BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF FOND DU LAC

and

CITY OF FOND DU LAC EMPLOYEES
LOCAL 1366, AFSCME, AFL-CIO

Case 168
No. 59175
MA-11207

Appearances:

Mr. Lee Gierke, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 2236, Fond du Lac, Wisconsin 54936-2236, appearing on behalf of the Union.

Ms. Alyson K. Ziendt, Davis & Kuelthau, S.C., Attorneys at Law, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, appearing on behalf of the City.

ARBITRATION AWARD

The City of Fond du Lac, hereinafter referred to as the City, and City of Fond du Lac Employees Local 1366, AFSCME, AFL-CIO, hereinafter referred to as the Union, are parties to a collective bargaining agreement with 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 an employee's employment. Hearing on the matter was held in the City Hall, Fond du Lac, Wisconsin on November 17, 2000. A stenographic transcript of the proceedings was prepared and received by the Arbitrator by December 4, 2000. Post hearing written arguments and reply briefs were received by the Arbitrator by January 30, 2001. 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 where agreed to the following issue:

"Did the City of Fond du Lac have proper cause to terminate the employment of Steve Lazich on August 14, 2000?"

"If not, what is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS

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ARTICLE XXVII

MANAGEMENT RIGHTS

Except as otherwise specifically provided herein, the Management of the City of Fond du Lac and the direction of the work force, including but not limited to the right to hire, to discipline or discharge for proper cause, to decide initial job qualifications, to lay off for lack of work or funds, to abolish positions, to make reasonable rules and regulations governing conduct and safety, to determine schedules of work, to subcontract work (no employee shall be laid off due to subcontract provisions) together with the right to determine the methods, processes and manner of performing work, are vested exclusively in Management. [Emphsais added].

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PERTINENT DRUG AND ALCOLHOL POLICY PROVISIONS

IV. PROHIBITED CONDUCT

Federal Regulations prohibit employees from engaging in the following conduct:

1. Using or possessing alcohol while on duty. NOTE: Federal Regulations include medications containing alcohol in the substances banned from use or possession in the workplace. Therefore, employees will not be assigned to safety-sensitive job functions while using or possessing prescription or non-prescription medication if such medication contains any measurable amount of alcohol. It is the responsibility of the employee to notify his/her supervisor of such medication;

2. Using alcohol within eight (8) hours following an accident. If the employee was required to be tested, unless an earlier test results in a reading of less than 0.02.

3. Reporting for duty or remaining on duty while having an alcohol concentration of 0.04 or greater;

4. Consuming any amount of alcohol within four (4) hours before reporting for duty;

5. 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;

6. Reporting for duty or remaining on duty if the employee tests positive for controlled substances; or

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

In addition, City of Fond du Lac Policies prohibit employees from engaging in the following conduct:

1. Dispensing, distributing or receiving alcohol and controlled substances while on duty;

2. Possession of 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;

3. Reporting for duty or remaining on duty while having an alcohol concentration of 0.02 but less than 0.04.

4. Reporting for duty or remaining on duty while under the influence of alcohol or a controlled substance;

5. Deliberately misusing this policy in regard to subordinates; and

6. Providing false information in connection with a test, or falsifying test results through tampering, contamination, adulteration or substitution.

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V. REQUIRED TESTS

Refusal to take a required test will result in removal of that employee from his/her assignment(s) which, in turn, may result in discipline up to and including discharge. [Emphasis added].

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PART VI

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1. Preparation for Drug Testing

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h. Refusal by an employee to complete and sign the test and chain of custody forms, to provide urine, to provide an adequate amount of urine (to be decided on a case-by-case basis), or other failure to cooperate with the testing process in a way that prevents the completion of the test will be considered grounds for disciplinary action, up to and including termination. [Emphasis added].

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XI. DISCIPLINE

Consistent with this policy the employer may take disciplinary action based on non-compliance with this policy by an employee and specifically for actions as follows:

A. If a Medical Review Officer (MRO) reports that a urine drug test is positive, the employee shall be subject to discharge. Discharge shall be held in abeyance if the employee enters into a last chance agreement and successfully completes a Substance Abuse Treatment Program.

B. If a BAT reports that a breath test is equal to or exceeds 0.04, that employee shall be subject to discharge. Discharge shall be held in abeyance if the employee enters into a last chance agreement and successfully completes a Substance Abuse Treatment Program.

C. If a BAT reports a breath test is recorded between 0.02 and 0.04, the employee shall be subject to discipline pursuant to "just cause". At a minimum, the employee will be placed on leave without pay for a minimum of 24 hours following administration of the test.

D. Any employee who refuses to submit to a urine drug and/or breath alcohol test shall be subject to discharge. [Emphasis added].

Questions: Any employees with questions with respect to the scope of this policy and its contents may contact the Human Resource Director at 929-3331.

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BACKGROUND

The City has employed Steve Lazich, hereinafter referred to as the grievant, for approximately eleven (11) years. At all material times herein the grievant was in the position of a Laborer 1 – Water/Meter Reader and, as a requirement of his position, required to have a Certified Drivers License, hereinafter referred to as CDL. Individuals who possess a CDL are required by United States Government to undergo random drug and alcohol testing. Pursuant to this requirement the City in 1995 negotiated with the Union a Drug and Alcohol Policy, pertinent provisions are noted above. All employees were distributed a copy of the Policy. The last page of the policy, "Employee Acknowledgement Form," was to be detached by employees, signed and returned to the City's Personnel Department. The form states the following:

> "I acknowledge that I have received, read and understand the City of Fond du Lac's Drug and Alcohol Testing Policy on the date indicated below and understand the provisions of this Policy. I understand that the terms described in this Policy may be altered or changed by the City of Fond du Lac to comply with the Federal Omnibus Transportation Employee Testing Act of 1991 and its implementing regulations, upon prior notice. I further understand that any violation of the City of Fond du Lac's Drug and Alcohol Testing Policy may subject me to discipline, up to and including termination."

On March 9, 1995 the grievant signed the Acknowledgement form and returned it to the City's Personnel Department.

The City does not have its own testing facilities and contracts with Substance Abuse Management, Inc., hereinafter referred to as SAMI, for administration of its drug and testing programs. SAMI determines who is to be randomly tested for drug and/or alcohol. They submit a list of names to the City's Assistant Director of Human Resources, Angela Armson. Armson then notifies the supervisor of the employee on the list who then confidentially tells the employee

to go to SAMI for the test. On the morning of August 10, 2000 Armson informed the grievant's immediate supervisor, Dale Paczkowski, that the grievant was to go to SAMI for a random drug test. On August 10, 2000 Paczkowski was unable to contact the grievant, so he informed Armson, and it was decided the grievant would be directed to report on Friday, August 11, 2000 for the test. Armson informed SAMI of the changed date and directed SAMI to inform her if anyone failed to show up for the test.

On the morning of August 11, 2000 the grievant met with the Director of Public Works Mark Lentz and Paczkowski to discuss an attendance problem. At the conclusion of the meeting Paczkowski directed the grievant to report for testing. As a City employee the grievant had been tested on two (2) previous occasions. The grievant was aware that normal operating procedure was that he was to go immediately for testing. However the grievant waited until noon to report. Shortly after noon, around 12:24 p.m., the grievant reported to SAMI. Their Lab Assistant, Heidi Bengel met him, demonstrated the procedures for him, put bluing in the toilet of the bathroom the grievant was to use, and stood outside the bathroom door to listen for running water. The bathroom has a sink with only a cold water tap.

The grievant was aware he would not pass a drug test so he added cold water to his specimen cup. When he exited the bathroom he handed his specimen sample to Bengel who noted it failed a temperature reading attached to the cup. She poured the specimen into another specimen cup and it again failed the temperature test. Bengel told the grievant he would have to provide another specimen. The grievant informed Bengel he was leaving and would return after lunch. Normal procedure it to keep the employee at SAMI until the test is completed. Bengel informed SAMI Drug Screen Coordinator Marcia Christian and she directed Bengel to go after the grievant and bring him back. However, by this time the grievant had already left the building. Bengel also contacted Armson and they discussed the possibility the grievant may have tampered with his sample. At approximately 1:50 p.m. Christian informed Armson the grievant had not returned.

Armson than contacted Paczkowski and informed him to contact the grievant to direct him to go back for the test. Paczkowski was unable to find the grievant and, as he would not be in the Department's facility when the grievant returned at the end of his shift, prepared a document directing the grievant to report to SAMI for his test. The grievant received the directive but did not go to SAMI for the test.

On the following Monday, August 14, 2000 the grievant reported to work. Armson contacted Christian and was informed the grievant had not reported for a test. Armson then took the matter to Human Resources Director Benjamin Mercer. Mercer concluded the grievant had violated the drug testing policy and a direct order of management. Mercer discussed the matter with Lentz and they concluded they were left with no option but to terminate the grievant's employment.

Mercer and Lentz reviewed the matter with Paczkowski and directed Paczkowski to direct the grievant to report to Lantz's office with a Union representative. The grievant arrived without a Union representative, one was found, Scott Luttenberger, and the grievant was informed he was being terminated. The grievant requested a second chance agreement which was allowable for employees who failed a drug test and this was denied. On August 14, 2000 the grievant then went and had urinalysis performed at SAMI at his own expense and he failed the test. Thereafter the grievant filed the instant grievance and it was processed to arbitration in accord with the party's grievance procedure.

City's Position

The City contends it did not violate the terms of the labor agreement when it discharged the grievant for refusing to submit to a random drug test. The City argues the language of Article XXVII as well as the language of the Drug and Alcohol Policy vests in management the authority to discharge an employe for just cause. The City argues the grievant's action in refusing to complete a drug test on August 11, 2000 constitutes conduct in violation of the Drug and Alcohol Policy. The City asserts there are no "shades of gray" with respect to the grievant's conduct. The City avers the grievant was directed to report immediately to SAMI for a drug test and he failed to go until 12:25 p.m. He then tampered with his sample. He left saying he would return after lunch and failed to do so. He was given a second directive to go and be tested and he chose to disobey this directive as well.

The City argues the grievant was fore warned of what his actions would result in. He had received a copy of the policy and returned the acknowledgement form. The City argues the grievant's defense that he could not remember the details of the Policy is irrelevant and subjective. The City stresses the Policy clearly specifies that refusal to submit to drug testing shall be cause for immediate discharge.

The City also argues that the Drug and Alcohol Policy is reasonable and related to the orderly, efficient and safe operation of City Business. The City points out it made an effort to discover whether the grievant in fact had violated the policy, that this was done fairly and objectively, and that it even gave the grievant a second opportunity to go have the test done. The City argues the conclusion reached by it was that the grievant was guilty and there is no question he did not complete the drug test at the time the decision was made to terminate his employment.

The City acknowledges this is the first instance when an employee has refused to take a drug test. The City argues the only other refusal involved a last chance agreement, the employee was called at home whereat his spouse took the call, that it was not the City's practice to have an employee who is off duty to take any drug and/or alcohol tests, and that the City apologized for calling the employee at home. The City acknowledges it has given to employees who have tested positive the opportunity to enter into a last chance agreement. However, the City points out, there is no last chance opportunity for employees who refuse to be tested.

The City also argues the degree of discipline administered by the City is reasonably related to the seriousness of the offense. The City stresses that the core herein is an employee who tried to subvert City policy that has at its purpose the protection of other employees and the general public. The City avers the undersigned should not substitute his judgement for the City's in deciding that discharge was appropriate. The City argues it did not act in a discriminatory, unfair or arbitrary and capricious manner and the punishment was warranted.

The City would have the undersigned deny the grievance.

Union's Position

The Union argues that given the facts and the mitigating circumstances herein that a lesser penalty was more appropriate. The Union argues the grievant has a drug problem and this explains a lot of his problems. The Union points out that the grievant was disciplined, an oral warning, on the morning of August 11, 2000 for an attendance problem. That same day he tampered with his drug sample and did not return as he said he would. The Union argues these actions are characteristic of a person with a drug problem. Concealment, self-denial, and lying are all typical tools of a person with an addiction.

The Union contends it does not raise these issues to give credence to what the grievant did, but to ask for assistance for him to deal with these matters. In support of its position the Union points to the City Personnel Polity Handbook wherein it states:

> "The City recognizes that alcohol and/or substance abuse are medical problems and will offer medical assistance, as is available for other illnesses."

The Union argues addictions are much more difficult sickness to deal with because they are not apparent. The Union argues termination of the grievant's employment would punitively punish him for exhibiting the symptoms of a recognized illness. In support of its position the Union points to ASHLAND PETROLEUM CO., 90 LA 687 (1988), wherein the arbitrator held that after-the-fact participation in a rehabilitation program is entitled to consideration, and, that discipline should correct faults and behavior.

The Union also argues that a refusal to take a drug test does not result in an absolute termination. The Union points out refusals are referred to on page 4, 16 and 20 of the Policy. On pages 4 and 16 the policy says "… up to and including discharge." The Union argues that if an employee test positive the employee is offered a last chance agreement. The City's Medical Review Officer informed Armson that a refusal constitutes a positive. The Union points out the last chance agreement is a remedy that tells an employee that if the employee engages in any further misconduct they do at their own peril and can be discharged.

The Union argues the City also made mistakes in this matter. The Union points out that the twenty-two (22) page document the grievant signed states he would be disciplined, but, does not state explicitly he would be terminated. The Union points out the City acknowledged that in the five (5) years since it had been issued, the policy had not been reviewed nor had anyone been disciplined under the policy for failing to take the test. The Union points out the City did not communicate after the grievant had left SAMI on August 11, 2000 that he would be terminated if he failed to return and take the test. The Union points out that while it would have taken some effort the City could have contacted the grievant prior to the end of his workday. The Union also points out that Paczkowski's letter to the grievant did not state the grievant's employment would be terminated if he did not cooperate and take the test within a certain time frame.

The Union argues the grievant, though aware he was not doing what was expected of him, was more fearful of what would occur if he tested positive. The Union argues the grievant therefore did not have a clear understanding of the consequences of his actions. The Union points out even the City was unsure of what to do. The Union also argues that had the grievant been apprised of the penalty he would of taken the test and then worried about the penalty for testing positive.

The Union also argues that SAMI was careless in its procedures by having a facet available where someone could dilute a sample, careless when it allowed the grievant to leave it's premises and careless when it destroyed his sample. The Union acknowledges that the grievant should be disciplined for his actions but that termination is too severe of a discipline. The Union also points out that in the grievant's eleven (11) year history no discipline has gone beyond the warning stage. In conclusion the Union points to WAREHOUSE DISTRIBUTION CENTERS, 90 LA 983 (1988), wherein an employee who refused to take a drug test was reinstated.

The Union would have the undersigned sustain the grievance, reinstate the grievant with a lesser penalty, and direct that the grievant enter into a last chance agreement.

City's Reply Brief

The City asserts mitigation on account of drug dependence and/or post-discharge rehabilitation is not warranted where there is no evidence in the record that the Grievant is either drug dependent or that he has participated in a post discharge rehabilitation program. The City also asserts that not only was there no medical evidence at the hearing or presented to the City that the grievant has a problem with drugs, there was no admission from the grievant that he has a problem. The City argues the facts herein do not demonstrate the undersigned should consider the mitigating factors raised by the Union as sufficient to overturn his termination.

The City argues the Drug and Alcohol Policy, negotiated with the Union, reflects the parties' intent not to allow a last chance agreement for employees who refuse to test. The City points out that had it been the intent of the parties to allow employees who refuse to take a test an

opportunity to enter into a last chance agreement they would of placed such a provision in the subsection of the policy dealing with employees who fail a test.

The City also argues that the grievant had adequate notice of the consequences of refusing to test. The City points out the grievant had received the policy, signed that he read and understood it, and that the policy was explicit and described the outcome for violation.

The City also argues the grievant's conduct is not excused by any deviations of SAMI. The City acknowledges that the throwing out of the sample did not strictly comply with federal guidelines but this does not excuse the fact the grievant left, failed to come back and that it was his choice not to come back.

The City also points out that it did not take into account the grievant's past disciplinary record when it disciplined the grievant. The City does argue that contrary to the Union's claim that the record demonstrates the grievant has positively responded to corrective discipline, some of the offenses such as attendance are repeat problems.

Union's Reply Brief

The Union argues that contrary to the City's claim there was notice to the grievant that he would be terminated for refusing to take a drug test is demonstrated by the wording of "…up to and including termination." The Union concludes the language is not as clear and explicit as the City claims. The Union also argues the City did not give the grievant clear notice of the consequences of his actions. The Union argues the City could of done so by contacting him directly and by putting in the written memo to him what would be the consequence if he failed to go take his drug test. The Union stresses that immediately upon finding out the consequences he went and took the test.

The Union also argues that contrary to Mercer's testimony (Tr. p. 107), the City did have other options other than termination. The Union points out the United States regulations do not require an employee's discharge.

The Union also argues the undersigned has the right to amend the penalty. The Union argues the policy allows latitude and avers that the way the parties defined the issue gives the undersigned latitude to determine an appropriate remedy. The Union also points out there is arbitral precedent for arbitrators to reduce penalties in drug and alcohol testing cases.

DISCUSSION

The facts herein are not in dispute. The fundamental question is whether the discipline imposed by the City is too severe. The Union argues there are mitigating factors which should be viewed, and, after viewing these mitigating factors, the Union contends a lesser penalty should

be imposed. While the undersigned would agree that under certain circumstances arbitrators have taken into account mitigating circumstances, such circumstances do not appear to be present in the instant matter. The undersigned finds there is no evidence, as in ASHLAND PETROLEUM CO., that the grievant has participated in a substance abuse program. Further, except for the Union's assertion the grievant is addicted to a controlled substance, there is no evidence he has been diagnosed as someone who is addicted to a controlled substance. Union Exhibit 4, while expressing the grievant is undergoing a great deal of stress, does not identify the grievant as having a substance abuse problem. Thus all we have herein is the grievant's testimony and the Union's assertions that he is addicted to a controlled substance. On this basis the undersigned can not conclude the grievant has a controlled substance addiction and that his actions should mitigate the penalty imposed upon him. The undersigned would note here that it is the Union's burden to demonstrate that mitigating factors exist. Absent any showing that the grievant has been diagnosed by a competent professional as being addicted to a controlled substance the Union fails to meet the burden of demonstrating the grievant is addicted to a controlled substance. Absent any showing that the grievant had voluntarily entered some type of post-discharged controlled substance rehabilitation program the Union has failed to demonstrate the grievant is trying to correct the problem.

The undersigned also finds that the instant matter is distinguishable from WAREHOUSE DISTRIBUTION CENTERS. Therein the arbitrator did not find the employee's conduct to be gross misconduct warranting a termination because the parties had labeled use of drugs as gross misconduct and the arbitrator concluded a refusal to take a drug test was a lesser misconduct. The parties herein have mutually agreed to discipline up to and including discharge for a failure to take a drug test. The grievant's conduct is compounded by other facts. He attempted to falsify his sample by adding water to it. Such conduct is a clear violation of paragraph "h", on page 16 of the policy, and the grievant was aware this was misconduct when he attempted to falsify his specimen sample. This was conduct the grievant knew was wrong.

The grievant also failed to come back for the drug test as he told the lab technician he would. The grievant clearly knew this was improper conduct but chose not to return to SIMI's facility. There is nothing in the record which would demonstrate that the grievant did not knowingly determine not to go back after lunch. While SIMI may have violated federal procedures by allowing the grievant to leave the facility, this does not alter the fact the grievant knowingly failed to return as he said he would.

The grievant also failed to comply with a written directive that he return to the lab and take the test. The grievant does not dispute that he received the written directive at the conclusion of his workday. The undersigned finds no merit in the Union claim that because this written directive did not state that the grievant faced termination if he did not comply with it that the grievant was thus unaware that his employment would be terminated. The grievant was aware that he would be in trouble if he failed a drug test. The grievant mistakenly assumed he would be in greater trouble if he took and failed the test (Tr. p. 154). He thus choose to refuse to

obey a written directive form his supervisor. Thus the undersigned finds he has on his own volition warranted the disciplined imposed upon him.

The undersigned does note that page 4 of the Drug and Alcohol Policy does state that a refusal to take a required test would result in removal from your job assignment and discipline up to and including discharge. The grievant has acknowledged that he has received and read the policy. Thus the undersigned finds that the grievant was aware that his acts could result in discharge. He was also aware of last chance agreements. He had taken the drug tests twice before. While the undersigned may be sympathetic to the grievant's plight, the grievant was aware of what he was doing when he added water to his specimen sample. The grievant was aware of what he was doing when he left SIMI and did not return. The grievant was also aware he was not following his supervisor's written directive when he chose to go home instead of returning to take the drug test. The Drug and Alcohol Policy does allow for last chance agreements. However, this is limited to employees who have followed the directives and a Medical Review Officer has reported a drug test that was positive for controlled substances. Such an occurrence has not happened herein.

The undersigned finds the intent of the parties is clear. When an employee complies with the procedures of the Drug and Alcohol Policy and test positive to a controlled substance the employee shall be given a last chance. To conclude that an employee who refuses to take a drug test, particularly when the employee is given a verbal and written directive to do so, and then allow that employee to enter into a last chance agreement would render meaningless this provision of the policy.

Therefore, base upon the above and foregoing, and the testimony, evidence and arguments presented, the undersigned concludes the City had just cause to discipline the grievant. The undersigned also finds that as the grievant's refusal also included an attempt to falsify his drug test and that he failed to comply with a written directive from his supervisor to take the drug test, that the City had proper cause to terminate the grievant's employment.

The grievance is denied.

AWARD

The City of Fond du Lac had proper cause to terminate the employment of Steve Lazich on August 14, 2000.

Dated at Madison, Wisconsin this 16th day of April, 2001.

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

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