

IN THE MATTER OF ARBITRATION

OPINION & AWARD

-between-

TEAMSTERS UNION, LOCAL 320

Grievance Arbitration

Re: Employee Discipline

-and-

**THE CITY of MINNEAPOLIS
MINNEAPOLIS, MINNESOTA**

**Before: Jay C. Fogelberg
Neutral Arbitrator**

Representation-

For the Employer: Trina R. Chernos, Asst. City Attorney

For the Union: Paula Johnston, Attorney

Statement of Jurisdiction-

The Collective Bargaining Agreement duly executed by the parties provides, in Article 4, for an appeal to binding arbitration of those disputes that remain unresolved after being processed through the initial three steps of the procedure. A formal complaint was submitted by the Union on behalf of the Grievant on August 26, 2011, and eventually appealed to binding arbitration when the parties were unable to resolve the matter to their satisfaction during discussions at the intermittent steps. The undersigned was then selected as the Arbitrator to hear evidence and render a decision from a panel of neutrals

mutually agreed upon by the parties. A hearing was convened in Minneapolis on February 10, 2012. At that time the parties were afforded the opportunity to present position statements, testimony and supportive documentation. Upon the conclusion of the proceedings, the parties agreed to submit written summary arguments which were received on February 27, 2012. Thereafter, the hearing was deemed officially closed.

At the outset of the hearing, the parties stipulated that their dispute was properly before the arbitrator for resolution based upon the merits and that the following constitutes a fair description of the issue.

The Issue-

Did the Employer have just cause to terminate the employment of the Grievant, Scott Mather? If not, what shall the appropriate remedy be?

Preliminary Statement of the Facts-

The adduced evidence indicates that Mr. Mather was hired by the City of Minneapolis (hereafter "City", "Employer" or "Administration") in April of 2000 as a General Laborer. Approximately four years later, he was promoted to Truck Driver and assigned to the Department of Public Works – a position included in the bargaining unit represented by the Teamsters Union, Local 320 ("Union" or "Local"). Together, the parties have negotiated and executed a

Labor Agreement (Joint Ex. 1) covering terms and conditions of employment for the personnel that comprise the bargaining unit.

As an operator of heavy motorized equipment for the City, the Grievant is obligated to maintain a commercial driver's license and further to undergo periodic drug and alcohol testing as mandated by the U. S. Department of Transportation. In August of 2005 he tested "positive" for a controlled substance and was charged with operating city equipment while under the influence of marijuana in violation of Department rules and Civil Service Regulations (City's Ex. 12). For the infraction Mr. Mather received a three day unpaid suspension, and was referred to a Substance Abuse Professional ("SAP") for analysis and treatment (Employer's Ex. 14). At that time, he was required to successfully complete "all phases of the recommended treatment program;" informed that he would be subject to additional random testing within the following year, and; warned that "...and subsequent positive test results may subject (him) to job termination" (*id.*).¹

Six years later, on August 18th of last year, Mr. Mather was notified via the Department's Dispatcher that in accordance with CFR 49 Part 40, he was to undergo another random drug test that day. At that time he notified Management that he knew he would test positive for marijuana, but was instructed to continue with the testing process nevertheless. The results of the

¹ The evidence demonstrates that he did not lose his CDL as a consequence of testing positive.

test supported the Grievant's prediction (Administration's Ex. 2). On August 25, 2011 Mr. Mather was informed that based upon the Administration's investigation, it had been determined he was in violation of Civil Service Commission Rules, City policies, and his Department's expectations, and that consequently he was being terminated for having tested positive for a controlled substance on two separate occasions (Employer's Ex. 3). The Local then filed a formal complaint on his behalf the following day alleging a violation of Articles 5 and 11, as well as Attachment "A" of the Master Agreement, and seeking Mr. Mather's reinstatement and a make whole remedy (Union's Ex. 1). Eventually, the matter was appealed to binding arbitration when the parties were unable to resolve their dispute at the intermittent steps of the process.

Relevant Contractual Provisions & Civil Service Rules -

From the Master Agreement:

Article 5
Employee Discipline & Discharge

Section 5.01 – Just Cause

Disciplinary action may be imposed upon an employee who has satisfactorily completed the initial probationary period only for just cause.

* * *

Attachment "A"
Drug & Alcohol Testing Policy

* * *

1. Definitions

* * *

Positive Test Result means a finding of the presence of alcohol, drugs or their metabolites in the sample tested in levels at or above the threshold detection levels recognized by the National Institute on Drug Abuse, the College of American Pathologists or the Department of Health, State of New York, as appropriate cutoff values or concentrations under the standards of the programs they administer....

* * *

N. Under the Influence means having the presence of a drug or alcohol at or above the level of a positive test result.

* * *

8. Action After Test

The Employer will not discharge, discipline, discriminate against, or request or require rehabilitation of an employee solely on the basis of a positive test result from an initial screening test that has not been verified by a confirmatory test. Where there has been a positive test result in a confirmatory test and in any confirmatory retest, the Employer will do the following unless the employee has furnished a valid medical reason for the positive test result:

* * *

B. Second Offense – Where alcohol or drug abuse prevents the employee from performing the essential functions of the job in question or constitutes a direct threat to property or the safety of

others or otherwise constitutes a bona fide occupational qualification, and the employee has previously received one program of treatment required by the employer within the last five (5) years while and employee of the City of Minneapolis, the employer may recommend to the Civil Service Commission that the employee be discharged from employment.

From the Minneapolis Civil Service Commission Rules:

11.03 Cause for Disciplinary Action

The two primary causes for disciplinary action and removal are substandard performance and misconduct.

* * *

A. Substandard Performance

* * *

3. Employees who fail to meet minimum performance and behavioral standards because of chemical dependency and who have either refused to undergo or failed to complete a prescribed program of treatment, or have previously received one period of prescribed treatment within the last five years while a City employee may be subject to discipline including discharge...

* * *

B. Misconduct

The following activities are examples of misconduct, which may be cause for disciplinary action.

9. Violation of safety rules, laws, and regulations.

* * *

14. Reporting to work under the influence or in possession of alcohol or illegal drugs, or using such substance on the job.

* * *

18. Violation of department rules, policies, procedures or City ordinance.

From 49 Code of Federal Regulations Part 382:

Controlled Substances & Alcoholic Use & Testing
Federal Motor Carrier Safety Administration

* * *

382.301 Controlled Substances Testing.

No driver shall report for duty, remain on duty or perform a safety-sensitive function, if the driver tests positive or has adulterated or substituted a test specimen for controlled substances. No employer having actual knowledge that a driver has tested positive or has adulterated or substituted a test specimen for controlled substances shall permit the driver to perform or continue to perform safety-sensitive functions.

From the Department of Public Works Safety Policies & Rules:

* * *

15. Employees shall comply with all federal, state or local laws, rules, regulations and ordinances as well as City of Minneapolis and/or Public Works policies and programs.

16. Violations of these or any other safety rules published by a particular division shall be subject to disciplinary action.

Positions of the Parties-

The **CITY** takes the position in this matter that the termination of Scott Mather was justifiable under the circumstances. In support, the Administration contends that there is no dispute but that on August 18, 2011, the Grievant was notified that he was part of an employee pool that was to undergo a random drug test, which no one disputes was the right of the Employer to administer, and that Mr. Mather informed Management he would fail said test. Indeed he did just that once the examination was administered as it detected a THC metabolite in his system. Further, the employer asserts that Mather was well aware of the importance of such examinations and the requirement for same as he had previously tested positive for marijuana in 2005, was disciplined and underwent a treatment program at that time as ordered by the Administration. In addition, he was warned that he would be subject to additional random testing in the future per DOT regulations, and should he again test positive his employment could be terminated as a consequence. Moreover, the City argues that the decision to discharge Mr. Mather was consistent with how they have disciplined other employees in the past who have been similarly charged. Finally, they argue that the City has both the right and the responsibility to take the necessary precautions against putting the public at risk. Here, the Grievant was assigned to operate a

piece of heavy equipment (a double-axel truck) hauling approximately 40,000 pounds of street sweeping material on a highway at a high speed. It is abundantly clear that the Department has a genuine interest to see to it that its HDL drivers are in compliance with all federal and state regulations in the performance of their duties. For all these reasons then, they ask that the grievance be denied in its entirety.

Conversely, the **UNION** takes the position that the severe disciplinary action taken by the Department against Mr. Mather was not for just cause as required by the parties' Labor Agreement. The Local notes that no one disputes the Grievant has made mistakes in the past by using a controlled substance, and that he tested positive for marijuana both in 2005 and again last year. At the same time however, they assert that he has otherwise been a good employee who fully and successfully performed the duties of his position. Unlike the initial program ordered by the Administration in 2005, Mr. Mather took it upon himself to seek help when he again tested positive, enrolling in a far more comprehensive and effective program. He has since remained free of all drugs and alcohol and has established an effective support network. Moreover, the Union claims he did not report to work in an impaired state in August of last year when he was tested. The test administered did not measure impairment but rather only detected a THC

metabolite level in his system. Importantly, according to the Union, CSR 11.03(A)(3) states clearly that an employee may be disciplined for failure to meet minimum performance and/or behavioral standards *and* they have received one period of prescribed treatment for substance abuse within the past five years. Here, six years had elapsed between positive tests by the Grievant. Further, the evidence shows, in the view of the Local, that the City has not terminated any of its drivers for similar infractions unless the second test result fell within the five year time span. Mr. Mather, then, is being subjected to desperate treatment. For all these reasons, they ask that the grievance be sustained and that the Grievant be returned to his former position and made whole.

Analysis of the Evidence -

At the outset, there are a number of salient facts which are not in dispute that bear directly upon the outcome of this matter. The evidence shows that Mr. Mather was randomly selected for drug testing on August 18th of last year pursuant to a regulation promulgated by the Department of Transportation. At that time, prior to being tested, the Grievant informed Management that he would test "positive" for marijuana use, and the subsequent results of the examination indicted as much. Further, it is

undisputed that both the City's commercial vehicle drivers' drug and alcohol testing policy, as well as the Federal Motor Carrier Safety Administration regulations, prohibit an operator of heavy equipment from performing his/her duties if they test positive for a controlled substance.

Finally, both sides have indicated that Attachment "A" found in their Master Agreement (Joint Ex. 1) does not apply to this case.² At the same time however, it is noted that the appendage was negotiated by the parties and enclosed with the contract. Indeed, both sides have made numerous references to the "policy" throughout the course of their respective presentations and closing arguments. Moreover, relevant parts of the Civil Service Rules cited by the Administration in the termination letter to Mr. Mather, closely parallel provisions of the policy, further blurring the line between the two.

The notice of discharge sent to the Grievant (City's Exhibit 3) makes reference to the alleged violation of four CSC Rules that the Employer cites as support for their decision. The first (11/03 A 3) *supra*, mentions a five year window following an employee's treatment in a "proscribed program." It is undisputed that Mr. Mather did just that in 2005. The Union argues that the

² While the formal grievance cites Attachment "A" as having been violated by the Employer's actions, as the Union has pointed out, it was submitted by one of its stewards who is a working member of the bargaining unit and not necessarily skilled in matters of labor law.

second positive test for marijuana which occurred in 2011 is outside the five year term. Further the Local maintains that the Administration has consistently enforced the five year rule in prior terminations. Specifically, they refer to two instances within the past ten years when employees have been discharged for failing a second drug test within a five year period (Union's Ex. 13). In this instance however, the Union notes the unrefuted fact that the Grievant's test results occurred outside the five year window. Thus, they conclude, the City engaged in desperate treatment of Mr. Mather.

The Union has made a cogent argument concerning the manner in which the Administration has dealt with other bargaining unit members in the past who have tested positive for drugs or alcohol. The City counters that Rule 11.03 A 3 only addresses treatment, not test results. Treatment, they urge, is not defined in the CSRs, Attachment "A," nor the federal regulations (Local's Ex. 17). It is clear from the Union's documentation, however, that the Administration based the prior two terminations referenced, at least in part, on failing the *test* within the previous five years (Ex. 13).

At the same time, I am not persuaded the two disciplinary actions within the past ten years mandates that two infractions within a five year period are absolutely imperative in order to terminate an employee. It is

questionable, at least, whether the frequency of the “practice” within the time measurement is sufficient to constitute an established approach to a consistent imposition of such a disciplinary penalty. Like the vast majority of most arbitrators, I have normally adhered to the principle that the equal enforcement of work rules is paramount unless a valid basis exists for a variance. Here, however, the Local's assertions cannot be viewed in a vacuum. Beyond the relative dearth of evidence concerning the imposition of such discipline within a five year time constraint, CSC Rule 11.03 A 3, in the last sentence, specifies that in the event of “gross misconduct” disciplinary action – including discharge – can occur regardless of the number of treatments that the employee may have experienced. Making no mention of a five year “window,” it is clear from a plain reading of this sentence that a finding of gross misconduct overrides prior test results regardless of when they may have been administered.³

The term “gross misconduct” is not defined either in the parties' master agreement or in 11.03 or 11.04 of the Rules. In the Employer's view, reporting for work on August 18, 2011, with the knowledge that he would

³ Further, it is noted that during the course of the proceedings, the parties stipulated that no employee has not been terminated after testing positive for a second time. This is also consistent with the testimony of the Deputy Director of Public Works, Heidi Hamilton, who stated, without challenge, that the Department has consistently discharged employees who test positive a second time.

not pass the drug test should one be administered, quite logically constitutes "gross misconduct."

The argument is compelling.

It was established on the record that the Grievant was scheduled to operate heavy equipment that day - a tandem/double axel truck weighing some 48,000 pounds - on an interstate highway. It is also undisputed that after failing the initial test in 2005, Mr. Mather was referred to a substance abuse professional for treatment. At the time he was put on notice that he would be subjected to random (unannounced) testing for drugs and alcohol for the next several years. Moreover, during the course of the hearing, under direct examination, the Grievant himself acknowledged he knew he was eligible for testing beyond the five year time frame that accompanied his initial three day suspension in 2005, and admitted that in August of last year, he "made a mistake."

Mr. Mather was also charged with violating CSC Rule 11.03 B 9, *supra*, which specifically prohibits a driver from performing "safety-sensitive functions" in the event that they test positive for a controlled substance. As noted in City's Exhibit 5, the performance of such functions includes, "...any period in which the driver is *ready to perform or immediately available to perform*" the work (emphasis added). There is no dispute that the Grievant,

with full knowledge he would fail a drug test for marijuana on the day in question, was about to climb into a 48,000 pound vehicle and operate it on a public road, when he received the call to be tested. Under the circumstances, it would take a quantum leap of faith in my judgment to exclude such behavior from the definition of "gross misconduct."

Another reason cited in their letter of termination to the Grievant was CSC Rule 11.03 B 18: violation of City Department's rules, policies and procedures. Clearly, Mr. Mather was on notice that he was subject to said rules, policies and procedures, and that any further violation of same ran the risk of additional discipline, "...up to and including termination of your employment with the City...." (Administration's Ex. 12). The City's license policies state that they cover CDL requirements, random drug testing and applicable penalties (Employer's Ex. 6). The same policies include a link to the Minnesota Commercial Truck and Passenger Regulations which prohibit a driver from performing his/her duties under the influence of (among other controlled substances) marijuana or testing positive.

The final reason given to Mr. Mather by his employer was a violation of CSC 11.03 B 14, reporting to work under the influence. Again, the undisputed facts show that on the day in question, the Grievant was on the premises of the Public Works Department and about to operate a piece of

heavy motorized equipment when he received the call from the dispatcher's office that he was to be tested.

In his defense, the Local contends that Mr. Mather did not violate the City's policy as testing positive on a random DOT drug and alcohol examination does not constitute a rule infraction. More specifically, they assert that both the policy and the applicable federal regulations state in relevant part, that "no driver shall report for duty or remain on duty requiring the performance of safety-sensitive functions when the driver uses any controlled substances" (Employer's Ex. 5). The phrase, "when the driver uses any controlled substances," clearly is not synonymous with when a driver tests positive for a controlled substance. If a driver tests positive for a controlled substance, the Union contends, then common sense says that the rule prohibits him/her from reporting to work, remaining on the job, or performing safety-sensitive functions *after* having tested positive. Once Mr. Mather tested positive, the evidence shows that he neither reported to work, remained on the job or performed his duties. Thus, the Local concludes, he was not in violation of any rule, policy or law and cannot be discharged for good cause.

While admirable, the Union's argument is less than persuasive.

The recorded evidence demonstrates conclusively that even though the Grievant knew he had used marijuana “a couple of days” prior to August 18th of last year, and was fully aware that he could not pass a test on that day even prior to being tested, he was fully prepared to operate his assigned vehicle and presumably would have but for the instruction from the dispatcher. Indeed, he had “reported” for work that morning. The fact that he never actually drove the truck after testing positive is not only an obvious safety precaution, it is less than relevant. It is akin to someone caught attempting to steal. While the actual theft might not occur as a result, the act itself is nevertheless a most common violation of a law, rule, policy, etc. The infirmity of the Union's reasoning is that based on the facts, but for the random call to be tested, the Grievant would have operated the heavy equipment that day as was his acknowledged intent. The City need not wait until a disaster occurs prior to exercising its authority and obligation to test its drivers.

I have also considered the Local's argument that being “under the influence” of a controlled substance is not tantamount to testing positive for it. In support, they offered into evidence their Exhibit 9 – a fact sheet published by the National Highway Traffic Safety Administration – which indicates that the effects of smoking marijuana are felt within minutes and

reach their peak in ten to thirty minutes, thereafter lasting “approximately 2 hours” (p. 4). Having consumed the drug some days earlier, the Union contends that Mather would not have been “under the influence” on the morning of August 18th.

It is not necessary that impairment per se be established here, however. While not defined in the Civil Service Rules, the term “under the influence” was given meaning in Attachment “A” specifically as being “the presence of a drug or alcohol at or *above the level of a positive test result*” (emphasis added). It bears repeating that this language was mutually established by the parties and appended to the master agreement.

Finally, I have taken into consideration the Grievant’s overall work record and the fact that he maintained his Commercial Drivers License following the testing process. The latter is less than relevant as the Employer has consistently stated that he was not terminated for the loss of any licensure requirement.⁴ Although his overall work record appears to be relatively “clean” - beyond the suspension he received in 2005 for the same infraction - I find neither this fact nor his length of service sufficient to warrant reinstatement. Of and by itself, his work history does not constitute a vaccination against discipline. The multiple rule and policy infractions the

⁴ Furthermore, there was no evidence presented indicating that the licensing authority had been made aware of the second positive drug test results.

Grievant committed in 2011, relative to the safe performance of his job, and the potential exposure to liability that the City risks, outweigh any other mitigating factor in this instance – particularly in light of the unrefuted fact Mr. Mather had already been put on notice of the consequences should such behavior be demonstrated again.

Award-

Accordingly, for the reasons set forth above, the grievance is denied.

Respectfully submitted this 6th day of April, 2011.

Jay C. Fogelberg, Arbitrator