

**STATE OF CONNECTICUT
STATE BOARD OF MEDIATION AND ARBITRATION**

ARBITRATION AWARD

In the Matter of	: MAY 28, 2024
	:
TOWN OF EAST HARTFORD	: CASE NO. 2024-A-0088
	: Date of Award: May 30, 2024
	: LOCATION OF HEARING:
	: State Board of
	: Mediation & Arbitration
AND	: 38 Wolcott Hill Road
	: Wethersfield, CT 06109
LOCAL 1174, COUNCIL 4,	:(In Person)
AFSCME, AFL-CIO	:
	:

**James T. Ferraro,
AFSCME Council 4
44 East Main Street
New Britain, CT 06605
Union Representative**

**Floyd J. Dugas, Esquire
Berchem Moses P.C.
75 Broad Street
Milford, CT 06460
TOWN Representative**

ISSUE (agreed to by the parties)

- 1. Did the Town of East Hartford have just cause to terminate the Grievant?**
- 2. If not what shall the remedy be consistent with the Collective Bargaining Agreement?**

FACTS

This grievance was filed by Local 1174, Council 4, AFSCME, AFL-CIO (“Union”) which alleges that a Union member, Peter Russo (“Grievant”), was terminated by the Town of East Hartford (“Town”) for failing multiple drug tests and the Town did not have just cause to terminate Grievant. The grievance was filed for arbitration with the Connecticut State Board of Mediation and Arbitration (“SBMA”).

An arbitration hearing was held before the Panel on February 5, 2024. All parties were afforded the opportunity to examine and cross-examine witnesses and to present documentary evidence in support of their respective positions. Both parties were represented during the proceedings before the Panel. Briefs were submitted by each party in support of their respective positions on or about March 14, 2024.

Grievant was a twenty-two (22) year employee of the Town at the time of his termination. Prior to Grievant’s termination, the Town and Union agree that he had no significant discipline and in fact was a “model employee” (testimony of Alex Trujillo, Town Director of Public Works, Tr. Pg. 38, line 2).

Grievant’s tenure with the Town started as a Maintainer II, promoted to Maintainer IV, and due to his desire to operate equipment, held the position of Maintainer III at the time of his termination (Tr., pg. 42-43). The position of Park Maintainer III (Equipment Operator) requires the operation and maintenance of machinery and equipment. The equipment duties consist of operating tractor mowers, bucket loading backhoes, snow blowers, mini bulldozers and pick-up and

dump trucks. In addition a Maintainer III employee must hold a Class II Motor Vehicle License. This License is what used to be known as Commercial Driver's License, equivalent to a CDL-B License today.

On October 3, 2023 Grievant was selected for a random drug test. The results of this test came back positive for "cocaine metabolites" (Joint Ex. 3). The sample again came back as positive for cocaine after Grievant requested that the sample be re-tested.

During the month of October 2023 Grievant was placed on administrative leave pending successful completion of the Drug and Alcohol Treatment Program and Return to Duty Drug Test. In accordance with Federal Law and the Town's policy Grievant was evaluated by a Substance Abuse Professional ("SAP") and he was thereafter certified by the Program as successfully completing the Drug and Alcohol Training Program and notified that he needed to complete a Return to Duty Drug Test to be cleared to return to work. On October 30, 2023 Grievant completed his Return to Duty Test that resulted in another positive result for cocaine (Jt. Ex. 6).

The Town followed its policy (which conforms to Federal Law) and that policy in part states: "any positive return to duty drug test...will be grounds for and result in immediate termination" (Jt. Ex. 8, pg. 81).

The Town thereafter terminated Grievant's employment.

The Town adopted a Drug and Testing Policy that implements Federal Motor Carrier Safety Administration Regulations (Jt. Ex. 8). This Policy was recently updated in February 2018 (Jt. Ex. 8). The Policy applies to all drivers of

commercial vehicles including Maintainer III positions (Jt. Ex. 8, pg. 72). Drivers are prohibited from using or ingesting prohibited drugs at any time. The Town's policy requires the employee who tested positive for drugs to be suspended until completing all recommended treatment and takes a Return to Duty Drug and/or Alcohol Test with a negative verified result. (Jt. Ex. 8, pg. 81) The Policy also states that a second positive test will result in immediate termination (Jt. Ex. 8).

The results of the tests are "credible and not contested by either party" (Union Brief, pg. 3).

UNION POSITION

The Union argues that Grievant was disciplined without just cause and points to the time tested seven elements for just cause:

1. Did the Company provide forewarning of possible discipline for the employee's conduct?
2. Was the rule or order reasonably related to the orderly efficient and safe operation of the Company's business?
3. Did the Company make an effort to discover whether the employee violated a rule of management?
4. Was the Company's investigation conducted fairly and objectively?
5. Was there substantive evidence or proof that the employee was guilty as charged?
6. Were the Company's rules and penalties applied evenhandedly and without discrimination to all employees?

7. Was the discipline administered reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the Company?

The Union, in its brief, only points to number seven (7) above as the crucial determination for the Panel. The Union asserts that Grievant, over a twenty-two (22) year employee was never disciplined or counseled for a drug-related matter and Grievant's termination has caused him significant stress, financial harm and prevented his continued service with the Town. The Union also argues Grievant was not given sufficient time and training necessary to fully achieve sobriety and enforce the sustainable cessation of a highly addictive drug.

The Union does not question the Town's right to establish and enforce drug policies related to workplace drug use but rather claims it is the enforcement of such a harsh penalty on an employee who needs further support and assistance. The Union points to Grievant's testimony that he has stopped the use of illegal drugs, reached out to family members for support and has his life back on track.

The Union contends the CBA supersedes Town Policy regarding mandatory termination on a re-test. The Town's Drug and Alcohol Testing Policy (Jt. Ex. 8), according to the Union, should be superseded by the CBA which does not require mandatory termination due to a positive re-test for drugs. The Town should have followed the CBA which, according to the Union, provides for a transfer to another position pending the reinstatement of Grievant's CDL.

The Union concludes its argument by urging that the Town has imposed a harsh penalty on a twenty-two (22) year employee with no prior related conduct. The Town, according to the Union, had other options, i.e. by continuing Grievant's employment in a position that does not require a CDL until that license is reinstated and then place Grievant back in his original Maintainer III position.

TOWN POSITION

The Town argues that the Panel needs to find whether it had just cause to terminate Grievant by a preponderance of the evidence. The Town asserts that Grievant's conduct in violating the clear terms of the Town's policy by testing positive for cocaine twice, warrants termination and the Panel cannot substitute its judgment for the decision of management. The Town contends Grievant has not presented the Panel with sufficient evidence establishing that the Town's decision should be reversed in favor of the Panel's decision.

The Town argues that there is no factual dispute in this case in that Grievant failed the random drug test on October 3, 2023 and again on October 30, 2023 (Jt. Ex. 3 and 6). The Town also points to the Grievant's admission that he was using cocaine during this time period (Tr. P. 45, Grievant Testimony).

The Town maintains the Town's Policy is clear when a random drug test yields a positive result a suspension is required until the employee undergoes a SAP evaluation and passes a Return To Duty Drug Test (Jt. Ex. 8, pg. 81). The Policy, according to the Town, also provides that a positive Return to Duty Drug Test will be grounds for immediate termination (emphasis added). The

Town argues it followed its Policy without bias when it terminated Grievant's employment. Any return to work for Grievant would be contrary to Federal Regulations and the Town is required to comply with the Drug and Alcohol Testing Requirements of 49 C.F.R, Part 382. Moreover, the Town contends that at the time of Grievant's termination he did not possess the required CDL that allowed the performance of his safety sensitive duties. The CDL was not reinstated at the time of the hearing before the Panel.

RELEVANT CONTRACT PROVISIONS

ARTICLE XI-DISCIPLINARY ACTION

Section 11.0

- a. Disciplinary action shall be for just cause and shall be applied in a fair manner and shall be consistent with the infraction for which the disciplinary action is applied.
- b. The following types of disciplinary action that may be invoked against members of the Union. They may be independently invoked:
 1. Verbal Reprimand (documented);
 2. Written Reprimand;
 3. Suspension for a period not to exceed five (5) days;
 4. Dismissal/Discharge.
- c. All disciplinary actions may be proceed as grievances under Article XIII.
- d. Just cause shall include, but shall not be limited to, loss of any license that is necessary to meet the qualifications of the position held by the bargaining unit employee. However, in the event that such a necessary license is suspended for a period up to one year, the Town may choose to:
 - 1) Suspend such employee during the period of license suspension, without pay or benefits; or
 - 2) Terminate the employment of such employee.

ARTICLE XV-MANAGEMENT RIGHTS

Section 15.0 Unless expressly and specifically limited, modified, abridged or relinquished by a specific provision of this Agreement, the rights, powers and authority to manage the operations of the Town, whether exercised or not, shall remain solely and exclusively vested by the Town. More specifically, the Town shall have the sole and unquestioned right, responsibility and prerogative of management of the affairs of the Town and the direction of the working forces, including but not limited to the following:

- a) To determine the methods and levels of care, maintenance and operation of equipment used for and on behalf of the purposes of the Town;
- b) To establish or continue policies, practices and procedures for the conduct of Town business, including personnel policies, and from time to time, to change or abolish such policies, practices or procedures;
- c) To maintain the efficiency of governmental operations and services and to set the standards of services to be offered by Town Employees;
- d) To establish new or improved methods, procedures, practices, technologies or facilities which the Town may deem to be in its best interest and/or advisable for efficiency of operations and to modify any job description to accommodate such new or improved methods, procedures, practices, technologies or facilities;
- e) To determine the standards of selection for employment, and to determine the number and types of employees required or desired to perform the Town's operations;
- f) To employ, direct, schedule, assign, appoint, discipline, transfer, promote or demote employees, lay off, terminate, or otherwise relieve employees from duty for lack of work, lack of funds or other legitimate reason in the best interest of the Town;
- g) To establish, amend, abolish and enforce reasonable rules and regulations for the maintenance of discipline and for the performance of work in accordance with Town requirements;
- h) To determine the content of job descriptions and/or classifications and to revise same as deemed necessary and to ensure that incidental duties connected with Town operations, whether enumerated in job descriptions or not, shall be performed by employees;
- i) To fulfill all of the Town's legal responsibilities;
- j) To determine work schedules of employees.

DISCUSSION

The Panel needs to determine whether the Town had just cause to terminate Grievant (Agreed to Issue, Jt. Ex. A). As stated by the Union, “The general facts of the case are mutually agreed to by the parties, and not in dispute. Neither the Town nor the Union could provide comparative cases as each party was unaware of any similar occurrence (Union Brief, pg. 3-4). Accordingly, Grievant was a twenty-two (22) year employee of the Town and at the time of his termination held the position of Maintainer III in the Parks Department. Grievant, pursuant to Town Policy was subject to random drug testing. Additionally, Federal Law mandates that individuals who operate a commercial vehicle are subject to random testing. Grievant was selected for a random drug test on October 3, 2023 that came back positive for an illegal controlled substance, i.e. cocaine. After Grievant requested the sample be re-tested the result was a second positive test for cocaine. Grievant was evaluated by SAP, he completed the recommended treatment and was cleared to take a Return to Duty Drug Test in order to return to work as a Maintainer III. The re-test also came back positive for cocaine on October 30, 2023.

Grievant’s discipline of termination is the most serious of discipline that can be issued by the Town (Jt. Ex. 1, Section 11.0.b(4)). While the discipline is severe, the offense that led to the discipline was significant. Federal Policy prohibits governmental employees from using or ingesting prohibited drugs at any time (Jt. Ex. 8). Town Policy follows Federal Law and requires the second positive result for cocaine results in immediate termination.

Grievant not only failed his October 3rd random drug test but also failed his Return to Duty October 30th test. In both cases Grievant tested positive for cocaine. It is admitted that during the relevant period (October 3rd to October 30th) Grievant was using cocaine. His own testimony before the Panel was:

Question: Okay. So you had two positives. You had the first positive and the second positive.

Grievant: Yes.

Question: So you were using cocaine in that same period?

Grievant: Yes (Grievant testimony, Tr. Pg. 48)

The Panel cannot ignore the Town's clear Policy that a positive result of the Return To Duty Drug Test will result in immediate termination (Jt. Ex. 8, pg. 81). Grievant was well aware of the Town's Drug Policy as he underwent multiple random tests and he was required to hold a CDL that was revoked upon his positive test results. Grievant was an operator of dangerous equipment as required of a Maintainer III and the Panel cannot reverse the Town's discipline and return Grievant to a safety sensitive public workers operator position. The Town acted appropriately and with just cause when Grievant was not returned to a safety sensitive position upon testing positive for cocaine for a second time; including a Return To Duty Test. The Panel if it saw fit to return Grievant to work would offend the spirit of Town Policy, Federal Law, safety of the community and the clear prohibition against the illegal use of drugs by employees who operate heavy commercial vehicles. The Panel notes that in spite of Grievant's testimony that he

expected the return of his CDL, the reality is that Grievant did not have the license at the time of the hearing (Tr. Pg. 58).

The Union's argument that the CBA supersedes Town Policy regarding mandatory termination on a re-test is unpersuasive. The Panel does not agree with the Union's argument that the Town could have assessed the situation and enforced a different or altogether more reasonable penalty against Grievant. The Town followed its own Policy and Federal Law and indeed had just cause to terminate Grievant.

After a review of the documentary and testimonial evidence, and by a preponderance of the evidence, the Town had just cause to terminate Grievant.

DECISION

The grievance is denied.

/s/ Gerald T. Weiner
Gerald T. Weiner
Public Arbitrator and Chairperson

/s/ Michael C. Culhane, Sr.
Michael C. Culhane, Sr.
Management Arbitrator

/s/ Peter S. Carozza
Peter S. Carozza
Labor Arbitrator
(Dissenting)