

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF RACINE

and

LOCAL 67, AFSCME DISTRICT COUNCIL 40

Case 770

No. 67696

MA-13995

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 12, 2008. Settlement discussions having failed to resolve the matter, a hearing was held on May 21, 2008 in Racine, Wisconsin. A transcript was filed on June 16, 2008. The record was closed on August 25, 2008, upon receipt of all post-hearing written argument submitted pursuant to a briefing schedule and notification that no reply briefs would be filed.

ISSUE

The parties were unable to stipulate to the issue to be decided. The Union proposes the following statement of the issue:

Did the City of Racine violate the collective bargaining agreement and drug and alcohol testing policy when it drug tested and subsequently terminated the grievants and if so, what is the appropriate remedy?

The City proposes the following statement of the issue:

Did the City of Racine violate the collective bargaining agreement when it terminated the grievants? If so, what is the remedy?

The parties agreed that the arbitrator would determine the issue based upon the evidence presented at hearing. The undersigned adopts the following statements of the issue:

1. Did the City of Racine violate the collective bargaining agreement or the Drug and Alcohol Policy when it subjected the Grievants to a DOT physical and drug test? If so, what is the remedy?
2. Did the City of Racine violate the collective bargaining agreement or the Drug and Alcohol Policy when it terminated the Grievants? If so, what is the remedy?

FACTS

The City of Racine is a municipal employer that provides the full panoply of municipal services. The City maintains a Parks Department as well as a Department of Public Works (DPW), the latter of 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). Many employees begin their employment with the City as long term seasonal employees (referred to in the collective bargaining agreement and below as "long seasonals"), who work no more than 32 weeks from April through November of each year. Typically, these individuals work for several seasons and are then hired as regular full-time employees, with a reduced probationary period as compared to new hires.

According to Human Resources Manager Terry Parker, the initial assignment of long seasonals is to the Parks Department where they basically pick up trash and operate lawn mowers. Because this work does not require a CDL, long seasonals are given a drug and alcohol test upon hire and are not subjected to a Department of Transportation (DOT) physical or drug and alcohol test. At the time that there is an opportunity for seasonal employees to advance into the Department of Public Works and perform work requiring a CDL, such as driving a garbage truck, they are required to undergo a DOT physical and drug test. The testing is supposed to take place at the time that the seasonal employee is transferred from the Parks Department to DPW.

Unfortunately, the proper procedure is not always followed and sometimes seasonal employees are not tested before transferring to Public Works. Such was the case with the three Grievants in this case, CH, RK and VJ. All three held CDLs at the time and were transferred to DPW in spring or fall 2006 without being tested. At the start of the seasonal work period,

in April, 2007, Parker became aware of this oversight and directed the Affirmative Action Officer and the Superintendent of Public Works that all three Grievants were to be sent to Concentra for a DOT physical and drug test. The physicals are performed at Concentra and a urine sample is provided at that location. The sample is then sent to an out-of-state laboratory to perform the actual testing. There is a rigorous chain of custody procedure in accordance with DOT guidelines that is followed in forwarding the samples to the laboratory.

Grievant CH submitted his sample on April 16, 2007.¹ On May 1, the Medical Review Officer forwarded the test results to the City which indicated that CH had tested positive for cocaine. This finding was reconfirmed on May 14. On May 29, CH sent a memo to the City of Racine:

Hi, my name is C[] H[], I have been with the City of Racine since April of 2002. I have always been to work on time, and rarely missed a day of work unless I was really sick or hurt. I would really like to come back to work as soon as possible, because I work so hard to get to where I was at. And by bringing me back to work for the City of Racine I am willing to do whatever it takes to come back even putting me on you [sic] five year plane [sic] of testing, I feel somehow that first test I took was some how mishandled, because I do not do anything illegal like that.

Thank you for your time,
C[] H[]

By letter dated May 31, the Director of Human Resources wrote to CH:

This letter is intended to officially notify you that your employment with the City of Racine is being terminated immediately (effective Wednesday, May 30, 2007).

Upon review of and consultation on your letter dated May 29, 2007 it has been decided that there are no mitigating circumstances that would change the City's intention to terminate your employment.

By letter dated June 18, Scott Sharp, Union President, was notified in accordance with the terms of the collective bargaining agreement between the Union and the City that Richard Jones, Commissioner, Department of Public Works, Scott R. Letteney, Deputy City Attorney,

¹ Unless otherwise noted, all references hereafter are to 2007.

and Sylvia Coronado-Romero, Director of Human Resources, had reviewed the circumstances surrounding CH's discharge and upheld the decision for dismissal.

At the hearing in this matter, CH testified that he was hired by the City in early 2000 and had worked in the Parks and Solid Waste departments. He was not drug tested until he had returned to work for about two to three weeks or longer in 2007. Other than the termination in 2007, he was subjected to only minor discipline while employed by the City. Since his termination, he has been drug tested in connection with application to other positions on three occasions. None of those tests came back positive. CH also acknowledged that he had driven a City garbage truck both before and after giving the urine sample on April 16.

Grievant VJ submitted a urine sample on April 16 as well. The report from the Medical Review Officer indicates that the sample submitted was "not consistent with normal human urine." In accordance with the DOT regulations, this is considered to be a refusal to test. Although VJ requested that the split sample also be tested, this test was not performed because the lab had determined that the sample was not a human urine sample.

On May 31 the City sent a letter to VJ officially notifying her that her employment with the City was terminated effective May 30 as a result of a failed drug test. Union President Sharp was notified by letter dated June 18 that the Public Works Commissioner, Deputy City Attorney and Director of Human Resources had reviewed the circumstances surrounding VJ's discharge and upheld the decision.

VJ testified at hearing that she was initially hired by the City in May of 1998 and became a long-term seasonal in June of 2002, working in the Parks and Solid Waste Departments. She moved from Parks to Solid Waste in June 2006. She took a drug test when she became a long-term seasonal in 2002 and was drug tested, but not given a physical, in April 2007. The 2007 test occurred on her first day back of the season. When she was terminated, she was advised to contact the medical review officer and request a retest of the split sample. She was told that they would, but she was advised by Scott Sharp a week later that the sample had been destroyed. Other than an oral reprimand for tardiness in 2003, VJ was not disciplined during her employment by the City until her termination.

Grievant RK submitted a urine sample on May 14. The Medical Review Officer notified the City on May 23 that the sample tested positive for marijuana. By letter dated May 31, RK was notified that his employment with the City was terminated effective May 30, 2007 as a result of a failed drug test. As with the other Grievants, Union President Sharp was advised by letter dated June 18 that the circumstances surrounding RK's termination had been reviewed and the discharge upheld. RK did not testify at the hearing.

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

RELEVANT CONTRACT PROVISIONS

ARTICLE II

MANAGEMENT AND UNION RECOGNITION

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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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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 [sic] 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.

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ARTICLE VII

TYPES OF EMPLOYEES

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C. Regular Long Seasonal: Any employee who has been hired on a full-time basis, usually for a definite period of time during a definite time of the year (limited to thirty-two (32) weeks from April through November). This type of employee is not entitled to the normal City benefits except where eligible under the Wisconsin Retirement and holiday pay. Seasonal employees are subject to discharge without recourse to the Grievance and Arbitration Procedure of this agreement during the first sixty-four (64) weeks of their employment.

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.

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VI. PROHIBITED USE OF CONTROLLED SUBSTANCES

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

VII. REQUIRED TESTS

Refusal to take a required test shall result in removal of that employee from his or her assignment(s) which, in turn, may result in discipline, up to and including discharge.

Testing must be conducted in the following situations:

1. **Pre-Employment** – Any individual not currently employed by the City who is applying for a safety-sensitive position, shall be required to undergo drug and alcohol testing after a conditional offer of employment has been made,

Prior to the first time an existing employee performs safety-sensitive functions for the department (i.e., new position, job transfer, promotion, new duties, etc.), the employee shall be required to undergo testing for alcohol and controlled substances. **A positive test will result in a disqualification from further consideration for the vacancy or eligibility list.**

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3. **Random Testing** – This test is used in order to eliminate risks associated with illegal or unauthorized drug and alcohol use. Random drug and alcohol testing will be conducted at any period in which an employee is ready to perform or immediately available to perform, is actually performing, or has completed performing safety-sensitive duties. The employee shall be randomly selected for testing from a “pool” of employees subject to testing.

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In the event an employee tests positive for either alcohol or controlled substances, the employee shall be subject to disciplinary action up to and including discharge.

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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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POSITIONS OF THE PARTIES

The City contends that it had just cause to terminate the three Grievants who tested positive for drugs because they all knew that they could be subjected to disciplinary action, up to and including termination, for use of illegal drugs.² Inasmuch as the City of Racine Drug and Alcohol Testing Policy (Policy) is based on federal law, is part of the City's commitment to a drug free workplace, and is a well-known feature of the employment relationship between the City and its employees, including the Grievants, the Policy is not at issue. The City followed the Policy in testing the Grievants and the samples they submitted, and the results were admitted without objection.

² In accordance with the Policy, VJ's "refusal to test" is considered to be equivalent to a positive test.

Evidence at the hearing demonstrates that similarly situated employees were also terminated after once testing positive for controlled substance, and there is nothing in the record suggesting that anyone similarly situated was not terminated after a positive drug test. The Policy permits termination, in the City's discretion, for any positive drug and alcohol test; there is no requirement that the employee be suspended for a period of time after the first positive, rather than being terminated.

The City contends that it did not abuse its discretion and that it had just cause to terminate the three Grievants, and it argues that the arbitrator's judgment of the proper penalty should not be substituted for that of the City. Accordingly, the grievance should be denied and dismissed.

The Union contends that the City could not discharge the Grievants because long-term seasonals are "just cause employees" under the collective bargaining agreement after sixty-four weeks of employment; the City did not have the grounds to drug test the Grievants in 2007; and the City has consistently given five-day suspensions to other employees who have failed one drug test. Based on these three rationales, the Union argues that the Grievants should be reinstated, given full-time positions, and made whole.

DISCUSSION

This grievance presents two questions for resolution: Whether the Grievants were properly subjected to drug testing early in the 2007 season and whether, having failed these tests, their terminations were for just cause.³

Terry Parker, the Employer's Human Resources Director, testified that long seasonals are drug tested upon hire and subsequently undergo a DOT physical and drug test at the time they are transferred from the Parks Department to the Department of Public Works (DPW) doing work requiring a CDL. Although Union President Scott Sharp testified that he was unaware that the Employer was subjecting long seasonals to these tests upon transfer, doing so is a valid application of the Employer's management rights, particularly in light of the fact that work performed in the Parks Department does not require a valid CDL while DPW work performed by such individuals typically does. In addition, the Drug and Alcohol Policy (Policy) specifically provides for testing at the time an employee commences performing safety-sensitive work.

³ The Union argues extensively that the Grievants are "just cause" employees and could not be terminated without just cause. The Employer does not dispute this and, in fact, has framed the issue to be decided as whether it violated the contract when it terminated the Grievants. The contract reserves to the City the right to discipline or terminate employees for just cause. In agreeing to submit this matter to arbitration, the Employer has, in effect, acknowledged that the underlying question is whether it had just cause to terminate the Grievants. As all the Grievants were long seasonals who had worked for the City in excess of 64 weeks, they had access to the grievance and arbitration provisions of the collective bargaining agreement.

Troubling in the instant situation is the fact that the Grievants were transferred to DPW without being subjected to the physical examination and drug testing. The Grievants were, apparently, all transferred to DPW in 2006 without being tested. At the time Parker became aware of this fact, he directed that the Grievants be sent for physicals and drug testing. In essence, Parker attempted to correct an error made previously by others.

The Union appears to argue that because the testing was done at a time that tests are not normally performed, the results cannot be utilized to discipline or discharge the Grievants. This argument falls well short of the mark. First, in the case of VJ, the test was administered on her first day back for the season, a test that was denominated on the Custody and Control Form as a Pre-Employment test. CH testified that he had been back to work for the 2007 season for two to three weeks, maybe more, when he was tested on April 16. Long seasonals can only start work at the beginning of April, so he probably had only worked for two weeks. The Federal Drug Testing Custody and Control Form for CH indicates that the reason for the test was "Pre-Employment" which is consistent with the timing of the test since it was near the beginning of the season. Inasmuch as RK did not testify at hearing, the record is silent as to whether this was performed on his first day back for the season. The Medical Review Officer Drug Test Results form indicates that the reason for the test, performed on May 14, was "other". This is consistent with Parker's testimony that the test was performed when he became aware of the failure to test at the appropriate time. As City of Racine employees, the Grievants are expected to come to work drug and alcohol free. Further, as CDL holders they are aware that they are subject to random, unannounced drug testing. Although the tests performed in April and May 2007 on these Grievants were not the result of having their names randomly generated for testing, the rationale provided by the Employer for having the tests performed at the time in question is permissible, rational and reasonable. Accordingly, the test results can be considered in determining whether the Grievants could be subjected to discipline or discharge for failing the drug tests.⁴

The clear and established practice of the City is to suspend regular full-time employees for a period of five days for the first instance of a positive drug test, with termination upon a second offense. This practice has been established pursuant to the Policy and has been upheld by a number of arbitrators. CITY OF RACINE AND LOCAL 67, AFSCME, AFL-CIO, WERC Case 525, No. 55036, MA-9974, 3/25/98, Arbitrator Bielarczyk; CITY OF RACINE AND

⁴ For purposes of this discussion, the three Grievants are all considered to have failed the drug test. The fact that one tested positive for cocaine, one tested positive for marijuana, and one failed to provide a sample of human urine is immaterial: all are considered to be positive drug tests under the Policy.

VJ requested that a re-test be performed on the split sample. The laboratory was unable to perform this test because the initial sample was not human urine. The Employer testified that the test was not done because the lab had thrown away the sample. The documentation regarding VJ's test, however, indicates that on both 4/19/07 and 4/25/07 two different individuals determined that the sample was substituted, hence a refusal to test. The arbitrator is satisfied that proper precautions were taken to ensure that VJ was afforded all her rights.

LOCAL 67, AFSMCE, AFL-CIO, WERC Case 530, No. 55707, MA-10075, 6/19/98, Arbitrator Houlihan; as well as the undersigned, CITY OF RACINE AND LOCAL 67, AFSCME, AFL-CIO, WERC Case 773, No. 67831, MA-14033, 7/9/08. However, the instant dispute concerns long seasonals, not regular full-time employees.

The evidence submitted by the Employer at hearing established that it was customary for it to terminate long seasonal employees for the first instance of a positive drug test. A review of those terminations (City Exhibit 5), however, demonstrates that the practice to terminate long seasonals upon the first instance of a positive drug test has been applied only to long seasonals who have been employed by the City for a period of less than 64 weeks. The testimony of both Terry Parker and Scott Sharp was the same that Troy West had worked less than 64 weeks; that John Veenstra was below 64 weeks; that they believed Agustin Gomez had worked less than 64 weeks; and Jonas Johnson was below 64 weeks. Sharp testified that Joe Garcia had worked less than 64 weeks, although Parker could not recall how long Garcia had been employed. Neither Parker nor Scott could state with certainty the length of time Michael Oliver had worked until he was terminated for a positive drug test. Long seasonals who work less than 64 weeks do not have access to the grievance and arbitration provisions of the collective bargaining agreement and, therefore, the Union did not and could not file grievances on behalf of these individuals.

The City contends that this evidence demonstrates that it had treated similarly situated employees in a like manner: terminating any and all long seasonals upon a first instance of a positive drug test. Inasmuch as the Grievants herein had been employed for more than 64 weeks, they had access to the grievance and arbitration provisions of the collective bargaining agreement – a significant difference between the Grievants and the above identified long seasonals who were terminated after the first instance of a positive drug test, without recourse. These Grievants could only be discharged for just cause. Although the Grievants were long seasonals who had been employed in excess of 64 weeks, they were not full time non-probationary employees of the City who would have been suspended for five days upon the first instance of a positive drug test. Accordingly, the Grievants' status is different from that of either group and the Employer's argument that it treated them as it had similarly situated employees fails.

Attached to the Policy is an unsigned Memorandum of Understanding which provides some guidance as to the City's view of how to deal with long seasonal employees. The first section thereof provides as follows:

The Employer shall not discharge an employee for testing "positive" the first time under the new policy unless a dischargeable offense occurs which is directly related to a positive drug or alcohol test. The above sentence shall not apply to employees who have previously tested positive while employed or as the result of a pre-employment physical examination. The first sentence shall also not apply to seasonal employees who test positive when being tested to move into regular employment.

According to the above referenced Bielarczyk decision, the parties had signed this Memorandum of Understanding in 1995. At hearing, Sharp testified that the Union did not sign onto the drug testing policy and reserved its right to grieve it at any time, based on its interpretation of the policy and how the City implemented it. This is consistent with the last paragraph of the Memorandum which states:

The City recognizes the right of the Union to grieve any and all disciplinary actions taken subject to the just cause standard.

While not directly on point since the testing which occurred in this matter was not upon movement into regular employment but movement from the Parks Department to DPW while continuing as long seasonals, it demonstrates that the City has consistently attempted to treat seasonal employees differently than it treated regular employees, in a manner in addition to the contractual difference relating to access to arbitration for long seasonals who had worked in excess of 64 weeks. In other words, the City, under this Memorandum, reserved to itself the right to terminate long seasonals for a first instance of a positive drug test at the time they would become eligible to become regular employees. This is consistent with the ability to terminate a long seasonal during the course of employment as a long seasonal upon the first instance of a positive drug test. In either situation, the Employer is, by terminating an individual who is not a regular employee for a positive drug test prior to the individual becoming a regular employee, attempting to avoid problems at a later time with its regular workforce.

The Grievants are not similarly situated to the individuals identified by the Employer in Exhibit 5 in that they have worked in excess of 64 weeks. The Grievants are not similarly situated to regular full-time, nonprobationary employees in that they are not regular employees - they work no more than 32 weeks a year whereas regular employees work year round. While as to the first group the Employer has the unconditional right to terminate employment upon the first instance of a positive drug test and as to the second group the Employer has given up its right to discharge upon the first instance of a positive drug test, absent a dischargeable offense directly related to the positive drug test, the Employer has not, until now, asserted and had challenged, its right to terminate a "just cause" long seasonal upon the first instance of a positive drug test.

Because the Grievants are not similarly situated to either group, and because there is no contractual or precedential basis to determine whether termination is appropriate in this case, the undersigned must determine whether there is just cause to terminate these long seasonal employees. The collective bargaining agreement contains no definition of just cause, and the parties have not agreed to any. However, the written arguments of both parties reference the Daugherty seven tests.⁵ These require that (1) the employee be forewarned of the consequences of his/her actions; (2) the employer's rules must be reasonably related to the

⁵ See, ENTERPRISE WIRE CO., 46 LA 359 (1966).

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; and (7) the degree of discipline must be reasonably related to the nature of the offense and the employee's past record.

There does not appear to be any dispute as to the first five (5) of these tests. The essence of the Union's argument, after its contention that the drug tests should not have been done or considered, is that employees who engage in the same type of misconduct must be disciplined in the same manner unless a reasonable basis exists for the difference in punishments. In pointing to the fact that a five day suspension has consistently been upheld for initial drug test failures, it neglects the fact that those cases all concerned regular employees, not long seasonal employees. The Union also argues that seasonals serve longer probationary periods than regular employees, and that it is unfair to terminate a seasonal for something for which a regular nonprobationary employee would only be suspended for five days.

On the other hand, the City argues that it has shown that similarly situated employees have been terminated for the same offense. As indicated above, this argument is without merit. The City also argues that where just cause for discipline exists, the City had discretion to terminate the Grievants and that the City did not abuse its discretion. It also argues that the arbitrator should not substitute her judgment for that of the City, in the absence of an abuse of discretion.

As a general rule, it is not only a question of whether the Employer abused its discretion in meting out discipline that is the test, but also the question of whether the discipline imposed by the Employer is appropriate under the facts of the case. The Grievants are all "just cause" employees, and the burden is on the Employer to demonstrate that it had just cause for termination for an offense that for regular non-probationary employees would result in a five day suspension. To do so, a qualitative difference between regular employees and long seasonals must exist as otherwise there would be no discernible reason to treat the long seasonals differently than regular employees.

Although the Grievants worked more than 64 weeks, and are thus entitled to a determination of whether just cause existed to discharge them, I find that the long seasonals are discernibly different than regular employees. Regular employees have an on-going expectation of employment by the City, week in and week out, year round. They generally are not employed by other entities, and the City has a long term investment in them. Though long seasonals may be recalled to work for several years in a row, there is no guarantee of such on-going employment. Most long seasonals seek other work during periods of the year in which they are not employed by the City and it is quite possible that they do not return to City

employment even if recalled. Seasonals do not, and cannot, have the same expectation of on-going employment as regular employees, despite the fact that many do eventually achieve regular employment with the City.

I find that there is sufficient difference between the nature of the employment relationship of the City with its regular employees and the nature of its employment relationship with long seasonals to warrant different discipline for a similar offense of a failed drug test. Although the choices presented, a five day suspension or termination, are not the only possible options, under all the circumstances presented, I find that termination at the time was appropriate. However, assuming that the Grievants are able to pass appropriate physical and alcohol/drug testing, they are eligible for employment with the City of Racine in the future.

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

AWARD

The Employer had just cause to discharge the Grievants, but they are eligible for re-employment by the City of Racine.

Dated at Madison, Wisconsin, this 17th day of September, 2008.

Susan J.M. Bauman /s/

Susan J.M. Bauman, Arbitrator