

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF RACINE

and

LOCAL 67, AFSCME DISTRICT COUNCIL 40

Case 773

No. 67831

MA-14033

Appearances:

Scott Letteney, Deputy City Attorney, 730 Washington Avenue, Racine, WI 53403, appearing on behalf of the City of Racine.

Nicholas Kasmer, Staff Representative, 8450 82nd Street, Pleasant Prairie, WI 53142, appearing on behalf of Local 67, AFSCME District Council 40.

ARBITRATION AWARD

The City of Racine (hereinafter City or Employer) and AFSCME Local 67 (hereinafter Union) are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Union, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission to appoint a WERC Commissioner or staff member to serve as the sole arbitrator of the instant dispute. Commissioner Susan J.M. Bauman was so appointed. In accordance with the collective bargaining agreement, the parties met to resolve the matter through mediation on March 13, 2008. Settlement discussions having failed to resolve the matter, a hearing was held on May 6, 2008 in Racine, Wisconsin. The Grievant was unable to appear in person. Accordingly, the parties, on the record, stipulated to facts and documents needed to resolve the matter. A transcript was filed on May 21, 2008. The record was closed on June 27, 2008, upon receipt of all post-written argument submitted pursuant to an oft-revised briefing schedule and notification that no reply briefs would be filed.

ISSUE

The parties stipulated that the issue to be decided is:

Whether the City violated the collective bargaining agreement between the parties when it terminated Philip Bauer and, if so, what is the appropriate remedy?

FACTS

The City of Racine is a municipal employer that provides the full panoply of municipal services. The City maintains a Department of Public Works which employs personnel in a number of divisions and in various job classifications, many of which require the employee to possess and maintain a valid Commercial Drivers License (CDL). The Grievant herein, Philip J. Bauer, was one such employee.

Mr. Bauer commenced working for the City as a seasonal employee on April 29, 1996. He became a full-time employee on April 21, 1997. During the course of his employment, which was terminated on September 24, 2007, in addition to drug related offenses discussed below, he was disciplined on a number of occasions, generally with written reprimands and usually for issues related to his attendance.

As a result of the federal enactment of the Omnibus Transportation Employee Testing Act of 1991, the City adopted the City of Racine Drug and Alcohol Testing Policy (Policy) which was disseminated to all affected employees. Grievant Bauer acknowledged receipt in writing of the Policy on September 9, 1996.

In accordance with the Policy, Grievant was required to submit to random drug testing. On December 5, 2003, Mr. Bauer submitted a urine sample which tested positive for the presence of marijuana. He was removed from the job and referred to a substance abuse specialist, Dr. Galten. By letter dated December 18, 2003, Dr. Galten advised

I saw Mr. Bauer for an alcohol and drug assessment on this date. I have diagnosed him with Cannabis Abuse and have referred him to my outpatient alcohol and drug abuse group therapy and education program.

Mr. Bauer has asked if I would advise you on his return to work concern. I see no reason why Mr. Bauer should not be permitted to return to work at this time, given his stated commitment to abstinence from all mood-altering substances during the time he's in treatment.

Bauer returned to work after serving a five-day suspension without pay and was subject to follow-up testing pursuant to the Policy for a period of up to 60 months.

On September 5, 2007, Mr. Bauer once again tested positive for marijuana.¹ The parties stipulated that Jeff Fidler, Superintendent of Public Works, would have testified that the grievant reported for work and drove city equipment from the public works garage to a work site and back after performing work on the work site subsequent to giving the urine sample.

¹ The record is silent as to other times Mr. Bauer may have been subjected to random drug and alcohol testing in the three year and nine month period between positive drug tests.

On September 17, 2007, the Director of Human Resources sent the Grievant a letter:

This letter is to officially notify you that it is the City of Racine's intention to terminate your employment as a Truck Driver in the Department of Public Works as a result of a second failed drug test.

You will have until the close of business Monday, September 24, 2007 to submit to this office, in writing, any mitigating circumstances as to why the City of Racine should not carry out its intended action.

Upon review of that information, the City will notify you of its intended decision.

. . .

Mr. Bauer responded by letter dated September 19, 2007:

I am in receipt of a letter dated September 17, 2007 sent by you terminating my employment with the City of Racine.

I am asking the City of Racine to reconsider my employment status. I have worked for the City of Racine for ten years. I value my job and believe that I am an asset to the City of Racine.

I have passed numerous tests over the past four years and at this time I am asking to be placed on a no pay five day suspension and be placed on the City's five year drug testing and assessment program. I also ask to be reinstated after serving a five day suspension.

Through this past year I have experienced some extreme personal situations; loss of a wife and my children.

Thank you in advance for your considerations, to my requests.

The Director of Human Resources responded by letter of September 25:

This letter is intended to officially notify you that your employment with the City of Racine is being terminated at the end of the day on September 24, 2007 as a result of a failed drug test.

Local 67 filed a grievance contending that the termination was not for just cause. The parties followed the steps of the grievance procedure and were unable to resolve the matter.

Additional facts are included in the **DISCUSSION**, below.

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 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.

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4. To maintain efficiency of City government operations entrusted to it.

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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 it will not use these Management Rights to interfere with the 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. Nothing in this Agreement shall be construed as imposing an obligation upon the City to consult or negotiate concerning the above areas of discretion and policy.

ARTICLE III

GRIEVANCE PROCEDURE

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F. Arbitration: If the Union grievance is not settled at the second step, or if any grievance filed by the City cannot be satisfactorily resolved by conferences with the appropriate representatives of the Union, the grievance shall be submitted to arbitration upon request of either party within thirty (30) calendar days of receipt of the Step 2 answer.

G. Selection of Arbitrator: In the event any grievance remains unresolved after exhausting the Grievance Procedure, either party may request the Wisconsin Employment Relations Commission (with a copy of the request to the other party) to appoint a WERC representative if possible or an impartial arbitrator to resolve the dispute.

H. Arbitration Hearing: The Arbitrator shall use his best efforts to mediate the grievance before the final arbitration hearing. The parties shall agree in advance upon procedures to be used at the hearing and the hearing shall follow a quasi-judicial format. The Arbitrator selected shall meet with the parties as soon as a mutually agreeable date can be set to review the evidence and hear testimony relating to the grievance. Upon completion of this review and hearing, the Arbitrator shall render a written decision as soon as possible to both the City and Union, which shall be final and binding upon both parties.

. . .

J. Decision of the Arbitrator: The decision of the Arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to interpretation of the contract area where the alleged breach occurred. The Arbitrator shall not modify, add to or delete from the express terms of the Agreement.

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 attempt at all times to use the disciplinary process as a means to 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 an 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 serve 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.

EXCERPTS FROM
“CITY OF RACINE DRUG AND ALCOHOL TESTING POLICY”

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 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 Drivers Licenses (CDL) 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 duty 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.

VI. PROHIBITED USE OF CONTROLLED SUBSTANCES

The unauthorized use of any controlled substance is strictly prohibited in all situations.

VII. REQUIRED TESTS

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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 participated in some form of treatment/rehabilitation or education and been evaluated by a Substance Abuse Professional (SAP) 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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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 five-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.

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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 Employee Assistance Program representative, who will provide the employee with a list of available substance abuse professionals (SAP) from which to choose for assessment and subsequent compliance with recommended rehabilitation;
- c) Employee must be evaluated by a substance abuse professional, who is required to recommend some form of treatment/rehabilitation and/or education, and the employee must comply with the SAP's recommendations. Reports from the SAP on assessment, treatment/rehabilitation and compliance recommendations must be provided to the designated employee representative (DER) for the City of Racine.

d) After the SAP's follow-up evaluation on the fitness of the employee to return to work, and prior to returning to duty, the employee must have a negative result on a return-to-duty drug test. The City of Racine, and not the SAP or MRO, has the sole authority whether to return the employee to safety-sensitive duties.

e) Follow-up testing to monitor the employee's continued abstinence from drug use will be required.

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IX. EMPLOYMENT ASSESSMENT

Any safety-sensitive employee who tests positive for the presence of illegal drugs or alcohol above the minimum thresholds set forth in this policy, shall be referred by the City's EAP representative to a Substance Abuse Professional (SAP), with knowledge of and clinical experience in the diagnosis and treatment of drug and alcohol-related disorders. The SAP shall evaluate each employee to determine what assistance, if any, the employee needs in resolving problems associated with prohibited drug use or alcohol misuse.

Assessment by a substance abuse professional or participation in the City's Employee Assistance program does not shield an employee from disciplinary action or guarantee employment or reinstatement with the City. The cost of any treatment or rehabilitation services will be paid directly by the employee or their insurance provider. Employees shall be allowed to take accumulated sick leave and vacation leave to participate in the prescribed rehabilitation program, but only if they go for treatment.

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POSITIONS OF THE PARTIES

The City contends that it had just cause to discharge the Grievant. It cites the provision of the management rights clause of the collective bargaining agreement for its authority to take disciplinary action against an employee, provided just cause for such action exists. The Employer then applies the Seven Tests of Just Cause² in support of its position. The City further contends that the discharge was an appropriate exercise of discretion in light of the Grievant's prior positive drug test. Accordingly, the Employer asks that the grievance be denied and dismissed.

The Union, on the other hand, contends that the Employer did not have just cause to terminate Mr. Bauer because of his long tenure with the City and the period of time that elapsed between the two positive drug tests. Arguing that discharge is the most extreme

² See *Enterprise Wire Co.*, 46 LA 359 (Daugherty, 1966)

penalty available for an employer to impose upon an employee, the Union applies Daughtery's seven tests and concludes that although some form of discipline, such as a lengthy suspension, is appropriate, discharge is not appropriate because of the Grievant's history with the City. The Union asks that the grievance be sustained and Mr. Bauer be made whole, less a suspension of not less than ten days and not more than thirty days.

DISCUSSION

The essential facts of this case are undisputed. The Grievant, Philip Bauer, was employed by the City of Racine as a Truck Driver in the Public Works Department. As such, he was required to maintain a valid Commercial Drivers License (CDL) and was subject to the City's Drug and Alcohol Testing Policy (Policy). Mr. Bauer tested positive for marijuana, a prohibited substance, in December 2003. In accordance with its standard practice, the Employer suspended Mr. Bauer for five days and required him to see a Substance Abuse Professional (SAP) and follow whatever recommendations the SAP established for him. In addition, Bauer was subject to a return-to-work test and to unannounced follow-up alcohol and/or controlled substances testing. According to the Policy, Bauer was to 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" returning to work.

The record is silent as to the number of times Bauer was subjected to testing and was "clean" after his return to work. However he was tested on September 5, 2007, and again tested positive for marijuana. The Grievant drove a City vehicle immediately after giving the urine sample that tested positive. Mr. Bauer was offered an opportunity to provide the City with any mitigating circumstances that would warrant the City deviating from its practice of terminating employees after a second positive test. The reasons proffered, that he had experienced some extreme personal situations including the loss of a wife and children in the past year, were not acceptable to the City. Bauer's employment was terminated effective September 25, 2007.

The collective bargaining agreement provides that the Employer may discipline an employee, up to and including discharge, for just cause. The Employer contends it had just cause to terminate Bauer and the Union argues otherwise. Although no definition of just cause is provided in the collective bargaining agreement, both parties argue Daughtery's seven standards. Accordingly, those standards will be utilized in the analysis:

1. The employee must be forewarned of the consequences of his/her actions.
2. The employer's rules must be reasonably related to the orderly, efficient and safe operation of the employer's business and the performance the employer might expect from the employee.

3. The employer must make an effort to discover whether the employee did in fact violate or disobey a rule or order before administering discipline to the employee.
4. The employer's investigation must be conducted fairly and objectively.
5. At the investigation stage, there must be substantial evidence or proof that supports the charge against the employee.
6. The rules must be applied fairly and without discrimination.
7. The degree of discipline must be reasonably related to the nature of the offense and the employee's past record.

The parties agree that the first six of these standards have been met, and that the only issue is whether the degree of discipline, termination, is reasonably related to the nature of the offense and the employee's past record. The Union argues that because of the Grievant's ten year tenure with the City and the amount of time that passed between the two positive tests, the Grievant should be subjected to discipline of a lesser degree than termination, something between a ten and thirty day suspension. In so arguing, the Union points to the fact that the City has issued suspensions of those lengths in other disciplinary situations, though not in matters involving the use of prohibited substances.

The City provided uncontroverted evidence that it has always severed the employment relationship with employees after a second positive test:

Name	Positive Test	Positive Test	Result
John Clark	8/28/95 Cocaine	3/4/96 Cocaine	Settlement of grievance: resignation effective 3/20/96
Ronald Eisel	6/9/95 Cocaine	7/5/96 Cocaine	Termination effective 7/18/96 modified to resignation effective 7/17/96
Scott Spaulding	6/3/96 Marijuana	5/27/97 Cocaine	Termination Notice effective 6/2/97; Resigned effective 6/2/97
Ronald Farris	2/28/97 Cocaine	8/6/97 Cocaine	Termination effective 8/20/97
Markus Dyess	4/30/99 Failed to provide sufficient sample	9/16/99 Cocaine	Termination effective 9/29/99
Charles Edwards	7/20/99 Cocaine	9/12/00 Cocaine	Termination effective 9/27/00
Scott Neveri	4/24/00 Marijuana	8/14/00 Marijuana	Termination effective 8/30/00 modified to resignation 9/4/00
Michael Christensen	3/12/99 Adulterated sample	11/22/00 Cocaine	Termination effective 12/11/00

Although I am sympathetic to the fact that the Grievant had a long tenure with the City, and that he, apparently, was clean longer than several other employees who failed two drug tests, I cannot reinstate the Grievant. There are several reasons for this. First is the fact that the Grievant drove a City vehicle after he gave the urine sample that proved to be positive for marijuana: Mr. Bauer actually drove while he had marijuana in his system, in violation of the Policy and City rules.

Second is Grievant's letter of September 19, 2007, wherein he asks to be placed on the "City's five year drug testing and assessment program" without, apparently, recognizing that he has been on that program since failing his first drug test in December 2003. Such a statement appears to indicate that he does not recognize the seriousness of the rules, or opts to forget that he is still on the "five year program." The statement is, however, recognition that the "five year program" is an appropriate manner to address substance abuse. Grievant fails to recognize that, for him, the five year program had not, apparently, been sufficient to prevent marijuana usage.

Last, and of most concern to the undersigned, is the question of where is the "line" to be drawn. The City, to date, has been consistent in its treatment of regular full time employees who fail random drug testing. The Union asks that, under the circumstances here, a ten year employee who did not fail a drug test for almost four years from his first drug test failure, should not be terminated. The Union points out that in all of the other cases where an employee failed a second drug test a much shorter time elapsed between the two positive tests: usually a little less or a little more than a year. Because Mr. Bauer did not fail a drug test for almost four years, the Union believes the City does not have just cause to terminate him.

Although I am sympathetic to the Union's argument, it is clear that the Policy, by its terms, would permit the Employer to terminate an employee after the first positive test: "Any employee who violates any of the rules set forth above shall be subject to discipline, up to and including termination." The City has determined to provide a rehabilitation program for employees who test positive once, but has determined not to do so for an employee who tests positive twice. This is a reasonable exercise of management's rights, particularly in light of the nature of the work that a CDL holder performs. If as the Union contends, close to four years "clean" warrants deviation from the Policy, where should the line be drawn? Should it be at two and one-half years clean? Should it be at two years clean? Perhaps it should be when the sum of the number of months without a positive test and years of service is greater than some number. While the 60 months contained in the policy may be arbitrary³ it is reasonable and it is the number the Employer has chosen. This arbitrator will not substitute her judgment for that of the City in determining how long an employee must be "clean" before another positive drug test will or will not result in termination.

³ The record is silent as to whether any employee who has tested positive for drugs or alcohol, has completed 60 months of follow-up testing, and has then tested positive. In fact, the record is silent as to whether anyone has completed 60 months "clean" after an initial positive drug test. The record implies that Mr. Bauer lasted the longest between positive tests, but it is unclear if anyone has gone further with continued negative tests.

Accordingly, based upon the above and foregoing and the record as a whole, the undersigned issues the following

AWARD

The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 9th day of July, 2008.

Susan J.M. Bauman /s/

Susan J.M. Bauman, Arbitrator