Brodsky #2

VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

Union

-and-

Employer

Issue: Discharge

BACKGROUND

The grievant, Employee 1, has been employed by the Employer for approximately sixteen years as an Equipment Repair Specialist ("ERS") within the Equipment Division. He is a member of the Union.

> On June 27, 2000, Equipment Repair Supervisor Employee 2 told Mr. Employee 1's foreman to have Employee 1 report to Employee 2, as Employee 1 had been selected for random drug testing. When Employee 2 told Employee 1 he would be escorting him to the clinic, Employee 1 refused to go. Employee 2 asked the grievant if he was refusing to be tested and he again replied, "yes, I refuse." When given another direct order in front of Deputy Director Employee 3, Employee 1 again stated that he refused.

Employee 1 was directed to clock out and report the next day for further disciplinary action. On June 28, 2000, Employee 1 was terminated for "refusing to complete drug testing procedures" under the Employees' Manual.

The Union filed the subject grievance on June 28, 2000 protesting Employee 1's discharge as being in violation of, inter alia, the just cause provision of the labor agreement. Union requested that the termination be rescinded, all related paperwork be removed from the

grievant's file, and that he be made whole. The case was processed through the contractual grievance procedure and Arbitrator Deborah M. Brodsky was selected to hear the case. A hearing was held on January 17, 2001. Both parties had the full opportunity to present testimonial and documentary evidence, examine and cross-examine witnesses, and present oral and written argument. Post-hearing briefs were filed by both parties. These briefs were received by the Arbitrator on or before January 23, 2001.

ISSUE

Did the Employer have just cause to terminate the employment of the grievant, Employee 1, effective June 28, 20001 If not, what is the appropriate remedy?

THE EMPLOYER'S POSITION

The Employer maintained that Employee 1's discharge was proper. Supervisor Employee 2 and Deputy Director Employee 3 testified on the Employer's behalf.

The Employer pointed out that it has been drug testing its employees since at least July of 1991. These initial tests were utilized for reasonable suspicion, returns to work, and follow-up drug testing. In 1995, as a result of related federal regulations, the Employer issued an additional policy regarding "Mandatory Drug and Alcohol Testing." This policy provided for random drug and alcohol testing of employees holding commercial drivers' licenses ("CDLs") or classified as "safety sensitive." In pertinent part, the policy states:

> Safety Sensitive:
>
> Employees who are required to possess a CDL or who hold a safety sensitive position related to the safe operation of equipment or vehicles and the dispatch and maintenance of these items. A list of safety-sensitive positions is attached (See Appendix A).

> Who must be Tested?
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> This policy applies to all safety-sensitive employees, when they are on Employer property or when performing any department-related safety-sensitive business. This policy may be activated "at anytime" whereby affected individuals might be required to give a urine or breath alcohol sample to determine if they are in compliance. See Appendix (A).
>
> Performing a safety-sensitive function.” performing a safety-sensitive function" means any period in which an employee is actually performing, ready to perform, or immediately available to perform any safety-sensitive function.

With regard to random testing, the policy states:

> Random - Annually, 50% of the number of employees in the testing pool must be tested for drugs; 25% of the number of employees in testing pool must be tested for alcohol.
>
> > Under the Random Drug! Alcohol Testing Program all employees shall remain in the random selection pool at all times regardless of whether or not they have been previously selected for testing.

The Union and the Employer each offered different versions of this policy. The Arbitrator cites the Employers version but notes that the relevant provisions are essentially the same in each version.

> The purpose of the random testing program is to deter substance and alcohol use and to detect controlled substances and alcohol use for the purpose of removing identified users from the work force in order to insure public safety.

Appendix A of the policy, inter alia, lists the safety sensitive positions. Included in this list is "Equipment Repair Specialist." In addition, the policy states, under "Applicability:"

> All safety-sensitive employees will be subject to urine drug testing and breath alcohol testing. Any employee who refuses to comply with a request for testing shall be terminated. Refusal can include an inability to provide a sufficient urine specimen or breath sample without a valid medical explanation, as well as, verbal declaration, obstructive behavior or physical absence resulting in the inability to conduct the test.

The Employer asserted that Employee 1 has been subject to random drug testing in the past as an ERS. He took one random drug test at some point between 1995 and 1999. In the fall of 1999, his name came up for another random drug test. He went to the clinic that time, but refused to complete all of the required forms, so the clinic did not process his test. As a result of his actions, the Employer terminated Employee 1's employment effective November 5, 1999 for failure to comply with the drug testing policy.

On or about November 12, 1999 the Union and the Employer entered into a memorandum of agreement regarding Employee 1. It stated:

> The Department of Public Services - Equipment Division terminated Employee 1's employment effective November 5, 1999. The parties agree that Employee 1 will return to work on November 15, 1999 subject to the following terms:
>
> 1. Employee 1 must take a drug test through Midwest Clinic before he returns to work.
> 2. The termination will be removed from Employee 1's personnel file.
> 3. The time Employee 1 has been off will be considered an administrative leave.
> 4. Employee 1 will receive full pay and benefits for the time he was off work.
> 5. Employee 1 must comply with all policies and procedures related to random drug testing, i.e. forms must be filled out in their entirety.
> 6. Should the above be violated, Employee 1 will be immediately disciplined.
> 7. This agreement shall not set a precedent.
> 8. The Union cannot refer to this agreement in any matter.

The Employer argued that Employee 1's subject discharge was warranted because the grievant knew of the policy, had been tested in the past and was aware of the consequences for failing to take the test when requested.

The Employer also contended that the subject policy had been in effect for at least five years and has never been adjudged unreasonable. Moreover, the Employer argued that the its position is properly included as a safety sensitive position since employees perform maintenance and prepare vehicles that are driven on public roadways.

In addition, Deputy Director Employee 3 testified that there are approximately 60 ERS employees in Employer service and none, other than the grievant has ever refused random drug testing. The Employer averred that Employee 1 was terminated in accordance with the DPS policy for refusing to take a random drug test.

THE UNION'S POSITION

The Union insisted that the Employer lacked just cause to terminate Employee 1. Employee 1 and Union President testified on behalf of Union.

The Union argued that the Employer's drug policy was put in place over the Union's objection. Union contended that the policy is arbitrary and capricious. The Union suggested that Employee 1 refused the drug test because he was not performing safety sensitive work. Furthermore, Employee 1 is not a driver, nor is her required to possess a CDL. The Union contended that the Employer was merely attempting "to dovetail and expand upon Department of Transportation regulations and include classifications that are not identified as part of the regulations."

The Union also stressed that the Employer failed to immediately send Employee 1 for the test as there was a four day time lag between the time his name came up for testing and when he was actually sent.

The grievant testified that he refused the random drug test because it was a violation of his "constitutional and civil rights."

UNION also pointed out that Employee 1 has considerable length of service and an excellent work record. In addition, the Union cited two cases.

DISCUSSION & FINDINGS

First, the Arbitrator finds it necessary to define the scope of the grievance. The subject grievance protests the June 28, 2000 termination of Employee 1. It is not a policy grievance. The relevant random drug testing policy went into effect in 1995. While the Union admitted that it never supported the policy, no evidence was submitted to the Arbitrator that the policy was ever challenged or struck down through the grievance procedure or through other means.

The Employer's policy clearly includes Employee 1's position as one that is deemed safety sensitive and thus subject to random drug testing. The fact that the grievant may have only been fixing a truck's radio at the time he was called for testing is irrelevant. The policy's definition of performing a safety function includes, "any period in which an employee is actually performing, ready to perform, or immediately available to perform a safety sensitive function." The position of ERS was included as a safety sensitive job because the employees "perform a wide variety of work which may include the repair and maintenance of automotive and heavy equipment, heavy trucks, pumps and compressors and the operation of motor vehicles or other equipment as necessary for the performance of assignments and/or testing purposes." Moreover, the equipment repair ticket for the vehicle he was repairing noted that the shift cable was frozen, in addition to the radio needing repair. The classification of "safety sensitive" is based on the type of work one may be assigned to do per one's job description, regardless of the actual work that one happens to be doing at the time he/she is called for testing.

In the Case cited by the Union, the grievant actually took the alcohol test as requested. Arbitrator Daniel ruled that the Employer (who was not this Employer) had rules and procedures regarding random testing that were confusing and were an insufficient basis for discharge in that particular case (although they were the basis for discipline).

In contrast, Employee 1 was subject to the same random drug testing that he had been subject to twice before. The first time, he apparently complied with the procedure. The second time, his insufficient compliance resulted in his termination. In November of 1999, the Employer agreed to bring Employee 1 back to work subject to certain conditions. The fifth condition stated that "Employee 1 must comply with all policies and procedures related to random drug testing, i.e. forms must be filled out in their entirety." Seven months later, the grievant refused to take a random drug test. This time, he even refused to go to the clinic, and thus, refused to fill out forms associated with the drug test.

The grievant adamantly stated that drug testing was a violation of his civil and constitutional rights. He further told the Arbitrator that he would have refused even if the Employer would have requested him to test on June 23, 2000 instead of June 27, 2000. The delay in the Employer's request is therefore of no relevance in this analysis.

The Employer is a governmental Employer and Employee 1 is subject to the Employer's reasonable rules and regulations. The Employer's drug testing policy is patterned after the Department of Transportation Regulations. It is clear that the grievant's constitutional challenge lacks merit, based on settled law.

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[2] Moreover, the other case cited by UNION involved a probable cause testing situation and is inapplicable to the subject case.

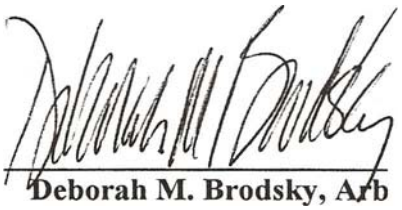
[3] For a detailed discussion (including case citations) of "Constitutional Rights and Drug Testing: Public versus Private Employment," see Elkouri and Elkouri, eds., Resolving Drug Issues, 112-128 (BNA Books, 1993); see also Brand, Norman, ed., Discipline and Discharge in Arbitration, 444-445 (BNA Books, 1998).

The applicable Employer policy clearly states that "an employee who refuses to comply with a request for testing shall be terminated." Although the record shows that Employee 1 was a hard working employee who had no discipline other than the November, and no known drug or alcohol problems, he is still subject to the same rules as all the other employees. An exception can not be made for him.

Employee 1 knew that he was expected to comply with the random drug testing procedure. If he desired to challenge the policy as a whole, or as applied to the ERSs, he could have either done so when the drug testing policy was first promulgated, or he could have attempted to challenge it after his compliance with the Employer's request (obeying first and grieving later, noting that he was complying under protest). His blatant and repeated refusal to go for a random drug test on June 27, 2000 was a clear violation of the Employer's policy. The Employer, therefore, possessed just cause to terminate his employment on June 28, 2000 as a result of his refusal.

AWARD

Based on the above, this grievance is denied.



Deborah M. Brodsky, Arb

Dated: March 19, 2001