

## **Ables #2**

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

### **I. ISSUE**

This dispute was presented to a three-person System Board of Adjustment on September 20, 1994.

At issue under the collective bargaining agreement and grievance by the union, representing the Employee classified as a utility man, is whether the employer had just cause to discharge the Employee under charges he violated Employer Rules of Conduct on drug abuse by testing positive for amphetamines, on a urine sample collected from the Employee on October 17, 1993.

### **II. FACTS**

Stipulations by the parties include:

- The Employee, classified as a utility employee, was hired on October 31, 1988.
- On October 17, 1993, the Employee volunteered for a drug test, the test was properly evaluated; test results were positive for amphetamines (speed) and methamphetamines.
- The Employee is required to adhere to the Employer's Rules of Conduct and to its Anti-Drug Policy.
- The Employee was terminated on October 29, 1993 for violating the Anti-Drug Policy "and Rule nos. 29 and 30 of the Rules of Conduct."

- Rule 29 concerns using, possessing on-duty, or showing signs of use of intoxicants;
- Rule 30 concerns use or possession of unauthorized drugs.
- The dispute is properly before the System Board of Adjustment.

Associated with these stipulations and included in the arbitration hearing as a joint exhibit is the "Anti-Drug Policy for FAA Covered and Non-FAA Covered Employees".

As pertinent to this dispute, that policy provides for: a drug-free workplace with "zero tolerance" for violations; "Reasonable Cause Testing"; an "Employee Assistance Program" separate from the Anti-Drug Policy; employment being contingent on employee compliance with all provisions of the Anti-Drug Policy; and that an employee violating the Anti-Drug Policy "shall" be terminated.

The Employer has a tough anti-drug policy. A number of arbitration awards included in the record of this proceeding confirms that finding. In each such award, the Employer's position was sustained that it had just cause to discharge the employee for drug violations, attesting therefore to the observation that the employer means what it says in its Anti-Drug Policy that it will terminate an employee who violates that policy.<sup>1</sup>

The union offered no arbitration awards.

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<sup>1</sup> One of those awards is by this arbitrator. The dispute was between the same parties (Grievance No. 90-02669, decided July 17, 1991). The discharge in that case was sustained on persuasive evidence that the employee had taken cocaine in violation of the Anti-Drug Policy. That decision was not "automatic", as noted in the opinion. Supervisors had reported that the employee was a good mechanic. He had not been previously disciplined. Conduct was off the job. There was no court action or publicity. There was at least a question whether the employee taking the drug had done so willfully. And, the employee had entered a certified rehabilitation center, proved himself clean and was endorsed to return to work by both a representative at the rehabilitation center and by the same Employer Medical Review Officer, who had certified the employee as being drug impaired.

Consistent with the thought that discharge should not be automatic for drug abuse is Executive Order No. 12564, issued by President Ronald Reagan, applicable to all federal employees. It calls for a drug-free workplace. Positive findings for illegal drugs mandate discipline up to discharge, but that discipline can be deferred pending the employee entering an agency-prescribed rehabilitation program. Pending discipline is removed if the employee successfully completes the rehabilitation program. Also, many employers in industry continue an employee in employment under a Last Chance Agreement. Thus, Employer's policy of automatic dismissal for any drug abuse may not be shared by arbitrators, in special circumstances.

There is an unusual twist in this case on how the Employer learned that the Employee was on drugs.

The Employee might as well be discharged for doing a dumb thing as for being on drugs.

The story is best told by the Employee.<sup>2</sup> He testified at the arbitration hearing.

After five years as a utility employee, his marital problems reached a peak in August 1993. Thus, he sought help. He contacted what he considered to be the office of the Employee Assistance Program (EAP). The Employee called an 800 telephone number (which had been posted on an Employer bulletin board). The operator, for what turned out to be the U.S. Behavioral Health facility, which was under contract to the Employer, referred the Employee to a counselor. The counselor was Person 1, a marriage and family counselor. He was not employed by Employer. The Employer for which Person 1 works is a contractor to Employer.

Still according to the Employee, the ostensible purpose of the counseling was the Employee's marital problems. At the last of four counseling sessions, however, the counselor asked the Employee -- as he had before -- if the Employee was on drugs. This time, the Employee said yes. The counselor recommended that the Employee take a drug test at an "outside" source and to "bring the results to me".

The Employee did not test at an outside source. He asked to be -- and was -- tested at an Employer medical facility on October 17, 1993, three days after the counselor advised that he do so. At the time, the Employee thought he would test okay. He tried to prove that he did not have any drug problems. He was wrong; he tested positive for methamphetamines. The results were forwarded to the Employer Medical Review Officer.

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<sup>2</sup> The Employee's long-time supervisor testified for the Employee. He had had no problems with the Employee's work. The Employee was a "very good worker". The supervisor had no reasonable suspicion (or cause) to require the Employee to take a drug test.

The Employer terminated the Employee on October 29, 1993 for violating rules 29 and 30 of the Employer's Rules of Conduct.

In further testimony at the arbitration hearing, the Employee explained that at the time he was seeing the marriage counselor; his thinking was dulled by the drugs he was taking. It was not until later that he realized his judgment had been impaired. He had attributed his marriage problems to almost everything other than drugs, but it was the drugs that caused his marital problems.<sup>3</sup>

His decision to go to an Employer facility to take the drug test, and not to an outside facility, was prompted by his desire -- perhaps need -- to save the \$40 for the test -- money he did not have. The Employee may well have believed that the three days before taking the test was sufficient time to clean illegal drugs from his system.

Not being required to test because of an accident or because of suspicious behavior or performance, the Employee "shot himself in the foot" by volunteering to take the test at an Employer facility. As he put it, he committed "termination suicide". He did.

Violation of the Anti-Drug Policy being evident, the union's case in short therefore is a request for leniency in applying discipline. That request is based on: a bad luck positive test result; reports by supervisors that he is a good worker; the fact that the Employee did not work in a designated safety-sensitive job; his candidness and honesty in testimony; and his good efforts and good results in rehabilitation.

Circumstances favorable to the Employee notwithstanding, the Employee clearly violated the established Anti-Drug Policy known to the Employee; that policy is zero tolerance; he was

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<sup>3</sup> In the record is evidence from a representative of a certified addiction counseling center that the Employee had entered a structured treatment program shortly after being terminated and that he "had made many positive lifestyle changes and will continue to do so if he remains active on the prescribed 12-Step program." At the arbitration hearing, the Employee spoke well; looked "clean"; and he did not evade tough questions.

"doing a lot" of drugs, according to him; entering the rehabilitation program probably was prompted by his being terminated from the job, which may have saved his life, which is better than saving his job.

Leniency in these circumstances is a matter for the employer -- not arbitrators.

There is no evidence the Employee violated Rule 29. To the extent the union's grievance protested that charge, the grievance is sustained.

There is persuasive evidence the Employee violated Rule 30. The employer therefore had just cause to discharge the Employee.

### **III. DECISION**

Any grievance as to Rule 29 is sustained.

The grievance as to Rule 30 is denied.