MARIO CHIESA
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January 16, 2009

Employer Representative
Employer Representative Firm
Location 1

Union Representative
Location 2

Gentlemen:

RE: Employer and Union
(Grievant/Discharge)

Enclosed please find a copy of the Opinion and Award in the above matter, along with my statement for services rendered which I would appreciate you forwarding to the appropriate individual.

It was a pleasure working with you.

Sincerely,

MARIO CHIESA

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STATEMENT

RE: Employer and Union
(Grievant/Discharge)

Hearing _1 __ day(s) at $ 875.00 per day	$ 875.00
Research, review and drafting of Opinion and Award 2 day (s)	$ 1,750.00
Cancellation Fee (one per diem - cancelled within 14 days of scheduled date)	$
Transportation and Other Expenses	$ 160.10
TOTAL	$ 2,785.10

Due from Employer: ½ $1,392.55

Due from Union: ½ $1,392.55

Submitted by:

MARIO CHIESA

FEDERAL MEDIATION AND CONCILIATION SERVICE

VOLUNTARY LABOR ARBITRATION

IN THE MATTER OF THE ARBITRATION
BETWEEN:

EMPLOYER
(Employer) (Company)

-and-

UNION

(Union)

_____/

Grievant/Discharge

OPINION AND AWARD

APPEARANCES:

ARBITRATOR:	Mario Chiesa
FOR THE EMPLOYER:	Employer Representative Firm By: Employer Representative Location 1
ALSO PRESENT:	Director H.R. Director of Operations
FOR THE UNION:	Union Representative Location 2
ALSO PRESENT:	Grievant Local President Committeeman Steward

THE CASE

The grievance in this matter is dated November 28, 2007. In part it reads as follows:

> "Grievant's Name: Grievant
>
> "Seniority Date: 5/16/88 Shift: first
>
> "Department/Workplace: MH division
>
> "Classification: Material Handling
>
> "Supervisor's Name: Supervisor
>
> "Grievance Handler's Name: Grievance Handler
>
> "Protest and Charge: . . .
>
> "Wrongful termination, a person with 3 years seniority & 5 writeups within that time was given a second chance but not myself & without explanation, punishment to (sic) severe.
>
> "Remedies and Demand: Reinstate employment."

The grievance was filed in response to the termination of the grievant's employment which was conveyed to him by then Director of Human Resources and Labor Relations (HR and LR) via a document dated November 26, 2007. In part that communication reads as follows:

> "Monday, November 19, 2007 you were recalled from being laid off since January 26, 2007. As stated in Employers' substance testing policy, Section 4F. Any employee who has been on layoff for more than 60 calendar days will be required to submit to a return to work test to screen for unacceptable levels of drugs and/or substances.
>
> "The results of your return to work drug/substance test are positive, after complete medical review. As stated in Section 11A of the substance testing policy, if the test results are positive for unacceptable levels of drugs/substances, the individual may be discharged or may be eligible for employment as provided in Section 1IB.

> "It is management's decision to terminate your employment, effective November 26, 2007. Your benefits including your health insurance ends at midnight on November 26, 2007 and your last check will have your remaining weekly insurance contributions deducted and it will be mailed to your home. COBRA Enrollment information will be sent to you within 14 days of your termination. If you have any questions, please contact me at phone number 1."

As noted in the written grievance, the grievant's seniority date is May 16, 1988. At times relevant to this dispute, he was working as a Material Handler on the first shift.

In January of 2007 the Employer initiated layoffs, including reducing the number of Material Handlers by one employee. At that time, even though the grievant had substantial seniority, he was the lowest on the seniority list. The grievant was slated for layoff.

Given his seniority and the skills he had acquired, the grievant could have easily bumped into another classification. If he had done so, he would have maintained his employment and seniority and earned a wage rate which would have been close to what he had been earning as a Material Handler.

By choosing not to bump the grievant was apparently taking a substantial risk. Article XII provides, inter alia, that an employee shall lose his/her seniority if he/she is laid off for more than 24 months or the actual period of his/her seniority, whichever is less. It is noted that the current contract was not the agreement in effect when the grievant was laid off. However, the evidence suggests that the provision referenced above had not changed.

Subsequent to the grievant's layoff, the parties executed a successor Collective Bargaining Agreement with a term of March 19, 2007 through March 4, 2011. It appears that new to that agreement is Section 55 which deals with drug and alcohol testing. It will be more specifically analyzed at a subsequent point, but in a nutshell it created the parameters for the Employer's drug and alcohol testing protocol. A provision in the contract language specified that the parties would meet between the date of the agreement and May 1, 2007 in order to bargain over specific testing policies. If the parties could not reach an agreement by May 1, 2007, the Employer could implement its testing procedure.

As it turned out, and much to their credit, the parties did indeed negotiate and develop what's known as the Employer Substance Testing Policy. It is an extensive document dealing with the various aspects of drug testing, the ramifications for failure to test, for positive tests, etc. The negotiated policy provided, inter alia, that an individual who tested positive or had a second test which was diluted "may be discharged or may be eligible for employment as provided in paragraph lIB." Paragraph lIB of the policy begins with the phrase "If an employee is offered an LCA by the company, "LCA is shorthand for last chance agreement.

The policy had an effective date of May 1, 2007. The Employer indicated that the policy was personally distributed to employees at the facility and mailed to those on layoff or leave. It introduced a document dated May 1, 2007 which was directed to all employees and apparently authored by the then Director of HR and LR. The notice concerned the Substance

Testing Policy and in part reads as follows:

> "A substance testing policy has been developed for the safety and security of all employees, effective May 1, 2007.
>
> "Your supervisor/manager has been formally trained on the policy and how to recognize drugs/substances and alcohol related behaviors. Additional training will be scheduled for employees on the policy and for requested union members on how to recognize drugs/ substances and alcohol related behaviors.
>
> "Please take some time to read the enclosed policy in its entirety and reference the included informational booklet to help with any questions that you may have.
>
> "We strongly feel that the policy will be beneficial to the health and well being of our employees, will bring stability and security to our families, and will provide us all with a safer work environment."

It is noted that at the time the contract was executed and the policy negotiated, the grievant was on layoff. However, on or about the time in question, the grievant was the Union's financial officer. He related that he did attend some union meetings, but couldn't attend the meeting wherein the contract was ratified. He also testified that he never received a copy of the Substance Testing Policy.

An Employer witness suggested that at the November 26, 2007 meeting the grievant was asked by the then Director of Human Resources and Labor Relations whether he had received a mailing and, according to the witness, the grievant responded "you mean that pamphlet and letter?" It is also noted that the grievant stated something like "he didn't know."

Nevertheless, subsequent to both the execution of the contract and the creation of the policy, in November of 2007 the Employer made a decision to recall the grievant on the basis that production was beginning to increase and there were several employees scheduled for vacation. Thus, by a document dated November 15, 2007, the then Director of HR and LR notified the grievant that he was being recalled. Indeed, a portion of the November 15, 2007 document reads as follows:

> "You are being recalled to the classification of Material Handler on Monday, November 19, 2007. We are going to temporarily transfer you to Final Assembler classification on November 19, 2007; your rate of pay will remain the same.
>
> "You are required to take a drug screen prior to coming into work on Monday, November 19, 2007. You can either take the drug screen at Testing Facility prior to Monday, November 19, 2007 or you may go to Testing Facility Monday, November 19, 2007 at your regularly scheduled start time. I have faxed an authorization slip to use when you go for your drug screen at the Testing Facility location. They will give you a time stamped receipt when you have completed your drug screen. **This receipt is required to return to work.** Give the receipt to your supervisor when you arrive at work. If you complete your drug screen prior to Monday, November 19, 2007, please report to work at your regularly scheduled start time.
>
> "If you have any questions or concerns please contact me at phone number 1."

The grievant reported for his drug screen on November 19, 2007. Subsequently on November 26, 2007 the released report shows that the grievant tested positive for marijuana.

The grievant explained that he and four others were preparing

for deer camp and that on November 14, 2007 he smoked marijuana. He related that he didn't have an abuse or drug problem and it was probably a stupid thing to do, but nonetheless, he did smoke marijuana and thus tested positive.

At the November 26, 2007 meeting, which included management as well as union personnel, the grievant was terminated. Hence, the grievance was filed, processed through the grievance procedure and presented to me for resolution.

It should be understood that the foregoing is a mere summary of the record and additional aspects will be displayed and analyzed as necessary.

DISCUSSION AND FINDINGS

There was a full and complete hearing with both parties being afforded every opportunity to present any evidence they thought was necessary. In addition, both filed helpful post-hearing briefs. It should be understood that I have thoroughly and carefully analyzed the entire record even though it would be impossible and probably inappropriate to mention everything contained therein.

Portions of the Collective Bargaining Agreement read as follows:

ARTICLE VI GRIEVANCE AND ARBITRATION PROCEDURE

****

> **"Section 8. Arbitrator's Authority.** The arbitrator's authority shall be limited to the application and interpretation of this Agreement as written. The arbitrator shall at all times be governed completely by the terms of this Agreement and may pass judgment only on the dispute before him. The arbitrator shall have no power or authority to amend, alter or modify this Agreement in any respect. No award of the arbitrator shall be retroactive prior to thirty (30) calendar days before the filing of the grievance."

ARTICLE VIII EMPLOYER'S RIGHTS

"Section 13. Employer's Rights. The Management of the plant; the determination of all matters of management policy and plant operation; limiting the rights to hire, discipline, suspend or discharge, promote, demote, transfer or layoff employees, or to reduce or increase the size of the working force, or to make judgements as to ability and skill, are within the sole prerogatives of the Company; provided, however, that they will not be used in violation of any specific provisions of this agreement .... "

ARTICLE XIII REPRESENTATION

****

"Section 55. Drug and Alcohol Testing. In keeping with the Employer's longstanding commitment to provide each employee with a safe environment in which to work, to protect each employee from the increased hazards associated with the adverse affects of drugs and alcohol in the workplace, the following policy shall apply equally to all employees.

"It is the policy of the Employer that employees shall not be involved in the use, consumption, possession, sale, distribution or transfer of any drugs, narcotics, or alcoholic beverages while on Employer property. For the purposes of this program, drugs are defined to mean any drug which is not legally obtainable, and/or any drug which is legally attainable, such as prescription drugs, but which has not been legally obtained, is not being used for prescribed purposes and/or is not being taken according to prescribed dosages. Neither shall they report to work under the influence of drugs or alcohol in any manner which may impair their ability to safely and efficiently perform assigned job duties or which may otherwise adversely affect the Employer's business or reputation. For purposes of this policy, a prohibited amount of drugs or alcohol means the presence of alcohol or an amount of an illicit drug in an employee that exceeds the threshold levels as defined by the Employer's testing agency. When testing is required under this policy, an employee must submit to a breath, urine or any other similar testing method

agreed to by the parties at an outside testing agency designated by the Employer.

****

"The Employer will have the right to implement the following drug/alcohol tests; pre-placement/post offer testing; reasonable suspicion testing; accident or 'near miss' testing; return to work after a leave of absence testing; and random testing. The Company and the union agree to meet between the effective date of this Agreement and May 1, 2007 in order to bargain over specific testing policies not laid out in this Section. If the parties have not reached agreement on these policies by May 1, 2007, the Employer may implement its testing procedure. The Union, however, may grieve the reasonableness of the policy the Employer has implemented.

"Prior to being required to submit to any testing procedure described in this policy, the employee will be asked to sign a voluntary consent form. An employee's refusal to sign the voluntary consent form or otherwise submit to the drug/alcohol testing described in this policy will be terminated. Employees who test positive for drugs/alcohol under this policy will be disciplined up to and including discharge."

Additionally, the parties have referenced the Employer Substance Testing Policy, portions of which read as follows:

"**4. Types of Testing** - The testing lab must be a lab certified by SAMHSA. A urine drug screen and/or breathalyzer (EBT) alcohol test shall be administered under the following circumstances:

****

F. Return to work testing: Any employee who has been on a Leave of Absence or Layoff for more than 60 calendar days will be required to submit to Return to work testing to screen for unacceptable levels

of drugs and/or substances. Employer's Human Resource Representative will arrange for the testing, at an off-site facility, with the employee upon their return to work.

G. **Return to duty/follow-up testing:** Any employee who has been offered a Last Chance Agreement will be required to submit to return to duty/follow-up testing to screen for unacceptable levels of drugs and/or substances.

****

"11. Consequences of Refusal to Test, Positive Test Results, or 2nd Test Dilute

A. If the test result is positive for drugs/ substance and/or alcohol or 2nd test is dilute, the individual may be discharged or may be eligible for employment as provided in paragraph llB.

B. If an employee is offered an LCA by the company, the employee will be required to:

1) Follow all requirements of the Employee Assistance Center.
2) Follow and complete all terms of the LCA.
3) Submit to random urine testing and/or breathalyzer at an off-site collection facility upon Company request."

The Employer argues that both the Collective Bargaining Agreement, as well as the Substance Abuse Policy, were fully negotiated and represent the parties' mutual intent. It argues that the policy provides that if an employee tests positive, as the grievant did, the employee will either be terminated or offered a last change agreement. There is no other option. It maintains that the negotiated documents establish that the Company has the discretion to decide if an employee who tests

positive will be terminated or offered a last chance agreement. It relates that in this case the Company chose to not offer the grievant a last chance agreement, but to terminate his employment. The Company argues that given the factual scenario, the odds are that the grievant would have lost his seniority had he not been recalled in November of 2007 and that the recall itself was a special exception so that the grievant could continue working for the Company. It argues that it has given the grievant a second chance to maintain his employment and the grievant "blew it" by smoking marijuana just before being recalled to work. It points out that the Union's argument that the grievant was not aware of the drug testing obligation was first raised at the arbitration and never mentioned in the grievance procedure. Nonetheless, the Employer goes on to maintain that it sent copies of the policy to the grievant and all others who were on leave or laid off at the time. Further, it points out that the grievant had more than six and one-half months to get a copy of the contract and the policy. It argues that it would have been especially easy for the grievant since he was an officer of the Union. In the face of the argument that an employee with much less seniority was given a last chance agreement, and thus the grievant should be given same, the Company argues that its decisions are based upon the facts and the circumstances in each situation. It maintains that the only other individual who tested positive for illicit drugs was also terminated. It argues that I should not undermine its ability to utilize the last chance agreement to grant leniency in any individual case. The Company argues that the grievance must be denied.

The Union argues that the grievant was not discharged for

cause. It argues that the grievant was an exemplary employee for almost 20 years who was subjected to a return-to-work condition, unknown to him, as a condition of employment. It argues that he was tested with the test results at the "minimum threshold level." It maintains that the grievant should have been offered a last chance agreement because to do so would be precisely consistent with the reasonableness of discipline. It maintains that the grievant was laid off prior to the development and distribution of the negotiated corporate Substance Testing Policy, and as such he had no knowledge of the drug screening requirement as a new condition of employment upon a return-to-work command. It maintains that even though the Collective Bargaining Agreement was in effect on March 19, 2007, the testing protocol was not in place until the May 1, 2007 policy was published and distributed to all employees. The Union argues that there is no evidence presented or existing which shows that non-active employees, those on layoff or leaves, were ever supplied with the new information regarding any new term or condition of continued employment. It maintains that since that is the case, the last chance agreement is a redemption feature which should have been utilized. It points out that there is no evidence suggesting the grievant is a drug-hardened individual, but in relation to his value of the Company, was an excellent employee who was versed in four or five classifications. It argues that the grievant did nothing more than make a mistake which falls within the boundaries of rehabilitation and redemption. It argues that the grievant should be reinstated, along with his seniority, and returned to the job in which he was discharged. It maintains that it should be found that there was no just cause for discharge.

Before analyzing and discussing the factual scenario in this dispute, it is extremely important that the parties' mutual intent, as outlined in Section 8 of Article VI of the Collective Bargaining Agreement, be recognized. Essentially the terms of the Collective Bargaining Agreement establish what could fairly be characterized as the law between the parties in those areas where the provisions apply. Clear and unambiguous provisions should be interpreted and applied as written, for to do otherwise would ignore the parties' mutual intent.

Section 8 of Article VI makes it abundantly clear that arbitrators, and hence I, do not have some broad, free-flowing authority similar to that of a judge of general jurisdiction. The first sentence in Section 11 makes it absolutely clear that my authority is limited to the application and interpretation of the agreement "as written." The second sentence goes on to mandate that an arbitrator "at all times" must be governed "completely by the terms of this Agreement ... " Further, the language goes on to prohibit arbitrators, and hence me, from altering or modifying the agreement "in any respect."

Thus, if the agreement grants the Employer the ability to do what it did in this case, I cannot, absent very limited exceptions, ignore the contract language and impose my own sense of industrial justice. This must be clearly understood because the parties must recognize that the standard to apply in this case is not what I would have done under these circumstances, for I may very well have granted the grievant a last chance agreement, but whether the Employer's actions violate the agreement as written.

An analysis of this agreement clearly establishes the parties' mutual intent that the Employer has the

right, per Section 55, to initiate drug and alcohol testing in the manner and with the implications that are outlined in the Collective Bargaining Agreement. It is true that the general language in the first sentence of Section 55 indicates that the policy "shall apply equally" to all employees. However, that does not mean that each employee must be treated the same. This will become clear as the language and the resulting Substance Testing Policy, which the parties adopted on May 1, 2007, is analyzed. The last sentence of Section 55 mandates that employees who test positive will be disciplined "up to and including discharge."

Given that the above provisions, and I have previously displayed the pertinent language of Section 55, represents the parties' negotiated contract provision, there can be no argument that the provision is unreasonable or by following the terms of the provision the Employer has acted in violation of the contract. To the contrary, if the Employer's actions are true to the language in the Collective Bargaining Agreement and also, as subsequently will be analyzed by the negotiated Substance Testing Policy, its actions, with very few exceptions, must stand.

Portions of the Employer Substance Testing Policy have been displayed above. The specifics contained in the policy parallel and supplement the provisions of the Collective Bargaining Agreement. As I indicated, since the policy was negotiated and agreed to by the parties, it displays their mutual intent, and if the Employer correctly follows the policy, its actions, by definition, are fair and reasonable.

Paragraph F of Section 4 of the policy requires that any employee who has been on layoff for more than 60 calendar days

will be required to submit to a return-to-work testing.

Paragraph G recognizes that any employee "who has been offered" a last chance agreement will be required to submit to return to duty follow-up testing. Additionally, Section 11 establishes that a positive test result means that the employee "may be discharged" or may be eligible for employment pursuant to a last chance agreement. The language regarding a last chance agreement begins "if an employee is offered a LCA by the company ... " This language persuades me that the Employer decides whether a last chance agreement will be offered. By using the term "by the company," the parties recognized that it is within the Company's discretion to offer a last chance agreement.

Notwithstanding the above, I do agree that in certain circumstances the Employer's failure to offer a last chance agreement may violate both the contract and the provisions in the Substance Testing Policy. This will subsequently be explored.

When the factual scenario is analyzed, it is true that the grievant was on layoff for more than 60 days, was recalled to employment, took a drug test and tested positively for marijuana metabolites. The cutoff level established by the policy is 50 ng/ml for the initial screen and 15 ng/ml for the confirmatory GCMS test. The grievant tested above that level and, in fact, admitted that he had smoked marijuana on November 14. The test was on November 19, so arguably four or five days had passed before the test was administered. I note that Appendix A to the policy suggests, and I recognize it is only a general statement, that marijuana metabolites would clear the system of a non-chronic user in about one to five days, but in a chronic user it

could take up to eight weeks. On November 26, 2007 a meeting was held and the grievant's employment was terminated.

One of the claims raised at the arbitration is that the grievant did not have knowledge of the contract provisions or the Employer Substance Testing Policy. Chronologically it must be remembered that the grievant was laid off in January of 2007, the contract became effective on March 19, 2007, and the negotiated Testing Policy became effective on May 1, 2007.

In analyzing this argument, I note that many arbitrators would take the position that notice to the union is notice to the employees. I am not prepared to agree with that blanket statement, but whether I do or not is really irrelevant.

The question to be decided in relation to notice is whether the grievant knew, or at least should have known, of the contract provision and the subsequent Substance Testing Policy. In response, I find that the evidence supports the conclusion that the grievant knew, or should have known, of the policy.

First of all, while it is not determinative, it is certainly interesting to note that when the grievant received his November 15, 2007 notice to return to work, which clearly required that he submit to a drug screen, he did not file a grievance, protest in any manner, contact the Union or suggest that he did not have knowledge of the requirement. Additionally, while the written grievance challenges the Employer's actions on what could reasonably be characterized as disparate treatment grounds, there is no mention that the grievant didn't have knowledge of the requirement to submit to a drug screen before returning to work pursuant to a recall from layoff.

Furthermore, there is substantial evidence submitted by the Employer establishing, or at the very least strongly suggesting,

that on May 1, 2007 the Substance Testing policy was provided to all employees, including those who were on leave or layoff. While there is reference to at least one other action taken by the Employer in relation to an employee who had returned from layoff and had tested positive on a drug screen, there is no indication in those documents that the employee in question indicated he did not have knowledge of the requirements.

It must also be recognized that the grievant was the Local Union's financial secretary and as such was more involved with Union activities than would be an ordinary member. While he testified that he wasn't present during the ratification and didn't attend all the meetings, it is nonetheless very difficult for me to conclude that something as important to a member's interest as the provisions of the new Collective Bargaining Agreement, or the subsequent Substance Testing Policy, were not explored by the grievant.

Thus, I must conclude that the grievant knew of, or at an absolute minimum, should have known of the provisions of the Collective Bargaining Agreement and the Substance Testing Policy.

This brings us to a very important issue raised by the Union, that is, the claim that the grievant, a 20-year employee, is in essence being discriminated against or being subjected to disparate treatment because an employee with much less seniority, apparently three or so years, who was essentially in the same position as the grievant, was given a last chance agreement and not terminated. While I have previously concluded that the Substance Testing Policy allows the Employer discretion to determine who and who will not be offered a last chance agreement, there are very narrow exceptions. If the Employer's

decision is based on anti-union animus or some type of illegal or inappropriate discriminatory consideration, or if it was purely arbitrary and capricious, then there could very well be a misapplication of the policy and the contract.

However, I cannot find that the Employer acted in any fashion which would nullify its actions in this case. Generally the test I use to determine whether there is disparate treatment is whether people who are essentially the same were treated essentially the same. In this case it is true that the grievant was treated much more harshly than the employee with much less seniority, but the decision made by the Employer did not fall within any of the exceptions I have listed above. One of the distinctions relied upon by the Employer is the fact that the grievant smoked an illicit drug, while the three-year employee took a legal medication, albeit someone else's, to cope with back pain. Whether I would have recognized that distinction is not the point. The question is whether the Employer's decision was arbitrary capricious or unreasonable, violated the law, showed anti-union animus, etc. It wasn't and didn't.

Given the language in the Collective Bargaining Agreement and the Substance Testing Policy, I must conclude that notwithstanding the Union's valiant attempt to preserve the grievant's employment, the Employer's actions did not violate the Collective Bargaining Agreement. It had the contractual authority and the authority granted by the Substance Testing Policy to take the action it did. The Employer has established just cause to terminate the grievant's employment. Thus, given the foregoing, I have no alternative but to conclude that the grievance must be denied.

AWARD

The grievance is denied.

MARIO CHIESA

Dated: January 16, 2009