

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

PORTAGE COUNTY

and

AFSCME LOCAL 311 HIGHWAY EMPLOYEES

Case #205

No. 68574

MA-14274

Appearances:

J. Blair Ward, Deputy Corporation Counsel, 1516 Church Street, Stevens Point, WI 54481, appearing on behalf of Portage County.

Houston Parrish, Staff Representative, 1457 Somerset Drive, Stevens Point, WI 54481, appearing on behalf of AFSCME Local 311 Highway Employees.

ARBITRATION AWARD

Portage County (hereinafter County or Employer) and AFSCME Local 311 Highway Employees (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 provide it with a panel of seven Commissioners or staff members from which to select an arbitrator of the instant dispute. Commissioner Susan J.M. Bauman was so selected. A hearing was held on May 29, 2009, in Stevens Point, Wisconsin. A transcript was filed on June 16, 2009. The record was closed on September 24, 2009, upon receipt of all post-hearing written argument submitted pursuant to a briefing schedule.

This award addresses the termination of D.C., an employee of the Portage County Highway Department.

ISSUE

There are no procedural issues to be decided. The parties stipulated that the substantive issue to be decided is:

Was there just cause to terminate the grievant? If not, what is the remedy?

FACTS

Grievant D.C. was employed by Portage County Highway Department in a number of capacities including Operator III (Semi Truck Operator), Operator IV (Village of Park Ridge Patrolman) and Operator I (Shovel Operator). The position descriptions of all include a requirement that the incumbent possess a Commercial Driver's License (CDL) and a safe driving record. Although D.C. was required to have a CDL, he did not always operate equipment that required a CDL for operation. As a holder of a CDL, D.C. was subject to the Omnibus Transportation Employee Testing Act and various Portage County policies that required him to submit to random drug testing. At the time of his termination, D.C. had worked for the County for a period of seven years during which time his evaluations indicate that he was an average to above-average employee. His personnel file, until the time of the events giving rise to the instant grievance, was clean with two exceptions: a verbal warning issued on September 22, 2003, due to his failure to punch in on time and/or give adequate notice that he would not be present on time; and a written warning issued on February 4, 2004, due to his failure to call in on a timely basis to advise that he would be out sick that day.

On April 15, 2008, D.C. was subjected to a random drug test at Saints Health Services. D.C. had taken and passed drug tests on numerous prior occasions. The sample on April 15 tested positive for cocaine. The results of the test were reported to Dr. Michael Curtis, the Medical Review Officer (MRO) for Saints. Dr. Curtis relayed the information to D.C. who requested that the split sample be tested. It, too, tested positive for cocaine. The MRO goes through a standard interview with any donor who tests positive, and he did so with D.C. During that discussion, D.C. reported past usage of cocaine, but denied usage during the previous two to three years.

Dr. Curtis contacted Portage County and reported that there were metabolites in the sample that confirmed the presence of cocaine and that there was no medically legitimate reason for it to be present.

Because the test results indicated the presence of cocaine in D.C.'s body, Portage County Executive Mark Maslowski confirmed by letter dated April 25 that D.C. was being placed on a non-disciplinary administrative leave with pay effective that day pending an investigation into the positive results of his random drug test. The letter specifically stated: "You are also hereby notified that you may be subject to disciplinary action or termination depending on the findings of the investigation." D.C. was further advised that "Portage County also strongly recommends you contact the Employee Assistance Program (EAP) to assist you with any personal issues as a result of this incident."

An initial investigatory interview was held on May 2, 2008, around 10:00 a.m. D.C. was represented by a member of the Union Executive Board, Russ Bachinski, and by a Union Steward, Dan Bemowoski. Questioning was done by Human Resources Director Laura Belanger Tess, with James Zdroik, Highway Committee Chair, and Dale Petersen, Assistant Highway Commissioner, in attendance as well. During that interview, D.C. denied that he was using cocaine or that he had ever used cocaine. D.C. had no additional information that he wanted to present at that time. After a break during which the union representatives caucused, Mr. Bemowoski advised Ms. Tess that they needed to speak with the AFSCME business representative, Houston Parrish, before D.C. could/would make any formal statement or explanation. In fact, Bemowoski stated that they would be able to provide a “more cooperative effort after we talk to Houston.”

By letter dated May 2, 2008, from Human Resources Director Laura Belanger Tess, D.C. was advised of the following:

As a result of your violation of the Department of Transportation (DOT) drug and alcohol regulations you cannot perform any DOT safety-sensitive duties for any employer until and unless you complete the Substance Abuse Professional (SAP) evaluation, referral, and education/treatment process set forth in Subpart O of the DOT agency regulations (attached). It is YOUR responsibility to complete this process in order to legally be able to perform any DOT safety-sensitive duties. It is also your financial responsibility but most services are covered under health insurance plans.

The first step in complying with the DOT agency regulations is to contact and set up an appointment with a Substance Abuse Professional (SAP). The following is a list of Substance Abuse Professionals in the Stevens Point/Wausau area.

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The investigatory interview was continued on May 6, with the same persons present. On that day, D.C. made an opening statement:

Well I guess I'd start by ah, the other day, ah, I didn't quite understand where we were going, I misunderstood ah, I have used, once. I'm under a lot of stress, I mean, sorry I just didn't understand what was going at the other day ah, though this divorce and everything that's going on, was that, I wasn't under the influence at work, it was on the weekend. Ah . that's all I got to say for right now.

In response to further questioning by Ms. Tess, D.C. acknowledged that he had used cocaine the Saturday before the April 15th random test. After a brief caucus, the Employer representatives returned and asked for D.C.'s resignation. Bemowski indicated that the Union was hoping that the County would offer D.C. a last chance agreement which would allow D.C. to keep his job, and get rehabilitation and counseling. Mr. Zdroik responded to the Union's assertions that D.C. had been a good employee, was a foreman for a while, had a good attendance record, and this was one strike against him, with the following comments:

But it's a major strike.

Well I'm looking at it personally from the aspect, everybody puts so lightly the alcohol or other issues, this is a much higher level of concern, as far as protocol, we have the areas known for the alcoholism which is a given but I guess cocaine or any controlled substance is of higher regard for safety with public issue and I guess that's the aspect that I'm looking at it.

At the end of the meeting, it was clear that D.C. was no longer a County employee. He had until Friday of that week to tender his resignation or his employment was terminated. D.C. did not resign.

By letter dated May 6, 2008, signed by James Zdroik, Highway Committee Chair and Mark Maslowski, County Executive, D.C. was advised of the following:

The investigation into the results of your random drug and alcohol test from April 15, 2008 is complete. It has been found that the positive result of your random drug and alcohol test is in violation of the Omnibus Transportation Employee Testing Act, Portage County Drug and Alcohol Testing policy, Portage County Human Resources Policy 3.11.13.12 - Drug-Free Workplace Policy, and Portage County Human Resources Policy 3.11.13 - Employee Rules of Conduct, 3.11.13.2 - Grounds for Discipline:

- (6) Condition brought about from use of intoxicants away from work which interferes with job performance, efficiency, or discipline;
- (10) Disregard or repeated violation of safety rules and regulations;
- (15) Unlawful conduct defined as a violation of or refusal to comply with pertinent laws and regulations when such conduct impairs the efficiency of County service.
- (17) Failure to follow duly established work rules, policies and procedures.

It has been found that due to the positive results of your drug test that you are unable to perform safety sensitive functions with the Portage County Highway Department. This makes you in violation of Portage County Human Resources Policy 3.11.13.2 – Grounds for Discipline (16) Failure to adequately perform assigned job duties.

It has also been found that your response during the investigatory interview on May 2, 2008 that you have never used cocaine is untruthful and is in violation of Portage County Human Resources Policy 3.11.13.2 – Grounds for Discipline (1) Dishonesty or falsification or [sic] records.

It has been found that there exists just cause to terminate your employment with Portage County. Your employment with Portage County is hereby terminated effective today, May 6, 2008.

Portage County's Employee Assistance Program (EAP) is available to you if contacted within a reasonable amount of time.

A timely grievance was filed and processed through the steps, culminating in this arbitration proceeding.

Additional facts are included in the **Discussion** below.

RELEVANT CONTRACT PROVISIONS¹

ARTICLE 2 – MANAGEMENT RIGHTS

A. The County possesses the sole right to operate county government and all management rights repose in it, subject only to the provisions of this contract and applicable law. These rights include, but are not limited to the following:

1. To direct all operations of the work force;
2. To establish reasonable work rules and schedules of work [sic] before implementing new policies or work rules, management will discuss such changes with the Union;
3. To hire, promote, transfer, schedule, and assign employees;
4. To suspend, demote, discharge, and take other disciplinary action against employees for just cause.

. . .

¹ Although the events giving rise to this grievance took place in 2008, the 2008 collective bargaining agreement was not ratified until August 2008. Accordingly, the language cited above is from the 2005 – 2007 collective bargaining agreement which was in effect during the hiatus until the 2008 agreement was signed.

Any dispute with respect to the reasonableness of the application of said management rights with employees covered by this agreement may be processed through the grievance and arbitration procedure contained herein; however, during the pendency of any grievance or arbitration proceeding, the County can continue to exercise their management rights.

ARTICLE 5 – GRIEVANCE PROCEDURE

A grievance shall mean a dispute concerning the interpretation, application, or violation of this agreement and shall be handled as follows:

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Any grievance relative to a discharge shall commence at Step 3 or the Grievance Procedures. The grievance must be presented to the Personnel Committee in writing within fifteen (15) working days after receipt of the discharge notice.

F. Arbitration:

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6. Decision of the Arbitrator: The decision of the arbitrator shall be limited to the subject matter of the grievance. The arbitrator shall not modify, add to, or delete from the express terms of the agreement.

ARTICLE 18 – WAGES AND OVERTIME

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K. The County shall pay all costs associated with initial and confirmation alcohol testing, including follow-up and return-to-duty testing. The County shall pay initial controlled substance testing, including follow-up and return-to-duty-testing [sic]. The employee will pay all costs associated with split testing for controlled substances. However, if the split sample results are negative, the County will reimburse the employee for such costs.

**RELEVANT PROVISIONS OF THE PORTAGE COUNTY HUMAN
RESOURCES POLICIES**

3.11.1.3 POSITIONS COVERED:

These policies shall be applicable to all County positions, including those within collective bargaining units. When there is a conflict between the Human Resource Policies and any County Labor Agreement or governing State Statute, the County Labor Agreement or State Statute shall prevail.

3.11.1.17 RIGHTS OF THE COUNTY

The County of Portage reserves unto itself all rights commonly associated with the employer in employment relationship, including but not limited to, the following:

- (1) To direct all operations of the County.
- (2) To establish reasonable work rules and schedules of work.
- (3) To hire, promote, transfer, schedule and assign employees to positions in the County.
- (4) To suspend, demote, and take other disciplinary actions against employees with cause.
- (5) To relieve employees from their duties because of lack of work or any other legitimate reason(s).
- (6) To maintain efficiency of County operations.
- (7) To take whatever action is necessary to comply with state or federal law.
- (8) To introduce new or improved methods or facilities.
- (9) To change existing methods or facilities.
- (10) To determine the kinds and amounts of services to be performed as pertinent to County operations, and the number and kind of classifications to perform services.
- (11) To contract out for goods and services.
- (12) To determine methods, means and personnel by which County operations are to be conducted.
- (13) To take whatever action is necessary to carry out the functions of the County in situations of emergency.
- (14) To take whatever measures as are reasonable to comply with the management obligations of the County.

3.11.13 EMPLOYEE RULES OF CONDUCT

3.11.13.1 DISCIPLINARY ACTION:

The purpose of discipline is correcting job behavior and performance problems of employees. Employees shall be informed of standards of conduct and performance. Rules and standards shall be consistently applied. Penalties shall be appropriate to the circumstances. Persons administering corrective discipline shall systematically document the case. Records of verbal reprimands shall be maintained in the employee personnel file. Copies of written reprimands, suspensions, and terminations shall be provided to the employee, the Human Resources Director, the employee's personnel file, the employee's supervisor and union steward if appropriate. Suspensions and terminations shall be discussed with the Human Resources Director before such actions are taken. In the event the Human Resources Director cannot be reached, the employee shall be suspended pending investigation.

3.11.123.2 GROUNDS FOR DISCIPLINE:

The following shall be grounds for discipline ranging from a verbal warning to immediate discharge depending upon circumstances and the seriousness of the offense in the judgment of management

- (1) Dishonesty or falsification of records;
- (2) Insubordination (refusal to obey reasonable orders, insolence, etc.);
- (3) Theft or destruction of County equipment or property;
- (4) Unauthorized use or abuse of County equipment or property;
- (5) Intoxication, including consuming intoxicants during working hours or being under the influence of liquor or drugs during working hours or bringing intoxicants or drugs into the work place;
- (6) Condition brought about from use of intoxicants away from work which interferes with job performance, efficiency, or discipline;
- (7) Fighting or creating a disturbance among fellow employees, resulting in an employee having an adverse effect on morale, production or maintenance of proper discipline;
- (8) Habitual tardiness or abuse of sick leave or unauthorized absence from work without substantiated reason, including violation of an approved department absenteeism policy;
- (9) Use of official position or authority for personal or political profit or advantage, including acts which constitute a violation of the Portage County Code of Ethics;
- (10) Disregard or repeated violation of safety rules and regulations;
- (11) Discrimination because of race, color, creed, national origin, ancestry, marital status, age, sex, or disability;

- (12) Knowingly making false or malicious statements with intent to harm or destroy the reputation, authority or official standing of individuals or organizations;
- (13) No employee or elected official shall use or disclose “privileged or confidential information” gained in the course of or by reason of his/her official position or activities;
- (14) No employee shall engage in his own business activity, accept private employment, or render services for private interests when such employment, business activity or service is incompatible with the proper discharge of his/her official duties or would impair his/her independence or judgment or action in the performance of his/her official duties;
- (15) No employee may purchase materials or services from Portage County for their personal use unless the purchase or service is available to the general public;
- (16) Failure to adequately perform assigned job duties;
- (17) Failure to follow duly established work rules, policies and procedures;
- (18) Professional unethical conduct or behavior;
- (19) Violation of the confidentiality requirements of the department.

Other circumstances may warrant disciplinary action and will be treated on a case-by-case basis.

3.11.13.12 DRUG-FREE WORKPLACE

Any employee is absolutely prohibited from the unlawful manufacture, distribution, dispensing, possession or use of controlled substances on all County property and work sites. Any employee who engages in any of these actions on County property or the work site or during work time may be referred to counseling or treatment, and may be subject to disciplinary action up to and including discharge. (Emphasis in original)

Employees who are convicted of any criminal drug statute violation occurring in the workplace must notify their supervisor or Department Head within five (5) days of the conviction of the employee is employed by Portage County at the time of the conviction.

Employees who have problems with alcohol or controlled substances are encouraged to voluntarily utilize the Employee Assistance Program. Early diagnosis and treatment of chemical abuse is in the best interests of the employee and Portage County. Voluntary contacts with the EAP representatives will remain confidential.

3.11.13.15 ALCOHOL FREE WORK PLACE

Portage County is an alcohol free work place. Alcohol possession, consumption and sale are prohibited in any worksite building or motor vehicles that are owned, leased, or rented by Portage County.

EXCERPTS FROM PORTAGE COUNTY DRUG AND TESTING POLICY

I. **STATEMENT OF POLICY**

Portage County recognizes that the use and/or abuse of alcohol or controlled substances by drivers of commercial motor vehicles present a serious threat to the safety and health of the driver and the general public. It is the policy of Portage County that its drivers should be free of drugs and alcohol. In order to further the County'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 as amended and revised, Portage County has implemented a drug and alcohol testing program which is designed to help reduce and avoid traffic accidents and injuries to the County's employees and the public, to discourage substance and alcohol abuse, and to reduce absenteeism, accidents, health care costs, and other drug and alcohol related problems.

III. **COVERAGE**

For purposes of this policy, Portage County and the DOT strictly prohibit the use of alcohol and/or controlled substances by its employees, applicants for employment, volunteers and any person designated in a DOT agency regulation as subject to drug and/or alcohol testing who are seeking to begin performing, performing, ready to perform, or ceasing to perform the following safety-sensitive functions:

1. Regular operation of a commercial motor vehicle;
2. Occasional, casual or intermittent operation of a motor vehicle;
and
3. Directly supervising employees who perform safety-sensitive functions, and the supervisors are required to have a CDL.

IV. **PROHIBITED CONDUCT**

Federal Regulations prohibit employees performing safety sensitive functions from engaging in the following conduct:

1. Using or possessing alcohol while on duty. Note: Federal Regulations include non-prescription and prescription medications containing alcohol in the substances banned from use or possession in the workplace. Therefore, employees should not report for duty while using or possessing prescription medication if such medication contains any measurable amount of alcohol;
2. Using alcohol within eight (8) hours following an accident, if the employee was required to be tested, unless earlier test results in a reading of less than 0.02;
3. Reporting for duty or remaining on duty while having an alcohol concentration of 0.04 or greater;
4. Consuming any amount of alcohol within four (4) hours before reporting for duty;
5. Using controlled substances while on duty, unless the use is pursuant to the instructions of a physician who has advised the driver that the substance does not adversely affect the driver's ability to safely operate a commercial motor vehicle and providing it is not contrary to No. 1 above;
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, Portage County's Policies prohibit all employees from engaging in the following conduct:

1. Consuming, dispensing, distributing or receiving alcohol and controlled substances while on duty;
2. Possession of controlled substances while on duty;
3. Reporting for duty while under the influence of alcohol or any time there is a quantifiable presence of a prohibited drug in the body above the minimum threshold defined in 49 CFR PART 40, as amended;
4. Deliberately misusing this policy in regard to subordinates; and
5. 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 the rules set forth is subject to discipline up to and including termination.

V. **REQUIRED TESTS**

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3. Random Testing – Random alcohol and drug testing will be conducted just before, during or just after an employee’s performance of safety-sensitive duties. The employee will be randomly selected for testing from a “pool” of employees subject to testing. The testing dates and times are unannounced and will occur with unpredictable frequency throughout the year.

The minimum annual percentage rate for random alcohol testing shall be 25 percent and the minimum annual percentage rate for random drug testing will be 50 percent of the average number of employees in safety-sensitive positions. Portage County reserves the right to either increase or decrease the minimum annual percentage rate for random alcohol and drug testing based upon [sic] by the Federal Highway Administration and the Federal Regulations implementing drug and alcohol testing in the transportation industry.

The selection of employees for random testing shall be made by St. Michael’s Hospital, using a scientifically valid method. This method will be a random number table of a computer-based random number generator that is matched with the employee’s [sic] social security numbers. Under this selection process, each employee will have an equal chance of being tested each time selections are made. As a result, some employees may be tested more than once each year, while other employees may not be tested at all. Rules and reasonable suspicion testing above (d, e, f, and g) also apply to Random Testing.

In the event an employee tests positive for either alcohol or controlled substances, the employee will be subject to disciplinary action.

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VI. TESTING PROCEDURES

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2) Testing for Controlled Substances

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2. Results of Positive Test

Any employee who tests positive for controlled substances is subject to discipline

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POSITIONS OF THE PARTIES

The Employer contends it had just cause to terminate D.C. for having tested positive for cocaine during the course of a random drug test administered on behalf of the Employer in accordance with Federal law as well as for the fact that D.C. initially denied having used cocaine. According to the County, Dougherty's seven tests for just cause have been met and the termination was appropriate. The grievance should be denied.

While conceding that D.C. used cocaine and failed the random drug test, the Union argues that the Employer did not have just cause to terminate D.C. It argues that the collective bargaining agreement in effect between the parties at the time expressly contemplates that a Highway Department employee who tests positive for a controlled substance has the right to follow-up and return-to-working testing. This means, according to the Union, that the employee is not automatically fired but is either placed on leave or assigned to duties that are not safety-sensitive. The Union cites numerous sections of the collective bargaining agreement and the County's policies for the proposition that the County's policies provided for discipline other than discharge for a first time offense. The policy is not a zero tolerance policy. There is no claim that D.C.'s performance at work on the day he was tested indicated that he was under the influence of drugs, an offense potentially significantly more dangerous to the employee and the public. Under the circumstances, D.C. should not have been terminated and the Union requests that the grievance be sustained and that a suspension of 30 or fewer days is appropriate.

DISCUSSION

Although the Omnibus Transportation Employee Testing Act was first enacted in 1991 and Portage County has had a Drug and Alcohol Testing program in place for many years, apparently the April 15, 2008 random drug testing of Grievant D.C. was the first positive test result experienced in the County. Thus, this is a case of first impression in Portage County. At issue is whether the fact that D.C.'s urine tested positive for cocaine and that, during the first portion of an investigatory interview, D.C. falsely denied using cocaine constitutes just cause for the termination of his employment.

As with many collective bargaining agreements, no definition of just cause is included in the contract between the Union and Portage County. Absent such a definition or agreement between the parties as to the standard to be utilized, the undersigned utilizes a two-prong analysis which requires the Employer to establish the existence of conduct by the Grievant in which it has a disciplinary interest and then to establish that the discipline imposed for that conduct appropriately reflects that disciplinary interest in light of the totality of circumstances, including the Grievant's

prior employment record. In this case, the Employer has used the DAUGHERTY seven tests and argues that this is the proper standard to be utilized. The Union does not utilize the seven tests, but it does not argue as to the appropriate standard to be used. There really is no question that the Grievant engaged in conduct in which the Employer has a disciplinary interest inasmuch as D.C. admitted to having used cocaine. The only question is whether the discipline imposed, termination of employment, is appropriate in light of the totality of the circumstances. For the reasons discussed below, the undersigned finds that termination is too harsh a penalty for D.C.'s conduct.

In this case, the conduct complained occurred while D.C. was off-duty. In general, an employer's right to question an employee's conduct is limited to behavior that occurs while the employee is on duty. There is a general presumption, to which the undersigned subscribes, that an employee's private life is beyond the employer's control. However, when the employee's off-duty conduct affects the employment relationship, the off-duty conduct can have repercussions to the continued employment relationship. Here, although the off-duty conduct did not evidence itself in the employee's on-the-job performance, it did result in his testing positive for cocaine, in violation of the County's rules and regulations. There were no mitigating factors presented by D.C. for his behavior, except that he was under significant stress due to his pending divorce from the daughter of the Highway Commissioner.²

The Employer relies on a decision by this arbitrator, CITY OF RACINE, MA-14033 (7/9/08), for the proposition that the phrase that prescribes punishment for violation of the drug policy, "subject to discipline, up to and including termination," to support its position that termination was appropriate for D.C.'s offenses. To the contrary, the Union relies on CITY OF JANESVILLE, (10/27/03, Krinsky), CITY OF GREEN BAY, NO. 58096 (11/10/00, Houlihan) and CITY OF WAUSAU (4/9/92, D.B. Johnson) to support its proposition that the same language, in part, fails to provide notice to the employee that a first time offense may result in termination and, in any event, termination under these circumstances is too severe a penalty.

Both the Union and the Employer agree that the discipline to be imposed on an employee for violation of the County's drug and alcohol policy must be determined on a case-by-case basis. The Employer acknowledges that it did not have to terminate D.C., but it chose to do so under the circumstances that were presented: a positive test for cocaine and an initial denial of cocaine usage. To determine whether termination is appropriate under these facts, it is imperative to review the actual facts and the language of the collective bargaining agreement and the policies adopted by Portage County.

² The Union appears to argue that inasmuch as the Commissioner assisted D.C. in obtaining his position with the County when D.C. was engaged to the Commissioner's daughter, the reverse must be true now that D.C. is divorcing the Commissioner's daughter. The argument that the Commissioner was out to get D.C. is not supported by a shred of evidence. Thus, it will be ignored, along with other references to what the Commissioner may, or may not, have done. This case is being decided solely on the question of what is the appropriate punishment for a first time positive drug test.

The facts are undisputed: D.C. was randomly selected to be tested for drugs and alcohol. D.C. was engaged in the operation of equipment requiring a CDL prior and subsequent to providing a urine sample. The urine sample tested positive for cocaine usage. At the investigatory meeting, D.C. initially denied cocaine usage but asked that the meeting be continued until he could speak with his Union business representative. At the continuation of the meeting, D.C. acknowledged that he had used cocaine a number of days prior to the random drug test. At least one member of the management group involved in determining the appropriate discipline, James Zdroik, Highway Committee Chair, made clear that he considered a positive cocaine usage as a “major strike” against D.C. which was significantly different than alcohol usage. D.C. was terminated.

The policy provisions provide that the following are prohibited behaviors:

1. Using or possessing alcohol while on duty. Note: Federal Regulations include non-prescription and prescription medications containing alcohol in the substances banned from use or possession in the workplace. Therefore, employees should not report for duty while using or possessing prescription medication if such medication contains any measurable amount of alcohol;
2. Using alcohol within eight (8) hours following an accident, if the employee was required to be tested, unless earlier test results in a reading of less than 0.02;
3. Reporting for duty or remaining on duty while having an alcohol concentration of 0.04 or greater;
4. Consuming any amount of alcohol within four (4) hours before reporting for duty;
5. Using controlled substances while on duty, unless the use is pursuant to the instructions of a physician who has advised the driver that the substance does not adversely affect the driver’s ability to safely operate a commercial motor vehicle and providing it is not contrary to No. 1 above;
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.

Additional prohibitions include the following:

1. Consuming, dispensing, distributing or receiving alcohol and controlled substances while on duty;
2. Possession of controlled substances while on duty;

3. Reporting for duty while under the influence of alcohol or any time there is a quantifiable presence of a prohibited drug in the body above the minimum threshold defined in 49 CFR PART 40, as amended;
4. Deliberately misusing this policy in regard to subordinates; and
5. Providing false information in connection with a test, or who is suspected of falsifying test results through tampering, contamination, adulteration or substitution.

The policies also provide for penalties for violation of these prohibitions: Any employee who violates the rules set forth is subject to discipline up to and including termination. In addition to the policies regarding bans on drug and alcohol use and drug testing, the collective bargaining agreement between the Employer and the Union provides: “The County shall pay initial controlled substance testing, including follow-up and return-to-duty-testing [sic].”

Of the prohibited actions, the Grievant violated No. 6 of the first group: “Reporting for duty or remaining on duty if the employee tests positive for controlled substances” and No. 3 of the second set: “Reporting for duty while under the influence of alcohol or any time there is a quantifiable presence of a prohibited drug in the body above the minimum threshold defined in 49 CFR PART 40, as amended.” It is important to note that although D.C. reported for work with a quantifiable amount of cocaine metabolites in his body, there was no question raised about his work performance that day, either before or after the random test, nor on any subsequent day when such metabolites may have still been present. He was removed from work only after the Employer received the results of the random drug test, many days after the sample had been given and tested positive. There is, however, no dispute that D.C. was engaged in safety-sensitive work on the day prior to and the day of the random drug test. Given that he acknowledged cocaine use three days prior to the random test, a quantifiable amount of cocaine would have been present in his body on April 14, since such was true on April 15.

The County acknowledges that it did not have to terminate D.C.’s employment, that it could have accommodated his inability to participate in safety-sensitive work until such time as he had participated in an appropriate Substance Abuse Program and had passed a return-to-work drug test. The County’s position appears to be that although it could have imposed a less severe discipline instead of termination, it was its decision to terminate and that it had the right to do so. In response to the Union’s arguments that D.C. did not have notice that a first time positive drug test would result in termination, it contends that the language up to and including termination permits it to terminate D.C.’s employment. The County points to the undersigned’s decision in CITY OF RACINE, MA-14033 (7/9/08), for the proposition that this language is sufficient notice to D.C.

It is important to distinguish the facts in that case from the instant situation. Here, we are faced with a first time positive drug test. There, we were faced with a second positive test in a period of less than 60 months, with an established policy that a first positive would result in a relatively short suspension followed by more intensive random testing for a period of five years, with a second positive in that period of time resulting in termination. The grievant in CITY OF RACINE (MA-14033) tested positive for a second time after an extended period of time, but less than 60 months. The argument made by the Union was that the grievant had made it almost to the 60 month mark, and should not be terminated. Given the clear statement of procedure by the parties, although the Union had never signed the memorandum of agreement to memorialize it (and used this grievance to test it), this was the practice of the parties that this arbitrator upheld. In another CITY OF RACINE case, MA-13995 (9/17/08), the undersigned interpreted the same language and held that as to a seasonal employee, the City was not obligated to retain the services of a seasonal employee who tested positive for the first time even though the collective bargaining agreement permitted access to the grievance procedure for long-term seasonal employees. In part, the rationale was based on the distinction between a long-term seasonal and a regular employee, including the length of the employment relationship and the "investment" that the employer had in the employee.

In the case at bar, the Grievant had worked for the County for an extended, but not overly long, period of time. If the Grievant had been employed by the County for more than 20 years, with the relatively clean record D.C. had, it would be easy to decide that termination is inappropriate. As to a seven year employee like D.C., it is a closer question. Again, the policies come into play along with the need to make the determination on a case-by-case basis.

From the minutes of the investigatory meeting on May 5, it is clear that Highway Chairman Zdroik made a determination that because cocaine, not alcohol, was involved, D.C. was to be terminated. The policies do not make this distinction. As noted above, there are numerous prohibitions against numerous actions that involve alcohol, as there are against numerous actions involving other controlled substances, such as cocaine. None of the documents support the policy decision that because cocaine was involved, termination is the only course of action. Chairman Zdroik's statement belies that County's contention that violations of the Drug and Alcohol Policy must be treated on a case-by-case basis. He testified that he was part of the decision-making process that resulted in D.C.'s termination. Although the record is not complete as to what the other decision-makers may have initially thought, Zdroik's statement together with the result that D.C. was terminated make clear that the Chair of the committee was persuasive with his belief that cocaine usage should be treated more severely than alcohol usage.

If an initial positive for cocaine results in termination, what happens to someone who distributes cocaine or some other controlled substance at the worksite? What happens to the employee who comes to work under the influence of alcohol or drugs and drives a large piece of equipment into a ditch, or into an oncoming vehicle? If all of the prohibited actions are to be treated the same way, by termination of the employee, the policies and regulations should say that. They do not. The policies make clear that discipline up to and including termination may result from violation of these prohibitions. The clear implication is that the penalty fits the act – that a more blatant action by the employee will result in more discipline, not that termination will result on the first positive drug test (but perhaps not the first positive alcohol test based on Zdroik's comments).

The County does not rely only on the positive drug test for its decision to terminate D.C. It also relies on the fact that he failed to tell the truth about his cocaine usage at the first possible opportunity. In fact, the County lists six different Human Resources policies that D.C. allegedly violated: condition brought about from use of intoxicants away from work which interferes with job performance, efficiency, or discipline; disregard or repeated violation of safety rules and regulations; unlawful conduct defined as a violation of or refusal to comply with pertinent laws and regulations when such conduct impairs the efficiency of County service; failure to follow duly established work rules, policies and procedures; failure to adequately perform assigned job duties; and dishonesty or falsification of records. While perhaps technically a violation of each of these could be found, the fact of the matter is that D.C. used cocaine and initially lied about it.

The parties argue extensively about the WOITCZAK case in which Portage County terminated a different employee in part because he was allegedly untruthful during an investigatory interview. A different AFSCME local brought that grievance on behalf of Mr. Woitczak. The investigatory interview there was conducted by sworn personnel and a GARRITY warning was provided to Woitczak. The arbitrator's decision, apparently currently on appeal, reinstated the employee and, for the most part, found that he had been truthful. The situation here is very different from the Woitczak matter which provides little to no guidance in the instant situation.

D.C. denied cocaine usage at the beginning of the investigatory interview on May 2. Before the conclusion of that meeting, he and his Union representatives requested a continuation so that they could consult with the AFSCME business representative. The County agreed to the continuation. Although the Employer has described the May 5 meeting as a second investigatory meeting, it was not a second meeting but a continuation of the first one. Thus, D.C. corrected his misstatement before the end of the meeting. The fact that D.C. lied was not a wise move on his part, but it is not an unusual one under such circumstances, and it is not one which went uncorrected. Though it is clear that a positive test for cocaine could only come about due to cocaine usage (or other limited circumstances which the Medical Review Officer

had already ruled out), D.C. already knew that the Employer was aware of the positive drug test. This was not a case where the employee failed to tell the truth and the Employer discovered separately and unknown to the employee what the facts are. D.C.'s initial denial of cocaine usage at the investigative interview was part and parcel of his denial of cocaine usage. It certainly was not designed to throw the Employer off course, but was part of his embarrassment and fear about the potential consequences of using cocaine and testing positive for its use. D.C.'s failure to immediately admit that he used cocaine – a fact that the Employer already knew – did not hamper the investigation. It was hardly a falsification of a record. And, he admitted it during the latter part of the meeting that was continued to another day.

There is no doubt that D.C. should be subjected to discipline for his cocaine usage, his reporting to work and performing safety-sensitive work while he had a discernible amount of cocaine in his system, and for his failure to immediately acknowledge that he had used cocaine. The penalty should not be such that his career with Portage County Highway Department comes to an end.³ He should, however, be suspended for an amount of time that demonstrates that the County is serious about its commitment to maintaining a drug-free work place although the County has not established that it has a zero tolerance to drug use.⁴

The Union urges that a 30-day suspension, or less, is appropriate under the circumstances present here. The collective bargaining agreement between the parties does not indicate a limitation upon the amount of time that an employee might be suspended for disciplinary purposes. The Department of Transportation regulations make clear that an employee who has had a positive drug test cannot perform safety sensitive work until after completion of a SAP evaluation and any referrals and programs that the SAP orders. D.C. testified that he did complete such a program in March or April of 2009, although no documentation of this is included in the record.

A number of other municipal employers in the State of Wisconsin which have adopted similar drug and alcohol policies provide for a 3, 5, or 10 day suspension for the first positive drug test. Given the facts of this case, a 30 day suspension appears to

³ Both parties reference a new provision in the 2008 collective bargaining agreement that had not been ratified at the time the events in this matter occurred. That provision, at Article 21, refers to actions to be taken in the event that an employee who is required to have a valid CDL has that license suspended or revoked due to activities that do not arise in the workplace. The Union points to this section to support its position that the County could accommodate D.C. and have him not perform safety-sensitive work until such time as his CDL is re-activated, after he has completed the program recommended by the SAP. The County points to the fact that this provision refers to loss of CDL for off-duty conduct. Because the section is not relevant as it references off-duty loss of CDL, and because the County readily acknowledges that it could have D.C. perform non-safety-sensitive work for the requisite period of time, this provision of the parties' collective bargaining agreement is not relevant to this proceeding.

⁴ The County has not made conflicting statements about having a zero tolerance, as other employers have. Rather, in its policies, procedures, and collective bargaining agreement it has made reference to return-to-work testing whereby it indicates that an employee who has tested positive may be able to return to work after participation in appropriate programs.

the undersigned to be more appropriate. In addition, inasmuch as D.C. did not complete a SAP approved program until sometime in 2009, his wages upon reinstatement should be at the General Laborer rate, rather than the Operator I, III, or IV rate for the period of time until the SAP program was completed. Accordingly, although D.C. will be offered reinstatement, he will not be made completely whole.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is sustained. The County did not have just cause to discharge the Grievant, D.C. Therefore, the County is directed to offer the Grievant immediate reinstatement with his continued employment subject to his providing documentation that he has participated in and successfully completed, a rehabilitation/counseling and treatment program recommended by a Substance Abuse Professional (SAP), including required or recommended random testings or if such documentation cannot be provided, his participating in, and successfully completing such a program.

The County is directed to make the Grievant whole as to lost wages and benefits he would have received, less a 30 work day suspension and any wages the Grievant earned during the period since his termination for performing other work.⁵ Back wages to be paid to the Grievant shall be at the General Laborer rate for all time up until the date that he has provided the afore-mentioned documentation from the SAP and is able to perform safety-sensitive work. At that time, his back pay will be calculated based on the wage rates he would have earned, absent the termination.

The arbitrator will retain jurisdiction in this matter for the purpose of resolving any disputes as to the implementation of the remedy awarded, and will relinquish jurisdiction sixty (60) days from the date of the Award, unless she is advised in writing before then that there is a problem or dispute with regard to the remedy.

Dated at Madison, Wisconsin, this 22nd day of October, 2009.

Susan J.M. Bauman /s/

Susan J.M. Bauman, Arbitrator

⁵ D.C. testified that he was working for himself during the interim. If he was also doing that during the time he was working for the County, an appropriate adjustment should be made to reflect that not all his earnings from self-employment are to be considered as an off-set from back wages owed. If, however, he was not engaged in such self-employed work while a County employee, his entire income during the period from his termination until the date of the reinstatement offer must be considered an offset.