained the discharge under the parties' contract and the Employer's drug and alcohol policy.

This grievant has a lengthy history of substance abuse. It is certainly true that he has made enormous efforts to turn his life around. It is equally true that the City has made significant efforts on his behalf. It appears that Mr. Dyess has expended considerable time and effort helping the grievant address his problem. The City has tolerated leaves of absence for rehabilitation. Meaningfully, the City has put this grievant on notice repeatedly, that repeated substance abuse would lead to his termination.

The Union argues for reinstatement. I believe the grievant is an honest man, a hard worker, and sincerely wishes to overcome his drug problem. He was a compelling witness. The Union argued his case well. However, for me to reinstate this grievant would treat him differently than all others who have tested positive.

The Union argues for leniency. Absent an employer breach of the provisions of the contract, leniency is not mine to bestow. The question posed to me is did the Employer violate the contract. The parties did not ask me to decide, what is the most appropriate discipline given these circumstances. Whatever discretion for leniency exists belongs to the employer.

The Union argues that the policy, as administered, is automatic. Therefore, the decision to terminate was made before asking for and considering any mitigating circumstances. This policy appears to be applied consistently and, so far, without exception. The consistent application of practice is always subject to this form of criticism. The alternative is a case-by-case analysis, which itself is subject to criticism that it constitutes an inconsistent and selective application of the rule. I believe the solicitation of mitigating circumstance eliminates the possibility that a decision is made in error or fails to consider facts which could not reasonably have been contemplated by the employer. It is a safety valve to arbitrary, mindless application of the rule.

The employer's policy relative to drug and alcohol use is rational, reasonably related to its operation and business needs. A good deal of the policy is mandated. A portion of the policy has been bargained with the Union. The Union contends that the grievant is a good worker, with a good work record. The grievant recognized and attempted to treat his problem. The work place stress contributed to his relapse. I believe all of this to be true. It is also true that the Employer's policy and practice does not tolerate drug use by good workers or by those who are attempting to control their problem. Given the origins of the policy, the seriousness of the behavior, and the unequivocal practice, I am not going to intervene and second-guess the Employer on its decision in this matter.

The Union points out through expert testimony that relapse in substance abuse cases is common. I believe that to be true; it is not a defense in this proceeding. I note that one of the underlying policies of the Employer's drug and alcohol testing policy is to attempt to reduce absenteeism. The record is clear that the grievant took two days off in order to cleanse his system.

The parties have submitted conflicting authority relative to arbitral treatment of individuals who have tested positive for drugs in the workplace. While I am aware of authority to the contrary, the interpretive practice of the parties to this agreement I believe is overwhelming, and supersedes consideration of countervailing arbitral authority.

AWARD

The grievance is denied.

Dated at the City of Madison, Wisconsin this 19th day of June, 1998.

William C. Houlihan /s/

William C. Houlihan, Arbitrator

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