

Daniel #4

PEER REVIEW AND ARBITRATION PROCEDURE

IN THE MATTER OF THE ARBITRATION BETWEEN:

EMPLOYER,

and

EMPLOYEE

ARBITRATOR: WILLIAM P. DANIEL

FACTS

The grievant, who was hired in May of 1997, was working in the produce department of store 137 on Monday, February 23, 1998 when, in operating a powered pallet jack to transport merchandise from the back room to the sales floor, he ran into the one of the grocery cooler doors causing damage. This occurred at approximately 3:30 a.m. midway through his 11:00 p.m. to 7:00 a.m. shift.

According to the grievant, approximately 10 or 15 minutes later, he saw Person 1, the Night Store Director, told him what had occurred and asked what to do about it. According to the grievant, Person 1 simply shrugged and said nothing. According to Person 1's testimony, he recalled the grievant calling him on the telephone, telling that he had had an accident and hit the door.

Under the Controlled Substances Testing Policy established by the employer, which the grievant acknowledges is applicable to him, in the event of any accident on premises resulting in injury or property damage a person involved is required to take a Post-Accident Drug Screen

(PADS) test regardless of culpability or the amount of damage involved. The grievant testified that Person 1 did not tell him at the time of his report or at any time during his shift that he would be required to take a drug test and Person 1 did not dispute this. According to Person 1, he did not feel he had enough information to determine whether the grievant needed to take such a test. Although the grievant had reported that he bumped the door with a forklift, Person 1 did not recall seeing the door or noting any damage. Person 1 asserted that if he had specific information in regard to damage to the door, he would have written up a report and sent the grievant for the test. On further questioning, he conceded that he knew the grievant was going out of town for two days following his shift that night. In fact, the grievant did leave for City A that night where, on the next two days he engaged in cocaine partying with friends.

Nothing was done in regard to the matter until notification was given to the store director, Person 2, when he arrived at work on Monday, February 23, 1998 at about 8:00 a.m. He was informed that the grievant had punctured a hole in the produce cooler door with an electric pallet jack in the middle of the third shift. Person 2 then determined that the grievant was required to submit to a PADS under the policy. Because the grievant's shift had already ended, Person 2 told his clerical assistant to contact the grievant by telephone and make arrangements for a test appointment.

Clerical Assistant Person 3 made the call to the grievant's home before 9:00 a.m. that morning and when he did not answer, left a message on his answering machine that "he needed to go for a drug screen as soon as possible". However, no one in the store office, which is open 8:00 a.m. to 5:00 p.m., heard anything from the grievant, who had gotten the message, until Thursday morning, February 26, 1998. The grievant came in at his regular shift time on February 25, 1998 and worked until 7:00 a.m. and then went to the office to complete the PADS

paperwork. He was sent for the test that day and tested positive for cocaine. On March 6, 1998, after Person 2 received notice of his failing the test, the grievant was discharged.

CONTROLLED SUBSTANCE TESTING POLICY

PURPOSE:

To promote a safe, healthful and efficient working environment; to safeguard Employer people, guests and vendors; and to protect Employer property, equipment, assets and operations from the damages of person who illegally use controlled substances.

SCOPE:

Applies to all Employer people. In cases involving Employer truck drivers (including applicants for truck driving positions) who are engaged in activities covered by the Controlled Substances Testing Policy for truck drivers (Policy 074), however, that policy will apply in lieu of this policy.

POLICY:

It is Employer, Inc.'s policy to take efforts to provide and maintain a drug-free workplace.

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All applicants for employment and Employer persons must report for testing without delay as soon as they are directed to do so.

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Responsibilities and Procedures

A. Controlled Substances Testing Program

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2. Post-Accident Testing:

(A) Duty to Report an Accident:

Any Employer persons involved in an accident occurring at a Employer location (store, distribution facility, office, etc.) must report the accident as soon as reasonably possible and, at the latest, before leaving that location that day.

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Accidents must be reported to the Employer person's first assistant, the manager-in-charge of the unit where the accident occurred or that unit's director.

Failure to report an accident within the guidelines of this policy will result in discipline up to and including discharge.

(B) Testing Requirements:

All Employer people whose conduct is or may be the cause or a contributing cause of an accident will be subject to post-accident controlled substances testing.

"Accident" means any event or series of related events that results in unintended personal injury or property damage and:

1. occurs at any Employer location (store, distribution facility, office or other real property); or
2. involves Employer equipment, merchandise, vehicle(s) or other assets; or
3. involves one or more Employer persons engaged in conducting Employer business or acting in the course of employment.

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"Property damage" means physical damage to property (real estate, equipment, merchandise, vehicles, etc.) or interference with its use arising from the use of power equipment or motor vehicles. Property includes property owned by Employer, Employer people, vendors or guests; except property damage shall not include to the Employer person's personal vehicle driven on Employer business if the Employer person is not issued a citation in connection with an accident.

3. All testing will be done by urinalysis.
4. Employer persons who are directed to take a drug test pursuant to this policy will be allowed to return to work pending the results of the test, unless the medical provider administering the test or evaluating the person for medical treatment determines that the person is not physically able to return to work.
5. The Human Resources Department will arrange for collection site, laboratory and MRO services. The Human Resources Department also will develop procedures and provide training for administering this policy, including but not limited to: notification of Employer persons to report for testing, . . . The procedures will be reasonably designed to determine accurately whether or not the Employer person undergoing testing has amounts of controlled substances above the designated cut-off levels.

B. Consequences of a Positive Test for Controlled Substances

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1. Employer people who test positive in any probationary/mutual evaluation or post-accident testing will be discharged.
2. Because upon the occurrence of an accident there is a short period of time within which testing procedures may effectively be carried out,

Employer persons may be sent for testing before final decisions as to culpability can be made. Nevertheless, the Employer person must submit to the drug testing.

EMPLOYER PEER REVIEW AND ARBITRATION PROCEDURE
FOR HOURLY TEAM MEMBERS

I General Information

A. Purpose and Philosophy

Employer, Inc.'s philosophy is to treat all team members fairly and with dignity and respect, to encourage open communication and to provide an effective means for team members to bring work-related problems and complaints to the Employer's attention.

While we hope that your employment relationship will be free from problems or conflicts, we recognize that at times problems may arise even in the best work environment. The Employer has adopted this procedure to provide a uniform, systematic and prompt method for team members to resolve all work-related complaints.

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C. Definitions

Work-related complaint includes complaints about problems with fellow team members or team leaders, complaints regarding promotion, demotion, discipline, discrimination or discharge and complaints about the interpretation or application of established Employer policy or procedures.

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A discharge complaint means specifically a complaint that you were discharged from employment without just cause or for reasons which violate applicable public policy or applicable federal, state or local laws.

II. Procedure

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B. Arbitration

Arbitration is a process similar to a court proceeding except that the final decision is made by a neutral arbitrator instead of a judge or jury. At our Employer, you must use arbitration if you want to contest the recommendation of the peer review panel.

Arbitrator's Authority

The arbitrator's authority is limited to deciding discrimination and discharge complaints. In reaching a decision, the arbitrator shall interpret, apply and be bound by an applicable Employer handbooks, rules, policies and procedures and by applicable federal, state or local law. The arbitrator shall have no authority, however, to add to, detract from, change, amend or modify any law, handbook, rule, policy or procedure in any respect. Nor shall the arbitrator have any authority to substitute his or her judgment for the Employer's business judgment.

The arbitrator shall have the authority to hear and rule on pre-hearing disputes and to hold pre-hearing conferences by telephone or in person as the arbitrator deems necessary. The arbitrator shall also have the authority to entertain a motion to dismiss and/or a motion for summary judgment or disposition by any party and shall apply the standards governing such motions under the Federal Rules of Civil Procedure.

Relief

The arbitrator may grant any remedy or relief that a court of competent jurisdiction could grant, subject to the following: (1) the arbitrator shall not award relief greater than that sought by the team member; (2) the arbitrator may not reduce any penalty imposed by the Employer if the arbitrator finds the team member was disciplined or terminated in accordance with Employer policy and not for an unlawful reason; and (3) if the arbitrator awards back pay, the arbitrator shall deduct from the award all lawful setoffs, including but not limited to, the team member's interim earnings, unemployment compensation payments, any other sums paid in lieu of employment during the period after discharge and any amount attributable to the team member's failure to mitigate damages or for periods of unavailability for work.

In cases of discharge from employment, if the arbitrator awards reinstatement, the Employer shall have the option, within fourteen (14) calendar days of receipt of the award, to request that the arbitrator make a monetary award in lieu of reinstatement. If the Employer makes such a request, the arbitrator shall make a monetary award which the Employer, at its discretion, may pay in lieu of reinstatement. The arbitration hearing shall be reopened for additional proofs on this issue if either party so requests.

POSITIONS OF THE PARTIES

Employer: The Employer has a clear and reasonable policy prohibiting such conduct as occurred here and it took reasonable efforts to make the grievant aware of that policy which he acknowledges. The grievant clearly violated the policy. The Employer attempted to send him for a PADS as soon as possible after it determined that the incident met the standard as defined in the policy. Within hours, the Employer tried to contact him off-shift by telephoning his home and left a message very specifically directing him to come in for the test. It is not the Employer's fault that the grievant went out of town for a couple of days or failed to call back and get messages left for him. When finally the grievant did take the test, he tested positive and that is an absolute basis for termination both under the policy and in accordance with the past application of it in every case. Discharge was appropriate in this case.

It cannot be ignored that this employee admitted to using cocaine and reporting to work with cocaine still in his system. This, itself, is a violation of the right of the Employer to promote a safe, healthful and efficient working environment and to protect guests and employees from the dangers of people operating equipment as in this case.

This is a policy and business decision which justifies discharging violators and the arbitrator's authority does not permit him to ignore or modify such policies or to substitute his judgment for the Employer's. If it is found that the grievant was disciplined in accordance with the policy and not for any unlawful reason, then the penalty should be upheld.

Grievant: There is no question but that I did the right thing in reporting the accident within ten minutes and I was willing to take the responsibility for my actions. I expected that that reporting would be appreciated but it was not. Instead, the Employer is trying to use it against me.

Night Store Director Person 1 had every opportunity from the notice until the end of my shift to send me for a PADS but he did not. He knew that I would be away from work for two full days and, nevertheless, did not take action.

I was not under the influence of drugs at the time of the accident though I did indulge during my two days in City A.

Under the policy, notice has to be given at a reasonable time and this was not done. There is no connection between my subsequent positive test and the accident which occurred. Requiring me to take the test at that late date was contrary to the policy and the results should be disregarded altogether. I request that I be reinstated to my job with back pay and benefits.

ISSUE

Was the grievant properly terminated under the policy for testing positive in a drug screening test?

DISCUSSION

The employer is absolutely correct that the arbitrator's authority is limited by the specific terms of the arbitration procedures and that he may not modify or alter specific terms of the policy or to substitute his judgment for that of the employer where fairly and properly exercised.

While the arbitrator is so bound by the terms of the arbitration procedures, so is the employer bound by the specific terms of the drug testing policy. That policy sets up very specific procedures in the event an accident occurs, requiring reporting and submission to testing when that is directed. It is quite clear that the damage to the cooler door by the grievant in the use of mechanized equipment constituted an accident resulting in property damage as defined under the policy. He quite properly and conscientiously reported that event within just minutes of its occurrence to Night Store Director Person 1. There is a bit of difference between the testimony

of these two witnesses as to how it was communicated. The grievant relates that he saw Person 1 in the area, pointed out the damage to the door and told him how it happened which resulted in only a shrug from Person 1. According to Person 1, the grievant called him on the telephone and told him that he had "bumped into the door with the handjack". Person 1 could not remember whether he saw the damage to the door at that time or not. In any case, during the remaining three and a half hours of the grievant's shift, Person 1 apparently did not go to the site to see the damage or to talk to the grievant. According to the grievant, if Person 1 had told him to go for a drug test then or at the end of his shift, he would have done so. There is no reason to assume that the grievant was under the influence of drugs and would test positive if Person 1 had so directed him. There were no outward signs common with drug usage that would have raised any suspicion.

Person 1 knew that the grievant was leaving town for two days after his shift and so must be held to realize that if any PADS testing was going to take place, it would either have to be that morning or very shortly after. Of course, a test several days after such event will probably not show the condition of an employee at the time of the accident. Person 1's failure to recognize this is a serious flaw in the employer's case.

It is difficult to understand exactly when Person 1 did conduct his "investigation" of the damage since the grievant left at 7:00 a.m. and Person 2 received a report of the incident at 8:00 a.m. It would be unreasonable for Person 1 to have waited until after the shift was over to do the investigation and highly unlikely - he had a full three and a half hours to accomplish that. A fair conclusion to be drawn is either that he conducted no investigation at all but simply relayed to Person 2 the report that the grievant had given to him or, as noted, he waited until after the

grievant had left work to become involved in it. In either case, this was a failure to meet his responsibilities.

The grievant did absolutely nothing wrong in leaving town. It was not his responsibility to seek out a PADS. The fact that while in City A, he indulged in cocaine, while reprehensible and illegal, is irrelevant and immaterial as to his condition as existed at the end of his shift on February 23, 1998. However, it does have other significance that will be addressed subsequently.

Person 2's direction to his clerical assistant to call the grievant to come in for drug testing procedures might have solved the problem had contact with the grievant been possible. Apparently, Person 2 and the clerical assistant were unaware that the grievant would be out of town for two days - a fact that Person 1 knew and apparently did not relay. Because the grievant got the telephone message at 6:00 p.m. on February 25, 1998, there really was little he could do about it at the time since the office was closed. To him "as soon as possible" was after his next shift and so he reported to work from 11:00 p.m. until 7:00 a.m. and then went to the office as he had been directed.

The reason that he tested positive in the PADS was that he had used cocaine over several days prior. That positive test in no way proves that he was under the influence of drugs at the time that the accident occurred.

It is important to note that the policy regarding PADS testing is not the exclusive basis under which the employer may require a drug test or take appropriate disciplinary action for a positive result. PADS testing is simply automatic and applied to every employee under the specified conditions even when there is no reason to believe they are under the influence of drugs or even at fault in a particular incident.

Certainly, the employer has the right for cause at any time to require testing if such is based upon fair and reasonable objective factors. There is no specification in the policy that a PADS test has to be required within a certain period of time after an incident or accident. However, as the time lengthens or the employee leaves work, the results of the test to prove the condition at the time of the incident are subject to question. In this case, the failure to require a test while the grievant was still at work was the fault of the supervisor. However, the employer acted in good faith thereafter by leaving a message for the grievant and seeking to have him take the test at his earliest opportunity. Even though it is found that the test results Could not be used to prove the grievant's condition at the time of the accident that does not mean that the positive results of that test are to be disregarded altogether or denied to the employer as a basis for disciplinary action.

This very unique case would have been decided in the grievant's favor had he not returned to work on February 25, 1998. That, combined with the positive test, clearly established that he had worked while under the influence of drugs.

The grievant knew prior to working that shift that he had very recently used cocaine and the message made it clear that he was to report for a drug test. It was his choice to go into work when he might otherwise have reported off work for that shift and waited until after the screening. Even with the positive result, under those circumstances, he could have argued that it did not prove his condition at the time of the accident and that since he had reported for work under the influence of drugs, he could not be discharged.

The information from the test came to the employer through fair and reasonable procedures and though found ultimately to be immaterial as to his condition at the time of the accident, it did constitute information upon which the employer was entitled to act. The facts in

this case, and the subsequent admission of the grievant clearly prove his misconduct and the employer was entitled to take disciplinary action against him.

AWARD

The grievance is denied. Although the employer failed to prove that the grievant was under the influence of drugs at the time of the accident, because of its failure to timely require a PADS test, the drug screen test was not improper. The positive test results could not be used to determine his condition at the time of the accident but did demonstrate clearly that he was under the influence of drugs at the time that he worked a full shift immediately prior to the testing. For working in that condition, he was subject to disciplinary action and termination was appropriate.