

**IN THE MATTER OF ARBITRATION  
BETWEEN**

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<b>Upper River Services, LLC</b>	)
	) <b>FMCS Case No. 09-55716-3</b>
<b>“Company” or “Employer”</b>	)
	) <b>Issue: Ken Schaffer Grievance</b>
	)
	) <b>Hearing Site: Minneapolis, MN</b>
<b>and</b>	)
	) <b>Hearing Date: 07-13-2009</b>
	)
<b>Int’l Union of Operating Engineers, Local No. 49</b>	) <b>Brief Submission Date: 08-17-2009</b>
	)
	) <b>Award Date: 09-28-2009</b>
<b>“Union”</b>	)
	) <b>Mario F. Bognanno, Arbitrator</b>

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**JURISDICTION**

Pursuant to Article V of the Collective Bargaining Agreement ("CBA"), the above-captioned arbitration was heard by the undersigned on July 13, 2009, in the Office of the Federal Mediation and Conciliation Service in Minneapolis Minnesota. (Joint Exhibit 1) Both parties were given a full and fair opportunity to present their respective cases. Through their designated representatives, the parties presented witness testimony, exhibits and arguments. Witness testimony was sworn and cross-examined, and a verbatim transcription of the hearing was prepared.

No procedural issues were raised by the parties, and they submitted the issue to arbitration for a final determination. Moreover, the parties stipulated that the Arbitrator may compose the statement of the issues in dispute, and they waived the Article V provision that imposes a 5-day time limit to decide the matter.

Timely post-hearing briefs were filed on or about August 17, 2009, which closed the record, and the matter was taken under advisement. Harry S. Crump (retired judge)

accompanied the Arbitrator to the hearing under the auspices of the Minnesota Bureau of Mediation Service's arbitrator-intern program.

**APPEARANCES**

For the Employer:

Michael J. Moberg	Attorney at Law
Stephen Soules	Operations Manager
Molly Isnardi	H. R. Manager

For the Union:

Mike Wilde	Attorney at Law
Kenneth Schaffer	Grievant
Kyle Jones	Area Business Representative
Engene Pickerign	Business Agent

**I. FACTS AND BACKGROUND**

The Company operates two shipyards and eight towboats that move tank barges, whose holds or “hoppers” are filled with aggregate and other bulk products, on the Minnesota and Mississippi rivers. (Tr. 33) The Company’s business is seasonal. Commencing around November, when the rivers begin to freeze, the Company necessarily shuts down its towing operations and lays-off workers in operating, repair, and maintenance job classifications, including Utility/Cleaning workers. When the rivers begin to thaw in March or April, the Company reboots its operations and recalls laid off workers. The Union represents the Company’s operating, repair, and maintenance workforce, and the Company and the Union are parties to a CBA with effective dates of February 1, 2007 to January 31, 2010. (Joint Exhibit 1)

The Company’s predecessor business entity hired the Grievant in 1973. At the time the business changed hands in 1986, the Grievant completed an application for employment with the Company. (Union Exhibit 8) The Company hired the Grievant

effective April 4, 1986. (Union Exhibit 2; Tr. 24) The Grievant's job duties have long involved Utility/Cleaner tasks, his most recent job classification. That work entails cleaning and repairing tank barges, which is largely outdoor work that is performed around the clock, regardless of weather conditions, on barge decks and in the cargo hold of barges. (Company Exhibits 1 and 2; Tr. 34-37) There is no disputing the fact that this work poses hazards to the worker's life and limb. (Tr. 42-43) This fact partly explains why the parties expanded the drug, safety, and health language in their 2007 – 2010 CBA. This inter-contract change in language is as follows:

Article II, Section 2.03

(a) The Employer has instituted a Drug & Alcohol program. The Union recognizes the need for a drug free, safe and healthy work environment and will support the employer and all established work rules to achieve this goal.

(February 1, 2004 – January 31, 2007 CBA; Union Exhibit 3)

Article II, Section 2.03

(a) The Employer has instituted a Drug & Alcohol program. The Union recognizes the need for a drug free, safe and healthy work environment and will support the employers and all established work rules to achieve this goal. *The Company will designate pre-identified negotiated positions at the State Street Cleaning and Repair Facility as "Safety Sensitive." This will result in those designated employees being subject to random drug testing using the same process and procedures as set forth in state guidelines. The Union and the Company mutually agree that one 91) employee will be tested per month every month, with the name and date to be generated randomly by an independent third party.*

(February 1, 2007 – January 31, 2010 CBA; Joint Exhibit 1; added language in italics)

The Grievant's Utility/Cleaner work is seasonal. Year in and year out, for the 22 years following his employment with the Company in 1986, the Grievant was routinely laid off in the winter and recalled in the spring. To fast-forward, effective November 21, 2008, the Grievant was given notice of the 2008 "seasonal layoff." (Union Exhibit 2 and Company Exhibit 6) In March 2009, the Company began notifying its laid off employees,

including the Grievant, about the spring 2009 recall and, pursuant to its Drug & Alcohol Policy (“Policy”), which was revised in 2007, the Company directed these employees to schedule an annual physical examination and drug test. This same process was followed in the spring of 2007 and 2008 (Joint Exhibit 2; Tr. 52) The Grievant’s examination and test occurred on March 24, 2009, and on March 26, 2009, he received a call from a M.D. who informed him that he tested positive for a trace of marijuana. (Company Exhibit 4) It is uncontroverted that this positive test result was the Grievant’s first such drug or alcohol test result. (Tr.170).

On March 27, 2009, the Grievant went to the Company to speak with Stephen Soules, Operations Manager. The latter testified that the Grievant was distraught, “crying,” admitted that he had made a “mistake,” and pleaded not to be “fired.” (Tr. 54) Mr. Soules advised the Grievant to see Molly Isnardi, Human Resources Manager, because under the Policy he had surrendered his recall/rehire rights. (Tr. 55-56) The Grievant testified, that later that same day that he spoke by phone with Ms. Isnardi, who pointed out, in so many words, that his positive test for marijuana use meant that the Company would be withdrawing its conditional offer of employment, pursuant to the 2007 edition of the Policy. (Joint Exhibit 2; Tr. 167) Effective March 30, 2009, the Grievant’s employment was formally terminated. On April 6, 2009, the Union filed a grievance, challenging the Company’s actions in this case. (Joint Exhibit 4) In the cover letter accompanying the grievance, the Union asserts, in part:

The Union considers Mr. Schaffer’s termination to be contrary to state law and, therefore, violated the terms and conditions of the collective bargaining agreement. The Union additionally considers the termination was without just cause...

(Joint Exhibit 3) In an email dated April 7, 2009, the Company denied the grievance.

(Joint Exhibit 5) In a letter dated April 14, 2009, the Union advanced the instant grievance

to arbitration. (Joint Exhibit 6) Finally, the record suggests that the Grievant subsequently sought AA assistance for drug abuse, and that twice weekly during the months of May, June, and July 2009, he attended the AA's abstinence program in Cottage Grove, MN. (Union Exhibit 9; Tr. 169-170) The Grievant maintains that he is and has been "sober" for several months. (Tr. 170)

## **II. LANGUAGE: CBA; DRUG & ALCOHOL POLICY; AND MN DRUG AND ALCOHOL TESTING IN THE WORKPLACE LAW**

### **CBA Relevant Provisions:**

#### Article II Management Rights

2.03 The Employer will not discipline any employee on the seniority list without just cause, and shall give at least one (1) verbal notice and one (1) written notice of the complaint to the employee affected, as stated in the work rules (Employee Handbook), except if the cause of such discipline or discharge is for insubordination, habitual and persistent tardiness, absenteeism, theft, dishonesty, or major violation of the employer rules not inconsistent with this Agreement. All policies and procedures will comply with all applicable State and Federal Regulations.

(a) The Employer has instituted a Drug and Alcohol program. The Union recognizes the need for a drug free, safe and healthy work environment and will support the Employer and all established work rules to achieve this goal. The company will designate pre-identified negotiated positions at the State Street Cleaning and Repair Facility as "Safety Sensitive." This will result in those designated employees being subject to random drug testing using the same process and procedures as set forth in state guidelines. The Union and the Company mutually agree that one (1) employee will be tested per month every month, with the name and date to be generated randomly by an independent third party.

#### Article VII Seniority

7.01 There shall be a probationary period of forty-five (45) days for all classifications, except Barge Cleaners who will have a probationary period of ninety (90) days.

7.02 Seniority rights shall prevail among the employees covered by this Agreement as specified below. All employees within the bargaining unit shall be entitled to seniority from their original date of hire. New employees shall be placed on the seniority list after forty-five (45) days, [90] days for Barge Cleaners) with a minimum of one hundred and eighty (180) hours on the payroll in any one ninety (90) days work period. Seniority is to start from the first day of employment within the period during which such seniority was established. Deliberate intermittent employment is not to be used to nullify the qualifying period.

7.05 Employees who have been laid off and are not recalled for work within twenty-four (24) months from the date laid off will lose seniority rights.

(Joint Exhibit 1)

**Drug & Alcohol Policy Relevant Provisions:**

**IV. Definitions**

9. **Employee** means a person, independent contractor, or person working for an independent contractor who performs services for compensation, in whatever form, for Upper River Services, LLC.
16. **Rehire employees** mean an employee who is returning to the Company after an absence (for any reason) of thirty (30) or more days.

**VII. Testing**

**B. Tests**

1. **Pre-employment (Post-offer)/Rehire Testing (drugs only)**

The Company requires that every newly-hired and rehired employee be free of illegal drug use. Every offer of employment for an employment position shall be conditional upon the job applicant or rehire providing evidence of a negative drug test. The cost of a pre-employment drug test will be paid by the Company. If an applicant or rehire produces a positive confirmatory test result, or, if requested, a confirmatory retest, the job offer will be withdrawn.

5. **Routine physical examination testing (drugs only)**

Annual physical examinations will include a required drug test. An employee who is required to submit to a physical examination will be given no less than two weeks' advance written notice of the examination and drug test. An employee will not be required to submit to a physical examination drug test more than once in a calendar year.

**C. Consequences of Positive Test Results**

**Rehires**

If a rehire's confirmatory test is positive and a confirmatory retest is also positive or is not requested, the individual will not be returned to the Company's employment.

(Joint Exhibit 2)

## **MN Drug and Alcohol Testing in the Workplace Law Relevant Provisions:**

### **§ 181.950. Definitions**

**Subd. 5. Employee.** “Employee” means a person, independent contractor, or person working for an independent contractor who performs services for compensation, in whatever form, for an employer.

**Subd. 9. Job Applicant.** “Job applicant” means a person, independent contractor, or person working for an independent contractor who applies to become an employee of an employer, and includes a person who has received a job offer made contingent on the person passing drug or alcohol testing.

### **§ 181.953. Reliability and Fairness Safeguards**

#### **Subd. 10. Limitations on Employee Discharge, Discipline, or Discrimination.**

(a) An employer may not discharge, discipline, or discriminate against, or request or require rehabilitation of an employee on the basis of a positive test result from an initial screening test that has not been verified by a confirmatory test.

(b) In addition to the limitation under paragraph (a), an employer may not discharge an employee for whom a positive test result on a confirmatory test was the first such result for the employee on a drug or alcohol test requested by the employer unless the following conditions have been met:

(1) the employer has first given the employee an opportunity to participate in, at the employee’s own expense or pursuant to coverage under an employee benefit plan, either a drug or alcohol counseling or rehabilitation program, whichever is more appropriate, as determined by the employer after consultation with a certified chemical use counselor or a physician trained in the diagnosis and treatment of chemical dependence; and

(2) the employee has either refused to participate in the counseling or rehabilitation program, as evidenced by withdrawal from the program before its completion or by a positive test result on a confirmatory test after completion of the program.

(c) Notwithstanding paragraph (a), an employer may temporarily suspend the tested employee or transfer that employee to another position at the same rate of pay pending the outcome of the confirmatory test and, if requested, the confirmatory retest, provided the employer believes that it is reasonably necessary to protect the health or safety of the employee, co-employees, or the public. An employee who has been suspended without pay must be reinstated with back pay if the outcome of the confirmatory test or requested confirmatory retest is negative.

### **§ 181.955. Construction**

**Subdivision 1. Freedom to Collectively Bargain.** Sections 181.950 to 181.954 shall not be construed to limit the parties to a collective bargaining agreement from bargaining and

agreeing with respect to drug and alcohol testing policy that meets or exceeds, and does not conflict with, the minimum standards and requirements for employee protection provided in those sections.

(Minn. Stat. §181.950 — §181.957; copy attached to Company's brief)

### **III. STATEMENT OF THE ISSUES**

The issues in this case may be phrased as follows:

(1) Whether the Employer violated the CBA and the Minnesota "Drug and Alcohol Testing in the Workplace Act" when it failed to offer the Grievant drug counseling or rehabilitation after his positive test result, which was his first such test result under the Policy, before withholding his conditional job offer? If not:

(2) Whether the Employer's termination of the Grievant's employment was for "just cause?"

(3) If question (1) or (2) is answered in the affirmative, then what is an appropriate remedy?

### **IV. POSITION OF THE EMPLOYER**

The Company begins by pointing out the pursuant to its 2007 Drug & Alcohol Policy, the Grievant's March 2009 rehire opportunity was conditioned on a negative drug screen, and because of the Grievant's drug screen was uncontrovertibly positive, the Employer withdrew its employment offer pursuant to VII(B)(1) and VII(C) (Rehires) of the 2007 Policy. (Company Exhibit 4 and Joint Exhibit 2) In addition, the Company observes that in Article II, section 2.03(a) of the CBA, the parties expressly recognize the importance and enforceability of this 2007 Policy, and that Article II, section 2.03 of the CBA further provides that the Employer may discharge an employee without providing prior verbal or written discipline if the discharge is for a "major violation of employer rules." (Joint Exhibit 1)

Next, the Company contends that the parties jointly negotiated the 2007 *revisions* to the Policy and, of specific relevancy, the parties added:

1. the definition of a "rehire employee" in IV (16) of the Policy, which is

*“...an employee who is returning to the Company after an absence (for any reason) of thirty (30) or more days.”*

2. the terms “rehired” and “rehire” to VII(B)(1) of the Policy, which now reads, in part, “...every newly hired and *rehired* employees must be free of illegal drug use;” “...every offer of employment for an employment position shall be conditional upon the job applicant *or rehire* providing evidence of a negative drug test;” and “If an applicant or *rehire* produces a positive confirmatory test result, or, if requested, a confirmatory retest, the job offer will be withdrawn.”
3. a new VII(C) paragraph, which states, *“If a rehire’s confirmatory test is positive and a confirmatory retest is also positive or is not requested, the individual will not be returned to the Company’s employment.”*

(Joint Exhibit 2 and Company Exhibit 3; italics indicate new, 2007 revisions to the Policy)

The Company also argues that the above-referenced negotiated amendments to the Policy, among others, were motivated by its desire to require workers who are being recalled from layoff to pass a drug screen before they are rehired; whereas, the Union’s negotiating focus was on “random” testing, and identifying “safety sensitive” positions. (Joint Exhibit 1, Article II, section 2.03; Tr. 48-49) In addition, the Company observes that the same rehire aspects of the Policy, as amended in 2007, were in effect and administered during 2007 and 2008, and that the Union did not object to same.

Further, the Company dismisses the Union’s contention that the Grievant was wrongly discharged because he was a first-time offender and, as such, he should have been offered the opportunity to participate in a drug counseling or rehabilitation program pursuant to §181.953, subd. 10(a) (1) of the MN Drug and Alcohol Testing in the Workplace Law (DATWA). In this vein, the Company argues that the cited DATWA provision applies to “employees,” and the Grievant was not an “employee” at the time of his separation, rather he was a “rehire employee” under the Policy. Moreover, the Company observes that a “rehire employee” is akin to a “job applicant” under the DATWA. Further, the Company notes that the DATWA distinguishes between “job

applicants” and “employees,” and that “employees” may not be discharged after an initial positive drug/alcohol test result unless first offered counseling or rehabilitation, which is refused or failed. The Company argues that when its seasonal workers are in laid off status they are no longer employees of the Company because said workers:

1. are not working;
2. no longer receiving Company benefits and paychecks;
3. only receive COBRA benefits; and
4. receive unemployment insurance benefits under state law.

Continuing, the Company points out that there is no question that at the end of the 2008 season it initiated a (1) Status Change Form showing that the Grievant was laid off, (2) Benefit Change Form ending Company-paid benefits the Grievant had been receiving and offering him COBRA rights; and that the Grievant was collecting unemployment insurance. (Company Exhibit 6) In addition, the Company notes that under Minnesota’s Unemployment Insurance Law, a “discharge” is defined as follows:

- (a) A discharge from employment occurs where any words or actions by an employer would lead a reasonable employee to believe that the employer will no longer allow the employee to work for the employer in any capacity. A layoff because of lack of work is considered a discharge. A suspension from employment without pay of more than 30 calendar days is considered a discharge.

(Minn. Stat. §268.059, subd. 5; copy attached to Company’s brief) In light of this definition, the Grievant, who had been “laid off,” was actually “discharged” *per* the state’s Unemployment Insurance Law. Thus, the Employer concludes, the Grievant was considered to be a “job applicant” under the DATWA.

Finally, the Company argues that it had “just cause” for the actions that it took in this case; and, for all of the above-discussed reasons, the Company urges that the grievance be denied.

## V. POSITION OF THE UNION

The Union initially points out that prior to the Grievant's April 6, 1986 hire date, he filled out an application for employment, and that he has not been required to do so since. Indeed, the Union asserts, when seasonally laid off on November 21, 2008, the Grievant had every reason to believe that the following spring he would be recalled to work, in order of seniority, as he had been for more than two decades, without having to reapply for employment. In addition, the Union continues, the Grievant's COBRA PQB Form has x-marks in the boxes labeled "reduction in hours," and "lay off," and not in the box "termination of employment." (Union Exhibit 2) These facts, the Union concludes, strongly suggest that during the instant and previous periods of seasonal layoffs, the Grievant and kindred workers were not "job applicants" under either DATWA or the Policy.

Further, the Union argues, it is unequivocally clear *per* the DATWA that an employer may not discipline an employee who tests positive for the first time under an alcohol and drug policy unless said employee is first offered and then refuses the opportunity to participate in drug and alcohol counseling or rehabilitation. (Minn. Stat. §181.953, subd. 10) In this regard, the Union observes that since the Grievant in this case is not a "job applicant" he must be an "employee" under the DATWA, and because the Grievant is a first-time offender under the Employer's Policy, the Company incontrovertibly and illegally failed to offer him drug or alcohol counseling or rehabilitation before discharging him. Thus, the Union concludes, the Company not only violated the DATWA, it also violated Article II, section 2.03 of the CBA where it is stated that "All policies and procedures will comply with all applicable State and Federal Regulations." (Joint Exhibit 1)

With respect to alleged CBA violation, the Union avers that the Employer's Policy does not distinguish between "job applicants" and "rehires" (i.e., "employees" on layoff), and that it provides for the discharge of both first-offender "job applicants" and "rehires" without regard to the DATWA requirement that "employees" (i.e., "rehires" in the Policy) must first be offered counseling or rehabilitation. Therefore, the Union concludes, the Policy does not comply with this aspect of applicable public policy (i.e., DATWA or specifically, Minn. Stat. §181.953, subd.10) in violation of Article II, section 2.03 of the CBA.

Next, the Union points out that the DATWA defines an "employee" as a "... person...who performed services for compensation, *in whatever form*, for the employer." (Minn. Stat. §181.953, subd.6; italics added) Accordingly, the Union contends the Grievant was an "employee" since the "form" of the services he provided were those of a "non-exempt seasonal" employee, who routinely was laid off at the beginning of every winter season and recalled at the beginning of every spring season, without having to reapply for work, and he was duly compensated for providing this form of services. (Company Exhibits 1 and 6) The Union argues that this array of facts also implies that the Grievant was not a "job applicant" under DATWA because when he was recalled in March 2009, he was not "... a person...who applies to become an employee of an employer..." (Minn. Stat. §181.950, subd.9)

Further, the Union continues, the Grievant and kindred workers are recalled in the order of their seniority, as provided by Article VII, Section 7.03, and that said seniority is not lost merely because of the layoff, unless the employee in question is laid off for more than 24 months, as provided by Article VII, Section 7.05. (Joint Exhibit 1) Still further, the Union contends that seasonal layoffs do not somehow compromise the affected

employee's contractually vested vacation accrual, overtime assignment rights, and representational and grievance filing rights under the CBA. (Joint Exhibit 1)

The Union also suggests that in order to skirt the above-discussed DATWA restrictions, the Employer newly created the so-called "rehire" category for inclusion among the 2007 revisions to the Policy, even though the DATWA does not legally recognize this category. Moreover, the Union vigorously argues that the Union did not negotiate the Policy's new "rehire" language and, it implies that even if it had, that would not somehow make the Policy's challenged provisions enforceable. Citing authority, the Union argues that the parties are prohibited from contracting for what is illegal under the law, and specifically under the DATWA. (See: *Elkouri & Elkouri* at 474; *Weyerhaeuser v. UFCW, Local 9* (2006) (Bognanno, Arb.); *Kevin Williams, et al v. NFL*, Memorandum and Order (Dist. Ct. Minn. 5/22/09) (Magnuson, Dist. Ct. Judge); and Minn. Stat. §181.955, subd.1)

Finally, the Union argues that the Company failed to establish that its action in this case is supported by common law standards of "just cause;" and that for all of the above-discussed reasons, the Union urges that the grievance be sustained.

## **VI. DISCUSSION AND CONCLUSIONS**

The Company credibly established that it denied the Grievant's March 2009 recall to work because (1) he is defined as a "rehire employee" under the Policy, and (2) the Company, under the Policy, may withdraw conditional job offers made to any "rehire employees" and "job applicant" who produces a positive confirmatory drug test. Further, the record evidence shows that the Grievant produced a positive confirmatory drug test for marijuana use. Accordingly, as the Company persuasively argues, the instant matter is not a run-of-the-mill wrongful termination case. The Union agrees with this conclusion in that

its primary case is built on the premise that the Company erred when it withdrew the Grievant's conditional job offer, because of his first-ever positive drug test result under the Policy.

The Union urges that the Company made a two-part error. First, the Union argues that although the Policy may define the Grievant as a "rehire employee" (Joint Exhibit 2, IV (16)), he is also defined as an "employee" under the DATWA (Minn. Stat. §181.950, subd.6 and subd.9). Second, the Employer erred when it withdrew the Grievant's conditional job offer on the basis of his positive test result because it was his first positive test result under the Policy. As an "employee," the DATWA requires that the Employer should have given the Grievant "...an opportunity to participate in a ... counseling or rehabilitation program," and only if the Grievant would have "... refused to participate in the ... program or has failed to successfully complete the program..." would have it have been legally permissible for the Company to discharge him. (Minn. Stat. §181.953, subd. 10 (b) and (b) (1) and (b) (2))

The Company suggests that a "rehired employee" under the Policy is equivalent to a "job applicant" under the DATWA. If true, this means that the Grievant was exempted from the DATWA requirement that the Company needed to offer him counseling or rehabilitation before withdrawing its conditional job offer. (Minn. Stat. §181.953, subd.11) For several reasons, the undersigned is not persuaded by this argument; the Grievant was an "employee," and not a "job applicant," under the DATWA.

First, a "job applicant" under the DATWA is a person "... who applies to become an employee..." (Minn. Stat. §181.950, subd.9), and the record evidence unequivocally establishes that the Grievant has never applied anew for employment with the Company when recalled from layoffs under the Policy.

Second, the Company's seasonal layoff business records show that effective November 21, 2008, the Grievant was laid off because of a "reduction of hours" and not because of a "termination of employment." (Union Exhibit 2)

Third, the Policy defines a "rehired employee" as "... an *employee* who is returning to the Company after an absence (for any reason) of thirty (30) or more days." (Joint Exhibit 2; italics added) The wording of this definition seems to acknowledge that the Grievant was an "employee." Further, given this definition, it would seem that under the Policy employees who are on extended (i.e., thirty (30) or more days) FEMA leaves, workers compensation leaves, or even on vacation leave require a conditional offers of employment at the end of said leaves. Strict application of the Policy under these illustrative circumstances amount to violations of the CBA and/or relevant law, a point the Company acknowledged at the hearing. (Tr. 107-112)

Fourth, an "employee" under the DATWA is a person "... who performs services for compensation, in whatever *form*, for an employer" (Minn. Stat. §181.950, subd.6; italics added). It seems reasonable to conclude that the "form" of the compensated services in question was that of a Utility/Cleaner, whose work was "seasonal" in nature. In contrast, it is difficult to conclude, as the Company would have it, that the Grievant was effectively "discharged" every winter only to be reemployed every spring. The state's Unemployment Insurance Law defines a discharged employee as one who "... believes that the employer will no longer allow the employee to work for the employer in any capacity." (Minn. Stat. §268.095, subd.5 (a)) This definitional standard qualifies a "discharged" worker for unemployment benefits, but it certainly does not describe the Grievant's beliefs—he knew that every spring he would be recalled from layoff. Further, the Grievant's seasonal receipt of unemployment benefits over the years had nothing to do

with the matter of “discharge,” and everything to do with the fact the Law’s also grants unemployment benefits to laid off employees because “... layoffs are “*considered* a discharge.” (The state’s Unemployment Insurance Law’s definition of “Discharge” appears on p. 10 above; italics added) For laid off workers to be “considered” to be discharged in order to qualify for unemployment benefits is not to be discharged in actuality, in the sense that the employee has lost a job in perpetuity. This construction suggests that merely because the Grievant was laid off for the winter season, not working, not receiving pay and benefits from the Company, offered COBRA benefits, and receiving unemployment benefits does not mean that he was anything other an “employee” who was merely “*considered* a discharged” for the purpose of qualifying for unemployment benefits. Under this view, it seems that the Grievant was a protected “employee” under the DATWA and under the Policy.

Finally, to be laid off under the CBA does not strip a bargaining unit member of the union-discussed seniority and other contractual rights—all of which distinguish the laid off worker from a “job applicant.” And, to repeat, the Policy defines a “rehire employee” as follows: “[R]ehire employee means an *employee* who is returning to the Company...” (Policy, IV (16); italics added). According to the Company’s own definition a “rehire” is an “employee,” as indeed the Grievance was.

Whether the Company’s 2007 Policy was the product of negotiations is a matter in dispute. However, resolving this dispute is not dispositive, as the undersigned can determine the fighting issue in this case without said resolution. The material facts in this case are that whether the Company or the Company and Union drafted the 2007 Policy, the resulting draft lost sight of the fact that “employees” enjoy certain protective rights under the DATWA, and it proceeded to wrongly treat “employees” as if they were the

equivalent of “job applicants,” who do not need to be offered DATWA-counseling or -rehabilitation for first-offense positive drug or alcohol test results. In line with its Policy, the Company withdrew the employee-Grievant’s conditional rehire offer, and did not offer him counseling or rehabilitation for his first-offense positive drug test result. Limited to the specific facts under review here, the undersigned concludes that the Company’s application of certain aspects of the Policy conflict with aspects of the DATWA and, specifically violate Minn. Stat. §181.953, subd.10, and Minn. Stat. §181.955, subd.1.

Moreover, to the extent that the Policy is incorporated into the CBA *via* Article II, section 2.03(a) of the CBA, the undersigned concludes that the CBA, in relevant part, also conflicts with the DATWA. Seemingly in anticipation of such conflicts, Article II, section 2.03 of the parties’ CBA provides that “All policies [read as Policy] and procedures will comply with all applicable State and Federal Regulations. (Joint Exhibit 1) However, since the Policy, in part, conflicts with state law (i.e., the DATWA), the undersigned concluded that the Employer’s actions also violate Article II, section 2.03 of the CBA.

This case’s first issue statement, as previously stated, is:

Whether the Employer violated the CBA and the Minnesota “Drug and Alcohol Testing in the Workplace Act” when it failed to offer the Grievant drug counseling or rehabilitation after his positive test result, which was his first such test result under the Policy, before withholding his conditional job offer?

The aforementioned conclusions mean that this issue statement is answered in the affirmative. Thus, the only remaining issue is that of remedy, which is now addressed. In this respect, it is concluded, first, that the plain meaning of the Article II, section 2.03 language quoted above is that those aspects of the Policy and its administration that conflict with the DATWA must be brought into conformity with state law, as ordered below.

Second, as discussed above, the Company wrongly denied the Grievant the opportunity to counseling or rehabilitation before withdrawing its conditional rehire offer. In fashioning a remedy for this infraction, the undersigned notes that he is not at all persuaded by the record evidence that the Grievant is “sober,” as he claims. Accordingly, as remedy, the Company is ordered to offer the Grievant the opportunity to participate in, at the Employer’s expense, a drug counseling or rehabilitation program, whichever the Employer determines appropriate. While in said program, the Grievant shall not receive Employer-provided pay or benefits. Further, if the Grievant refuses to participate in and/or fails to complete the counseling or rehabilitation program, or if the Grievant produces a second confirmatory positive test and retest result after completing the program, then the Employer’s March 30, 2009, withdrawn job offer shall remain in-tact. However, if the Grievant successfully completes the program, and produces a confirmation negative drug and alcohol test result, and, if requested, a confirmatory retest, the Grievant shall be reinstated, and “made whole” for a period beginning on March 30, 2009.

**VII. AWARD**

For the reasons discussed above the Company violated relevant aspects of both the CBA and the DATWA, as charged by the Union. Thus, a two-part remedy is warranted in this case. First, to the extent that the Company’s Policy and its application conflict with DATWA, the former shall immediately and henceforth be brought into conformity with the latter.

Second, the Company shall immediately offer the Grievant the opportunity to participate in, at the Employer’s expense, a drug counseling or rehabilitation program, whichever the Employer determines appropriate. While in said program, the Grievant

shall not receive Employer-provided pay or benefits. Further, if the Grievant refuses to participate in and/or fails to complete the counseling or rehabilitation program, or if the Grievant produces a second confirmatory positive test and retest result after completing the program, then the Employer's March 30, 2009, withdrawn job offer shall remain intact. However, if the Grievant successfully completes the program, and produces a confirmation negative drug and alcohol test result, and, if requested, a confirmatory retest, the Grievant shall be reinstated, and "made whole" for a period beginning on March 30, 2009.

For the limited purposes of clarifying and overseeing the administration of this remedy and award, the undersigned shall retaining jurisdiction over the case for sixty (60) days, beginning with the issuing date of this Award.

Issued and Ordered on the 28<sup>th</sup> of September,  
2009, from Tucson, Arizona.

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Mario F. Bognanno, Labor Arbitrator