

A well cited arbitration case

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BEFORE

DR. DANIEL F. JENNINGS

IMPARTIAL ARBITRATOR

In the Matter of Arbitration between)	FMCS 01-16221
)	
City of Oklahoma City, Oklahoma)	Chavez Smith—Discharge for Failing
)	Random Drug Test
and)	
)	
American Federation of State,)	
County and Municipal Employees)	
Local 2406)	
)	

OPINION AND AWARD OF THE ARBITRATOR

January 17, 2002

ARBITRATION AWARD

In the Matter of:

City of Oklahoma City, Oklahoma

and

American Federation of State, County and Municipal Employees
Local 2406

FOR THE CITY:

Amy G. Douglas, Esq.
Assistant Municipal Counselor

FOR THE UNION:

Larry W. Gooch
Business Agent

IMPARTIAL ARBITRATOR:

Dr. Daniel F. Jennings
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MS# 3367
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By the terms of the agreement between the City of Oklahoma City, Oklahoma, hereinafter referred to as the "City," and the American Federation of State, County and Municipal Employees, Local Number 2406, hereinafter referred to as the "Union," Dr. Daniel F. Jennings, Texas A&M University, College Station, Texas, was selected by the parties to serve as impartial arbitrator. A hearing was held in the Second Floor Conference Room at the City's Municipal Office Building at 200 North Walker Avenue in Oklahoma City, Oklahoma on November 14, 2001. Full opportunity was afforded the parties for the introduction of evidence, examination and cross-examination of witnesses, and oral arguments. Post-hearing briefs were filed. These proceedings were declared closed on January 8, 2002.

ISSUE

Was Grievant Chavez Smith discharged for just cause? If not, what is the appropriate remedy?

PROVISIONS OF THE LABOR AGREEMENT

Article 4—Management Rights And Responsibilities

4.1 The Union recognizes the prerogative of the City to operate and manage its affairs in all respects in accordance with its responsibilities, and the powers or authority which the City has not officially abridged, delegated, granted or modified by this Agreement are retained by the city, and all rights, powers and authority the City had prior to the signing of this agreement are retained by the City and remain exclusively without limitation with the rights of the City.

Article 5—Bargaining Unit Security

5.4 Except as specifically provided in this Agreement, all rights and privileges currently enjoyed by members of AFSCME Union shall remain and be applied as currently applied that are set forth in the City Charter, the City Personnel and departmental rules, regulations, and policies for the City of Oklahoma City. The Employer reserves the right to make changes to the personnel, departmental rules, regulations, and policies and will notify the Union when such changes are made. In the event that the Union believes that such change violates the contract, it shall have the right to file a grievance regarding the change.

Article 7—Mutual Responsibility

7.1 This agreement shall not foster or create, either in the Employer or in the Union, any right, claim, or other adaptation that shall limit their mutual responsibility to undertake concerted actions in assuring equitable and fair treatment of all applicants for employment and employees or Union members covered hereunder in their vocational and career pursuits and aspirations.

Article 8—Contract Grievance Procedure

8.4 (d) With respect to the interpretation, enforcement, or application of the provisions of this Agreement, which do not relate to the statutory and charter authority of the City Council and the City Manager, the decision, findings and recommendation of the arbitrator shall be final and binding on the parties to this Agreement.

Article 9—Discharge and Suspension Cases

9.1 In the event an employee under the jurisdiction of the Union shall be suspended from work for disciplinary reasons or is discharged from his/her employment after the date hereof and he/she believes he/she has been unjustly suspended or discharged, such suspension or discharge shall constitute a case arising under the grievance procedure, provided a written grievance with respect thereto is presented to the head of

the department in which the employee was working within seven (7) regularly scheduled work days after the employee receives written notification of such discharge or suspension. Each grievance must include the facts regarding the suspension or discharge, including who is affected, when the event leading to how the grievance happened, where it happened, which Article and Section of the Collective Bargaining Agreement has been violated, and the employee's requested resolution to the grievance.

9.1 In the event it should be decided under the grievance procedure that the employee was unjustly suspended or discharged, the employer shall reinstate such employee and pay full compensation, partial or no compensation as may be decided under the grievance procedure, which compensation, if any, shall be at the employer's regular rate of pay at the time of such discharge or the start of such suspension. It is understood that the provisions of this section of the Agreement are procedural in nature for the purpose of supplying maximum flexibility to settle discipline and suspended cases prior to arbitration.

Article 15—Employee Assistance Program

15.1 The City of Oklahoma City considers alcohol and drug abuse to be a treatable illness and a serious problem which will affect an employee's ability to perform his/her assigned duties and the City's ability to provide service to the citizens. Therefore, the Mayor and City Council have ratified a Drug Policy.

15.2 The City will offer employees an opportunity to participate in an Employee Assistance Program as described in the Drug Policy.

Article 16—Disciplinary Action

The City of Oklahoma City shall not take disciplinary action against an employee who tests positive for drugs or alcohol unless the test results are confirmed by a second test performed on the same sample, using one of the methods prescribed by the Oklahoma Standards for Workplace Drug and Alcohol Testing Act.

- c. If an employee tests positive for drugs or alcohol, said employee may be subject to suspension, demotion, or termination following a pre-determination hearing. In addition to the alleged offenses, the appropriate course of action shall be determined based on the employee's total work record, including but limited to, any prior drug or alcohol problems.

Addendum E—Drug and Alcohol Testing Policy

1. Policy Statement

It is the policy of the City of Oklahoma City that the use, abuse, or dependency on illegal drugs, alcohol, and/or controlled substances represent a threat to personal and public safety and property and is in contradiction with Oklahoma

City's organizational values which require accountability to the citizens of Oklahoma City.

The City of Oklahoma City considers employees to be its most valuable resource. In this regard, the City is concerned about the health, safety, well-being and satisfactory work performance of all employees. Safety is a paramount concern of the City and employees under the influence of drugs and alcohol constitute a serious risk to the public, to other employees, and to themselves.

The City cannot tolerate the abuse of controlled substances or the use, possession, sale, distribution or having employees under the influence of illegal chemical substances and/or alcohol at their work site or any time they are on duty. The City of Oklahoma City will administer a program to educate employees regarding the hazards of substance abuse and to eliminate such abuse.

Any employee found using, possessing, selling, distributing or under the influence of an illegal chemical substance, and/or alcohol during working hours or on City property, including buildings, parking lots, and vehicles, will be subject to appropriate disciplinary action, up to and including termination.

2. Authority

This policy is in accordance with OKLA. STAT. Tit. 40, X551, et.seq.: The Oklahoma Standards for Workplace Drug and Alcohol Testing Act, 49 U.S.C. Sections 2717 and 1434 of the Federal Statutes and the Department of Transportation (DOT) rules and regulations found at 40 CFR Part 121 and 40 CFR Parts 391, and 392 and any amendments thereto. Drug or alcohol testing required by and conducted pursuant to federal law or regulation shall be exempt from the provisions of the Standards for Workplace Drug and Alcohol Testing Act.

3. Scope of Application

This policy shall apply to all regular full-time employees, except those exempted by a collective bargaining agreement, as well as part-time and temporary employees of the City of Oklahoma City, and applicants who have received a conditional offer or employment with the City of Oklahoma City. Certain provisions of this policy will apply specifically to employees who are under the Department of Transportation's commercial motor vehicle driver regulations and are directed at those employees who are required to possess an Oklahoma Commercial Driver's License type A, B, or C.

6. Education

The City of Oklahoma City has an Employee Assistance Program (EAP) available to its employees...

Employees who participate in the EAP, or are required to participate as a condition of continued employment, will be referred on a confidential basis. Participation in an assistance program may be covered by the employee's health insurance plan. However, any costs associated with the employee's participation

in an assistance/rehabilitation program which are not covered by the employee's insurance plan will be borne by the employee. Accrued leave may be used during the time an employee is participating in an in-patient treatment program. Leave without pay may be granted for those employees who have insufficient accumulated leave to complete the program.

7. Definitions

Controlled Substances-shall be defined as those substances whose dissemination is controlled by regulation or statute (Oklahoma State Law, title 63 and/or Section 202. Schedules I through V of the Federal Controlled Substance Act), including but not limited to, narcotics, depressants, stimulants, hallucinogens, and cannabis.

Drug-shall be defined as any substance which impairs an employee's ability to perform his/her job or poses a threat to the safety of others. This definition includes over-the-counter drugs and/or drugs which require a prescription or other written approval from a licensed practitioner/physician or dentist for their use.

Drug Testing-shall normally be defined as the collection of a urine specimen by medical personnel and a laboratory analysis of that specimen. The initial drug screen will be a form of immunoassay identification with confirmation testing of any positive results with Gas Chromatography/Mass Spectrometry (GC/MS) or other reliable confirmation testing.

8. Drug/Alcohol Testing

8.3 Random and Scheduled Period Testing

Certain classifications of employees, as delineated in Section 8.3(b) below shall be required to undergo drug and/or alcohol testing on a random selection basis or on a scheduled periodic basis.

b. Random and/or scheduled periodic testing shall include those employees who:

1. Are employed in safety-sensitive positions. Those employees shall include but are not limited to heavy equipment operators and employees in classifications requiring a Commercial Driver's License (CDL) A, B, or C class license.

11. Drug Or Alcohol Testing Methods And Documentation

Collections, storage, transportation and testing procedures shall be conducted in accordance with rules established by the Oklahoma State Board of Health and applicable Federal Statutes and regulations including the following:

- a. Employees must present a picture I.D. (Oklahoma Driver's License or City identification cards, etc.) or be accompanied by an exempt supervisor/manager who can provide identification as the employer

representative to the Medical testing personnel representative prior to testing, as required by NIDA regulations.

16. Disciplinary Action

The City of Oklahoma City shall not take disciplinary action against an employee who tests positive for drugs or alcohol unless the test results are confirmed by a second test performed on the same sample, using one of the methods prescribed by the Oklahoma standards for Workplace Drug and alcohol Testing Act.

- c. If an employee tests positive for drugs or alcohol, said employee may be subject to suspension, demotion, or termination following a pre-determination hearing. In addition to the alleged offenses, the appropriate course of action shall be determined based on the employee's total work record, including but not limited to, any prior drug or alcohol problems.

DEPARTMENT OF TRANSPORTATION—49 CFR PARTS—CONTROLLED SUBSTANCES AND ALCOHOL USE AND TESTING

§382.605. No employer shall permit a driver who has engaged in conduct prohibited by subpart B of this part to perform safety-sensitive functions, including driving a commercial motor vehicle, unless the driver has met the requirements of §382.605.

§382.605 (c) (1). Before a driver returns to duty requiring the performance of a safety-sensitive function after engaging in conduct prohibited in subpart B of this part, the driver shall undergo a return-to-duty alcohol test...and be evaluated by a substance abuse professional to determine that the driver has properly followed any rehabilitation program prescribed under paragraph (b) of this section.

STATEMENT OF FACTS

Grievant Chavez Smith was discharged on May 2, 2001 after testing positive for marijuana metabolites. The Parties have negotiated a Drug and Alcohol Policy that is described as Addendum E in the Collective Bargaining Agreement (CBA) and this policy conforms to 49 CFR of the Department of Transportation federal regulations. Section 8.3 (b) of the CBA provides for the random drug testing of employees who are required to hold a Commercial Driver's License (CDL). The City employed the Grievant, with 19 years of service, as an Equipment Operator I, a position that requires a CDL, in the Street and Drainage Maintenance Division of the Public Works Department.

On April 23, 2001, the Grievant was selected for a random drug test and was transported to the drug testing facility utilized by the City by an exempt supervisor and

was so tested. On April 27, 2001, the medical review officer of the drug testing facility informed the Grievant that he had had tested positive for marijuana metabolites. The medical review officer advised the Grievant that he had the option of having an independent test.¹ The Grievant declined to have the “split sample” so tested and the medical review officer informed the City that the Grievant had tested positive. The Grievant was removed from any safety sensitive functions that he was performing and informed that a predetermination hearing would be held on May 2, 2001. The Grievant attended the meeting but did not provide any information or testimony to refute the test result of April 23, 2001. The City discharged the Grievant on May 2, 2001 and he filed a third step grievance on May 3, 2001. The grievance stated that “contract was violated including Article 4 by the unjust termination of the Grievant” and requested the following remedy: “restore Grievant to his position and make whole in all regards.” The third step grievance was denied by the City on May 4, 2001 and the matter was scheduled for arbitration on November 14, 2001.

POSITION OF THE CITY

As an Equipment Operator I, the Grievant was required to have a CDL. Pursuant to the CBA and by federal law, the Grievant was subject to random drug testing by virtue of the CDL requirement. The City followed the federal guidelines and the Grievant was randomly tested at a drug testing facility that utilized state-of-the-art procedures. The Grievant had an adequate remedy to challenge the validity of the drug test by having the split sample so tested. However, the Grievant made no such request and adamantly refused this right during the instant hearing.

¹ In accordance with federal regulations, the drug testing facility utilized by the City splits the urine sample of an individual who is to be tested into two parts. One part is then tested by the drug testing facility utilized by the City while the other part is retained for a retest. An individual may elect to have this other part or the “split sample” tested by another drug testing facility. The individual is responsible for all expenses involved in testing the split sample.

During the instant hearing the Union attempted to defend the Grievant by trying to casting doubt in several different directions. First, the Union alleges that the random selection of employees to be drug tested is not random. The Grievant testified at the instant hearing that he believes that he was selected because he drove his wife's Mercedes automobile to work on April 23, 2001 and because he, the Grievant, wears gold jewelry. The City maintains that personnel at the testing facility utilized by the City select the City employees to be so tested.² Furthermore, the Union did not offer any evidence, other than hearsay, to support such a contention nor has the Union filed a grievance challenging the random selection process.

Second, during the instant hearing, the Grievant disputed that he had been informed that he had 72 hours to request that his split sample be tested by another certified laboratory. However, Dr. Richard Morgan, medical review officer of the drug testing facility, testified at the instant hearing that he had informed the Grievant of the process involved in testing the split sample.³ Also, the Grievant testified at the instant hearing that he was advised about the 72-hour rule at the predetermination hearing on May 2, 2001.

The third direction in which the Union attempted to move was the argument that the drug testing facility used by the City cannot be trusted to properly conduct drug tests. For example, the Grievant testified at the instant hearing that he was not asked to provide any identification before giving his urine sample. The Grievant testified that he would have never been allowed to give a sample if he had used his driver's license because the name on the license is "Chavez Smith Simon" and the name on the test form was "Chavez Smith." During the instant hearing, the Grievant testified that he freely provided a sample of his urine at the drug testing facility and signed the "Custody and

² The City utilizes St. Anthony's Hospital as its drug and alcohol testing facility.

³ Dr. Morgan testified by telephone as a witness for the City and was cross-examined by the Union.

Control Form” utilized by the facility. The City argues that if the Grievant had a problem with the collection methods employed at the drug testing facility, then he should have refused to sign the “Custody and Control Form.” Also, the City notes that the driver’s license bearing the name Chavez Smith Simon was issued in August 2001, nearly five months after the drug test in question.

Finally, the Grievant testified at the instant hearing that he went to another drug testing facility on April 27, 2001—four days after the city’s random drug test of April 23, 2001—and that this second test was negative for marijuana metabolites. The Union did not present any evidence at the instant hearing pertaining to the second drug testing facility. For example, what procedures were used to collect the urine sample? Was the second facility NIDA certified as is the drug testing facility used by the City? Dr. Morgan testified at the instant hearing that a negative test on April 27, 2001 for marijuana does not negate the validity of a positive test for marijuana on April 23, 2001 because the test results are dependent upon when the Grievant used marijuana and with what frequency. The City maintains that the appropriate remedy provided by federal law to dispute a positive drug test is to request the independent testing of the split sample.⁴ The City contends that the Grievant knowingly chose not to avail himself of that right.

An important question in a discipline case is the appropriateness of the discipline. The City maintains that an arbitrator should not second-guess management in matters of employee discipline unless the employer has violated some specific provision of the CBA or abused its discretion. The following provides further elaboration regarding the role of arbitrators in matters of employee discipline.⁵

An arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may, of course look for guidance from many sources, yet his award is legitimate only so

⁴ See 49 CFR §40.25.

⁵ *Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960).

long as it draws its essence from the collective bargaining agreement.

Also, Arbitrator Whitley McCoy has ruled that the determination of the penalty for misconduct is properly a function of management and that an arbitrator should hesitate to substitute his own judgment and discretion for that of management. Following is Arbitrator McCoy's ruling:⁶

Where an employee has violated a rule or engaged in conduct meriting disciplinary action, it is primarily the function of management to decide upon the proper remedy. If management acts in good faith upon a fair investigation and fixes a penalty not inconsistent with that imposed in other like cases, an arbitrator should not disturb it. The mere fact that management has imposed a somewhat different penalty or somewhat more severe penalty than the arbitrator would have, if he had the decision to make originally, is no justification for changing it. The minds of equally reasonable men differ...the only circumstances under which a penalty imposed by management can rightfully be set aside by an arbitrator are those where discrimination, unfairness, or capricious and arbitrary action are proved – in other words, where there has been an abuse of discretion.

The City maintains that it cannot tolerate the abuse of controlled substances or the use, possession, sale, distribution, or having employees under the influence of illegal chemical substances that represents a threat to personal and public safety and property and is in contradiction with the City's organizational values which require accountability to its citizens.⁷ Drug use has the very real potential of causing destructive behaviors and attitudes in the workplace and when it affects the ability of someone to operate a commercial vehicle on public roads, it can be hazardous to both the public and to the City's employees. For the preceding reasons, the City has treated positions requiring CDLs as safety sensitive and considers that testing positive on a drug test by an employee with a CDL is a most serious disciplinary infraction. In essence, the City contends that where the potential for harm is the greatest, so is the discipline imposed.

⁶ *Stockholm Pipefittings Co.*, 1 LA 160.

⁷ Addendum E, pg 40 of the CBA.

The CBA provides that discipline for a positive drug test can be suspension, demotion, or termination, and the decision on which penalty to apply shall be based on the total work record.⁸ The City contends that it is extremely important to keep in mind that the CBA and in particular Article 16, Section C applies to all Union employees of which those employees with CDLs are only a subset. A part of the “total work record” includes in the City’s opinion, whether or not the employee possesses a CDL. Thus, those employees who are not in a safety sensitive position and who are not within the purview of federal laws on drug use violations may be demoted or suspended because such violations may not create the potential for as much harm as an employee with a CDL. A positive drug test from an employee with a CDL is considered an extremely serious rule infraction that is appropriate for summary discharge.

The City maintains that the Grievant knew about the rules regarding the use of drugs and was aware of the consequences of testing positive on a drug test. During the instant hearing, the City produced a document entitled “Drug and Alcohol Testing Policy: Employee Training” which was signed by the Grievant on February 10, 1999. Also, during the instant hearing, Mr. Brian McKeever, Management Coordinator of the City’s Random Drug and Alcohol Testing Program for City Employees with CDLs, testified that during training programs regarding alcohol and drug testing—employees are informed that a positive drug test will result in termination for all employees with CDLs. There is no doubt that the City required the Grievant to have a CDL. The Grievant was subject to random drug tests and would be terminated if he tested positively. The City also notes that even if the Grievant had forgotten the training he received in 1999 regarding drug testing, he was well aware of his brother’s termination from City employment just months prior to his (the Grievant) own termination. The Grievant’s brother, also a CDL holder, tested positive for marijuana during a random drug test and was so terminated.

⁸ Article 16, Section C of the CBA.

The City maintains that the Grievant was not treated any differently than other employees. In October 1998, the City implemented federal random drug testing procedures for employees operating commercial vehicles and performing safety sensitive functions. The City's Personnel Department has consistently advised that any commercial driver-testing positive should be terminated due to the greater potential for harm. The City has budgeted positions for each job and only has so many non-driving positions within the Grievant's division. Mr. Lonnie Fuller, Assistant Superintendent of the Street Division of the Public Works Department, testified during the instant hearing, that there were no non-driving jobs available at the time the Grievant was terminated. Thus, even if the policy of termination for a positive drug test for employees with CDLs, had not been mandatory, the Grievant would not have been a candidate for demotion because there were no non-driving positions available. However, in the instant case, suspension was not an option due to federal law which requires removal from the safety sensitive function.⁹

In summary, the Grievant was required to have a CDL and tested positively in a random drug test. The testing procedures were followed and the positive test results were not properly challenged. The City argues that discharge is the appropriate penalty in the instant case. The City also contends that if a lesser penalty, such as demotion, were appropriate, it was not available in the instant case because no non-driving jobs were available. The grievance should be denied.

POSITION OF THE UNION

The Union maintains that the City has a high burden of proof in the instant case that involves an accusation of an illegal act and the industrial death penalty for a 19-year employee with an exemplary work record. This accusation does not come about as a result of any work conduct or any observation except that the Grievant is black, wears

⁹ 49 CFR §382.501.

jewelry, and drives a nice car. As such, the Union contends that the City has failed to meet its burden of proof because of the lack of credibility of the drug testing procedures and its witnesses. The Union also maintains that in disciplining the Grievant, the City failed to apply progressive discipline and did not follow the principles of just cause.

Credibility of the Drug Testing Procedures

The Union argues that the integrity of the City's drug testing program must come into question when one considers that (a) on a random basis, the Grievant, one of 500 employees with a CDL, was tested four times in one and a half years; (b) the Union received reports that some employees were forewarned that they were to be tested—giving them the opportunity to leave work that day and not be tested; (c) the individual from the City's Personnel Department who contacts the Street Department regarding which employees are to be tested is a former long-term employee of the Street Department and knows the employees who are being so selected; (d) employees at the drug testing facility are over-worked with laboratory technicians working as both technicians and as receptionists; and (f) a lack of confidentiality for employees who are being so tested.

Credibility of City's Witnesses

During the instant hearing Mr. Lonnie Fuller testified that employees with CDLs who test positively for drugs must be removed from safety sensitive positions and are terminated. However, on October 19, 2001 in another arbitration hearing, Mr. Fuller testified under oath that previous CDL holders who have tested positively for drugs have been suspended and have maintained their employment with the City.¹⁰ Thus, the Union contends that Mr. Fuller either lied during the instant hearing or he lied during the October 19, 2001 arbitration hearing.

City's Failure to Use Progressive Discipline

¹⁰ The October 19, 2001 arbitration pertained to the discharge of W___.

The Union explains that drug-testing penalties are oddities in the common law of arbitration in that they do not indicate that the employee did anything wrong while at work. During the instant hearing, the City never suggested that the Grievant ever did anything wrong while at work, although the City did charge the Grievant with being under the influence of a controlled substance or reporting to work under such an influence. However, Dr. Morgan testified at the instant hearing that the drug test taken by the Grievant on April 23, 2001 could not deduce these allegations. The Union argues that the significance of this fact is that, unlike alcohol tests, there is no proof through a drug test that the Grievant was impaired or under the influence of a controlled substance while at work. The CBA defines under the influence as a behavior. Certainly, the evidence and testimony presented during the instant hearing does not indicate that the Grievant was ever impaired while at work. The Grievant's supervisors so stated to the Grievant's behavior.

The CBA and the general disciplinary policies of the City require the use of progressive discipline.¹¹ Addendum E, Section 16 (c) makes it clear that termination is not automatic. The range of discipline agreed to by the Parties ranges from suspension to discharge depending on other factors. The language of the CBA states the discipline: "shall be determined based on the employee's total work record, including but not limited to, any prior drug or alcohol problems." The word "shall" makes the terminology mandatory, not optional. Testimony presented during the instant case indicated that the Grievant had been previously tested for drugs with negative results, and he had no on-the-job problems. The Union maintains that the City was unable to point to any evidence that would have disqualified the Grievant from the most favorable disciplinary treatment. Also, the City never offered the Grievant the opportunity to go to EAP as described in the CBA. The Union contends that even if the City meets its burden of proving that the

¹¹ Article 16, Section C and Addendum E, Section C--all of the CBA.

Grievant had ingested or inhaled marijuana prior to the random test of April 23, 2001, the disciplinary penalty should have been the most lenient. The Grievant's good work record as well as the absence of any prior drug or alcohol problems meant that the Grievant should have received a suspension at most. According to the testimony of Mr. Fuller in the October 19, 2001 Wise arbitration, the minimum discipline that the City has meted out for positive drug tests in the past has been suspension.

The City Violated Principles of Just Cause

Arbitrator Daugherty has listed seven tests for just cause. One such test is similar discipline for similar offenses. Thus, if the employer had not disciplined the grievant in a manner similar to others, the discipline is not seen as fair or for just cause. The Union maintains that the evidence presented at the instant hearing was abundant that the City has not disciplined the Grievant in a manner with other discipline rendered to employees with CDLs who have tested positively for drug use. The evidence presented at the instant hearing indicated that forty-eight City employees with CDLs have tested positively from either illegal substances or alcohol from July 22, 1998 through May 29, 2001. Also, from December 1998 through December 1999, seven of the forty-eight employees who tested positive were demoted. Interestingly, four of the seven demotions were employees from the Street Department—the same department in which the Grievant is employed. Mr. McKeever testified at the instant hearing that the reason some City employees were demoted rather than being terminated was a “management foul-up” rather than the application of the CBA in determining discipline. The Union asserts that it is incredible that a City witness can state that these seven demotions do not count when the comparable discipline is assessed. The Union asserts that even more interesting is the fact that an additional six of the disciplinary actions taken by the City from July 22, 1998 through May 29, 2001 were for positive tests taken on a follow-up exam. The Union explains that in order to give a follow-up test, an employee must have already

tested positive once in the past. In other words, there were at least six other positive tests, for which the employees were not fired, for a total of thirteen employees with CDLs who tested positive for drug use but were not terminated. The Union strongly argues that the City cannot escape its duty to bargain or to totally abandon the clear language of Addendum E of the CBA by simply making a verbal announcement that CDL holders will be automatically terminated if they test positive during a ransom drug test.

The Union maintains that the following statement made by Arbitrator Weiss is relevant to the instant case: "An across-the-board policy, which results in discharging...regardless of...the infraction...cannot be tolerated."¹² Also the following statements made by Arbitrator Hays in arbitration similar to the instant case are also appropriate.¹³

Assuming a normal scenario, a relatively long term City employee who is proven to have, for the first time, engaged in this type of actionable misconduct under these or comparable circumstances, should normally be considered for some type of remedial discipline and rehabilitate treatment...

{Grievant's} service record appears comparatively good and is clearly void of any disciplinary history that would have specific relevance to the circumstances involved in this dispute. Such an employment profile, particularly when combined with...{on-duty misconduct} involved in this appeal, does not constitute a compelling reason for by passing other available remedied progressions and summarily concluding that this employee is patently unfit and therefore unsalvageable.

The Union explains that Arbitrator Hays is describing an employee who tested positive following a vehicle mishap and admitted to a "comparatively long history of such covert drug use which clearly smacks of addiction." The Union maintains that the preceding statement does not apply to Grievant Chavez Smith whose work record and past drug tests clearly indicate that Grievant Smith does not have a drug problem. The

¹² *MGM Grand Hotel*, 77-2 ARB 8324.

¹³ March 30, 2000 arbitration involving the discharge of Milton Rockwell who tested positively for drug use following a driving mishap while operating a City vehicle.

Union contends that if the April 23, 2001 drug test taken by the Grievant is deemed to be accurate, then it is obviously an isolated situation and accordingly, the penalty for such an infraction should not be discharge.

In summary, the Union contends that the City has failed to prove that the Grievant was “under the influence or reported to work under the influence” as charged in the City’s discharge letter dated May 2, 2001 and the City’s proof is flawed because of the lack of credibility of both its witnesses and the drug testing procedures. The Union also contends that the City lacked just cause in the discharge of the Grievant because of the failure to follow progressive discipline and for disparate treatment. Thus, for all these reasons, the Union requests that the grievance should be sustained and the Grievant should be made whole.

OPINION OF THE ARBITRATOR

Both parties were well represented during the instant hearing and their post-hearing briefs contained excellent arguments. The City’s position in the case at bar is that the language of the CBA, past practice and federal law pertaining to the misuse of alcohol or the use of controlled substances by drivers of commercial motor vehicles provides that City employees with CDLs may be randomly tested for alcohol and drug use and may be disciplined if they test positive. The City also argues that it has a rule in which employees with CDLs who test positive for alcohol and drug use will be discharged. Further the City maintains that the Grievant, who is required to have a CDL, knew about the rules regarding the use of drugs and was aware of the consequences of testing positive on a drug test. Thus, the Grievant was discharged after he tested positive on a random drug test conducted on April 23, 2001.

The Union’s position is that the Grievant’s discipline is too severe and argues that (1) procedures pertaining to drug testing are not credible, (2) the testimony of a City witness during the instant hearing was not credible, (3) disparate treatment was involved

in the Grievant's discipline, (4) progressive discipline was not used, and (5) the Grievant's 19-year "exemplary" work record was not considered. Following is the reasoning of this Arbitrator with respect to the Union's preceding arguments.

Drug Testing Procedures Are Not Credible

The Union maintains during the instant hearing and in its post-hearing brief that employees are not randomly selected, personnel at the drug test facility are over-worked and make mistakes, and that employee confidentiality is violated. Based on the testimony and evidence produced at the instant hearing, this Arbitrator cannot make a determination whether the City's drug testing procedures are credible or not. Quite frankly, this Neutral chooses not to enter this thicket.

Testimony Of A City Witness Is Not Credible

This Umpire is convinced that a difference exists in the testimony rendered by Mr. Fuller during the instant hearing and his testimony of October 19, 2001. This contradiction indicates that the City has not always discharged employees with CDLs who test positive for drug use.

Disparate Treatment Was Involved In the Grievant's Discipline

The Union introduced Union Exhibit #3 during the instant hearing which was not disputed by the City. Union Exhibit #3 indicated that out of forty-eight City employees with CDLs who tested positive from either illegal substances or alcohol from July 22, 1998 through May 29, 2001, thirteen were suspended rather than being discharged. This Arbitrator cannot determine whether disparate treatment existed because insufficient evidence was presented by the Union at the instant hearing regarding the nature of the suspensions that were meted to the thirteen employees. However, this Arbitrator is convinced that the City has not always discharged employees with CDLs when they test positive from illegal substances or alcohol.

Progressive Discipline Was Not Used

The Union maintains that Article 16C and Addendum E of the CBA state: "If an employee tests positive for drugs or alcohol, said employee may be subject to suspension, demotion, or termination." The Union further argues that the Grievant should be suspended rather than being discharged because he has never been disciplined by the City for any rule infraction nor has he tested positive on prior drug tests. The City's argument is that "a positive drug test from an employee with a CDL is considered to be an extremely serious rule violation that is appropriate for summary discharge." The City cited Steelworkers v. Enterprise Wheel and Car Corp., *supra* and the often quoted opinion of Arbitrator Whitley McCoy in Stockholm Pipefittings, *supra* for instructive purposes in its argument that arbitrators "should hesitate to substitute their own judgment and discretion for that of management." A careful reading of both of the preceding cases indicates that decisions of management may be set aside in situations in which the principles of just cause are violated. Thus, an arbitrator may set aside employee discipline when just cause does not prevail. A ruling by Arbitrator Linda Byars in which she ruled against Kimberly-Clark when it discharged an employee with 26 years of "immaculate" service rather than using a lesser discipline is an excellent example of an arbitrator overturning the disciplining of an employee. According to Arbitrator Byars:¹⁴

Taking the supreme penalty against an employee without due consideration for a long unblemished record goes to the very heart of "just cause"...An employee's awareness of the rule and the penalty associated with it does not justify discharge regardless of the circumstances.

While the infraction in the case at bar does not justify discharge for an employee with 19-years of "exemplary" service, certainly there are offenses that are sufficiently egregious that discharge would be upheld regardless of the employee's history. Furthermore, this Arbitrator is not convinced that the City has sufficiently promulgated its

¹⁴ Kimberly-Clark Corp., 107 LA 554.

rule that employees with CDLs who test positive for alcohol and illegal substances will be summarily discharged. During the instant hearing, the City failed to introduce any evidence that such a rule has been neither communicated in writing to City employees nor posted in any conspicuous place. What we have is the testimony of Mr. McKeever who testified at the instant hearing that such a rule is verbally communicated to employees during certain training sessions. However, the Union produced witnesses that contradicted Mr. McKeever's testimony. City Exhibit #5, a form that employees sign to indicate that they have received training on the effects and detection of substance abuse in the workplace was presented during the instant hearing. This form does not so state that employees with CDLs who test positive for illegal substances and alcohol will be summarily discharged.

The Grievant's 19-Year "Exemplary" Work Record Was Not Considered

During the instant hearing several of the Grievant's supervisors all testified that the Grievant had a very good work record, had never been suspected of being under the influence of alcohol or an illegal substance while working, had never been injured on the job, had a good attendance record, and ranked among the top employees in terms of the quality of his work. These supervisors included Mr. Edward Jones, Superintendent of Streets and Drainage Division;¹⁵ Mr. Randall Moulder, Unit Operations Supervisor of Streets and Drainage; Mr. Terry Hedgecock, Unit Operations Supervisor of Streets and Drainage; Mr. Carnell Skanes, Field Supervisor of Streets and Drainage; and Mr. Charles Westbrook, Field Supervisor of Streets and Drainage. Interestingly, Mr. Fuller also testified that the Grievant had a good work record. Several of the preceding supervisors also testified at the instant hearing that had been "associated" with the Grievant for many years during the Grievant's employment with the City. For example,

¹⁵ Mr. Jones testified at the instant hearing that he reports directly to the Public Works Director. Thus, Mr. Jones is the "number two" individual in the chain of command of a division that employs a large number of people.

Mr. Moulder had a 15-year association with the Grievant, Mr. Hedgecock—19 years, and Mr. Jones—14 years. During the instant hearing, Mr. Jones was asked the following question: “If you were the hiring authority for the City would you hire the Grievant back if he met the criteria for reemployment?” Mr. Jones answered “yes.”

In Kimberly-Clark, *supra*, Arbitrator Byars states:¹⁶

Long service especially when unblemished as in this case, is often given significant weight upon arbitral review. The Arbitrator’s review of published arbitration summaries revealed no case where the discharge of a long-service employee was upheld for possession of a controlled substance. In many of the published cases discharge was found excessive even where the charge was a more egregious one than in this case and where the employee’s history was not nearly so exemplary as the Grievant’s record.

The Elkouris state: “it should be recognized that while arbitrators do not lightly interfere with management’s decision in discharge and discipline matters, this by no means suggests that they fail to act firmly when management’s decisions are found to be unjust or unreasonable under all the circumstances.”¹⁷ Also, Arbitrator Harry Platt stated: “In disciplinary cases generally, therefore, most arbitrators exercise the right to change or modify a penalty if it is found to be improper or too severe, under all the circumstances of the situation. This right is deemed to be inherent in the arbitrator’s power to discipline and in his authority to finally settle and adjust the dispute before him.”¹⁸

In the case at bar, Grievant Chavez Smith had been employed by the City for 19 years and had an excellent work record. Thus, the Grievant has achieved an exceptional work record over a long time period that should be given serious consideration in a

¹⁶ In Kimberly-Clark, *supra*, the grievant, who operated “dangerous” heavy equipment, had a 26-year “immaculate” work record and was discharged because marijuana was found in his lunchbox while he was at work. When the marijuana was so discovered, the grievant was arrested and pleaded guilty to a misdemeanor offense and paid a nominal fine. The CBA in Kimberly-Clark, *supra*, had a provision in which “bringing liquor and/or illegal drugs into the plant was prohibited.” Discipline for such a violation was progressive ranging from a written “caution” to discharge.

¹⁷ Elkouri & Elkouri, *How Arbitration Works* 5th ed., M.M. Volz and E.P. Goggin (Co-Editors). Washington, DC: BNA Books, 1997, p. 911-912.

¹⁸ H.H. Platt, “The Arbitration Process in the Settlement of Labor Disputes,” 31 *J. Am. Jud. Soc’y*: 54-58. 1947.

discipline decision. Accordingly, this Arbitrator is not convinced that discharge is warranted. The decision in the instant case is not an act of clemency by this Neutral but is the direct result of the Grievant having earned a work record that weighs heavily in his favor and is sufficiently mitigating to make his discharge unjustified.

In summary, after a careful review of all the evidence and testimony presented at the instant hearing, the instant grievance is to be sustained. The Grievant is to be reinstated in a non-driving position at the same pay as that of an Equipment Operator I and to remain in that capacity until the requirements of Addendum E, Section 16 are met by the Grievant. The City is directed to create a non-driving position if such a position is not readily available. The Grievant is to be reinstated with the discipline of a two-month suspension rather than discharge. The time period that the Grievant has been off work as a discharged employee from May 2, 2001 (the Grievant's discharge) until January 17, 2002 (this Arbitrator's decision) is approximately 8.5 months which is too severe a penalty. The City is directed to provide back pay to the Grievant at the appropriate pay of Equipment Operator I from June 1, 2001 until the City reinstates him in the non-driving position. All seniority and benefits are to be fully restored as if the Grievant had never been discharged.

AWARD

The instant grievance is sustained. The City is directed to:

1. Reinstatement the Grievant in a non-driving position at the same rate of pay as that of an Equipment Operator I.
2. Create a non-driving position if one is not available.
3. Reduce the discharge to a two-month suspension.
4. Provide back pay to the Grievant from June 1, 2001 until he is reinstated in the non-driving position.
5. Remove all mention of the discharge from the Grievant's personnel files.
6. Restore all seniority and benefits as if the Grievant had never been discharged.

The Grievant is to remain in the non-driving position until he fulfills the requirements of Addendum E, Section 16 of the CBA. This Arbitrator retains jurisdiction of the case at

bar for six months. Any unresolved issues regarding the interpretation or implementation of this Award will be settled by the undersigned upon the written request of both parties.

Daniel F. Jennings
Impartial Arbitrator

January 17, 2002
College Station, Texas