BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 67, AFSCME, AFL-CIO

and

CITY OF RACINE

Case 578
No. 58278
MA-10904

(Markus Dyess Termination)

Appearances:

Mr. Michael J. Wilson, Staff Representative, Wisconsin Council 40, AFSCME, AFL–CIO, 8033 Excelsior Drive, Suite "B", Madison, Wisconsin 53717–1903, appeared on behalf of the Union.

Mr. Guadalupe G. Villarreal, Assistant City Attorney, City of Racine, 730 Washington Avenue, Room 201, Racine, Wisconsin 53403, appeared on behalf of the City

ARBITRATION AWARD

On December 7, 1999, Local 67, AFSCME, AFL–CIO filed a request with the Wisconsin Employment Relations Commission seeking to have Arbitrators assigned to hear a series of disciplinary cases involving employee Markus Dyess. David Shaw, a member of the Commission's staff was assigned to hear, heard, and decided, a five-day suspension involving Mr. Dyess. William C. Houlihan, a member of the Commission's staff was assigned to hear, heard, and decided, a 30-day suspension involving Mr. Dyess. Houlihan was subsequently asked by the captioned parties to hear the termination case involving Mr. Dyess. That hearing was conducted on July 12, 2001, in Racine, Wisconsin. A transcript of the proceedings was made and distributed. Briefs, and reply briefs were submitted and exchanged by November 12, 2001. Further submissions were rejected on January 28, 2002.

This Award addresses the termination of employee Markus Dyess.

BACKGROUND AND FACTS

Markus Dyess, the grievant, has been employed by the City of Racine, as a truck driver in the solid waste operation, since September of 1995. Dyess is required to hold a Commercial Drivers License (CDL) to maintain his position. As of the date of the events giving rise to this proceeding, Mr. Dyess had accumulated a lengthy disciplinary record. There are 15 disciplinary incidents listed in Mr. Dyess' file in the four-year period between his date of hire and October 1999. Notably, Mr. Dyess has two oral reprimands, two written reprimands, and a one-day suspension for "failure to notify of absence from work". Additionally, Mr Dyess served a two-day, 5½ hour suspension in January of 1997 for insubordination. That suspension was grieved and arbitrated. In sustaining the suspension, the arbitrator found Dyess to have behaved in an insubordinate fashion, that he had challenged a supervisor's authority, that he was angry, and that he was prone not to listen. Mr. Dyess also served a five-day suspension in May of 1999 for insubordination. That suspension was grieved and arbitrated. In sustaining the five-day suspension, that arbitrator noted that the grievant had on three separate instances refused a directive to go home on an overtime day.

On August 5 the grievant received a three-day suspension for failure to notify of absence from work. He had arrived 50 minutes late. Dyess took issue with the suspension in a loud, confrontational, and threatening manner. He was issued a 30-calendar day suspension for his behavior on that date, as well as the totality of his workplace performance and behavior. The suspension was characterized as a last chance opportunity and indicated that any further transgression would result in his discharge. The suspension was arbitrated before me. I reduced the suspension to a five-day suspension because the letter of suspension failed to reference the August 5 incident, the City failed to meet with the grievant before imposing discipline, and the lack of clarity relative to the City's expectations of Dyess.

The City has a Drug and Alcohol Testing Policy, which has been in effect since 1994. On or about April 30, 1999 the grievant was selected to take a random drug test. He failed to do so, and was given a five-day suspension for refusing to submit to a drug test. He grieved the suspension, claiming that he was unable to produce a sample. The matter was taken to arbitration, and the arbitrator denied the grievance and sustained the discipline. The refusal to submit to a test is treated as a positive result.

The grievant was requested to submit to a drug test on September 16, 1999 as part of the random testing policy of the Drug and Alcohol Testing Policy. His drug test results were positive for a prohibited controlled drug. The grievant's urine sample was submitted as a split sample on September 16, 1999 and confirmed as positive for cocaine on September 29, 1999. Mr. Dyess was terminated by letter dated October 18, 1999, which provided in relevant part:

> . . .Upon review of the totality of your work record which was set forth in the City's letter to you dated August 9, 1999 and the additional serious work rule violation of September 16, 1999, it is the City's intention to terminate your employment status effective November 1, 1999. . . .

ISSUE

The parties stipulated to the following issue:

> Did the employer have just cause to terminate the grievant on October 18, 1999? If not, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

Article II, Management and Union Recognition

. . .

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

. . .

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

POSITIONS OF THE PARTIES

The employer notes that it has disciplined all first violations of the drug and alcohol testing policies with a five-day suspension. Failure to provide an adequate specimen is considered a refusal. The five-day suspension was sustained. The grievant again tested positive on September 29, 1999. The City contends that the grievant's history of discipline supports the termination. The employer reviews the grievant's disciplinary record and argues that the City has been lenient with the grievant over the course of his employment.

The City further argues that the two positive drug tests, standing alone support the decision to discharge. The employer has established a standard of termination for a second drug test offense.

The Union contends that the City failed to follow its own Drug and Alcohol policies after the first positive test by failing to have the grievant evaluated by EAP and referred for treatment. The Union asserts that such a referral is a pre condition to sustaining a second positive drug test where the consequence is discharge. Workers have a right to expect that the employer will intervene to assist employees suffering drug or alcohol problems, and not just test and punish those individuals.

The Union contends that discharge is a last resort. It was incumbent upon the employer to attempt treatment. Treatment was never offered.

With respect to the City's contention that the totality of the grievant's work record justifies discharge, the Union notes that I overturned the 30 day suspension and last chance provision. Under that circumstance, the Union argues that the grievant's work record is not so poor, as is alleged by the City.

DISCUSSION

Markus Dyess had a terrible work record. His employment record is filled with incidents and behavior resulting in discipline, the frequency and severity of which increased over time. Mr. Dyess unsuccessfully challenged a number of the disciplinary measures. There is no indication in the record that any of this discipline was effective in modifying the inappropriate workplace behavior. It is in this context that the termination must be reviewed.

Mr. Dyess' termination is alleged to be appropriate for two separate, but related reasons. The first is that he failed a drug test. Under the terms of the Drug and Alcohol Testing policy, this failure constituted the second positive test. It was the uncontradicted testimony of Terry Parker, Assistant Human Resource Manager, that every city employee who has tested positive for drugs has been suspended for 5 days. Parker further testified that all second positive tests have led to termination, and that each of those terminations have been sustained in Arbitration.

The Union contends that the termination should be overturned because of the failure of the City to have the grievant evaluated by EAP, and offered a drug treatment opportunity. The City Drug and Alcohol Testing policy provides as follows:

2. RESULTS OF A POSITIVE TEST

An 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. . .

b) Refer the employe 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 test. . .

The record establishes that there was no referral to EAP, nor was there a City initiated evaluation by a substance abuse professional. However, William Dyess, the grievant's father, was the EAP Coordinator at the time. The City attempted to introduce an exhibit which purportedly referred the grievant to EAP, at an earlier time. That exhibit was excluded based upon a Union objection. The record also establishes that following the first drug test, Mr. Dyess went to his own physician and received a clean drug test.

I believe that a referral to EAP was called for following the first test. However, in the context of the foregoing, I do not believe the failure of the City to make such a referral is a fatal mistake. Mr. Dyess was certainly aware of the EAP program by virtue of his father's status. The policy places the burden of referral on the employer. Mr. Dyess familial status does not alter that. I do believe that Mr. Dyess must be held to knowledge of the program. The Union successfully objected to the introduction of what was described as a prior EAP referral. The employer contended that it was evidence of past efforts at assistance, and its frustration with the grievant. Under that circumstance the Union's claim that the City owed Mr. Dyess a referral loses some of its persuasiveness.

Mr. Dyess did not actually fail the first drug test. He failed/refused to provide a sample. He was subsequently seen by a physician, and given a clean bill of health. He claimed to be dehydrated. It is in that context that no referral was made.

There are circumstances under which I would agree with the Union that the City's failure to refer the grievant to EAP or provide him with assistance would cause a termination to be overturned. This is not such a case. Mr. Dyess has been treated consistently with those who have gone before him. The circumstances described above do not suggest he has been disadvantaged.

The second basis for termination is the totality of Mr. Dyess' work record. The Union argues that my prior Award overturned the 30-day suspension, and last chance status that preceeded this discipline. My prior Award reduced the suspension imposed due to procedural flaws in the imposition of the discipline. That Award indicated that I found Mr. Dyess behavior to be "..inappropriate to the workplace, confrontational, and threatening." The behavior described in that Award was Mr. Dyess reaction to being disciplined for admittedly coming to work almost an hour late, for the second day in a row. These disciplines were the culmination of the lengthy disciplinary history set forth above.

This case poses the question: At what point has the City put up with enough? I believe the answer is that this positive drug test was the last straw.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 22nd day of March, 2002.

William C. Houlihan /s/
William C. Houlihan, Arbitrator

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