#838

IN THE MATTER OF ARBITRATION

BETWEEN

OCSEA, LOCAL 11, AFSCME-AFL-CIO

AND

STATE OF OHIO/ODMR/DD

Before: Robert G. Stein

Grievant(s): Thomas J. Thompson
Case # 24-04-(06-01-02)-932-01-04
Termination

Advocate(s) for the UNION:

Steve Wiles, Staff Representative
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Advocate for the EMPLOYER:

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INTRODUCTION

A hearing on the above referenced matter was held on May 15, 2003 in Cambridge, Ohio. The parties agreed that the issue is properly before the Arbitrator. During the hearing the parties were given a full opportunity to present evidence and testimony on behalf of their positions on the merits. The parties made oral closing arguments in lieu of submitting briefs. A decision is to be postmarked by June 30, 2003.

ISSUE

Did the grievant violate the Last Chance Agreement which he entered into on June 21, 2001? If not, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE
(As cited by the parties, listed for reference, see Agreement for language)

ARTICLES 24

BACKGROUND

The Grievant is Thomas J. Thompson ("Grievant", "CO West"), a Custodial Worker at Cambridge Developmental Center ("Employer" "Department"). Mr. Thompson began his employment on 5/27/97. He was terminated on June 4, 2002 for violation of his Last Chance

Agreement ("LCA"). He entered into the LCA (his termination was held in abeyance, pending EAP participation) on June 21, 2001, for reporting to work under the influence of alcohol.

The parties stipulated to the following facts: "On May 28, 2002, the grievant was working on Steele Cottage. At approximately 7:20 a.m., the grievant was informed he would be going to a random follow-up drug/alcohol test mandated by his Appendix M last chance agreement. The grievant never submitted to the random follow-up drug/alcohol test on May 28, 2002."

The Employer claims the Grievant refused to take the drug/alcohol test ("test") violating his LCA and removed the Grievant in accordance with its provisions. At the time of the Grievant's removal he had an oral reprimand on his record (4/15/02 for tardiness). The Union argues the Grievant did not refuse to take the test, but simply sought to first consult his Union representative as his right under Appendix M of the Collective Bargaining Agreement ("CBA"). The Grievant filed a grievance in response to his removal.

SUMMARY OF EMPLOYER'S POSITION

The Employer argues that this is a straightforward case of an employee who violated his Last Chance Agreement by refusing to submit to a random drug test. The Employer asserts that as part of the conditions

of his EAP program (required by the LCA), the Grievant was required to submit to random drug/alcohol testing. The Employer contends that on May 28, 2002, Mr. David Lynch, Labor Relations Officer at Cambridge, properly informed the Grievant of the random drug test. After this notification was delivered by Mr. Lynch, the Grievant refused multiple times in the presence of Lynch and Byrce Davis, Cottage OMRD to take the drug test, contends the Employer.

The Employer rejects the Union's argument that it did not "uphold" its responsibility in the EAP process (See Employer Opening Statement). The Employer points out that a refusal to submit to a mandatory drug screen, "reaps the same result as a positive test" (See Employer's opening and Closing Statements). The Employer theorizes that the Grievant's refusal to take the drug screen on the morning of May 28, 2002 is because he knew he would fail the test, and it would have resulted in his removal for violating his LCA.

Based upon the above, the Employer requests the grievance be denied.

SUMMARY OF UNION'S POSITION

The Union argues that The Grievant did not refuse to take the drug/alcohol screen. After being notified by Lynch of the need to take the drug/alcohol screen, the Grievant sought out Union representation in the form of the Local Union Vice President, Sheri Scott. Scott informed the

Grievant that the Collective Bargaining Agreement afforded him an hour with his Union representative before being required to submit to a drug test. Scott consulted by telephone with Local Union President, Teresa Lemon, before providing the Grievant with this information. Both Lynch and Davis were present when Scott informed them that the CBA affords the Grievant the right to a one hour consultation with his Union representative prior to having to submit to a drug/alcohol test (See Union Opening Statement), argues the Union.

The Union asserts that after the Grievant attempted to inform Mr. Lynch of his contractual rights of Union consultation, Mr. Lynch became loud and refused to consider what the Grievant was saying by interrupting him several times during their exchange. During this heated conversation, Ms. Scott interjected that the Grievant was not refusing to take the test and just wanted some time to counsel with her regarding the random drug test, argues the Union. According to Ms. Scott, the Grievant was prepared to take the drug test, and she attempted to telephone Mr. Lynch five (5) minutes after he left the nurse's station. She finally reached Mr. Lynch about 8:00 a.m. at which time he told Ms. Scott it was too late to take the test (See Union's Opening and Closing Statements).

The Union argues the Employer did not have just cause to remove the Grievant from his employment. It contends the Employer failed to properly execute the EAP Agreement on 6/21/01 when the LCA was

implemented. The Union asserts the Employer finally executed the EAP agreement on 4/10/02, and changed it from a ninety- (90) day agreement to a one hundred and eighty (180) day agreement on 4/18/02 without the knowledge and agreement of the Union. These acts rendered the LCA and the EAP Agreement procedurally defective, argues the Union. The Union characterizes the Employer's action in this matter as a "rush to judgment" (See Union's Opening and Closing Arguments).

Based upon the above, the Union urges the Arbitrator to sustain the grievance.

DISCUSSION

The central question in this case is stated in the above listed issue. The Arbitrator is confined by operation of the CBA to determine whether there was a violation of the Last Chance Agreement that was in effect on 6/21/02. As with most last chance agreements, the sole function of the arbitrator is to decide whether the grievant violated it and if answered in the affirmative, the discharge must be upheld.

There is no question that in 2001, the Grievant came to work under the influence of alcohol and was placed on a Last Chance Agreement in which he consented to random drug testing (Jx 4d p. 5). The Grievant, the Union, and the Employer all placed their signatures on this duly

authorized document. Items 1 and 3 in this document unequivocally state that the employee agrees to:

> *"1. Enter into and sign the EAP and Last Chance Agreement(s).*
>
> *3. Complete at least six (6) randomly scheduled Follow-up Tests, as determined by the SAP, within the following year. The tests must all be negative.*

In the final paragraph of the LCA the parties also agreed to the following:

> *" It is agreed by all the parties that if an employee violates the Last Chance Agreement, the EAP Participation Agreement, or if there is continued violation of the Random Drug Testing Policy; the appropriate discipline shall be termination from his/her position. The Department need only prove that the employee violated the above agreement (s)/rules(s). The arbitrator shall have no authority to modify the discipline. All parties acknowledge the waiver of the contractual due process rights to the extent stated above."*

In his Last Chance Agreement, the Grievant agreed to mandatory testing for a period of one year. When consenting to be tested for drugs or alcohol, an employee waives his rights to challenge the propriety of the employer's directive to be tested (See Elkouri and Elkouri, *Resolving Drug Issues, p. 417 (1993)).* After being told of his mandatory drug test on May 28, 2003, the Grievant disappeared for approximately ten (10) minutes, ostensibly to get his jacket.

When the Grievant did not return, Mr. Lynch had to locate him. The Union argued that Mr. Lynch was impatient and would not allow the Grievant to explain why he was not readily submitting to testing. Although some of the evidence may point to Mr. Lynch's impatience, I do not find it excuses the Grievant's lack of a timely compliance to what he had

agreed to do in regard to his LCA in June of 2001. It is also noted there were inconsistencies between Lynch and Davis regarding some of the events of the morning of May 28, 2002, yet they did not disagree on the fundamental points of the Grievant's directive to take a drug test and on his repeated refusal to comply in a timely fashion.

Mr. Davis's testimony also provided credible corroboration of Mr. Lynch's account of the Grievant's repeated refusal to submit to testing at that time. Mr. Davis stated that when the Grievant was ordered to take the test by Mr. Lynch, he replied by saying he "*was not going to take the test at this time.*" According to Davis, the Grievant refused more than once and said he was not going to take the test *"this morning"* (See Jx 4d p. 8).

The Grievant's explanation for the delay with his compliance rings hollow in as much as he had previously submitted to a mandatory test without protest or delay (See Lynch's testimony). The Union did not submit any evidence that the Grievant was displeased with the conduct of his previous random drug test. Furthermore, this was not a reasonable suspicion test that is initiated without warning. It was a mandatory test that he conceded to as part of his Last Chance Agreement.

The Union's arguments regarding the Employer's handling of the EAP Agreement are well taken. The evidence and testimony indicate the Employer was attempting to comply with the terms imposed by the EAP provider. However, I find that the Employer violated the mutuality of the

EAP process when it failed to consult Teresa Lemon, Local Union President, of the change on the EAP Agreement from 90 days to 180 days. The Employer had the Grievant initial the change, which was appropriate. However, the Employer did not inform the Local Union President of this change, yet it allowed the Local Union President's signature to remain on the document as if she had agreed to the 180 day EAP period. Imagine the reaction of the Employer if the Union had unilaterally altered a term of the EAP and allowed the Appointing Authority's signature to remain on the form as if she had agreed to the change. The Employer's actions constituted a violation of good faith dealing and brought into question the valid execution of the EAP Agreement.

However, the inappropriate actions of the Employer regarding the EAP Agreement, while problematic at best, do not impact the distinct and separate obligations of the Grievant under his Last Chance Agreement. Moreover, I do not find that the procedurally defective and separate EAP Agreement placed the Grievant or the Union at a disadvantage in regards to the Last Chance Agreement. It is also important to be noted that the parties stipulated to a definition of the issue that is confined to the Employer's charge that the Grievant violated the LCA and not the EAP Agreement.

The introductory paragraphs to Appendix M make it clear the parties recognize the dangerous impact of drugs in a place of

employment. In order to maintain the integrity of the workplace, both the Union and the Employer have recognized the importance of having employees remain free of such impairments while performing their work. Furthermore, the parties have agreed that if employees become victims of such abuses, they deserve an opportunity to maintain their employment. In exchange for this reprieve, employees must conform to conduct that results in a restoration of trust and reliability.

Random drug testing is a fundamental tenet of the Grievant's Last Chance Agreement. It provides steppingstones to reestablish his reliability. An employee who is under a Last Chance Agreement that includes random drug testing does not have the luxury of dictating the conditions of his testing. I find the Grievant's refusal to submit to testing when asked represents a failure to comply with the terms of his Last Chance Agreement. A majority of Arbitrators uphold the fact that a refusal to submit to drug testing while under a last chance agreement, without a justifiable reason, is ground to uphold a discharge (See Linde Gases of the Midwest, 94 LA 225 (Nielson, 1989) and Ethyl Corp., 95 LA 632 (Blum, 1990). The Grievant contends he was not refusing to take a drug test, but was attempting to consult with his Union representative. However, as previously stated he did raise any dissatisfaction with any aspect of his previous random testing, the testing protocol, or the testing facility.

While Appendix M of the Collective Bargaining Agreement

provides an employee with the right to consult with a Union representative "*if one is available one hour prior to a drug testing*", it is unclear whether this provision was intended to allow a full hour of consultation time or simply a consultation time one hour before testing. A plain reading of the language favors the latter interpretation. In fact, if transportation time is involved, and it often is, the hour of consultation would have to include time in transit to the testing site. However, a review of the intent of this provision is not the focus of the Arbitrator's decision in this case. The focus is the Employer's charge that the Grievant violated the terms of his LCA.

It is also reasonable to conclude that an employee who has agreed to random testing in Last Chance Agreement has carefully considered his options and had an opportunity to consult with his Union representative prior to signing it. It is also clear that the Union has an opportunity by contract to review the Employer's testing procedures (See Appendix M, Section 4 C. The Union raised this procedural argument as a main part of its defense. However, it did so without plausible explanation as to the reason for meeting with his Union Representative. The proffering of a plausible rationale would have lent credence to the Grievant's procedural argument and would have put to rest any logical inference that the Grievant was simply attempting to "buy time" to avoid a positive test.

The facts in this case indicate the Grievant was able to consult with

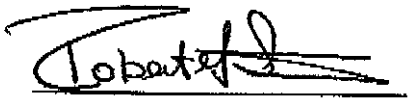
the Local Union's Vice President, Sheri Scott. Mr. Lynch also provided testimony that was not refuted by the Grievant that Scott could have accompanied the Grievant to the testing site, affording him more consultative time with his Union representative. Without any specific reasons for the need to consult with his Union representative for a longer period of time, I find the Grievant's procedural arguments do not justify his repeated refusal to timely comply with the terms of his Last Chance Agreement. The concept of "obey now and grieve later" is fundamental to the continued operation of a safe workplace. This was always an option the Grievant could have pursued after taking his test.

Finally, I find the determination of the unemployment compensation review commission has no bearing on this matter in as much as Commission applies different criteria in making their decisions to approve or disapprove unemployment compensation.

AWARD

The grievance is denied.

Respectfully submitted to the parties this 28th day of June, 2003.



Robert G. Stein, Arbitrator