BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF RACINE

and

LOCAL 67, AFSCME, AFL-CIO

Case 609
No. 59844
MA-11425

(M.C. Grievance)

CITY OF RACINE

and

LOCAL 67, AFSCME, AFL-CIO

Case 610
No. 59845
MA-11426

(M.C. Grievance)

Appearances:

Mr. John Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P. O. Box 624. Racine, WI 53401-0624, appearing on behalf of the Union.

Mr. Guadalupe G. Villarreal, Deputy City Attorney, City of Racine, City Hall, 730 Washington Avenue, Racine, WI 53403, appearing on behalf of the City.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ARBITRATION AWARD

According to the terms of the 1998-99 collective bargaining agreement between City of Racine (City) and Local 67, AFSCME, AFL-CIO (Union), the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff as arbitrator to resolve a dispute between them regarding the suspension and discharge of M.C. 1/ The Commission designated Sharon A. Gallagher to hear and resolve the disputes. Mediation was initially scheduled for June 14, 2001, but was later canceled, although the parties met in an attempt to mediate the dispute. Hearing in these cases was scheduled and held on August 9, 2001, at Racine, Wisconsin. A stenographic transcript of the proceedings was made and received by August 23, 2001. The parties agreed to file their initial briefs through the Arbitrator, which were postmarked November 7, 2001. They also agreed to reserve the right to file reply briefs which were to be received by November 21, 2001. The parties chose not to file reply briefs so that the record herein was closed on November 21, 2001.

1/ The Grievant's identity is being withheld based upon the allegations herein.

ISSUES

For the first time at the hearing, the City raised the issue whether the five-day suspension issued Grievant M.C. was arbitrable. The Union resisted this issue. The parties jointly agreed to bifurcate this issue, allow the Arbitrator to hear the evidence regarding the arbitrability issue and make a bench ruling regarding whether the grievance was arbitrable before reaching the merits of these cases. The Arbitrator heard all facts and arguments from the parties regarding arbitrability. Thereafter, the Arbitrator ruled from the bench, stating all of her reasons on the record, that said grievance was arbitrable as it had been timely filed and processed.

The parties stipulated that the following substantive issues were properly before the Arbitrator in these captioned cases:

1. Did the City have just cause to impose a five (5)-day suspension on the Grievant on April 6, 1999? If not, what is the appropriate remedy?

2. Did the City have just cause to terminate the Grievant on December 11, 2000? If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE II

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 of 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 which 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.

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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 they 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 by the City under rights conferred upon it by this Agreement, or the work rules established by the City of Racine. . . .

ARTICLE III

Grievance Procedure

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K. Discipline. The Union shall be furnished with a copy of any written notice or reprimand, suspension or discharge. The City agrees that it will correct shortcomings on the part of City employees in terms of their overall work performance. Discipline, therefore, is intended to initiate a corrective action on the part of the employee. A written reprimand sustained in the Grievance Procedure or not contested shall be considered a valid warning. The Union agrees upon receipt of the reprimand notice to review the situation with the employee in an attempt to correct the problem. When an employee's record is cleared of minor infringements for a year, all previous records of minor infringements shall be removed from his personnel file.

L. Discharge. Although the City continues to exercise its sole discretion in determining when it will discharge and employee (subject to the requirement of discharge for just cause), when practical, in its discretion, the City will advise both the Union and the individual employee that his job is in jeopardy. Probationary and student employees are subject to discharge without recourse to the Grievance and Arbitration Procedures of this Agreement. Receipt of reprimands or suspensions will be deemed to served [sic] as such notice to the individual employee. Upon receipt of copies of such notices, the Union agrees that it will meet with the individual employee in an attempt to correct his inadequate job performance.

When a grievance involves discharge, it shall be reduced to writing and referred directly to a special committee consisting of the Personnel Director, the Head of the Department concerned and a member of the City Attorney's Office or the Labor Negotiator. Steps 1 through 2 would not apply in this type of case, and the decision of the special committee shall be subject to arbitration as provided in Section F of the present Grievance Procedure.

RELEVANT PROVISIONS OF THE CITY'S "DRUG AND ALCOHOL TESTING POLICY"

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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 should 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 Employee 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.

II. PURPOSE

The Department of Transportation (DOT) and the Federal Highway Administration (FHWA) have issued Federal Regulations (49 CFR Parts 40 and 382) implementing the provisions of the Federal Omnibus Transportation Employee Testing Act of 1991 which requires alcohol and controlled substance testing of drivers who are required to have a commercial driver's license. These Regulations include detailed procedures for breath alcohol testing and urine drug testing of employees in safety-sensitive positions. 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. Consequently, the City of Racine has established the following alcohol misuse and drug prevention program, as well as the subsequent enforcement of violations, for its employees conducting safety-sensitive job functions (Employees should also refer to the City's "Drug Free Workplace Policy," which addresses the strict enforcement of workplace controlled substances and alcohol usage).

III. COVERAGE

For the purposes of this policy, the City of Racine and the DOT strictly prohibit the use of alcohol and/or controlled substances by its employees and volunteers with Commercial Vehicle Licenses (CDLs) who are actually performing, ready to perform or immediately able to perform, or ceasing to perform, the following safety-sensitive job functions:

1. Operation of a commercial motor vehicle;

2. Repair and maintenance of a commercial motor vehicle that requires road testing the vehicle on a public highway;

3. Supervisors and managers on stand-by to perform a safety sensitive job.

IV. PROHIBITED CONDUCT

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

1. Using, possessing, dispensing, distributing, or receiving alcohol, intoxicants, illegal drugs or other controlled substances on City premises, or while engaged in City business;

2. Reporting to work under the influence of alcohol; intoxicants, illegal drugs, or other controlled substances in their system;

3. Reporting to work under the influence of a prescription drug, unless the employee's physician determines that the use of the prescription drug will not adversely affect the employee's ability to perform a safety-sensitive position. Note that the federal regulations include prescription medications containing alcohol in the substances banned from use in the workplace. Therefore, employees should not report for duty while taking prescription medication if such medication contains any measurable amount of alcohol;

4. Consuming any amount of alcohol, intoxicants, illegal drugs, or other controlled substances while on duty or within four (4) hours of reporting for duty; or

5. Refusing to undergo or cooperate in any required alcohol or controlled substances testing required by this policy.

6. Knowingly disregarding the requirements of this policy, or who is found to deliberately misuse the policy in regard to subordinates as the City is dedicated to assuring a fair and equitable application of this substance abuse policy.

7. Providing false information in connection with a test, or who is suspected of falsifying test results through tampering, contamination, adulteration, or substitution.

Any employee who violates any of the rules set forth above shall be subject to discipline, up to and including termination.

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VII. REQUIRED TESTS

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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 accordance with federal requirements, the minimum annual percentage rate for random alcohol testing shall be 25 percent and the minimum annual percentage rate for random drug testing shall be 50 percent of the average number of employees in safety-sensitive positions. For example, if the City has 120 employees who are required to submit to testing, and DOT regulations specify that random testing will be performed at a rate of 50 percent, then 60 employees must be tested each year, which translates into 5 employees per month.

The City reserves the right to either increase or decrease the minimum annual percentage rate for random alcohol and drug testing based upon the reported violation rate for the entire commercial vehicle industry as determined by the Federal Highway Administration and the federal regulations implementing drug and alcohol testing in the transportation industry.

The selection of employees for random testing shall be administered by an outside agency 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 that it may 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. As a result, some employees may be tested more than once each year, while other employees may not be tested at all.

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.

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5. **Return-to-Duty/Follow-Up Testing -** This test is used to maintain abstinence and prevent relapse by employees during and after drug treatment. The City shall 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 verified negative result for controlled substance use. In any event, an employee shall not be allowed to return to duty without first having been evaluated by the City EAP provider in order to determine the employee's fitness for duty.

Following a determination that an employee is in need of assistance in resolving problems associated with alcohol misuse and/or use of controlled substances, the City shall ensure that the employee is subject to unannounced follow-up alcohol and/or controlled substances testing in consultation with a substance abuse professional. Consequently, the employee shall be given at least six (6) random tests during the 12 month period after returning to duty with the possibility of follow-up testing for up to 60 months after the employee returns to duty.

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VIII. TEST PROCEDURES

The City will use a qualified provider to perform alcohol and drug testing, which may be done on both urine and breath. All drug and alcohol testing sha11 be conducted in conformance with the procedures and rules established by the Federal Omnibus Transportation Employee Testing Act of 1991 and its implementing regulations.

The qualified provider will handle taking the sample (in standard collection kits) on a 24 hour basis, utilizing different collection sites when necessary based on the time of day. The qualified health provider will be responsible for ensuring proper transportation from the collection site(s) to a Department of Health and Human Services (DHHS) certified laboratory. Specimen collection shall not be done anywhere but at a City authorized collection site unless specifically authorized by the Personnel Department.

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B. CONTROLLED SUBSTANCES

The City has established its anti-drug program through its Drug Free Workplace Policy, which strictly prohibits the unlawful manufacture, distribution, dispensing, possession or use of a controlled substance in the workplace. Furthermore, any abnormal conduct that may create a reasonable suspicion that an employee is under the influence of a controlled substance is addressed in the "Reasonable Suspicion Testing" section described previously in this Policy.

For purposes of this policy, the City will utilize, according to federal requirements, a 5-panel drug screen consisting of the following drugs:

a) Tetrahydrocannabinol (Marijuana drug)

b) Cocaine

c) Amphetamines

d) opiates (including heroin)

e) Phencyclidine (PCP)

The City reserves the right to expand the above list if additional drugs are required under federal mandates, or to impose the reasonable suspicion standards of this policy.

Drug testing is conducted by analyzing an employee's urine specimen (through a DHHS certified testing lab). This procedure shall include the use of a split specimen testing procedure. Each urine specimen is subdivided into two bottles labeled as a "primary" and a "split" specimen. Both bottles will be sent to a certified lab. Only the “primary” specimen bottle is opened and used for the urinalysis. The split specimen bottle remains sealed and is stored at the lab. If

the analysis of the primary specimen confirms the presence of illegal, controlled substances, the employee has 72 hours from the time of notification of a positive test result to request the split specimen be retested at the same lab or be sent to another certified laboratory for analysis, at the employee's expense. An employee who fails to notify the City within 72 hours after receiving notice of a positive test result of his/her desire to have the split specimen tested shall be deemed to have waived his/her right to seek testing of the split specimen.

In some cases the employee may be unable to provide a urine specimen. After a reasonable waiting period, the employee can be given up to 24 ounces of liquid and be allowed up to 2 hours to produce a suitable sample. If the employee is still unable to produce a urine sample, the MRO will send the employee to a doctor to determine why a sample cannot be produced by the employee.

1. PREPARATION FOR DRUG TESTING

The following procedures summarize the procedures established by the Federal Highway Administration regulations implementing drug testing under the federal law. These procedures are subject to change in the event the FHWA or other government agency changes the regulations on drug and alcohol testing of employees in safety-sensitive positions.

a) When the employee enters the collection site, the employee will be required to provide positive photo identification (i.e., driver's license).

b) The employee will be instructed to provide at least 45 ml of urine under the split sample method of collection. This will be done in a specifically designated "donor" bathroom.

c) The urine sample shall be divided into a primary specimen (30 ml) and a split specimen (15 ml).

d) If the test result of the primary specimen is positive, the employee may, within 72 hours of notice of a positive test result, request that the Medical Review Officer (a licensed physician employed by the health service provider who is responsible for receiving and interpreting laboratory test results) direct that the split specimen be tested in the same or a different DHHS certified laboratory for presence of the drug(s) for which a positive result was obtained in the test of the primary specimen.

e) An employee shall be removed from the safety-sensitive position pending the result of the test of the split specimen.

f) If the result of the test of the split specimen fails to reconfirm the presence of the drug(s) or drug metabolite(s) found in the primary specimen, the MRO shall cancel the test.

g) Employees will be required to complete and sign various forms used to document the testing and chain of custody process. Refusal to sign the test form(s) shall be regarded as a refusal to take the test.

h) Refusal by an employee to complete and sign the test and chain of custody forms, to provide an adequate amount of urine (to be decided on a case by case basis), or otherwise 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.

In the event of conflicting results between the initial test and the confirmation test, the confirmation test results will determine the outcome of the test.

2. RESULTS OF A POSITIVE TEST

Any employee who tests positive for controlled substances shall be subject to discipline, up to and including termination. As with an alcohol misuse violation, the City is required to act upon a positive drug test result in the following manner:

a) Remove the employee from the safety-sensitive position. This removal shall only take place after the employee has been allowed to meet or speak with a Medical Review Officer (MRO) in order to determine that the positive drug test did not result from the unauthorized use of a controlled substance;

b) Refer the employee to the City EAP for assessment and subsequent compliance with recommended rehabilitation after a determination of a drug problem has been made;

c) Employee must be evaluated by a substance abuse professional or MRO and determined to be fit to return to work prior to their release of the employee;

d) Employee must have a negative result on a return-to-duty drug test. Follow-up testing to monitor the employee's continued abstinence from drug use will be required.

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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.

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STIPULATIONS OF THE PARTIES

Prior to the hearing in this case, the parties entered into the following stipulations of fact which they agreed the Arbitrator could accept "as evidence and consider . . . in rendering a decision on the merits of the cases. . . ." The stipulation of fact reads as follows:

. . .

1. M.C. (Grievant) was an employee of the City of Racine (Employer) from August 19, 1996 to December 11, 2000.

2. The Grievant was employed as a truck driver and required to possess a Commercial Driver's License (CDL). (Exhibit A) 2/

3. The Employer has a Drug and Alcohol Testing Policy (Policy) in effect for all CDL holders. . . .

4. The Grievant was subject to the Policy, together with corresponding Federal rules and regulations and subject to the random drug and alcohol testing.

5. The Grievant was terminated on December 11, 2000 as a result of a positive drug test (Exhibit B) taken on November 29, 2000.

6. The Employer and Local 67, AFSCME, AFL-CIO (Union) have an agreement that recognizes the Employer's right to impose a five (5) day suspension for a first positive drug test.

7. The Grievant was sent to the Substance Abuse Management Institute (SAMI) for a random drug test on March 12, 1999.

8. On March 12, 1999 at 8:52 a.m., the Grievant submitted a urine sample for analysis in accordance with the Department of Transportation's Workplace Drug Testing Program, as provided in 49CFR, Part 40.

9. The Grievant's urine sample was analyzed by SAMI through the services of independent laboratories, Info-Meth Toxicology Laboratory and Northwest Toxicology Laboratory.

10. On March 13, 1 999, Info-Meth Toxicology reported the urine as 'Specimen Not Suitable for Analysis".

11. On March 26, 1999, the Northwest Toxicology performed an analysis of the urine sample and reported the urine as adulterated with anionic surfactant (soap).

12. On March 29, 1999, the Medical Review Office (MRO), Dr. J. Jaworski, treated the adulterated test results as a refusal to take the test on March 12, 1999.

13. On April 6, 1999, the Employer suspended the Grievant for five (5) days as a result of the adulterated urine sample submitted on March 12, 1999. (Exhibit C)

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2/ Exhibits A, B and C are not quoted here.

FACTS

On March 12, 1999, M.C. went for a random drug test to the City's collective agent, All Saints Medical Clinic. While at All Saints, and before he gave his urine sample, M.C. received the following instructions regarding the collection of his sample and the procedures therefor:

SAMPLE DONOR INSTRUCTIONS FOR DOT

You have been designated to provide a urinalysis for drug testing.

The collection of your urine specimen will be conducted under the procedures required by the Mandatory Guidelines for Federal Workplace Drug Testing Programs. These procedures allow for individual privacy unless there is reason to believe that a particular individual may alter or substitute the specimen to be provided. The collection site person will take precautions to ensure that your specimen is not adulterated or diluted during the collection procedure. Your specimen collection must also follow strict chain of custody and security procedures.

In addition:

- Photo identification (e.g., driver's license, agency badge) must be presented at the time of collection or you must be identified by your supervisor.
- You will be asked to remove any unnecessary outer garments such a coat or jacket. All personal belongings like purses or brief cas4es [sic] will remain with the outer garment, <u>You may retain your wallet.</u>
- You will be instructed to wash and dry your hands prior to providing a specimen.
- Your specimen will be provided in the privacy of a stall or otherwise partitioned area that allows for privacy.
- The collection site person working with you and observing your sample if required will be of the same gender as yourself.

- After handing the specimen bottle to the collector, you should keep the specimen in full view at all times until it is sealed and labeled. This protects you against the wrong label being put on your bottle or someone possibly tampering with your specimen.
- If the collection site person has reason to believe that you may have altered or substituted the specimen, they will notify a higher level supervisor. Should you tamper, adulterate, or in any way attempt to dilute your sample, the collection site person will request authorization to collect a second specimen under direct observation of a same gender collection site employee.
  - *Note:, A higher level supervisor shall review and concur in advance with any decision by a collection site person to obtain a specimen under direct observation by a same gender collection* site *person.*
- You will be asked to initial the identification label on the specimen bottle for the Purpose of certifying that it came from you.
- Your sample will be tested for Cannabinoid (Marijuana), Cocaine, Amphetamines, Opiates, and Phencyclidine (PCP).
- If, after laboratory analysis, the specimen is found to contain any drugs of abuse, the
- results will be disclosed only to your company's Medical Review Officer (MRO). prior to making a final decision to verify a positive test result the MRO shall give you an opportunity to discuss the test result and submit medical documentation of legally prescribed medications.
- Records concerning you're your [sic] collection and testing are covered under the privacy Act 5 U.S.C. 522a. Employee records shall be maintained and used with the highest regard for your privacy.

Notes Any employee, upon written request, has access to any records relating to his or her drug tests. Results may only he disclosed without your written consent to those designated by the DOT regulations.

M.C. stated herein, and the medical records confirm, that there was nothing unusual (color, temperature or odor) about the sample he offered to All Saints Medical personnel on March 12, 1999 and the All Saints personnel did not then object to M.C.'s sample as having been tampered with or adulterated. In addition, all safeguards were taken, per DOT regulations and City policy, that the sample was properly labeled and sealed and sent to the first testing laboratory. 3/

3/ The Union did not object to or raise any procedural questions regarding the collection of the sample or its chain of custody.

The initial lab to test M.C.'s sample was Info-Meth Toxicology Laboratory which determined that the urine was "not suitable for analysis." Dr. Jaworski, the Medical Review Officer (MRO) for the City, who is employed by Substance Abuse Management Inc. (SAMI), stated herein that the findings of Info-Meth indicated to her that the sample must have been adulterated or tampered with by M.C. Dr. Jaworski also stated that the collection agent (All Saints) may not be able to determine at the time of collection that a sample has been adulterated if the sample has not changed dramatically in temperature, color or odor. Because M.C.'s March 12, 1999 sample was not suitable for testing, Jaworski stated that the test for alcohol or other controlled substances could not be performed. Jaworski stated that under DOT regulations, this is a result which is treated the same as a refusal to test or a positive result.

Jaworski stated that each donor must sign a certification that he/she has provided a sample to the collection agency and that he/she did not adulterate that sample in any manner. Thereafter, the samples are sealed with tamper-evident seals in the donor's presence and the donor must essentially certify that the labels and seals on the specimens are correct. In addition, Jaworski stated that under DOT regulations which existed in March, 1999, donors were not allowed to have the second sample be "split sample" tested after an "adulterated" result was returned. Rather, at that time, the regulations stated that only if the result was positive could a donor request and receive a split sample test on the second sample to confirm or deny a positive result. Under DOT regulations, Jaworski stated, a positive or an adulterated result requires that the employee be found unfit for the operation of safety-sensitive equipment so that a positive or adulterated result would be treated the same for those purposes under DOT regulations.

Dr. Jaworski stated that on March 24, 1999, she talked to Grievant M.C. at approximately 11:55 a.m. and asked him about any medications he might have been taking on March 12, 1999. Jaworski stated that M.C. was not taking anything that could have caused interference with his urine test. At this point, Dr. Jaworski decided to send M.C.'s sample to Northwest Toxicology Lab to determine why Info-Meth had determined the sample was unsuitable and could not be tested. Northwest Toxicology Laboratory (NTL) tested M.C.'s specimen and found it "unsuitable" as it gave ultra-negative results. Dr. Jaworski stated that this result meant that the sample had been adulterated which interfered with the ability of the test to find whether or not there were any controlled substances in M.C.'s urine. NTL further found that the adulterant used was soap, known as anionic surfactant.

Dr. Jaworski stated that soap would have had to be added by M.C. as he was the only one who had possession of the donor container prior to its having been sealed by All Saints Medical Clinic personnel. In response to cross-examination questions from the Union, Jaworski stated that there should be no residual soap that could wash into the urine cup even if the donor splashed his finger with his own urine. This is true, because the donor must wash his hands before he gives his urine sample and that this is done in a separate area from the place where the donor produces the urine sample. Dr. Jaworski also stated that "peeing on your finger is a willful act." Therefore, Jaworski issued the results of M.C.'s test as "adulterated, test not performed."

Jaworski stated that in her conversation with him, M.C. never requested that the split sample be tested; that M.C. never admitted adulterating the sample; that it is not illegal to adulterate a sample under Federal law but that it may be under State law. 4/ Jaworski also stated that had M.C. asked for a split sample test she would have told him that under DOT regulations in effect at that time, he was not entitled to this based on an adulterated result. Jaworski stated that had M.C. asked for a split sample test, she would have written this in her file notes and that she would have told the City of his request even though such a request would not have been allowed under the then-effective DOT regulations. Dr. Jaworski said she had no such file notes regarding M.C.

4/ There is no evidence in this record to show whether such adulteration would violate Wisconsin law.

M.C. stated herein that he had difficulty reaching Dr. Jaworski after she called him at work and left a call back message regarding the results of his test. M.C. also asserted that he continued working on safety-sensitive equipment after Jaworski called him because he could not reach her that day. Shortly thereafter, he had a conversation with Jaworski in which M.C. claimed that Jaworski told him that his urine had been sent to another facility and that it was suspected to have been adulterated. M.C. asserted that he asked for a split sample test and stated on direct examination that Dr. Jaworski said that his sample was no longer available — that it had been sent to another lab. From this, M.C. concluded that his sample had already been tested without his consent. On cross-examination, M.C. stated that Jaworski told him that a split sample was not available and that she said that "they" would not allow M.C. to split the sample. M.C. admitted he never asked to pay for a split sample test on the sample given on March 12, 1999. After his five-day suspension, M.C. was sent to the City Employee Assistance Program (EAP) and to a substance abuse professional for evaluation. After his suspension, he tested negative and returned to work.

The City's drug and alcohol policy agent, Terry Parker, stated that Dr. Jaworski talked to him after she had spoken to M.C. in March, 1999, indicating that M.C.'s March 12, 1999 sample had been adulterated. Parker stated that Dr. Jaworski never called him to say that M.C. had requested a split sample test and that normally Dr. Jaworski would have called the City to indicate that M.C. had asked for a split sample test, even in the case where he was not entitled to such a test. After speaking to Dr. Jaworski, Parker stated that he called Department Head Joe Golden and told Golden to take M.C. off any safety-sensitive equipment and tell him to call the City EAP immediately.

Parker stated that it is the City's past practice on a first positive test for drugs or alcohol to suspend employees for five days and that on a second positive test thereafter, the employee is terminated. Parker stated that the City treated M.C.'s adulterated test result the same as a positive result based on the City's policy. Parker affirmed that under the City's policy and Federal regulations effective in March, 1999, an employee would only get a split sample test if the employee tested positive for drugs or alcohol, not for an adulterated result.

On November 20, 2000, M.C. had a follow-up drug and alcohol urine test. M.C. gave another urine sample at All Saints Medical Clinic which came back positive for cocaine. 5/ M.C. requested a split sample test, which was done and he failed the test on the split sample as well. On December 11, 2000, M.C. was terminated by the City. 6/

5/ M.C. stated herein that he had not taken illegal drugs prior to his random drug/alcohol test on March 12, 1999, but that after his suspension he had done so.

6/ The Union has not objected to any of the procedures used regarding M.C.'s second test (November 22, 2000), which resulted in his testing positive twice for cocaine.

POSITIONS OF THE PARTIES

The City

The City asserted that its Drug and Alcohol Testing Policy (DATP) was implemented to mirror the Federal regulations and that the DATP is "subject to change" in the event the Federal government mandates changes. The City also noted that under Federal regulations, the Medical Review Officer (MRO) has the authority to send a urine sample to a different certified laboratory if the first test at the first certified laboratory showed the test had been interfered with, to determine whether the test sample had been adulterated.

In this case, the City argued that M.C.'s assertion that he asked the MRO for a split sample test is contrary to all other evidence and logic on this point. Here, the City noted that the MRO's notes contained no reference to such a request, although her notes were extremely detailed; that the City was never notified of a request for a split sample test by the MRO (which is normally done) in M.C.'s case; that the MRO would have denied the request in any event as a split sample test was not available for an adulterated result under the Federal regulations that were in effect in March, 1999. In addition, in 1999, all split samples had to be kept for one year by the laboratory under Federal regulations and it would not have been tested unless the first sample tested positive for drugs. Thus, the City urged that the Grievant's testimony was not credible. In any event, even assuming the Grievant's story is true — that the MRO told him his split sample was unavailable because it had been tested by another lab — this would mean that M.C. actually received a split sample test (which he was not entitled to) which showed that the split sample was also adulterated with soap.

The City noted that the parties stipulated to a set of facts which must be accepted by the Arbitrator as true in this case. Among these was the fact the Grievant's urine sample was properly analyzed in accordance with all of the regulations as contained in 49CFR Part 40. In addition, the hypothetical put by the Union to the MRO during her testimony (that the Grievant may have had soap on his fingers and that he may have peed on his fingers, thus adulterating the sample with soap) was not confirmed or stated by the Grievant under oath in this case.

Because soap is not a naturally found component of urine, the MRO treated M.C.'s test as adulterated, which under Federal regulations is the equivalent of a refusal to test or a positive result. In turn, the City accepted the MRO's determination that the test was adulterated and constituted a refusal to test and treated that as a violation of its policy, which provides that a refusal to test shall be treated the same as a positive test result which will then result in discipline of the employee on a first violation of the policy with a five-day suspension.

It is the City's position that it had no alternative but to treat M.C.'s adulterated urine sample the same as a refusal to test, which is also the same as a positive result, as employees could simply adulterate their urine or refuse to give a sample if the policy were not read in this fashion. Therefore, the City urged that the evidence demonstrated that the urine sample provided by the Grievant on March 12, 1999, was adulterated and the City therefore had good cause to impose a five-day suspension for this violation of its DATP. As the Grievant's termination resulted from his November 29, 2000, follow-up drug test which resulted in a positive test result for cocaine, the City urged that it had just cause to discharge the Grievant's employment for this second violation of the City's DATP. Therefore, the City requested that both grievances be denied and dismissed in its entirety.

The Union

The Union asserted that M.C. requested a split sample test be done on his March 12, 1999 sample under the City's Policy and that he was entitled to such a split sample test upon demand whether the test results were positive or adulterated, pursuant to the City's DATP. The Union noted that City Manager Parker admitted that an adulterated result is to be treated the same as a positive result. Nothing in the policy limits an employee's access to a split sample test, in the Union's view. Also, Federal regulations do not specifically deny employees the right to a split sample test where the result is an adulterated sample and the Federal regulations do not mandate discipline. Federal regulations only require that an employee be removed from operating safety-sensitive equipment if there is a positive test result.

The Union pointed out that in January, 2001, the Federal government began mandating that split sample tests be allowed at an employee's request where the result was an adulterated sample. This change in the Federal regulations was made "because problems were discovered in the lab," (Union Exhibit 1) which showed that 300 tests had been canceled. Because M.C. was denied a split sample test in March, 1999, the City did not have just cause to suspend him for an adulterated drug test result. Therefore, the Union sought an award making M.C. whole and expunging his record of the suspension.

As the suspension could not stand under the Union's analysis, the Union urged that M.C.'s discharge must be reversed because a five-day suspension is the appropriate penalty (under the DATP) for a first violation thereof. Therefore, a five-day suspension must be substituted for the discharge given M.C. on December 11, 2000, due to M.C.'s positive drug test result on his November, 2000, test. In addition, the Union sought an award making M.C. whole (except for the five-day suspension) and an order expunging his work record of the discharge.

DISCUSSION

The Union's main argument in this case is that the because M.C. was denied a split sample test following his March 12, 1999, test, the City's discipline of M.C. for this adulterated result should be disregarded. Based upon this record, I need not determine whether M.C., in fact, requested a split sample test of his March 12, 1999, sample for the following reasons.

A close analysis of the City's DATP shows that this policy is the City's attempt to comply with the Omnibus Transportation Employee Testing Act of 1999, which is implemented by the Department of Transportation through 49CFR Parts 40 and 382. The record evidence showed that as of March 12, 1999, there was no requirement that those receiving an adulterated test result must be given a split sample test if one were requested. This was confirmed by Dr. Jaworski, the City's MRO, as well as the Federal Register documents placed in the record by the City and the Union. Indeed, there was no evidence to affirmatively show that if an adulterated result occurred, the employee tested was entitled to request a split sample test under the DATP or the Federal regulation as they existed in March, 1999. Rather, the City's DATP clearly states that a split sample test will be provided only when a positive result occurs. The Union cannot bootstrap the fact that an adulterated test result is treated as a refusal to test which is then treated as a positive result in other areas of the DATP and/or Federal regulations to gain access to a split sample test on an adulterated result.

The Union argued that because 49CFR Parts 40 and 382 were changed after March, 1999, to provide for split sample tests on adulterated samples, this means, that in fairness such a test should have been provided to M.C. I disagree. It is clear that the City's DATP was specifically intended to comply with the Omnibus Transportation Employee Testing Act of 1999 as implemented by the DOT through 49CFR Parts 40 and 382. The fact that an adulterated result is punishable under the DATP as if it were a positive result (DATP, Part IV, Sub. 7), really appears to have been intended as a fail-safe mechanism so that employees will not adulterate their samples with impunity.

Here, the facts showed that the adulterant used was soap. Although the Union asked Dr. Jaworski several hypothetical questions involving a test subject who washes his hands, allows soap to remain on his fingers, and then urinates on his fingers, mistakenly washing soap into the sample cup, I note that the Union never asked M.C. to confirm that this is, in fact, what occurred regarding his March 12, 1999 sample. The facts showed that M.C. was the most likely person to have had the ability to adulterate his urine sample on March 12, 1999, as he was the only person who was alone in the stall when the sample was given. The fact that All Saints personnel did not detect any change in the temperature, odor or color of M.C.'s urine sample does not mean that M.C. could not have adulterated it while producing it alone in the bathroom stall. Indeed, I note that whether a sample is adulterated intentionally or accidentally does not change the fact that being suspected of adulteration is cause for discipline under Part IV of the DATP.

In addition, I note that the Union submitted no evidence to show there was anything wrong with the procedures used by All Saints collection personnel on March 12, 1999. Also, M.C. signed a certification after producing his sample that the sample was his, and that he had not adulterated it. M.C. then gave this certification to All Saints personnel before he left the testing facility. In all of the circumstances of this case, it is reasonable to conclude that M.C. was in fact the person who adulterated his urine sample on March 12, 1999, and that there is no other likely explanation therefor. As such, M.C. violated the DATP and was subject to a five-day suspension for adulterating his urine sample, pursuant to Part IV, Sub. 7, of the DATP.

M.C. was employed by the City from August 19, 1996 until his discharge. After serving a five-day suspension 7/ due to the adulterated result on his March 12, 1999 test, M.C. returned to work and had no problems until he took a follow-up drug test on November 29, 2000, which revealed his urine was positive for cocaine. M.C. requested and received a split sample test on his November 29, 2000 sample, which came back positive again for cocaine. M.C. was then discharged on December 11, 2000. I have not found any irregularities concerning the March 12, 1999 test, and have ruled that M.C.'s five-day suspension therefor must stand. As a consequence, and given the fact that no irregularities occurred regarding M.C.'s November 29, 2000 test, his discharge for testing positive for cocaine on that test must also stand. Therefore, I issue the following

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7/ The record evidence was undisputed that the City has imposed a five-day suspension for a first violation of the DATP and that it then discharges the employee for an second violation. The Union raised no objections to the use of this approach herein except as noted above.

AWARD

The City had just cause to impose a five-day suspension on the Grievant on April 6, 1999. The City also had just cause to terminate the Grievant on December 11, 2000. The grievances are therefore denied and dismissed entirely.

Dated in Oshkosh, Wisconsin, this 7th day of January, 2002.

Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator

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