

IN THE MATTER OF ARBITRATION BETWEEN

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TEAMSTERS LOCAL NO. 320,)	ARBITRATION
)	AWARD
Union,)	
)	
and)	
)	NIELSEN DISCHARGE
)	GRIEVANCE
CITY OF LAKEVILLE,)	
)	
Employer.)	BMS CASE NO. 10-PA-0319
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Arbitrator: Stephen F. Befort

Hearing Date: July 28, 2010

Post-hearing briefs received: August 13, 2010

Date of decision: September 3, 2010

APPEARANCES

For the Union: Paula R. Johnston

For the Employer: Joan M. Quade

INTRODUCTION

Teamsters Local No. 320 (Union), as exclusive representative, brings this grievance challenging the City of Lakeville's (City) decision to terminate the employment of Street Maintenance Worker Chris Nielsen for a second positive workplace drug test. The Union contends that the City violated the parties' collective bargaining agreement by discharging Mr. Nielsen without just cause. The grievance proceeded to an arbitration hearing at which the parties were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

ISSUE

Did the Employer have cause to discharge the grievant? If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE 35. DISCIPLINE

35.1 The Employer will discipline employees for just cause only. Discipline will be in one or more of the following forms:

- a) Oral reprimand
- b) Written reprimand
- c) Suspension
- d) Demotion
- e) Discharge

35.5 Discharges will be preceded by a five (5) day suspension without pay.

35.6 Employees will not be questioned concerning an investigation of disciplinary action unless the employee had been given an opportunity to have a UNION representative present at such questioning.

ARTICLE 48. DRUG AND ALCOHOL TESTING POLICY

Drug and Alcohol Testing Policy Language – Pursuant to Exhibit A.

Drug and Alcohol Testing Policy for Commercial Vehicle Drivers language effective January 1, 1996 – Pursuant to Exhibit B.

EXHIBIT B – DRUG AND ALCOHOL TESTING POLICY FOR COMMERCIAL VEHICLE DRIVERS

A. Disciplinary Action

- 2. Drivers who test positive after verification of a confirming test or are otherwise found to be in violation of this policy shall be subject to disciplinary action, which may include immediate suspension without pay and/or immediate discharge.

B. Referral, Evaluation, and Treatment

1. Shall be advised of resources available for evaluating and resolving problems associated with misuse of alcohol and drugs.
2. Shall be evaluated by a SAP, who shall determine what assistance, if any, the driver needs.
3. Must undergo return-to-work testing before returning to duty.

APPENDIX A: REFERRAL, EVALUATION, AND TREATMENT

- A. The City shall advise any driver who has violated subpart B of this policy of the resources available to the driver in evaluating and resolving problems associated with the misuse of alcohol and the use of controlled substances. The City shall provide the driver with the names, addresses, and telephone numbers of substance abuse professionals and counseling and treatment programs.
- B. Each driver who violates part B of this policy shall be evaluated by a substance abuse professional who shall determine what assistance, if any, the driver needs in resolving problems associated with alcohol misuse and controlled substance use.
- C. Evaluation
 1. Before a driver returns to duty requiring the performance of a safety sensitive function after engaging in conduct prohibited by Part B of this policy, the driver shall undergo a return-to-duty alcohol test with a result indicating an alcohol concentration of less than .02 if the conduct involved alcohol, or a controlled substances test with a verified negative result if the conduct involved a controlled substance.
 2. In addition to the previous paragraph, each driver identified as needing assistance in resolving chemical problems:
 - a. shall be evaluated by a substance abuse professional to determine that the driver has properly followed any rehabilitation program prescribed under paragraph b of this section, and
 - b. shall be subject to unannounced follow-up tests administered by the City following the driver's

return to duty. The City shall follow the testing frequency and methodology requirements of 49 CFR 382.605.

FACTUAL BACKGROUND

Chris Nielsen has worked for the City of Lakeville since 2006 as a Street Maintenance II Worker. In that capacity, Mr. Nielsen is responsible for performing a variety of street and park maintenance duties. Many of these duties involve the use of commercial vehicles such as dump trucks, snow plows, and street sweepers. Street maintenance workers are required to obtain and maintain a Class B Commercial Drivers License.

Mr. Nielsen generally received good evaluations for his work performance. However, he did have four accidents using City vehicles. He received a four hour suspension in conjunction with one of the accidents. While the record establishes that Mr. Nielsen may have acted carelessly with respect to these accidents, there is no evidence that any of the accidents were caused by drug or alcohol use.

The labor agreement applicable to Mr. Nielsen establishes a drug and alcohol testing policy for employees who drive commercial vehicles. The policy is intended to comply with federal regulations governing drug and alcohol testing for commercial drivers and provides for a program of random testing.

Mr. Nielsen was required to take a random drug and alcohol test on February 20, 2009. The results showed that Mr. Nielsen tested positive for marijuana use. The City temporarily placed him on leave, and he was required to attend three hours of “THC drug education” at the River Ridge Treatment Center. The Employer also advised Mr. Nielsen that he would be subject to follow-up controlled substance drug testing and warned him

in writing that “a second positive test . . . will result in your discharge from employment with the City.”

On July 28, 2009, Mr. Nielsen learned that he again tested positive for marijuana use based upon a follow-up test conducted four days earlier. He contacted his supervisor, Streets Superintendent Troy Grossman, and informed him that the City would be getting a call that he tested over the limits for marijuana. Grossman called Chris Petree, Operations and Maintenance Director, with the news, and Petree, in turn, informed Human Resources Manager Cindi Joosten. Mr. Grossman was instructed to pick up Mr. Nielsen from his work site and transport him to the Central Maintenance Facility for a meeting with Mr. Petree. During the trip, Mr. Nielsen spoke on his cell phone with Union Steward Mick Higgins and made arrangements for Mr. Higgins to join him for the meeting.

When Grossman and Nielsen arrived at the facility, Mr. Nielsen asked if he should “get Mick,” but Mr. Grossman replied that it should not be necessary. According to Mr. Nielsen, he interpreted this response as meaning that he was not permitted to have a union representative present during the meeting.

During the meeting, Mr. Petree informed Mr. Nielsen that he would be suspended with pay until an official determination was made concerning his status. Mr. Petree also advised Mr. Nielsen of his right to have a retest of his split test sample, but Mr. Nielsen declined. In addition, Mr. Petree told Mr. Nielsen that he would be discharged if the confirmatory test of the July 24 sample came back positive. Mr. Petree testified that he did not ask any other questions of Mr. Nielsen during this meeting.

Shortly after the meeting, the City received confirmation of the positive test, and City Administrator Steve Mielke made the decision to terminate Mr. Nielsen's employment. Mr. Petree then called Mr. Nielsen and informed him of the termination. On the following day, Ms. Joosten presented Mr. Nielsen with a termination letter stating that the "termination is a result of the positive result from the follow-up drug test you took on July 24, 2009."

The Union timely grieved the termination. At the arbitration hearing, Mr. Nielsen testified that he never reported to work or operated heavy equipment while under the influence of drugs or alcohol. In addition, Union Steward Higgins testified that if he had been present at the July 28 meeting, he would have advised Mr. Nielsen to request the retest of a split sample.

POSITIONS OF THE PARTIES

City:

The City contends that it had just cause to discharge the grievant due to the positive test result showing his use of illegal drugs. The City maintains that discharge is an appropriate sanction since this was Mr. Nielsen's second positive test and the Employer had warned him in writing that a second positive test would result in termination. The City also argues that discharge appropriately reflects the fact that illegal drug use poses an unacceptable safety risk for an employee assigned to operate large commercial vehicles. Finally, the City asserts that Mr. Nielsen was not contractually entitled to have union representation present at the July 28 meeting since Mr. Nielsen was not questioned during this meeting.

Union:

The Union does not dispute that Mr. Nielsen tested positive for illegal drug use and that some level of discipline is warranted. The Union argues, however, that discharge is too severe a sanction for several reasons. First, the Union argues that the positive test result does not constitute just cause for termination since there is no evidence that Mr. Nielsen ever reported for work while impaired. Second, the Union contends that the City violated the contract when it did not precede the grievant's termination with a five-day suspension without pay. Finally, the Union maintains that the Employer violated the parties' contract by denying his request for union representation at the July 28 meeting.

DISCUSSION AND OPINION

In accordance with the terms of the parties' collective bargaining agreement, the City bears the burden of establishing that it had just cause to support its disciplinary decision. This inquiry typically involves two distinct steps. The first step concerns whether the City has submitted sufficient proof that the employee actually engaged in the alleged misconduct or other behavior warranting discipline. If that proof is established, the remaining question is whether the level of discipline imposed is appropriate in light of all of the relevant circumstances. *See Elkouri & Elkouri, HOW ARBITRATION WORKS* 948 (6th ed. 2003). Each of these steps is discussed below.

The Alleged Misconduct

The parties do not dispute that Mr. Nielsen engaged in conduct warranting discipline. The City bases its discharge decision on the grounds that Mr. Nielsen twice tested positive for the use of illegal drugs. The Union acknowledges this conduct, but

contends that discharge is too severe of a sanction under the circumstances. Accordingly, the only issue presented in this matter concerns the extent of the appropriate remedy.

The Appropriate Remedy

The City asserts that discharge is an appropriate remedy since it is a permissible response under both its own drug testing policy and applicable federal law. In addition, the City argues that the use of illegal drugs is inherently incompatible with a safety-sensitive position that requires the operation of large commercial vehicles. Finally, the City points out that it expressly warned Mr. Nielsen following his first positive drug test, that “a second positive test . . . will result in your discharge from employment with the City.”

Although not directly contesting these assertions, the Union raises three arguments in support of a lesser sanction. First, the Union maintains that Mr. Nielsen never reported to work while impaired by illegal drug use. Although Mr. Nielsen was involved in an unusually large number of work-related accidents, the Union is correct in pointing out that there is no evidence in the record to show that any of these accidents occurred due to the illegal use of drugs. Nonetheless, it is important to recognize that both federal and state law recognize the right of an employer to terminate an individual with commercial driving responsibilities upon the occurrence of a second positive test. In essence, these laws permit an employer presented with evidence of smoke to presume that the danger of fire is imminent. This presumption is particularly apt with respect to a safety sensitive employee such as Mr. Nielsen who may be called out to duty on short notice.

Second, the Union contends that a discharge sanction violates Article 35.5 of the parties' agreement which states that "discharges will be preceded by a five (5) day suspension without pay." Since the discharge action in this matter was not preceded by a five-day suspension, the Union argues that it is an invalid disciplinary sanction and may not be given effect.

While the contract generally does require that a five-day suspension precede a discharge, this provision must be measured against that of Section IV A.2 of the agreement's drug-testing policy which provides that "drivers who test positive after verification of a confirming test shall be subject to disciplinary action, which may include immediate suspension without pay and/or immediate discharge." As a matter of contract interpretation, specific provisions generally prevail over more general provisions. *See Elkouri & Elkouri, HOW ARBITRATION WORKS 469-70 (6th ed. 2003).* Since the discharge sanction authorized by Section IV A.2 is the more specific of the two provisions, it is not limited by the language of Article 35.5.

Finally, the Union argues that the City violated Mr. Nielsen's due process rights by refusing his request for union representation during the July 28 meeting. In NLRB v. Weingarten, 420 U.S. 251 (1975), the Supreme Court held that an employee has the right to request the presence of a union representative in an investigatory interview that the employee reasonably believes will result in discipline. The parties' contract incorporates this principle in Article 35.6 which states that "Employees will not be questioned concerning an investigation of disciplinary action unless the employee had been given an opportunity to have a UNION representative present at such questioning."

The Union argues that the City violated this provision with respect to the July 28 meeting. While being driven from the field by Mr. Grossman to Mr. Petree's office, Mr. Nielsen telephoned Union Steward Mick Higgins and asked him to accompany him when meeting with Mr. Petree. When they arrived at the Central Maintenance Facility, Mr. Nielsen asked if he should get Steward Higgins, but Mr. Grossman replied that it should not be necessary. According to the Union, this response amounted to a refusal to permit union representation during an interview likely to result in disciplinary action.

There are three significant deficiencies in this line of argument. First, Mr. Grossman did not tell Mr. Nielsen that he could not have union representation at this meeting, but only that such representation should not be necessary. In this regard, Mr. Petree testified that he would have permitted the presence of a union steward if Mr. Nielsen had made such a request. Second, the meeting was not investigatory in nature, since Mr. Petree did not ask any questions of Nielsen concerning the incident. Mr. Petree, instead, merely placed Mr. Nielsen on suspension. Third, the National Labor Relations Board has recognized that reinstatement is proper for a Weingarten violation only where the discharge results because of retaliation for requesting representation. Taracorp Industries, 273 NLRB 221 (1984). The Union has not alleged such retaliation in this instance.

The closest inquiry involves the latter issue. Here, it is true that Mr. Petree asked Mr. Nielsen if he wanted a retest of the split sample and that Mr. Nielsen responded in the negative. At the hearing, Mr. Higgins testified that if he had been present at the meeting, he would have urged Mr. Nielsen to request a split sample. I do not believe that this is sufficient to be deemed a violation of Article 35.6 since the query did not relate to

the factual basis for discipline, and the Union could have requested a retest of the split sample other than at the July 28 meeting.

Based on the above, I find that the City's termination decision is supported by just cause.

AWARD

The grievance is denied.

Dated: September 3, 2010

Stephen F. Befort
Arbitrator