IN THE MATTER OF ARBITRATION

BETWEEN

OCSEA, LOCAL 11, AFSCME-AFL-CIO

AND

STATE OF OHIO/ODOT

Before: Robert G. Stein, NAA

Grievant(s): James Green
Case # 31-08-(11-12-05)-27-01-06
Termination
:

Advocate(s) for the UNION:

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Advocate(s) for the EMPLOYER:

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INTRODUCTION

A hearing on the above referenced matter was held on August 2, 2006 at ODOT District 8 located in Lebanon, 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 submitted written briefs in lieu of making oral closings. The hearing was officially closed upon receipt of briefs on September 2, 2006.

ISSUE

Was the Grievant, James A. Green, discharged for just cause in accordance with the Collective Bargaining Agreement? If not, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

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

ARTICLES 24, Appendix M, and see Parties' briefs

BACKGROUND

The Grievant is James Green ("Grievant", "Green"), a Highway Worker 3 at District 8. His employer is the Ohio Department of Transportation ("ODOT", "Employer" "Department"). Green has been

employed with ODOT for over seventeen (17) years and was terminated effective 11/2/05. He was charged with violations of Directive WR 101:

Directive WR-101, Item #11 a positive drug test.

Directive WR-101, Item #16-unauthorized absence in excess of thirty minutes.

On Tuesday September 27, 2005 at approximately 7:12 a.m., the Grievant reported late for work. His starting time is 7:00 a.m. The Grievant went to the lunchroom, sat down and then suddenly fell out of his chair and passed out on the floor. An emergency squad was called and Green was taken to the nearest medical clinic. The Grievant's supervisor, Michael Brown, inquired of the Grievant's co-workers as to what had occurred leading up to this incident. He was informed that when Green arrived at work, his appearance was disheveled, his shirt was inside out, his hat was askew and wrinkled, and he was wearing sunglasses. Brown also stated that employees told him that the Grievant was acting peculiar, staggered when he walked, and had urinated on himself. When Brown left the garage area he noticed that Green's car was parked in a haphazard fashion straddling two parking spaces. Brown reported this information along with the emergency medical situation to the district, and proceeded to the medical clinic where the Grievant was being treated.

After examining the Grievant, medical personnel, were unable to

determine a medical cause for the Grievant's passing out or his other inexplicable behavior upon arriving at work on September 27, 2005. Supervisor Brown then reported this result to the district personnel office. Upon receiving this information and assessing what information Brown had conveyed, the personnel office ordered the Grievant to submit to a drug and alcohol test. Along with this directive, Brown informed the Grievant of the consequences of refusing to submit to the test. According to the Employer, the Grievant resisted taking the test and orchestrated a series of delays. He delayed by talking to a nurse, filling out forms, and asking for a steward to be present. The Employer stated that the nurse at the medical center surmised that the Grievant's delay tactics were done in order to increase his chances of having a "clean" test. According to the Employer, after a lengthy delay of over one (1) hour, Green finally complied with the Employer's directive and provided a urine sample. The Employer did not arrange for a union steward to be present prior to testing. Following analysis by the laboratory, the sample was negative for alcohol but was positive for cocaine.

The Grievant, who had active discipline on his file in the form of a counseling, written reprimand, one (1) day fine, and a three (3) day suspension, was offered an opportunity to remain employed under the conditions of a Last Chance/ E.A.P. Agreement by the Employer. The Grievant refused the Employer's offer, which the Employer indicates had

been offered several times over the course of four (4) days. The Employer then terminated his employment, and Green filed a grievance. As stated above, at the time of his termination the Grievant had completed seventeen (17) years of service with ODOT.

SUMMARY OF EMPLOYER'S POSITION

In summary, the Employer argues the Grievant "…is alone responsible for his termination of employment with ODOT" (Employer's brief, p. 4). It contends that the Grievant has had a long history of attendance problems and the positive test for cocaine use may serve to explain a portion of his attendance history. The Employer further asserts that it has attempted to give the Grievant several chances to retain his employment by agreeing to seek help through the E. A. P. program. Its arguments in this matter are succinctly stated in its brief. They read as follows:

> Following all the testimony, exhibits, and evidence presented at arbitration it appears there are two questions the arbiter must consider in order to decide the issue before him. 1) Did the conduct of James Green warrant a reasonable suspicion alcohol/drug test? and 2) Did the employer improperly deny Mr. Green union representation?
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> The answer to both questions are found in the credible testimony of Ed Flynn, who is and has been since 1995, ODOT's highest ranking and only spokesperson and administrator of the employer's Drug and Alcohol Testing Policy, Appendix M. of the collective bargaining agreement , and the Federal Omnibus Testing Act (Emp.Ex. 7).
>
> The evidence is clear in the contract that the State and Federal Testing program differs. Mr. Green, as a "safety sensitive" employee is governed by the Federal Program. The program compels the full and complete cooperation of the employee, it does not mandate the presence of union representation in advance of testing, and there is near a zero tolerance for a lack of cooperation on the part of the employee or interference by any other means or person. There should be absolutely no delay in the process.

The union's attempt to rebut the testimony of Mr. Flynn was presented by Mr. Michael Martin whose expertise comes from being a member of a committee (circa 1990) whose purpose was to formulate a recommendation on the union's position before the Federal Omnibus Testing Act became law and before the Appendix M drug test language of the contract was negotiated. This was at time when Mr. Martin was a union steward in another agency. With glaring attention, it should be noted, the union passed up the opportunity to present any testimony from any union official involved in current drug test policies, recent contract negotiations, or anyone else within the OCSEA structure, who has or had a direct relationship with ODOT relative to drug and alcohol testing.

In comparison, it seems that the testimony of Mr. Flynn should carry considerably more weight than that of Mr. Martin as the arbiter considers the grievant's request for union representation.

According to Mr. Flynn's testimony, the steward comes into play for "State" testing, not Federal, and then, only if one is available, i.e., on the premises. Additionally, one should consider, even if a steward were available and present, would the outcome have been different. I think the answer is no. The test result would have been the same. The alternative would have been a refusal to test which would have resulted in the termination of Mr. Green without the offer of a Last Chance /EAP Agreement. In every case where a steward was present, the union has never recommended the employee refuse to test.

On the question of a reasonable suspension test being warranted, one must consider the sequence of events in total, in relation to the federal testing act. This was a building process that only became clear after all other possible medical causes were ruled out. This was the point in time when the decision to test was made, at approximately 10:00 a.m. This was also the point in time where Mr. Green became uncooperative and argumentative and delayed for an additional hour and a half. It is now clear he had a motive for attempting to avoid the test. Mr. Green's appearance and conduct observed directly by Supervisor Brown warranted a drug/alcohol test, add to that, the observations reported by co-workers, the verbal report of the paramedics at the garage, the verbal report of the nurse in the exam room, the verbal report of the nurse at the test site. All these events would have rendered the employer negligent in its duty had a drug test not test been ordered.

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In summary, it is clear Mr. James A. Green alone is responsible for his termination of employment with ODOT. He has a long history of attendance problems, for which he has been disciplined repeatedly. (Note: attendance issues are a part of the employer's decision to terminate in this instant case, but, they are not related to any bonafide medical condition or FMLA approved absence) These past attendance problems may well have been related to the abuse of illegal drugs. Even though the employer has repeatedly went above and beyond its obligations and showed compassion for this grievant, and every attempt has been made to accommodate each need or request he has made in relation to his medical documentation of record and his FMLA rights. It is apparent and unfortunate that our kindness in this regard was taken as a weakness by Mr.Green. He has consistently violated ODOT rules and policies, it was he who ingested illegal drugs and reported for work, it was he who attempted to conceal the matter, it was he who employed every delay tactic he could muster to avoid being tested, it was he who tested positive for cocaine, it was he who repeatedly rejected the employer's offer of assistance through the EAP, and it is he who is still in denial of his personal problems and his fit for duty.

Reinstatement of Mr. Green to ODOT would be an injustice to him, as it would confirm his present state of denial, it would be an injustice to his co-workers and jeopardize their safety and it would be an injustice to ODOT, who has already went the extra mile with this grievant.

I believe the record firmly supports the employer's burden of just cause termination in this case. Therefore, on behalf of the employer, I respectfully request the arbitrator to deny this grievance it its entirety.

SUMMARY OF UNION'S POSITION

In summary the Union's position is that the charges against the Grievant are unsubstantiated and that ODOT "…failed to act pursuant to policy when ordering the drug test that subsequently led to the Grievant's termination. The Union strongly asserts that the Grievant was denied his due process rights part of which related to Union representation prior to his drug test. The Union's arguments are succinctly summarized in its post hearing brief as follows:

ARGUMENT:

A. The Grievant's termination for refusing to sign a Last Chance Agreement was improper because it was imposed without regard for his negotiated rights.

The Drug-Free Workplace Policy (Appendix M Sections 1-7) enumerates many rights and protections for all employees covered by the Collective Bargaining Agreement who may be drug tested during the course of their employment. Even taking a more limited view of those rights and protections as offered by the State's witness, Ed Flynn, the Grievant was entitled to union representation on the date in question. Moreover, Mr. Flynn conceded during the course of his testimony that the protections found in *Part A* of Sections 2 & 3 do CARRY OVER to safety sensitive employees tested under the federal guidelines so long as the exercise of those rights do not unduly delay in the process. He cited one example of an unreasonable delay. In that case, the employee refused to be tested, later consulted with the Union and upon advice from the Union then produced a specimen some 24 hours later. The 24-hour delay was deemed to be excessive by an arbitrator according to Mr. Flynn's testimony. No such delay was present in this case. In this case, while the State has accused the Grievant of engaging in "delaying tactics" (E-3), the evidence does not bear it out. As soon as he was aware of the test, the Grievant asked for a union steward. Mr. Brown admits that the Grievant made at least two requests to him for union representation that morning. This Grievant had recently sought union representation earlier that summer during the course of an involuntary disability separation process; he understood the value of union representation. The record shows he was denied union representation on September 27, 2005 despite his best efforts to obtain it.

The Employer had several opportunities to expedite union representation throughout the morning and they chose not to do so. Mr. Brown suggested that he had reasonable suspicion after speaking with paramedics about Mr. Green's condition at the garage at approximately 7:30 a.m. A short while later, he set the wheels in motion for a drug test when he called the Safety office before leaving the garage to go to Bethesda. Yet, he did not ask the available union steward, Kevin Wamsley, to accompany him, a move that would have greatly expedited the process. While in the waiting room at Bethesda, he conferred with LRO Carl Best about setting up the drug test. No one called a union steward then either. Next, when the Grievant was transferred over to the specimen collection area, he made his first request for a union steward and was denied one. Other request(s) for steward representation were denied even though the District Steward had been effective in encouraging reluctant employees to test in the past. The evidence clearly shows that the

Grievant/Union were not the source of any delays. The Employer, on the other hand, refused every opportunity to provide union representation.

ODOT managers denied the Grievant other rights found in Appendix M as well. Mr. Brown testified that while he had blown half of his day in the waiting room at Bethesda, he still did not have time to write out a signed statement of his observation that morning. Instead he chose to send an email the next morning. He also could have used the time to leave instructions for garage employees to make out their own statements. Mr. Best could have come to Bethesda to make a personal observation of the Grievant. Simple actions such as these would have helped bring ODOT closer into compliance with federal law and the Contract.

The Employer's attempt at arbitration to escape *Part A, State Testing* protections failed. ODOT has the burden to prove it exempted itself from *Part A* during the 1997 negotiations. Mr. Flynn was not present during the 1997 negotiations and cannot be relied upon as a very reliable witness about the bargaining that occurred there. Without direct testimony backed up with intent notes, they fall short of meeting their burden. Secondly, Mr. Flynn conceded that contractual due process rights should be coordinated with federal law when he testified that *Part A, State Testing* "carries over" to *Part B, Federal Testing.* Thirdly, due process rights are found in other parts of Appendix M that ODOT did not contest. For example, Mr. Flynn testified that ODOT was covered by the "koombaya" language of Appendix M, Section 1 which states in part,

(T)he State recognizes employees' rights to privacy, and other constitutionally guaranteed rights, as well as the due process and just cause obligations of this agreement.

…managers and supervisors shall be provided training about the Drug-Free Workplace policy and alcohol and drug testing policy in order to ensure that the policy and program are administered consistently, fairly, and within appropriate Constitutional parameters.

For all of the above reasons, the Grievant was within his rights to refuse to sign a Last Chance Agreement without repercussion. *The Drug Free Workplace Policy, Appendix M, Section 6, Disciplinary Action* states as follows:

On the first occasion in which any employee who is determined to be under the influence of, or using, alcohol or other drugs, while on duty, <u>as confirmed by testing pursuant to this policy,</u> (emphasis added) the employee shall be given the opportunity to enter into and successfully complete a substance abuse program certified by the Ohio Department of Alcohol and Drug Addiction Services.

Without a test conducted pursuant to policy, ODOT cannot impose discipline for the employee's refusal to sign. In *Bart Brown v. Ohio Dept. of Rehabilitation and Corrections,* the Arbitrator ruled in favor of the Grievant who refused to cooperate in an investigatory interview when his Garrity rights protecting him from self incrimination were not read to him. Also, in *George Motley v Ohio Civil Rights Commission*, the Arbitrator reinstated the Grievant finding *…the parties have committed themselves to follow a set of procedures and required timelines in order to ensure that the due process rights of employees who are properly charged with violations of work rules are followed. (pg. 14, para 2)*

B. <u>The absences are mitigated by the circumstances.</u>

As an afterthought, the Employer charged the Grievant with some unauthorized absences. (E-3, pg.4). By that time, the Employer had been unsuccessful in placing him under a Last Chance Agreement. Without such an agreement in place, the Grievant had no more chance to retain his employment. No useful purpose is served by the Employer stacking superfluous charges on the Grievant when the cause for termination was already known at the time of the last chance refusal.

The Grievant was subsequently charged with these absences despite having an FMLA balance available (U-1). Mr. Green was experiencing a serious medical condition on September 27 and he left work with the

permission of the County Manager, Mike Brown. Mr. Brown testified that he believed Mr. Green whenever he said he was suffering from an FMLA condition and needed to be off work. Such was the case during the week of September 26th. The absences are excusable under the circumstances. The absence from September 22 had already been excused in large part as FMLA- related. (U-1). The absence on October 24th occurred after the Grievant had been notified by the Medical Review Officer of a positive drug test. Absences are generally excused just after an employee is notified of a positive test according to the testimony of both the Employer and Union. Alternatively, in the event that any or all of the absences are unexcused, then termination would be too severe of a consequence. The Grievant's most recent infraction was a working suspension: a notation to file without any actual lost wages (E1). Proceeding to discharge from this point would not comply with the principle of progressive discipline. Please see Article 24.02 a-g. (J-1)

V.

CONCLUSION:

The Union respectfully requests that the Arbitrator uphold the grievance. The evidence and testimony clearly demonstrate that the charges are unsubstantiated. *ODOT failed to act pursuant to policy* when ordering the drug test and subsequently terminating the Grievant. ODOT testified that it expects to pay heavy fines for violations of drug testing regulations. Accordingly, the grievance should granted and the Grievant should be made whole.

DISCUSSION

The identified issue for resolution in the instant matter is the validity of the Grievant's termination. One of the most firmly established principles of labor relations is that management has the inherent right to direct its work force, normally though the use of a collective bargaining agreement, which specifies the parties' respective rights and responsibilities. In the exercise of those management rights, the Employer is governed by the rule of reasonableness, and the exercise of its management rights must be done in the absence of arbitrary, capricious, or unreasonable conduct. *Cal. Edison and Int'l Bhd. of Elec. Workers, Local 47*, 84 LA 1066 (2002).

"While it is not an arbitrator's intention to second-guess management's determination, he does have an obligation to make

certain that a management action or determination is reasonably fair." *Ohio Univ. and Am. Fed'n of State, County, and Mun. Employees, Ohio Council 1, Local 1699*, 92 LA 1167 (1989). In the absence of contract language expressly prohibiting the exercise of such power, an arbitrator, by virtue of his authority and duty to fairly and finally resolve disputes, has the inherent power to determine the sufficiency of a case and the reasonableness of a disciplinary action or penalty imposed. *CLEO, Inc., (Memphis, Tenn.) and Paper, Allied-Indus., Chem., and Energy Workers Int'l Union, Local 5-1766*, 117 LA 1479 (Curry 2002).

Generally, in an employee termination matter, an arbitrator must determine whether an employer has clearly proved that an employee has committed an act or acts warranting discipline and that the penalty of discharge is appropriate under the circumstances. *Hy-Vee Food Stores, Inc. and Local 147, Int'l Bhd. of Teamsters, Warehousemen, and Helpers of Am.*, 102 LA 555 (Bergist 1994). In making such a determination, an arbitrator must consider, among other circumstances, the nature of the Grievant's offenses(s) and the Grievant's previous work record. *Presource Dist. Serv., Inc. and Teamsters Local 184*, FMCS No. 95-01624 (1997). In the instant matter consideration must also be given to Employer's obligations under Federal law. Typically, an arbitrator will not substitute his own judgment for that of an employer unless the challenged penalty imposed

is deemed to be excessive, given any mitigating circumstances. *Verizon Wireless and CWA, Local 2236*, 117 LA 589 (Dichler 2002).

> Discharge from one's employment is management's most extreme penalty against an employee. Given its seriousness and finality, the burden of proof generally is held to be on the employer to prove guilt of a wrongdoing in a disciplinary discharge or to justify or show "good cause" for terminating an employee . . . Although the quantum of proof appears to be variable in discharge cases overall, arbitrators often use the "preponderance of the evidence" rule or some similar standard in deciding the fact issues before them.

Int'l Assoc. of Machinists and Aerospace Workers Union, Dist. 150 and Intalco Aluminum Corp., 00-1 Lab. Arb. Awards (CCH) P 3608 (Nelson 2000).

In contravention to the recognized right of management to direct its workforce, the Union and the Grievant have a reciprocal right or duty to challenge managerial action perceived by them to have been ill founded. *Minn. Mining and Mfg. Co. and Local 5-517, Oil, Chem. and Atomic Workers Int'l Union*, 112 LA 1055 (Bankston 1999). When a grievance involves a challenge to a managerial decision, the standard of review is whether a challenged disciplinary action is arbitrary, capricious, or taken in bad faith. *Kankakee (Ill.) School Dist., No. 111 and Serv. Employees Int'l Union, Local 73*, 117 LA 1209 (Cook 2002).

> Arbitrary conduct is not rooted in reason or judgment but is irrational under the circumstances. It is whimsical in character and not governed by any objective rule or standard. An action is described as arbitrary when it is without consideration, in disregard of facts and circumstances of a case, and without a rational basis,

justification, or excuse. The term "capricious" also defines a course of action that is whimsical, fickle, or inconstant.

City of Solon (Ohio) and Patrolmen's Benevolent Ass'n, 114 LA 221 (Oberdank 2000).

When a collective bargaining agreement reserves to management the right to establish reasonable rules and regulations and the right to discharge for "cause," but does not define what does constitute "just cause," it is proper for an arbitrator to look to in-house rules and relevant regulations to determine whether or not a discharge was warranted. *E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17*, 139 Lab. Arb. Awards (CCH) P 10, 604 (1998).

The existence of "just cause" is generally recognized as encompassing two basic elements. First, the Employer bears the burden of proof to show that the Grievant committed an offense or engaged in misconduct that warranted some form of disciplinary action. The second prong of just cause is to determine whether the severity of the responsive action taken by the Employer, in this case termination, was commensurate with the degree of seriousness of the established offense and the Grievant'. *City of Oklahoma City, Okla. and Am. Fed'n of State, County and Mun. Employees, Local 2406*, 02-1 Lab. Arb. Awards P 3104 (Eisenmenger 2001). The proof must satisfy both the question of a wrongdoing charged against an employee and the appropriateness of the punishment assessed. "Just cause" requires that all Employer policies

and rules be fair and reasonable, especially when addressing the sensitive employee privacy issues and the rights inherent in a drug and alcohol testing program and policy.

The arbitrator's task in this matter is somewhat lessened because there is really no dispute that the Grievant did test positively for cocaine usage in violation of the Employer's Drug-Free Workplace Policy, included in Appendix M of the Agreement. Appendix M contains the following commitment by the parties regarding the harmful presence of alcohol and drugs in the workplace:

> A. Both the State and the Union desire a workplace that is free from the adverse effects of alcohol and other drugs. **As such, both parties acknowledge that substance abuse is a serious and complex, yet treatable, condition/disease that adversely affects the productive, personal, and family lives of employees. The parties further acknowledge that substance abuse may lead to safety and health risks in the workplace, for the abusers, their co-workers, and the public-at-large.** Accordingly, the State and the Union pledge to work collaboratively in programs designed to reduce and eradicate the abuse of alcohol and drugs.
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> B. The Union recognizes the need to address problems associated with having on-duty employees under the influence of alcohol or drugs. The Union also recognizes the State's obligation under the Federal Drug Free Workplace Act of 1988 and federal laws and regulations concerning the controlling of substance abuse in the workplace. At the same time, the State recognizes the employee's rights to privacy and other constitutionally guaranteed rights, as well as due process and just cause obligations of this Agreement. **Both parties agree that the emphasis of any drug-free workplace programs shall be to prevent and rehabilitate employees and to abate risks created by employees who are on duty in an impaired condition. [emphasis added].**

The evidence submitted in this matter undeniably establishes that the Grievant had, in fact, reported to work under the influence of an illicit substance. That fact looms large in the analysis of this case, particularly given the parties' firm commitment to a drug free workplace. The Union has not challenged the validity or reliability of the testing procedures nor contested the outcome of the test itself. Therefore, it would appear to be a rather straightforward matter to conclude, based on the actual test results, that the Grievant was guilty of the misconduct alleged and merited a response by the Employer consistent with the provisions of the Agreement.

ODOT's employees are required to be tested in accordance with the relevant provisions of the Agreement, federal laws and regulations, and state laws, which include the federal Omnibus Transportation Employee Testing Act of 1991 (OTETA), 49 U.S.C. § 31306 *et. seq*., the corollary regulations adopted by the U.S. Department of Transportation, included at 49 C.F.R. § 382.101 *et seq*., and also Ohio Rev. Code § 4506.15(A). Compliance with the federal statute and regulations is necessary to assure the receipt of federal assistance by the various states. The legislation and the accompanying regulations demonstrate an embodiment of policies against illegal drug use by employees in safety-sensitive transportation positions and in favor of drug testing, as well as a policy promoting the rehabilitation of employees who use drugs and

requiring substance abuse treatment before the affected employees are permitted to return to work. *E. Associated Coal Corp. v. United Mine Workers of Am.* (2000), 532 U.S. 57, 121 S.Ct. 462.

> The preamble of the OTETA notes Congress's recognition of the significant dangers to the nation from alcohol abuse and illegal drug use in the transportation industry. The greatest efforts must be expended to eliminate the abuse of alcohol and use of illegal drugs, whether on duty or off duty, by those individuals who are involved in the operation of aircraft, trains, trucks, and buses.

Cleveland Bd. of Educ, v. Int'l Bhd. of Firemen and Oilers, Local 701 (1997), 120 Ohio App. 3d 63, 696 N.E.2d 658. The federal regulations promulgated under OTETA specifically prohibit employees from reporting for work, remaining on duty, or performing a safety-sensitive function if the employee tests positive for controlled substances and also require all employers having knowledge that a driver has tested positive to not permit the impaired driver to perform his safety-sensitive duties. 49 C.F.R. § 382.215. A "safety sensitive" employee is defined in 49 C.F.R. § 653.7 as a vehicle operator holding a commercial driver's license (CDL).

> Ohio Rev. Code §§ 4506.15(A), (C) prohibit an individual from either (1) driving a commercial motor vehicle while having a measurable or detectable amount of a controlled substance in his blood, breath, or urine; or (2) driving a commercial motor vehicle while under the influence of a controlled substance. Ohio Rev. Code §§ 4506.16 and 4506.99 provide for a one-year suspension of the commercial driver's license. In short, under Ohio law, simply having a detectable amount of a controlled substance in one's system is a criminal offense punishable by up to six months in jail.

Cleveland Bd. of Educ.

The ODOT drug-testing policy in effect at the time of the incidents resulting in the instant grievance allows for the testing of specimens from employees when there is a reasonable basis for believing that the employee may be impaired and that drugs may be a causative factor. The circumstances and events surrounding the conduct and condition of the Grievant upon his arrival at work on the morning of September 27, 2005 certainly demonstrate a legitimate basis for the response taken by the Employer in summoning the emergency squad that subsequently transported the Grievant to the nearest emergency clinic. Green had arrived late, parked his car haphazardly, appeared disheveled to his co-workers, acted peculiarly, had a staggered walk, and ultimately passed out in the ODOT employee lunchroom. It was only after a third-party determination was made by clinic personnel that there was no other medically identifiable condition detected which had caused the Grievant's condition that a decision was made by ODOT supervisory personnel that a reasonable suspicion drug and alcohol test would be conducted.

The records indicate that the drug test was actually conducted at 11:24 a.m. after some delay due to the Grievant's reluctance to sign the consent form and his otherwise uncooperative conduct with clinic personnel. After having completed the necessary paperwork and having moved to the sample collection room at the clinic, Green requested the

appearance of a Union representative, as provided in Appendix M-3, Part A.2., State Testing., but the testing was actually completed without the presence of any Union representative. It was not until October 25, 2005 that the Employer was notified that the Grievant had tested positively for the presence of cocaine.

The parties differ as to whether employees who are required to be tested pursuant to Federal laws and/or Federal regulations, such as the Grievant, are afforded the rights articulated under sections of Appendix M referring to state testing. The construction of the language under Appendix M, Section 2, Drug-Testing Conditions and under Section 3, Testing Procedures and Guarantees, favors the Employer's position that said employees are required to be tested pursuant to Federal laws and regulations and that they are distinct from other state employees who are not under Federal requirements. In these sections the parties clearly separate employees in these two categories.

When confronted with plain contract language that conveys a straightforward course of conduct, arbitrators assume that the parties knew what they were doing when they drafted their agreement incorporating the language used. For example, Ohio courts have consistently held that "[t]he overruling concern when construing a contract is to ascertain and effectuate the intention of the parties." *Aultman Hosp. Ass'n v. Community Mut. Ins. Co.*, 40 Ohio St. 3d 51, 544

N.E.2d 244; *Skivolocki v. E. Ohio Gas. Co*. (1974), 38 Ohio St. 244, 313 N.E.2d 374 (1974). The first rule in interpreting contract language is the "plain meaning rule." According to this rule, if a writing appears to be plain and unambiguous on its face, its meaning must be determined from the four corners of an instrument itself without resort to extrinsic evidence of any nature. *Colonial Baking Co. (Chattanooga, Tenn.) and Bakery, Confectionery & Tobacco Workers, Local 25*, 110 LA 1071 (Holley 1993). If the words are plain and clear, conveying a distinct idea, there is no occasion to resort to technical rules of interpretation, and arbitrators will ordinarily apply the clear meaning. *Colonial Baking*. If the language of a contract is free from ambiguity, an arbitrator should effectuate the clearly expressed intent of the parties. *Duluth (Minn.) City and County Employees Credit Union and AFSCME Council 96, Local 3558*, Befort 2002). In those circumstances, there is no need for an arbitrator to go beyond the face of a contract to resolve a dispute. *QUADCOM 9-1-1 Pub. Safety Communications System (Carpentersville, Ill) and Local 73, Serv. Employees Int'l Union*, 113 LA 987 (Goldstein 2000).

The language of Appendix M, Section 2. Sub-section B clearly delineates that "…employees who are required to be tested pursuant to Federal laws and/or Federal regulations shall be tested in accordance with those laws and regulations." And, Appendix M Section 3 Sub-Section B, further reinforces the differing obligations the Employer has regarding

employees subject to or not subject to Federal testing requirements. In Sub-Section B the parties have agreed, "The Employer will comply with any bargaining obligations **as required by law.**" There was no evidence introduced by the Union to demonstrate that Federal law or regulations regarding drug testing require Union representation as a pre-condition to testing.

In spite of the distinct testing procedures for employees in Appendix M, the testimony at the hearing indicated that the Employer attempts to provide Union representation to employees tested under Federal law and regulations when it does not interfere with its obligations to carry out testing pursuant under such regulations. The language of Appendix M does not support the Union's contention that employees who are required to be drug tested under Federal law or regulations are to be afforded the same rights of Union representation as those employees who are not under such regulations. However even if this were the case, the right of an employee in Section 3, A 2 to consult with a Union representative is not unconditional but is contingent upon steward availability one hour before testing.

The arbitrator here is certainly cognizant of the need to assure the provision and protection of all contractual, legislative, and due process rights to the Grievant. However, based on the evidence presented in this matter regarding the events and procedures related to the "reasonable

suspicion" testing of Green, the arbitrator here concludes that the Grievant, being subject to testing under Sub-Section B of Appendix M, Section 3, is not afforded a contractual guarantee of Union representation prior to testing and is not arbitrarily or improperly disadvantaged by the Employer's failure to assure the presence of a Union representative one hour before the test was actually conducted. Hearing testimony indicated that safety-sensitive employees, such as the Grievant in his work as a Highway Worker 3, have been included under the provisions of Appendix M-3, Part A. 2B, Federal Testing, since negotiations occurring in 1997. The federal testing program does not mandate the presence of a Union representative in advance of the actual testing.

The arbitrator finds the Union's focus on this tangential issue of the presence of Union representation to be without significant merit. Based on the facts and circumstances of this matter it appears unlikely that the presence of a Union representative would have had a significant impact on the eventual outcome. The only impact or influence that such a representative might have had was in the Grievant's decision regarding whether or not to sign the consent for the drug test. Because the drug test results were, in fact, positive, the Grievant would have been viewed as insubordinate for his potential refusal to submit to the drug test. This would have subjected him to discipline, including termination, under the terms of

the Agreement for his failure to cooperate in the testing. The Grievant's employment status was equally jeopardized under either scenario. An employee who refuses to be tested when the circumstances merit "reasonable suspicion" testing is deemed to have tested positive for drug use and cannot be permitted to operate a commercial motor vehicle. 49 C.F.R. § 391.95(d).

> It is imperative to enforce the demand for a drug screen whenever it is reasonably possible. The need for safe drivers and a drug-free workplace mandates it. Therefore, the rule requiring submission to a legitimate drug test or be subject to a discharge is reasonable and enforceable.

Transit Mgmt. of Southeast La. and Amalgamated Transit Union, Local 1560, 93-2 Lab. Arb. Awards (CCH) P 3429 (Massey 1993). Union representation would not have eliminated nor diminished the reasonable cause existing, which merited and required the Grievant to submit to the drug testing, and certainly did not mitigate the discipline ultimately imposed. The presence of a Union representative would have had no impact on the eventual outcome, especially in view of the fact that there is no claim or any evidence of any procedural defects in the testing procedure itself nor of any actual rights violation to the Grievant. The ODOT supervisor remained in the waiting area outside of the actual testing location and did not attempt to conduct any type of investigatory interview of the Grievant nor collect any potentially incriminating statement(s) from him. There is no evidence that the drug test was

intended or utilized as a tool of harassment, discrimination, or intrusion. The Employer had legitimate grounds to order a "reasonable suspicion" drug test based on the circumstances, physical evidence, and the physical signs, symptoms, and conduct of the Grievant. The evidence presented supported a reasonable suspicion that the Grievant was under the influence of some an illicit drug and was in an unfit condition to perform his customary work-related duties. To "fail a drug test" under 49 C.F.R. § 40 means "the confirmation test results show positive evidence of the presence of a prohibited drug in the employee's system." *S. Cal. Gas. v. Utility Workers Union of Am., Local 132, AFL-CIO* (2001), 265 F.3d 787.

Because no Union representative was **readily available**, his presence was not as significant at that time as was the need to complete the drug testing in a timely fashion to ensure its validity. Because approximately four (4) hours had already passed since the Grievant's physical symptoms were initially noted upon his arrival at work, the need for the drug test to be conducted expeditiously to ensure valid results is deemed by this arbitrator to be a more significant concern than delivery or arrival of a Union representative from another location to the clinic. As noted by another arbitrator, "It is imperative that possible drug users should be tested as soon as there is reasonable cause to suspect drug use.. . . to [ensure] due process." *Shell Oil Co. and Oil, Chem. and Atomic Workers, Local 4-367*, 91-2 Lab. Arb. Awards (CCH) P 8448 (Massey 1991).

Because the validity of the test is time-sensitive, ODOT had a valid interest in attempting to have the drug test completed in a timely fashion. The language of the Agreement makes it clear that the Employer is required to comply with Federal law and regulations regarding employees who fall under the requirements of Federal testing. Therefore, the arbitrator finds that the Employer acted reasonably in not further delaying the actual testing, which in large part was caused by the Grievant, and potentially limiting the validity of the results. Moreover, conducting testing in a timely manner is consistent with the clear and unequivocal commitment by the parties in Appendix M, Section 1, Statement of Policy, Sections A and B of the Agreement to keep the workplace free from the adverse effects of alcohol and drugs.

"Actions taken pursuant to employer policies and rules must be reasonable under all of the circumstances. The principal inquiry to be made in examining the question of reasonableness is whether there is a 'reasonably discernible' connection between employee activities and the employer's business." *CFS Cont'l, Inc.* Here, the evidence ultimately established beyond a reasonable doubt that the Grievant had ingested the illegal cocaine. Because Green was an ODOT employee working in a position as a Highway Worker 3, guaranteeing safety of the Grievant's co-workers and members of the general public merits high priority.

> An employer's ability to test employees for drug use is essential to the safe and orderly operation of its facility and all on-

> going projects. Due to the nature of the employer's operations, a drug-impaired employee is a life-threatening hazard to everyone. Thus, an effective drug control program is imperative and is in the vested interest of every employee. "Loopholes" which allow deferment of testing are counterproductive to effective drug control and should be balanced against the objectives of a drug control policy.

Shell Oil Co. Otherwise, innocent co-employees and other citizens are placed in jeopardy. Management has a continuing duty and responsibility to take appropriate action to ensure that employees are not working with impaired judgment resulting from mind-altering chemicals.

Because the Grievant had reported to work in an impaired condition and under the influence of illegal mind-altering drugs, the Employer followed all of the relevant procedures in imposing discipline based on regulations promulgated by the Federal Highway Administration of the federal Department of Transportation, which are applicable to all employees who operate a commercial motor vehicle involved in interstate commerce. While those regulations certainly establish that safety issues and concerns are paramount, the regulations (49 C.F.R. § 382.101 *et seq.*) permit the parties to a collective bargaining agreement to determine the appropriate discipline through labor-management negotiations. *Citgo Asphalt Ref. Co. v. The Paper, Allied-Indus. and Energy Workers Int'l Union Local No. 2-911* (2004), 385 F.3d 209.

Article 24 of the Agreement details the progressive discipline policy affecting all ODOT employees. The inclusion of the opportunity for

employees to participate in the Employee Assistance Program (herein "EAP") demonstrates a commitment by the parties to support corrective action and to address issues related to the health and welfare of bargaining unit employees. Participation in most EAP's includes some time away from work while employees are involved in concentrated drug rehabilitation efforts but does not preclude an employee's eventual return to work based on completion of specific components of the program. Despite having multiple opportunities under varying circumstances to voluntarily agree to sign a last chance agreement and commit to participating in ODOT's EAP at the Employer's expense, the Grievant has refused available rehabilitation opportunities and, as a result, has thereby precluded any opportunity for his continued employment with ODOT. Green knowingly violated ODOT's drug policy, reflecting a zero tolerance level, when he reported to work under the influence of cocaine. Because Green worked as a CDL operator in a safety-sensitive position with an already active disciplinary record, the safety and welfare of ODOT's other employees and the general public, and also the right of the Grievant's fellow employees to work in a drug-free environment, merited his discharge. No employer is responsible to keep watch over its employees twenty-four (24) hours each day. The Grievant here failed to accept any responsibility for his substance abuse.

Given the record of the evidence in this case, the Arbitrator finds that ODOT, which is required to comply with Federal law and regulations, did not violate the Agreement when it required the Grievant to submit to drug testing without the presence of a Union representative. Furthermore, the Employer complied with the Agreement when it discharged the Grievant after multiple good-faith efforts to provide him with an opportunity to agree to the terms of a last chance agreement.

AWARD

The grievance is denied.

Respectfully submitted to the parties this _____ day of October 2006.

____
Robert G. Stein, Arbitrator