BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

GREEN BAY MUNICIPAL EMPLOYEES UNION,
PARK DEPARTMENT LOCAL 1672, AFSCME, AFL-CIO

and

THE CITY OF GREEN BAY

Case 300
No. 58096
MA-10841

(Robert Lenard Discipline)

Appearances:

Mr. Bob Baxter, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appeared on behalf of the Union.

Attorney Daniel M. Olson, Assistant City Attorney, City of Green Bay, 100 North Jefferson Street, Room 200, Green Bay, Wisconsin 54301-5026, appeared on behalf of the City.

ARBITRATION AWARD

On October 19, 1999, the Green Bay Municipal Employees Union Park Department Local 1672, AFSCME, AFL-CIO and the City of Green Bay requested the Wisconsin Employment Relations Commission to appoint William C. Houlihan, a member of its staff, to hear and decide a grievance pending between the parties. A hearing was conducted on January 18, 2000 in Green Bay, Wisconsin. The proceedings were transcribed, with a transcript having been distributed on February 1, 2000. Post-hearing briefs were submitted and exchanged. In addition, the City submitted a reply brief, which was received and exchanged by June 6, 2000.

This Award addresses the discipline of employee Robert Lenard.

BACKGROUND

In January of 1995, the City of Green Bay adopted a drug policy, the relevant portions of which are set forth below, applicable city-wide. Members of this bargaining unit and

several others are covered by the policy. In excess of 50 percent of the members of this bargaining unit are required to hold Commercial Driver's Licenses (CDL), and are therefore covered by the drug policy. This is so in spite of the modest amount of safety-sensitive work performed by members of the bargaining unit. There are two vehicles, at least one of which is rarely used, which require CDL licensure. Mr. Lenard, the grievant, rarely operates such a vehicle.

Notwithstanding certain provisions of the drug policy, employees randomly selected to take a drug test commonly drive themselves to and from the testing site. At times, randomly-selected employees have had their scheduled test postponed to accommodate work.

The City drug policy has no explicit provision detailing discipline arising out of positive tests for drug use. Rather, the policy refers to the applicable collective bargaining agreement. It was the uncontradicted testimony of a Union official that discipline arising from drug testing has never been bargained. He further testified that there has been no demand to bargain.

Robert Lenard, the grievant, is a Forestry Worker I, who has worked in that capacity since August, 1991. Previous to that he worked in a seasonal capacity since 1982. Mr. Lenard tested positive for marijuana use on July 28, 1999. He was not performing a safety-sensitive duty either prior to, during, or immediately following his drug test. His positive test result was forwarded to the City on August 4, 1999. On August 4, Mr. Lenard was off on a pre-scheduled vacation day. Lenard was suspended from August 5 through August 18, 1999, a period encompassing ten (10) work days. On August 13, 1999, the City was advised that Lenard tested negative on a follow-up drug test. This follow-up negative test enabled him to return to work under the drug policy.

Lenard had been previously tested under the City drug policy. Additionally, all employees covered by the drug policy, including Lenard, were required to execute the following form, upon receipt and review of the drug policy:

> I acknowledge that I have received and read the City of Green Bay's drug and alcohol testing policy on the date indicated below. I understand that the City of Green Bay will comply with any amendments to the Federal Omnibus Transportation Employee Testing Act of 1991, and its implementing regulations, with or without prior notice. I further understand that any violation of the City of Green Bay's drug and alcohol testing policy may subject me to discipline, up to and including discharge, subject to the just cause standard outlined in each labor agreement and the Personnel Policies and Procedures Manual, whichever applies. This means that each employee can exercise their grievance and arbitration rights.

This form was unilaterally implemented by the City, and was the subject of a good deal of discussion and concern within the ranks of the bargaining unit. As of the hearing date,

somewhere between 40 and 60 bargaining unit employees had been tested, over a five-year period.

Lenard is the first member of this bargaining unit to test positive for drug use. The following chart represents an overview of all employees, city-wide, who tested positive for drug use and the discipline imposed. Mr. Lenard is number 8 on this list.

City of Green Bay
History of Positive Drug Screens
Under Drug & Alcohol Testing Policy

	Type of Test	**Positive for**		**Discipline**	
(1)	Random	Marijuana		Suspended w/ pay 3 days Suspended w/o pay 8 days	First Offense
(2)	Random	Marijuana		Suspended w/ pay 3 days Suspended w/o pay 22 days	First Offense
(3)	Follow up to positive			Terminated 12-23-97 Reinstated 5-14-98	Second Offense Negotiated Settlement
(4)	Post Accident	Marijuana		Suspended without pay 16 days	First Offense
(5)	Follow up to positive	Cocaine		Terminated 4-28-98	Second Offense
(6)	Random	Marijuana		Suspended w/o pay 9 days	First Offense
(7)	Follow up to positive	Nitrates		Terminated 7-28-98 Adulterated sample	Second Offense
(8)	Random	Marijuana		Suspended w/o pay 10 days	First Offense
(9)	Random	Marijuana		Suspended w/o pay 10 days	First Offense

ISSUE

The parties stipulated to the following issue:

Did the Employer have just cause to give Bob Lenard, the grievant, a ten (10) work day suspension? If not, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE 1

RECOGNITION – PROBATIONARY PERIOD

. . .

(F) All newly hired regular full-time employees shall be on probation for the first ninety (90) calendar days of their employment (not necessarily consecutive days). All probationary employees shall be subject to discipline and/or discharge without recourse to the grievance procedure hereinafter outlined. Continued employment beyond the probationary period is hereby defined to be satisfactory completion of probation.

. . .

ARTICLE 15

DISCIPLINARY PROCEDURE

The Employer shall not discharge any employee without just cause, and shall give at least one (1) warning notice of the complaint against such employee to the employee in writing, and a copy of the same to the Union affected, except that no warning notice need be given to an employee before discharge if the cause of such discharge is dishonesty, being under the influence of intoxicating beverages while on duty, recklessness, endangering others while on duty, the carrying of unauthorized passengers, or other flagrant violations. Discharge must be by proper written notice to the employee and the Union affected. Any employee may request an investigation as to the discharge. Should such investigation prove that an injustice has been done an employee, the employee shall be reinstated and compensated at the usual rate of pay while having been out of work. Appeal from discharge must be taken within five (5) days by written notice, and a decision must be reached within ten (10) days from the date of discharge. In the event a settlement cannot be reached within ten (10) days of the first date of appeal, then such dispute shall be submitted to arbitration as outlined in Article 15 of this Agreement.

ARTICLE 16

GRIEVANCE PROCEDURE

. . .

(C) It is understood that the Arbitrator shall not have the authority to change, alter or modify any of the terms or provisions of this agreement. The decision of the Arbitrator shall be final and binding on both parties. The expense of the Arbitrator shall be divided equally between the parties.

. . .

ARTICLE 17

MANAGEMENT RIGHTS

The Union recognizes the prerogative of the City to operate and manage its affairs in all respects in accordance with its responsibilities, and the powers and authority which the City has not officially abridged, delegated or modified by this Agreement are retained by the City, including the power of establishing policy to hire all employees, to determine qualifications and conditions of continued employment, to dismiss, demote, and discipline for just cause, to determine reasonable schedules of work, to establish the methods and processes by which such work is performed, to establish reasonable work rules. . .

. . .

RELEVANT PROVISIONS OF THE CITY OF GREEN BAY DRUG AND ALCHOL TESTING POLICY

I. POLICY STATEMENT

It is the policy of the City of Green Bay to maintain a drug and alcohol free workplace for all of its employees. The City of Green Bay recognizes that the use and/or abuse of alcohol and controlled substances by drivers of commercial motor vehicles presents a serious threat to the safety and health of the driver and the general public. In order to achieve the City's goal of obtaining a drug and alcohol-free workplace, and to comply with the Omnibus Transportation Employee Testing Act of 1991, the City of Green Bay has implemented a drug and alcohol testing program. This program is designed to reduce and avoid traffic accidents and injuries to the City's employees and the public, and to discourage substance and alcohol abuse and any related problems.

II. PURPOSE

The Department of Transportation (DOT) and the Federal Highway Administration (FHWA) have issued a rule (49 CFR Parts 40 and 382) requiring alcohol and controlled substance testing of drivers who are required to have a commercial driver's license. These rules include procedures for urine drug testing and breath alcohol testing. The purpose of this policy is to establish an alcohol and controlled substances testing program to help prevent accidents and injuries resulting from the misuse of these substances by drivers of commercial motor vehicles. This policy will also establish an alcohol misuse prevention program and anti-drug program, as well as the subsequent enforcement of violations for its employees conducting safety-sensitive job functions.

III. POLICY

For purposes of this policy, the City of Green Bay and the DOT strictly prohibit the use of alcohol and/or controlled substances by its employees and volunteers who are performing, ready to perform, or ceasing to perform the following safety-sensitive job functions:

1. Operation of a commercial motor vehicle;

. . .

IV. PROHIBITED CONDUCT

Federal Regulations prohibit covered employees from engaging in the following conduct:

. . .

6. Using controlled substances while on duty, unless the use is pursuant to the instructions of a physician who has advised the driver that the substance does not adversely affect the driver's ability to safely operate a commercial motor vehicle;

7. Refusing to submit to any alcohol or drug testing required by this Policy.

In addition, based on the Commercial Motor Vehicle Safety Act of 1986 and the Drug-Free Workplace Act of 1988, City of Green Bay policies prohibit employees from engaging in the following conduct:

. . .

3. Reporting for duty or remaining on duty while having an alcohol concentration of 0.02 but less than 0.04; or while under the influence of alcohol or a controlled substance;

. . .

Any employee who violates any of the rules set forth above is subject to discipline, up to and including discharge. NOTE: Discipline outlined in this Policy is subject to the just cause standard outlined in each labor agreement and the Personnel Policies and Procedures Manual, whichever applies. This means that each employee can exercise their grievance and arbitration rights.

V. REQUIRED CONDITIONS OF TESTING

Refusal to take a required test will result in removal of that employee from their assignment(s) which, in turn, may result in discipline up to and including discharge.

Testing must be conducted in the following situations:

1. **Pre-employment** - . . .

2. **Reasonable Suspicion** - . . .

3. **Random** – 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 just before, during, or just after an employee's performance of safety-sensitive duties. The employee will be randomly selected for testing from a "pool" of employees subject to testing. The "pool" will consist of covered employees from the Public Works and Park Departments, the Green Bay Water Utility and Transit Department (effective January 1, 1996). The testing dates and times are unannounced and are with unpredictable frequency throughout the year.

. . .

The selection of employees for random testing shall be administered by the West Side Clinic using a scientifically valid method. This method will be a computer software-based random selection program that is matched with employee social security numbers. A quarterly list of confidential numbers will be generated and forwarded to the Personnel Department in order for it to contact the employee's supervisor for testing arrangements. Under this selection process, each employee will have an equal chance of being tested each time selections are made. In

the event an employee tests positive for either alcohol or controlled substances, the employee will be subject to disciplinary action up to and including discharge.

Employees who are notified of selection for random alcohol and/or controlled substances testing shall be transported by a supervisor to the collection site immediately.

. . .

5. **Return-To-Duty/Follow-Up** – This test is used to maintain abstinence and prevent relapse by employees during and after drug treatment. The City of Green Bay will ensure that before an employee returns to duty requiring the performance of a safety-sensitive job function after engaging in conduct prohibited in this policy, the driver shall undergo a return-to-duty alcohol and/or controlled substance test with a result indicating an alcohol concentration of less than 0.02 percent and a verified negative result for controlled substance use. In any event, an employee will not be allowed to return to duty without first having been evaluated by the City's Employee Assistance Program provider in order to determine the employee's fitness-for-duty.

. . .

APPENDIX A

DEFINITIONS

. . .

L. COVERED EMPLOYEE: Any employee of the City of Green Bay required to have and maintain a Commercial Driver's License (CDL) and who is subject to operating a Commercial Motor Vehicle at the direction of, or with the consent of the City.

. . .

POSITIONS OF THE PARTIES

It is the position of the Union that the grievant rarely performs work of a safety-sensitive nature, and therefore was given a drug test contrary to the Employer's policy. It is the Union's view that the Employer did not have cause to discipline the grievant. The Union quotes the Employer's drug and alcohol policy as follows: "Random alcohol and drug testing

will be conducted just before, during, or just after an employee's performance of safety-sensitive duties." Obviously, argues the Union, the Employer has not complied with its own policy in regard to testing employees for drug and/or alcohol use. Accordingly, no drug or alcohol test should have been given to Mr. Lenard on July 28, 1999. The Union points out that the record establishes that there was ample work of a non-safety-sensitive nature available to Mr. Lenard to perform on the days he was erroneously suspended.

The Union contends that Lenard's personnel file is clear of any disciplinary action. The undisputed testimony was that Mr. Lenard is a good employee. He had worked for the City for a period of eighteen years and received a letter from the mayor congratulating him on his dedication and long-term service. The Union cites arbitral authority for the proposition that an employee's prior work record should be considered in a disciplinary matter.

The Union notes that neither the collective bargaining agreement nor the Employer's drug and alcohol policy contain a schedule of discipline for employees who test positive for use of a controlled substance. The Union points to testimony that the Employer commonly uses progressive discipline and argues that the Employer gave Lenard the highest level of discipline possible, aside from termination. This involves Lenard's off-duty conduct. Assuming, *arguendo* that some discipline is warranted, progressive discipline should have been applied.

The Union contends that the Employer's view of past practice is not relevant to this dispute. The Union notes that there were no negotiations over the implementation and application of the Employer drug and alcohol policy. It was adopted unilaterally. Further, the Union notes that no employee in the Local has ever been disciplined for testing positive for drugs or alcohol. Any reliance upon practice is misplaced, argues the Union.

The Employer contends that the elements of a just cause analysis are familiar to labor disputes. The Employer contends that the following questions are presented: Was the employee aware of the rule? Was the employee aware of the consequences for its violation? Did the Employer prove that the rule was violated? Was the rule reasonable and consistently applied? Are there any extenuating circumstances that mitigate in favor of the action taken against the employee?

The Employer goes on to argue that it is undisputed that the City provided the grievant with a copy of its drug and alcohol testing policy that contains the rule. The grievant was not only aware of the rule prohibiting the use of controlled substances by employees who are ready to perform safety-sensitive job functions, but also the consequences of violating the rule. It is not disputed that the grievant reported for, and was at work on July 28, 1999, with marijuana, a controlled substance, present in his system as confirmed by the positive drug test performed on him that day. Having reported for work, the grievant was therefore "ready to perform" those duties he might be assigned. The Employer contends that it is clear the grievant violated the rule set forth in the city's drug and alcohol testing policy.

The rule violated by the grievant was adopted by the City in order to comply with the Federal Omnibus Transportation Employees Testing Act of 1991. As such, the rule must be regarded as rational.

The grievant received a ten-day unpaid suspension for violating the City's drug and alcohol testing policy. The discipline was neither arbitrary nor discriminatory. The City has disciplined a total of six employees who have tested positive for marijuana use. All received suspensions from work. All suspensions fall generally around the time of the ten days meted out to the grievant. Finally, the City contends that there is nothing that would suggest a mitigation of its generally-applied discipline.

In its reply brief, the City contends that the grievant was properly tested because the test was permitted under the policy testing language, the test was done in accordance with an established past practice of the City, and the grievant consented.

The City contends that the grievant's claim that he should not have been tested relies upon a construction of the drug policy that renders the rule unenforceable. The result of the Union's contention is that Lenard's operation of CDL equipment is so sporadic that the Employer's drug and alcohol policy cannot be enforced. This is an unreasonable interpretation that would reduce an important and legitimate workplace rule to a nullity. The Union's position is alleged to conflict with the Federal Omnibus Employees Testing Act of 1991 that requires, with no exception for sporadic CDL use, random testing of employees whose job positions require the use of a CDL (49 CFR Section 382.305).

The City policy does not define either "performance of a safety-sensitive function" or "performing a safety-sensitive function". Federal law does. Section 382.107 of the Omnibus Employees Testing Act defines "performing a safety-sensitive function" to mean " . . . any period in which (a driver) is actually performing, ready to perform or immediately available to perform any safety-sensitive functions." The City contends that by reporting to work on July 28, 1999, the grievant was "ready to perform" or "immediately available to perform" a safety-sensitive function.

The grievant agreed to undergo the test. Any objection he may have had to the procedure, therefore, was waived by his consent, and it was not improper for the City to then conduct the test.

DISCUSSION

The Employer's drug and alcohol testing policy is in effect, and applicable to members of this bargaining unit. As of the date of the hearing, it had been in place for a period of five years. There have been approximately 50 bargaining unit employees tested under the policy, with no formal objection. The Employer has a right, under Article 17, to promulgate reasonable work rules. This drug policy was promulgated to comply with the Omnibus Transportation Employee Testing Act which regulates the operation of safety-sensitive vehicles

by employees of the City. There has been no demand to bargain over the work rule, despite this passage of time and its operation.

The grievant is a "covered employee", in that he is " . . .subject to operating a commercial motor vehicle at the direction of, or with the consent of the City." The record supports the Union's contention that his use of commercial motor vehicles is an infrequent occurrence. However, the drug policy is drawn from the federal code, with no evidence of a "*de minimis*" exception to licensure. There is no basis in this record to conclude that the grievant ought not be treated as a covered employee.

The Union contends that there was ample non-safety-sensitive work available for the grievant to perform. While this claim is true, it does not detract from the fact that the grievant has a CDL requirement as a part of his job. That requirement subjects him to random testing, and all that follows.

The Union contends that the grievant should not have been subject to testing, since he was not engaged in safety-sensitive duties. . . "just before, during, or just after the test." The language involved is poorly written. The Employer acknowledges that read literally, it could preempt all testing in this bargaining unit. In this bargaining unit, the requirement of a random test and a test "just before, during, or just after" operation of safety-sensitive equipment are essentially mutually exclusive. Given the relatively modest and occasional use of CDL vehicles, it would be virtually impossible to schedule random tests. In administering the clause, the Employer has essentially ignored the "just before, during, or just after" criteria. Rather, the Employer has applied a purely random process. Indeed, Section V – 3 establishes an elaborate procedure for random tests. All this would be rendered meaningless if the Employer is only free to test around the relatively rare operation of regulated equipment.

I believe the Union has acquiesced in this application of the policy. Approximately 50 employees have been tested over a five-year period. All were drawn randomly. None were selected around the specific operation of equipment. I do not believe the Union is now free to attack the random selection of Lenard, once the process has generated a positive test.

The Union contends that the Employer's discipline of non-bargaining unit employees cannot form a practice binding on this unit. I agree, but it does establish that Lenard has not been subject to disparate treatment. The Employer has administered substantial suspensions for first instances of positive drug tests. There is no evidence to suggest that the Employer has administered lesser forms of discipline under similar circumstances.

The Employer contends that the grievant agreed to take the test, and has thus waived his ability to object. This argument flies in the face of the policy itself that subjects an employee who refuses to take a test to "discipline up to, and including discharge." As a practical matter, the grievant was compelled to take the test. His submission to the test cannot be construed as a waiver of any sort.

The real question posed in this proceeding is whether a lesser form of discipline is appropriate, under all the circumstances. This is a substantial amount of discipline for testing positive to a random drug test, conducted at a time when the grievant does not operate safety-sensitive equipment. The Union contends that if any discipline is appropriate, a significantly lesser form is appropriate. The Union goes on to contend that the disciplinary progression includes a series of progressive steps including an oral and written warning. The record does not support a claim that this is universally required. On cross-examination, Union President Kellow testified "the discipline procedure is usually an oral, written warning, suspension, discharge." Kellow's use of the term "usually" equivocates. This is the first instance of a positive drug test in the bargaining unit. On re-direct, Kellow was asked whether or not the Employer followed the just cause standard in disciplinary actions. His response was, "Well, I'm not sure."

Employee Landry was asked to describe "just cause". He did so as follows: "Basically, the punishment fits the crime. You know, the oral warnings needed, oral warning or written warning or day off." Landry's testimony suggests the exercise of an Employer discretion appropriate to the facts presented. That begs the question presented in this proceeding.

The Union contends that the grievant has no discipline on the books. That appears to be the fact. However, it also appears that the grievant was involved in a prior incident involving the use of drugs. Testimony relative to this incident is sketchy, and whatever incident occurred appears to pre-date the Employer's drug policy.

For me to reduce the discipline imposed would require that I establish some rational basis for the level of discipline sustained. There is no basis in the record for me to do that. To the contrary, the Employer has been consistent across bargaining unit lines in the imposition of discipline. Furthermore, this discipline is intended as a warning that the next incident will lead to termination. Under the circumstances presented in this case, I am unwilling to substitute my judgment for that of the Employer in reconciling the disciplinary considerations.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 10th day of November, 2000.

William C. Houlihan /s/

William C. Houlihan, Arbitrator

WCH/gjc
6154.doc