BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**OSHKOSH CITY EMPLOYEES UNION,
LOCAL 796, AFSCME, AFL-CIO, and affiliated with the
WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL EMPLOYEES**

and

CITY OF OSHKOSH, WISCONSIN

Case 350
No. 63794
MA-12716

Appearances:

Mary Scoon, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 807 Saunders Road, Kaukauna, Wisconsin 54130, with **Jack Bernfeld,** Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, appearing on behalf of the Oshkosh City Employees Union, AFSCME, AFL-CIO, and affiliated with the Wisconsin Council of County and Municipal Employees, referred to below as the Union.

William G. Bracken, Labor Relations Coordinator, with **Tony J. Renning**, Davis & Kuelthau, S.C., Attorneys at Law, 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, appearing on behalf of City of Oshkosh, Wisconsin, referred to below as the City or as the Employer.

ARBITRATION AWARD

The City and the Union are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin to serve as Arbitrator to resolve a grievance filed on behalf of Robin Blythe, who is referred to below as the Grievant. Hearing on the matter was conducted in Oshkosh, Wisconsin on November 5 and December 6, 2004. Myrna J. Williquette filed a transcript of each day of hearing with the Commission by December 22, 2004. The parties submitted briefs and reply briefs by March 16, 2005.

ISSUES

The parties did not stipulate the issue on the merits of the grievance. The City states the issue thus:

> Did the City have "just cause" to discharge the Grievant?

The Union states the issue thus:

> Did the City violate the collective bargaining agreement when it discharged the Grievant?

The parties agreed that if the grievance was found to have merit, then a determination of remedy was appropriate. I have determined the record poses the following issues:

> Did the City violate Article VIII when it discharged the Grievant?
> If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE VIII

SUSPENSION-DEMOTION-DISCHARGE

. . .

***Suspension*:** Suspension is defined as the temporary removal without pay of an employee from his/her designated position.

. . .

b. *Suspension During an Investigation*: During investigation, hearing, or trial of an employee on any civil or criminal charge when suspension would be in the interest of the City, an employee may be suspended by the Employer for the duration of the proceedings. The suspension shall terminate within ten days after completion of the case for which he/she was suspended, by reinstatement or by other appropriate action, by resignation or dismissal of the employee. If the employee is suspended and then exonerated of all blame, he/she will be reimbursed in full for all loss pay after the suspension and for purposes of employee benefits and seniority, the suspension will be considered not to have taken place. . . .

Dismissal: No employee shall be discharged except for cause. . . .

> ***Usual Disciplinary Procedure***: The progression of disciplinary action shall be oral reprimand, written reprimand, suspension, demotion and dismissal. . . . A written reprimand sustained in the grievance procedure or not contested shall be considered a valid warning. A warning shall be valid for a two (2) year period, provided no additional infractions occur. In the event additional infractions occur that violation and the original violation are in effect for three (3) years from the date of the second warning. After the above time periods have been met, evidence of the discipline shall be removed from all records. . . .

BACKGROUND

Michael O'Brien, the Union's President, signed the grievance form, which is dated February 13, 2004 (references to dates are to 2004, unless otherwise noted). The form states:

> (The Grievant) failed a random drug test. She was tested at Aurora and both samples tested positive . . . Employee says she was not on drugs (cocaine) and claims she was innocent. She feels she was treated unfairly compared to past employees that tested positive for drugs. . . . The Union is asking that if the testing, and the results are reliable, without error that (the Grievant) be given a second chance like other employees have in the past. I would like to see that her work record and past years be considered.

David Patek, the City's Director of Public Works, issued the Grievant her letter of termination, which states:

> This letter is to inform you that your employment with the City of Oshkosh as a Sanitation Operator has been terminated . . . effective April 8 . . .
>
> This disciplinary action is based on the result of a positive random drug test administered on March 18 . . .
>
> This circumstance violates several City of Oshkosh work rules and policies, which include:
>
> > Employee Handbook – Page 2 "Conduct Code of Ethics" City employees should conduct themselves in a manner that will reflect favorably upon the city and show respect to other employees and the public.
> >
> > Employee Handbook – Page 3 "Drug free Work Place Act and Policy" It is the policy of the City of Oshkosh to maintain a drug free workplace for all of it's employees. Drug use, both on and off the job, can have a significant impact on an employee's job performance, and can threaten an employee's own personal well being and safety, as well as the safety of other City employees.

> Employees are expected to report to work free from any substance that can inhibit their ability to perform their duties.
>
> Personnel Policy Manual – Page 38, Section 14, Item F "Grounds for Disciplinary Action"
>
> (1) Use of drugs while on duty other than prescribed by a physician
> (3) Condition brought about from use of drugs away from work which interferes with job performance, efficiency or discipline.
>
> Drug and Alcohol Testing Policy
>
> Your conduct has the potential of severely diminishing the safety of yourself, other employees, as well as the public. Your conduct demonstrates a lack of sound judgement in the discharge of your responsibilities, which damages the trust placed in you by the City of Oshkosh.
>
> The City of Oshkosh's Employee Assistance Program is available to you to assist you during this employment transition.

The Grievant served the City for roughly seven years prior to her discharge. She started work in the City's Transit Department as a Bus Driver, worked there for roughly eight months, then moved to the Sanitation Department. Each department requires its drivers to possess a Commercial Driver's License (CDL), and each maintains a drug and alcohol testing program. She passed a drug test to be hired by the City, passed four random tests in the Transit Department and passed two random tests in the Sanitation Department prior to March 18.

The Grievant received a copy of the City's Employee Handbook, its Personnel Policy Manual, and its Drug and Alcohol Testing Policy (DATP). The DATP includes the following provisions:

> I. STATEMENT OF POLICY
>
> The City of Oshkosh recognizes that the use and/or abuse of alcohol or controlled substances by drivers of commercial motor 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 Oshkosh that its drivers should be free of drugs and alcohol. In order to further the City's goal of obtaining a drug-free and alcohol-free transportation system, and to come into compliance with the Omnibus Transportation Employee Testing Act of 1991, the City of Oshkosh has implemented a drug and alcohol testing program . . .

IV. PROHIBITED CONDUCT

Federal Regulations prohibit employees from engaging in the following conduct:

1. Using or possessing alcohol while on duty . . .
5. Using controlled substances while on duty;
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 Oshkosh Policies prohibit employees from engaging in the following conduct . . .

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

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 may be held in abeyance if the employee enters into a last chance agreement involving mandatory completion of a Substance Abuse Treatment Program.

The Transit Department maintains a separate Drug and Alcohol Testing Policy (Transit Policy), which covers "All bus operators". That policy states the following:

B. RESULTS OF A POSITIVE ALCOHOL TEST

This procedure applies only for the first positive alcohol **or** drug test within a thirty-six month period. If a drug test is determined to be positive and the confirmation process has been completed, the following actions will occur . . .

2. The employee will be subject to immediate termination **UNLESS** he/she agrees to enter into a last chance agreement involving mandatory completion of a Substance Abuse Treatment Program . . .

The Union represents employees in the Sanitation and in the Transit department. The City did not negotiate either testing policy with the Union. The Union has not filed a grievance regarding the implementation of the DATP, which has been in effect since 1995.

Since January 1, the Occupational Health Services of Aurora Health Care has administered the random drug testing called for by the DATP. Aurora maintains the social security numbers of employees covered by the DATP, and generates, at random, from that pool of numbers a list of employees to be subject to a urine and a breath test. Under Aurora, the City may have to schedule appointments for over ten employees, necessitating several days to complete. Under the predecessor contractor, the number of employees was smaller and testing typically took place on a single day. The City plays no role in the generation of the list of employees to be tested, but does coordinate the scheduling to permit the employees to report to a clinic for the tests.

Yvonne Molinski is the City's Personnel Assistant Safety Officer. She oversees the City's role in the administration of the DATP. Aurora notified her that the Grievant's name had come up for a random test. Molinski made an appointment for the Grievant at 1:15 p.m. on March 18, advising the Grievant's supervisor, Robert Horton, to release her from work.

The Grievant reported to the clinic for the tests, which were administered by Linda Loker, an Aurora LPN. The breath test detected no alcohol. One of the urine samples returned a positive reading for cocaine. A Medical Review Officer (MRO) verified the result, and an Aurora representative, on March 26, attempted to reach Molinski to assist in having the Grievant contact Aurora. Molinski spoke to an MRO on March 29 to verify the positive result and to determine if the MRO found the procedures had been followed. After being advised that the testing procedure had been followed, Molinski met with Horton, the Grievant and O'Brien. At the meeting, Molinski advised the Grievant that she was on suspension pending the testing of the second sample, and that if the test came back negative she would be reinstated with back pay.

On April 1, Aurora advised the City that the second sample tested positive for cocaine. Molinski conferred with Patek, Horton and John Fitzpatrick, the City's Director of Administrative Services. The Grievant noted her disbelief at the test results, and City administrators determined that her concerns with the test had to be investigated. The Grievant did research on the internet to determine what medications could cause a false positive for cocaine. On April 2, the Grievant returned to the clinic to speak with Loker to determine what, other than cocaine ingestion, could account for the positive results.

During the morning of April 7, Molinski, Horton and Lynn Lorenson, the Assistant City Attorney, met with the Grievant and O'Brien. The Grievant voiced concerns including that she did not take drugs; that she had consulted her pharmacist, who thought a number of medications the Grievant was taking might impact a drug test; that the MRO who spoke to her regarding the positive finding did not ask about her medications; that a medical alert occurred on March 18 before her urine sample was sealed; and that she had voluntarily submitted to a drug test at a different clinic on April 6, which detected no cocaine. The meeting lasted roughly thirty

minutes, and the Grievant supplied the City with roughly twenty-five pages of documentation to support her concerns. Because of the severity of the issue and because of the upcoming Good Friday holiday, the parties agreed to meet on April 8.

After the April 7 meeting, Molinski phoned the Grievant's pharmacist. She understood his position to be that he had supplied an Aurora MRO with a list of the medications the Grievant was taking. She understood the pharmacist's position to be that he did not know, and was not qualified to assess whether any one or any combination of the medications could produce a false positive, but that the MRO should consider the point. She phoned the Aurora MRO who had verified the positive findings. He informed her that the only legal substances that could generate a positive result for cocaine are used in nasal and dental surgeries, and that he had verified with the Grievant that she had not had any such surgery. He affirmed his findings, stating that no commercially sold medications could produce a false positive for cocaine. On the afternoon of April 7, Molinski went to the clinic at which the Grievant had been tested. She spoke to Loker, who assured her that the urine samples had been sealed prior to the medical alert the Grievant spoke of, and verified that she had followed the testing protocol.

On the morning of April 8, Molinski, Lorenson, Horton, O'Brien and the Grievant met. Molinski reported the results of the investigation of the Grievant's concerns. At the conclusion of the meeting, Lorenson noted that she and Molinski would turn the information obtained to that point to Fitzpatrick, Patek and Warren Kraft, the City Attorney, who would determine what action the City would take. Later that day, Lorenson and Molinski reported their findings and their conclusion that the DATP procedures had been faithfully followed. Their role in the matter ceased.

Fitzpatrick, Kraft and Patek then discussed the information and reviewed the Grievant's work history. They considered a written warning for reporting for work late on September 5, 1997; an oral warning on August 26, 2002 for failing to remove a tarp while dumping; and a written warning on September 9, 2002 for driving over a curb and striking a rock. They also reviewed past applications of the DATP and the Transit Policy. The administrators determined that the Grievant's positive test for cocaine was a more serious matter than prior positive tests for alcohol or marijuana. They rejected the possibility of offering the Grievant a last chance agreement, reasoning that apart from the drug involved, the Grievant had shown no indication that she accepted responsibility for the positive result and thus had shown no willingness to correct her behavior.

Late in the day on April 8, the administrators met with O'Brien and the Grievant, and informed them of their conclusions. Patek spoke for the administrators. He stated that the City would offer the Grievant the opportunity to resign; that if she did, the City would not contest her application for Unemployment Compensation; that the City would give her a favorable reference; that she could retain her CDL; that the City appreciated her service; and that she could use the Employee Assistance Program. The Grievant declined to resign, stated she had done nothing wrong and that she did not need counseling. She was upset at what was happening and left the room, believing that if she spoke more it would not be productive. The City did not offer, nor did she request, a last chance agreement.

The balance of the background is best set forth as an overview of witness testimony beyond the points noted above.

Yvonne Molinski

The Grievant's concern with the test results prompted her investigation. She did not look into the test taken by the Grievant on April 6, because that test came too far after the initial positive result to have a bearing on it. Her investigation regarding the propriety of the Aurora testing procedures was significant because the City views its drug-free workplace policy as essential to the safety of the public and employees. Prior to March 18, two Transit employees had returned positive tests for alcohol and two non-Transit employees returned positive tests for marijuana. She was unfamiliar with the handling of the Transit cases, but knew that each non-Transit employee received a last chance agreement.

John Fitzpatrick

The administrators who reviewed the investigation considered the positive test for cocaine a serious and unprecedented violation of City policy. Cocaine is treated at law as a more dangerous drug than marijuana or alcohol. The Grievant's unwillingness to acknowledge responsibility for the use of cocaine was also troubling. The Grievant's past discipline did not play a major role in the decision to discipline, and reflected City practice of reviewing a personnel file before deciding on the level of discipline to impose. The DATP does not require the City to offer a last chance agreement, and City use in the past reflected its willingness to respond to an employee who admitted the existence of a problem requiring attention. The Grievant's testing positive for cocaine and her failure to admit fault distinguished her from other employees. He was unsure whether the City would have offered her a last chance agreement had she acknowledged responsibility for the test result.

The Grievant

The Grievant learned from another employee on March 17 that he had been tested and that she would be next. Horton informed her on March 18 that she would be tested, and that she could use a work truck to go to and from the clinic if she was going to work a full shift, or could use her own vehicle if she chose to go home from the clinic. She reported to the clinic, and occupied a room across a hall from a young girl. Loker had the Grievant fill out some paperwork, then sent her to a bathroom to supply the urine sample. When the Grievant returned with the sample, she heard the young girl say that she was in the clinic because her parents wanted her tested for drugs. Loker left the girl, and the Grievant spoke with Loker briefly before a medical alert of "code blue" was announced over the intercom. Loker left with the Grievant's urine sample to respond to the alert. Sometime after that, the young girl returned to the room across the hall. The Grievant did not see if the girl had a sample container. After roughly fifteen minutes, Loker returned to the Grievant's room, split the urine sample and told her she would have to wait for the breath test because of a machine malfunction. Loker then returned to the young girl across the hall. The Grievant ultimately took a breath test and left the clinic at roughly 2:30 p.m.

The Grievant was shocked by the positive result reported on April 1. On April 2, she returned to the clinic to speak to Loker. Loker asked whether the MRO asked her what medications she was taking. When she responded in the negative, Loker noted that the MRO should have asked them. Loker also noted that lab employees "are the people that usually screw up" (Transcript at 132). On April 3, the Grievant spoke to her pharmacist, who faxed a list of her medications to the MRO. The pharmacist told her that the medications might have produced a positive test result and he highlighted for the MRO the medications that were of particular note. Those included two antibiotics for an infection in her finger and an infection in her tooth. The MRO, however, would not acknowledge any possibility of error when she spoke to him.

The April 8 meeting shocked her and her Union representative, who had advised her that she would probably be offered the option of treatment and should take it to preserve her job. The City made no such offer. She would have agreed to it to preserve her job.

She had no recall of the 1997 discipline, which was not in the personnel file supplied by the City to the Union. When she contacted the MRO on March 26, he did ask if she had dental work done and possibly asked regarding nasal surgery. She did note that she had been experiencing trouble with a possible infection in her finger, but the MRO did not think that could affect the test. After her pharmacist faxed the MRO a list of her medications, she again spoke with the MRO. The MRO stated that the medications she was taking would not affect the test. She did not dispute his conclusion. She was not sure if she raised, during the meetings of April 7 and 8, the possibility of a mix-up in urine samples, but believed she did raise the concern sometime after the City announced its decision to discharge her.

Mike O'Brien

O'Brien has served in various capacities for the Union for perhaps twenty years. He has represented employees who violated the DATP and the Transit Policy. He did not believe that either policy imposed discipline based on the drug used. He was not aware of any City action to discharge an employee for a single positive drug test. In one instance, employee KB tested positive for marijuana under the Transit Policy. She acknowledged a problem and was offered a last chance agreement. Under that agreement, she underwent an assessment and treatment program, received a thirty-day suspension and was subject to an increased level of testing after her return to work.

O'Brien was familiar with employees SH and WH, who submitted positive drug tests. SH, a Transit employee, tested positive for alcohol, acknowledged the problem, underwent an assessment and treatment program then returned to work under a last chance agreement. WH tested positive for marijuana under the DATP, acknowledged a problem, received a thirty-day suspension, and returned to work under a last chance agreement after undergoing an assessment and treatment program. Not every last chance agreement has proven successful, but at least one has. The City never offered the Grievant a last chance agreement. The Grievant consistently asserted her innocence, and never requested one.

Keith Vienola

Vienola has served in a number of Union positions, including President. He was familiar with the KB and SH tests and resulting discipline. The Director of the Transit Department initially sought discharge for KB, but Vienola noted that the Transit Policy did not permit it. The Director agreed, and he, Vienola and Fitzpatrick worked on the last chance agreement for KB that ultimately came to be used in other cases. He did not think the City's policies based discipline on the type of drug involved.

Mary Scoon

Scoon served as the Union's business representative at the time of the Grievant's positive test. She and Molinski discussed the matter on several occasions, including on April 6, when Scoon asked if a last chance agreement was possible. Molinski responded in the negative, stating cocaine posed a more serious violation than did marijuana.

Linda Loker

Loker, an LPN, has worked for Aurora for roughly nineteen years. She has, for the past three years, administered drug testing in Aurora's Occupational Health Department. She performed over one-thousand drug tests in the past year, and roughly one hundred-fifty breath alcohol tests. She administered the urine and breath tests taken by the Grievant on March 18.

At roughly 1:00 p.m., the Grievant reported to Loker. While the Grievant filled out necessary paperwork, Loker prepared a bathroom for her to submit a urine sample. Loker then met the Grievant in an examination room, and began the chain of custody paper work that precedes obtaining a urine sample to submit to a testing lab. Loker obtained the necessary identification material from the Grievant, instructed her on how to submit the sample, including the amount of time available, gave her a vial to contain the sample, then led her to the bathroom Loker had prepared. The Grievant returned with the vial within the time necessary to meet DOT guidelines, and gave the vial to Loker. Loker verified that the sample was within DOT guidelines regarding temperature, then split the sample by pouring from the vial into two separate bottles to convey the samples to testing labs. The chain of custody paperwork includes two stickers to be placed on the two sample bottles. The stickers are identical regarding a specimen ID number, a "Specimen Bottle Seal" label, a placement symbol and blank entry fields for the date and for the "Donor's Initials". They differ regarding one identification label. One sticker is labeled "A" and one "B (Split)". The "B" label is to be placed on a bottle with a lesser amount of urine, which is tested only if a second test is necessary. After filling the two bottles, Loker filled in the date of the sample, then gave each bottle to the Grievant, asked her to verify the specimen number on each bottle, then asked the Grievant to initial each sticker. The Grievant did so. Loker then placed the two vials into a shipping bag and sealed it.

Loker then completed her portion remaining chain of custody paperwork, and asked the Grievant to complete the "Step 5" portion of the paperwork. The Grievant did so, signing the

form under the following sentence: "I certify that I provided my urine specimen to the collector; that I have not adulterated it in any manner; each specimen bottle used was sealed in a tamper-evident seal in my presence; and that the information provided on this form and on the label affixed to each specimen bottle is correct."

While this process took place, a medical alert was announced over the intercom as "medical alert, administration." Each employee on the unit is obligated to respond to such an alert, but DOT guidelines preclude leaving a testing process until the process is complete. Loker told the Grievant what the alert meant and that she could not respond until the sampling process was complete. Loker remained with the Grievant until the specimen bottles had been sealed and the paperwork completed. She then left to check the alert, leaving the door to the Grievant's examination room open. The alert turned out to be a drill, and Loker returned to the Grievant's room in a matter of minutes. She then administered the breath test, which took longer than usual because of a machine malfunction, which demanded that a machine from another part of the facility be obtained.

While Loker waited for the breath-testing machine, she started a procedure to obtain a urine sample from another person, who was being tested for drugs, but not under DOT guidelines. The procedure Loker followed for that test demands a different protocol, using a different sample container, a different mailing pouch and different paperwork. The person subject to that test checked in at 1:20 p.m., and Loker took her urine sample at 1:55 p.m. Loker completed her portion of the DOT chain of custody paperwork for the Grievant at 1:30 p.m. Loker did not start the second procedure until the Grievant's urine sample had been fully processed. When Loker finished administering the urine test of the other person, she returned to the Grievant to perform the breath test.

On April 2, the Grievant returned to the clinic to talk to Loker about the positive result. The Grievant was very concerned about the result, and asked Loker questions about the testing process, including whether taking antibiotics could cause a false positive. Loker did not know, but affirmed that she had performed her end of the testing protocol appropriately. Loker advised the Grievant to call the MRO if she believed that the MRO had failed to ask the appropriate questions regarding her medications, and gave her the phone number to call.

Stuart Hoffman

Hoffman is an MD, and the Chief MRO at Choicepoint Corporation. Among his duties, he oversees compliance with drug testing protocols, including the review of chain of custody documentation. He reviewed the documentation for each sample obtained from the Grievant, and found no flaw. He was aware that the Grievant had supplied a list of medications she was taking, but found the list "totally irrelevant", since, "There is no prescription drug available in the United States, either singly or in combination, which will cause a false positive for cocaine" (Tr. at 276-277). The testing protocol in this case starts with an immunoassay screening test, which, if it yields a positive for the major active metabolite that the body produces if exposed to cocaine, is subject to confirmation testing through gas chromatography and mass spectrometry.

Only after the confirming tests yield a positive finding is a positive result reported to an MRO. In this case, one of the Grievant's samples returned positive from a lab in West Allis, and the second sample returned positive from a lab in Lenexa, Kansas. He was aware that the Grievant had spoken with MROs on several occasions, but he had "no doubt" (Tr. at 280) that the positive results accurately detected cocaine in the Grievant's system.

Robert Horton

Horton is the Superintendent of the Street and Sanitation Departments, and was the Grievant's direct supervisor. Molinski advised him late on March 16 or early in the work day on March 17 that two of his employees would be drug-tested. He never told any employee, other than the Grievant, that the Grievant was to be tested. He found the Grievant to be a good worker, and had no problem with her as an employee.

Further facts will be set forth in the **DISCUSSION** section below.

THE PARTIES' POSITIONS

The City's Brief

After an extensive review of the record, the City contends that it has the contractual authority to discharge for cause and the authority to "make reasonable rules and regulations governing conduct and safety." It exercised each type of authority appropriately in this case. The DATP was adopted under federal law, was supplied to the Union and is applicable to the Grievant. City policies, including the Personnel Manual and the Employee Handbook, reinforce the DATP. Read together, the policies preclude working if an employee is not capable of passing a drug test, and make discharge an available sanction for a violation.

The labor agreement does not define "just cause", but the seven standards of Arbitrator Daugherty have come to establish a commonly understood definition. The City has met each of the seven standards. It met the first by supplying the Grievant a copy of the DATP and all relevant City policies. The second has also been met. The Union "has not, to date, challenged the reasonableness of the City's" DATP. Even if it had, the policy identifies a compelling rationale, traceable to "the safety of its employees and the general public as well as the prohibition of the use of controlled substances". The City met the third standard through a thorough investigation, conducted by Lorenson and Molinski at Fitzpatrick's direction. The City reviewed Aurora's testing procedures and checked into each area of concern relayed by the Union and the Grievant. More specifically, the City affirmed the integrity of the testing procedures, verified that the Grievant's prescription medications could not have produced a false positive, and verified that the MRO had asked the appropriate questions concerning those medical procedures that could produce a false positive.

Since the investigation was fairly and objectively conducted, the City met the fourth standard. Neither Molinski nor Lorenson was involved in the decision to impose discipline.

The City also afforded the Grievant "every opportunity to raise concerns regarding the circumstances surrounding her positive test for cocaine." The Union has, in any event, not challenged the objectivity of the investigation.

The investigation supplied City decision makers with substantial evidence of the Grievant's guilt. The test was reliable and the Grievant's concern regarding the testing protocol was not. The City thus met the fifth standard. The sixth standard has also been met. This is the first instance of a positive test for cocaine. Two prior positive tests for marijuana did occur and did result in last chance agreements. Such an agreement was not appropriate here. The DATP does not mandate such an agreement. One involved the Transit Policy. In any event, the two other employees acknowledged the drug use and voluntarily sought assistance. The Grievant did not. Her lack of honesty and unwillingness to seek an assessment and treatment distinguish her case from any predecessor.

The final standard has also been met. The drug involved is more serious and the employee was less willing to accept responsibility than other employees caught by the DATP. To sanction this conduct "would send a negative message to other City employees". In any event, arbitral precedent establishes that an arbitrator should not second guess an employer's selection of discipline in the absence of evidence of the abuse of discretion. No such evidence exists, and the grievance "must be denied."

The Union's Brief

After a review of the evidence, the Union asserts that "just cause" demands evidence of equal treatment of employees. This criterion is of "utmost importance" here, since the evidence shows "disparate treatment of the Grievant in relationship of how other employees were treated under similar circumstances." The City's belief that the offer of a last chance agreement was not an option can not be squared with its treatment of two other employees who failed a test under the DATP. The City's own policies mandate a treatment program prior to discharge and do not distinguish between sanctions based on the type of drug involved. The DATP governing City and Transit employees have some distinctions, but neither permits the summary discharge used by the City against the Grievant, and neither has been so applied in the past.

The Grievant "was being truthful, she did not do cocaine." Thus, the City had no basis for its belief that she would not respond appropriately to assessment and a last chance agreement. That she was a good worker over a long period of time underscores this conclusion. She knew in advance that she was going to be given the test, took no action to avoid it, participated willingly in it, and submitted a negative test shortly after receiving the false positive that prompted her discharge. Against this background, the evidence shows the "City never afforded the Grievant the opportunity to prove her innocence."

As a result, the "Arbitrator (should) . . . sustain the grievance and order the City to reinstate (the Grievant) to her position and make her whole for any and all lost wages and benefits."

The City's Reply

The evidence will not support a conclusion that the Grievant had prior knowledge of the random drug test. Her supervisor did not know until the day of the test. She may have learned of another employee test on March 17, but could not have known of her test until March 18. The knowledge the Union points to may have induced the Grievant to celebrate St. Patrick's Day in a fashion that prompted the positive test on March 18.

The testing procedure was not flawed. Loker's response to a medical alert had no bearing on the sample collection, which fully complied with federal regulations. Beyond this, the DATP does not mandate a last chance agreement. Rather, it makes that offer discretionary on the City's part. Here, the City weighed relevant factors and declined to make an offer. The Grievant's use of a more serious drug and her refusal to accept responsibility for it undermine the Union's attempt to show disparate treatment. Nor do the Union's arguments afford any basis to question the quality of the City's investigation. The investigation and the determination of discipline was appropriate and the Union's attempt to assert the Grievant was amenable to a last chance agreement is self-serving and without support in the evidence.

The Union's Reply

Contrary to the City's assertion, no member of the Union "has ever been discharged for a first time positive drug test." This precludes compliance with at least one of the seven Daugherty standards. Neither City policy nor Federal regulations distinguish positive drug tests based on the type of drug involved. This precludes concluding that discharge fits the positive test involved in this case. The City's failure to offer a last chance agreement rests on no more than its assumption that she would not agree to one. The Union, contrary to the City's arguments, did request one.

Thus, the City has failed to show that its penalty is a reasonable response to the Grievant's positive test. The grievance should be sustained and the Grievant should be reinstated and made whole for her losses. The arbitrator should retain jurisdiction to assure City compliance with the make whole order.

DISCUSSION

The parties did not stipulate the issue on the merits of the grievance, but there is little substantive difference between their proposed issues. The Union's statement of the issue is broad, but its arguments focus on the issue of cause for the discharge. The City's focuses on "just cause". Article VIII refers to "cause". Neither party argues, nor do I perceive there to be, a difference between "cause" and "just cause". Thus, I have adopted an issue focusing on Article VIII to reflect the common ground in the parties' arguments.

The City used the seven "Daugherty" standards to argue its position, as did the Union in its reply brief. Thus, I use the standards drawn from ENTERPRISE WIRE CO., 46 LA 359 (Daugherty, 1966) to structure my review of the record.

I

Did the County give to the employee forewarning or foreknowledge of the possible or probably disciplinary consequences of the employee's conduct?

There is no dispute that the Grievant received a copy of the DATP, or that she had experience with drug testing under it and under the Transit Policy. Nor is there any dispute that she received a copy of the Employee Handbook and the Personnel Policy Manual. There is thus no significant dispute on the application of this standard. Whether the DATP demands summary discharge is a closely disputed point, but that dispute poses an issue under the remaining standards. There is no dispute that the Grievant was forewarned that the positive cocaine test meant she "shall be subject to discharge" under the DATP.

II

Was the County's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of its business and (b) the performance that it might properly expect of the employee?

The rule at issue here is traceable to federal law. The DATP reflects the City's adoption of that law and its commitment to a drug free workplace. The social policy and personal privacy implications of that commitment are debatable social policy points. As an arbitration matter, however, the DATP has been a feature of the employment relationship since 1995. Operators of heavy equipment are responsible for machinery with a direct impact on their own and public safety. The linkage between public safety and the DATP is established in this record, as is the City's commitment to a drug free workplace. Thus, the City has met each factor of this standard.

III

Did the County, before administering discipline to the employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

The record poses no meaningful issue on this standard. Molinski was aware of the test results on March 29, but notified the Grievant as soon as possible, not later than April 1. The Grievant questioned the validity of the positive result as soon as she was aware of it. Between April 1 and April 7, the City made a concerted effort to determine the Grievant's concerns and to investigate those concerns. City administration met with the Grievant and the Union to learn of her concerns, received documentation to substantiate them, and considered the documentation. Molinski, between the April 7 and April 8 meetings, followed up on the Grievant's concerns, verifying the testing protocol with the MRO and Loker. She contacted the Grievant's pharmacist to determine whether he had knowledge of the impact of the medications he had supplied to the MRO. By the April 8 meetings, she felt the City had assurance that the test results were based on appropriate protocol. Neither she nor Lorenson played a role in the decision to discipline, which did not start until the investigation was completed. This meets the third standard.

IV

Was the County's investigation conducted fairly and objectively?

There is no significant dispute regarding the application of this standard. O'Brien questioned the City's consideration of the Grievant's disciplinary history. That consideration may be flawed under the labor agreement, but this poses an issue regarding the remaining standards. There is no dispute that the investigators conducted themselves with a view to determining objective fact. Union fairness concerns focus not on the City's investigation, but on its evaluation of the investigation. Thus, the City has met the fourth standard.

V

At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

This standard prefaces the core of the parties' dispute regarding Article VIII. Application of the standard demands an examination of the "charge" as well as an examination of the evidence. The fundamental issue regards the charge, which the letter of discharge identifies as "a positive random drug test administered on March 18". The letter goes beyond that, but this is the only charge for which there is substantial evidence of guilt.

More specifically, the charge is based solely on the positive test for cocaine and the implication of that test on the DATP and the drug free workplace policy articulated in the Employee Handbook. The Code of Ethics violation has no demonstrated role in this charge. The discharge letter quotes that portion of the Code preceding the following reference: "All employees should be dressed and groomed appropriately for their positions in accordance with departmental custom and health and safety standards." This focuses on workplace conduct, and there is no evidence that the Grievant conducted herself on the job in any fashion that

implicates the Code of Ethics. The DATP questions non-workplace conduct that is brought onto the workplace, i.e. the detectable presence of illicit drugs. Nothing in the Grievant's workplace conduct on March 18 constitutes disciplinable behavior. There was no proof of such conduct because there was none to prove.

Similarly, the administrators who imposed the discipline had no proof of a violation of the City's Personnel Manual. There is no evidence that the Grievant used cocaine on the job or was in any observable way impaired on March 18. Horton offered the Grievant the use of a City truck to travel to the clinic at which she gave a positive drug test. If there was evidence of impairment, Horton would not have offered her the use of the truck or permitted her to operate heavy equipment.

Thus, the charge rests on the positive test standing alone. On this specific point, the City administrators who chose to discharge the Grievant had substantial proof of guilt. By March 29, Molinski had documentation of the positive test for cocaine, and some assurance from an MRO that the test was proper. Between April 1 and April 8, she confirmed that the Grievant was taking prescription medications. She confirmed that the Grievant's pharmacist had no independent knowledge of the impact of those medications on a drug test. She also confirmed through an Aurora MRO that the Grievant had not been involved in the type of medical procedures that could impact a drug test and that none of the Grievant's prescriptions could produce a false positive. That the Grievant submitted to a later test that proved negative did not impact this, since cocaine detected in the March 18 test would not be detectable on April 6. In any event, acceptance of the April 6 test results calls into question the assertion that the Grievant's prescription medications produced a false positive on March 26. Beyond this, Molinski confirmed that Loker was sure that she had followed the appropriate testing protocol. The documentation of that protocol included the Grievant's initials on the specimen bottles obtained on March 18. In sum, the administrators who made the discharge decision had substantial proof that the Grievant had failed a random drug test after the administration of appropriate testing protocol.

There is a tension in the Daugherty standards between the review of the procedure which prompts discipline and of the substance which underlies the discipline. Information can arise between when a decision-maker acts and when the grievance reaches arbitration. Here, the evidence includes the Grievant's insistence of innocence. Questions on her part concerning the testing protocol arose during and after the April 8 meeting. It is not, for example, evident when the Union articulated the basis of the Grievant's concern with the impact of a medical alert on the testing process. The Daugherty standards can be read to make this standard turn solely on the evidence available to the City as of April 8.

This tension was manifested in this case. At the end of the first day of hearing, it was not evident if the Grievant's insistence on an improper test had been thoroughly checked. Loker and Hoffman did not testify until the second day. It was not evident after the first day whether the City had tested whether the Grievant had a basis for her insistence that the sample was unreliable or whether Aurora's assertion of a proper test procedure was anything more

than a self-serving conclusion. Loker's and Hoffman's testimony addressed these issues. Whether or not the Grievant or Molinski had fully evaluated the propriety of the testing procedures as of April 8, it is evident that events subsequent to April 8 prompted a full evaluation. The evidence adduced at hearing essentially confirms the evidence made available to City administrators on April 8.

More specifically, Loker addressed the medical alert. The evidence, from the type of vials used in urine tests she administered to their underlying documentation, establishes that the specimen bottles submitted on March 18 were the Greivant's. The type of test administered to the other person involved one specimen bottle. The Grievant's signature on the chain of custody documentation affirms Loker's recall regarding her initialing the sealing tapes of the two specimen bottles used in her test. The evidence does not support the assertion that Loker left the Grievant at any sensitive point during the testing protocol, or that Loker could have switched urine samples.

In sum, however the tension in the Daugherty standards is resolved, the City had substantial evidence that the Grievant submitted, on March 18, a positive result for cocaine in a random drug test properly conducted under the DATP. There is substantial evidence of a violation of the City's drug free workplace policy, but not for any other violation mentioned in the discharge letter.

VI

Has the County applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?

This standard prefaces the application of the seventh standard, which is the most closely disputed in this case. That this is the City's first experience with a positive test for cocaine does not inherently favor either party's view of this standard. The Union notes that the Grievant's situation is unprecedented, but this fails to establish that the City's distinction between cocaine and marijuana or alcohol is inherently discriminatory. By the same token, the lack of precedent affords no support under this standard for the City's contention that cocaine must be taken more seriously. The parties assert viable, but conflicting, views of the DATP.

The strength of the Union's case is that the City has, prior to the Grievant, uniformly afforded employees testing positive for marijuana or alcohol an opportunity to rehabilitate under a last chance agreement. There is solid support for this under the language of the Transit Policy, which makes an employee "subject to immediate termination **UNLESS**" the employee "agrees to enter into a last chance agreement". Section XI, A of the DATP grants the City greater discretion than the Transit Policy, by the "may be held in abeyance if" reference. Subsection 2 of Section VI, B of the DATP, however, casts doubt on this point:

2. Results Of Positive Test

> . . . the City of Oshkosh is required to act upon a positive drug test in the following manner:
>
> • • •
>
> b. Refer the employee to the . . . EAP for assessment and subsequent compliance with recommended rehabilitation after a determination of a drug problem has been made . . .

The Grievant testified that she would have taken a last chance agreement to save her job, and O'Brien testified that he was surprised when the City failed to offer a last chance agreement. The force of the Union's position on this point must be acknowledged.

The City's position is not, however, a weak one. The bulk of the City's disciplinary experience with drug tests is under the Transit Policy. The City accurately notes that cocaine can be treated more seriously than marijuana or alcohol under the criminal law. More to the point, the City notes that the Grievant, unlike any other employee who submitted a positive test, never acknowledged the existence of a problem or the validity of the test results. The Grievant left the April 8 meeting asserting she had no problem and needed no counseling. The City viewed this as a lack of candor, impacting adversely on the benefit of a last chance agreement, either as a matter of discipline or of treatment. This does impact the relationship of Section VI and Section XI of the DATP, since Section VI, B, 2 demands the existence of a drug problem the Grievant denied.

The sixth Daugherty standard questions the even-handedness of the City's discipline. On balance, the evidence supports the City's view. Section XI, A of the DATP is difficult to reconcile with Section VI, B, 2, particularly on the type of drug involved. The two sections, however, presume the existence of a drug problem amenable to assessment and treatment. The Grievant, unlike any prior employee, admitted no drug usage, much less a problem. Whether this made discharge an appropriate sanction is posed by the final standard. That the City viewed the Grievant's situation to be unlike any other employee's cannot be faulted under this standard. It was unique, both by the drug involved and by the Grievant's stance on the positive test. Whatever is said of the City's discharge decision, it was not discriminatory under this standard.

VII

Was the degree of discipline administered by the County reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in her service with the County?

This standard is the most difficult to apply to the evidence. While the City's actions cannot be characterized as discriminatory under the sixth standard, it does not follow that the discharge decision was "reasonably related" to the offense and to the Grievant's service record. The strength of the City's decision rests on its drug free workplace policy alone. There is no evidence that the Grievant used drugs at work or was impaired on March 18. Even if the Grievant received the September, 1997 warning, it has no validity under Article VIII. The record substantiates Horton's assessment of the Grievant as a good employee, and, as confirmed in Fitzpatrick's testimony, the 2002 warnings have little bearing on the discharge decision.

As noted in the application of the sixth standard, the Transit Policy and the DATP point toward a last chance agreement before discharge is invoked. The DATP affords little support for distinguishing a sanction based on the type of drug revealed by a random test. Section VI, B, 2 of the DATP affords a most troublesome background to the City's choice of discharge over direct referral to the EAP. Patek did offer the Grievant access to the EAP at the meeting of April 8, but this came after the City voiced its decision to discharge her. The Union's arguments concerning a last chance agreement have considerable persuasive force.

This cannot obscure that the Section XI, A of the DATP makes an employee "subject to discharge" on an MRO report that "a urine drug test is positive". That section makes the discharge decision discretionary "if the employee enters into a last chance agreement". The seventh standard demands an evaluation of the reasonableness of the City's exercise of discretion. Fitzpatrick stopped short of stating that the City would have offered the Grievant a last chance agreement had she accepted responsibility for the test result. This point, however, was never posed because the Grievant never acknowledged any validity to the test. The City viewed her conduct to confront it with an all-or-nothing decision.

This poses the fundamental interpretive dilemma of this case. The DATP can be interpreted to permit an immediate discharge or to call for a last chance agreement. Either result is defensible on the evidence. The presence of conflicting but viable results is the hallmark of a difficult case. The cause standard of Article VIII demands that the City's exercise of discretion under the DATP be reasonable. The evidence establishes that the City considered its options and selected discharge based on the drug involved and on the Grievant's unwillingness to accept any responsibility for the positive result. Ultimately, only the Grievant can answer whether or not she is innocent regarding the test result. Loker's and Hoffman's testimony establish that the testing protocol was administered properly and is reliable to their experience. Even as each basis for her challenge of the test was brought into question, the Grievant refused to accept the March 26 test results. The submission of the April 6 test raises more questions than it answers, since it calls into question how her prescription medications could cause a false positive on March 26, but not on April 6. On April 8, she left the discharge meeting stating she had no problem and no need of assessment. Against this background, the City reasonably determined that the Grievant's conduct posed an all-or-nothing dilemma. To overturn the discharge determination demands substituting an arbitrator's judgment for the City's, in the absence of evidence of an abuse of discretion, and

in the presence of evidence of a reasonable evaluation of the evidence. Article VIII does not grant that level of discretion to an arbitrator. The City has met the seventh standard, and thus has demonstrated cause for the discharge.

AWARD

The City did not violate Article VIII when it discharged the Grievant.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 21st day of June, 2005.

Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

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