

IN ARBITRATION

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In the Matter of the Arbitration Between:
NORTHROP GRUMMAN NEWPORT NEWS

Grievance of

and

Discharge:
Violation of
Article 49, Controlled
Substance/Alcohol Abuse
Yard Regulation No. 5
Grievance No. 59604

**UNITED STEELWORKERS OF AMERICA,
LOCAL NO. 8888**

Before M. David Vaughn, Panel Arbitrator

OPINION AND AWARD

This proceeding takes place pursuant to the expedited arbitration procedures of the Collective Bargaining Agreement (the "Agreement") in effect at relevant times between Northrop Grumman Newport News ("NGNN" or the "Company") and Local No. 8888, United Steelworkers of America ("USW" or the "Union") (the Company and the Union are the "Parties" to the proceeding) to resolve a grievance filed on behalf of _____ ("Grievant"), which protests his May 16, 2008 discharge for alleged violation of Article 49 and Yard Regulation #5. The Parties were unable to resolve the grievances through the steps of the grievance procedure, and the Union invoked arbitration. This proceeding followed.

A hearing was held on June 4, 2009 at which the Union was represented by _____ and _____ and the Company by Labor Relations Representative _____ and _____ of Labor Relations _____. At the outset of the hearing, the Parties stipulated that the matter is properly in arbitration and before me. The Parties were then each afforded opportunity, as provided in the expedited arbitration procedures, to present evidence and argument and to cross-examine witnesses and challenge evidence offered by the other. For the Company testified X36 Production Supervisor _____ and _____ of Laboratory Services _____.

For the Union testified Union Committeeman _____ and _____ (in his capacity as Assistant Committeeman). Grievant was present at the proceeding and also testified. Witnesses were sworn but not sequestered. Joint Exhibits 1-3 ("JX__"), Company Exhibits 1-2 ("CX__") and UX1-2 ("UX__") were offered and received into the record.

The Parties closed orally; and the record of proceeding was complete at the conclusion of the hearing. This Opinion and Award is based on the record, considers the arguments of the Parties and interprets and applies the Agreement.

ISSUES FOR DETERMINATION

The Parties agreed that the issues for determination are:

Did the Company have just and proper cause of the discharge of Grievant for violation of Article 49 and Yard Regulation #5? If not, what shall be the remedy?

FACTUAL BACKGROUND AND FINDINGS

Prior to his discharge, Grievant was employed as a Dry Dock Operator, was assigned to Department X36 and worked at the Repair Shop, Building 213. He had commenced his employment on February 3, 2005. At all times relevant, Grievant was supervised by

. Grievant had been reassigned to several different locations; and he asserts that the Company was out to get him.

On April 28, 2008, Grievant was subjected to a drug test. The sample which he provided was low in specific gravity and in creatinine and was deemed to be dilute and unacceptable. The sample was not tested. Grievant was told he would be retested, although he was not told when.

On May 2, 2008, Production was instructed to take Grievant to the Clinic for his retest. located Grievant outside, away from his work area but close to the pickup truck which was to use to take Grievant to the Clinic. Grievant stated he had been using the restroom. instructed Grievant to get in the truck. Grievant asked why, and when told he was being taken to the Clinic, he either said nothing (testimony) or said he needed to get his personal belongings (Grievant's testimony). Supervisor testified that Grievant grabbed his backpack from inside and ran up to the

second floor, with [redacted] in pursuit with Grievant in his sight. After several requests and a direct order to stop, Grievant did so and returned to the truck. Grievant denied that he fled or that [redacted] had to order him to halt and return him to the truck. There is no disagreement that [redacted] then drove Grievant, who was carrying his backpack, to the Clinic, and that the Supervisor instructed Grievant not to eat or drink.

Upon arrival at the Clinic, [redacted] escorted Grievant to the second floor. [redacted] testified that Grievant broke away and ran down a hall, carrying his backpack, and attempted to enter a closed door, but [redacted] caught up with him. Grievant testified that he was merely going to the restroom, although he had testified that he had just done so at the time [redacted] found him.

Grievant was taken into an office, [redacted] from Labor Relations and a security guard were called and Grievant's backpack searched. Among other items found were five bottles of water and a bottle of a substance called "STAT Royal Flush", which is advertised, in oblique terms, as helping to flush toxins from the body and which can be used to try and beat drug tests. I take note that any fluid will help to dilute any sample given and that vitamin C, an ingredient of STAT Royal Flush, will add color to a urine sample, making it appear denser.

Grievant was tested. His sample was positive for cocaine at a reading of over 15,000 nanograms per milliliter - the "top of the chart" and 22 nanograms per milliliter for tetrahydrocannabinol (marijuana).

Grievant denied that he had attempted to escape or evade the test and denied that the bottles in his backpack were for anything more than remaining hydrated while at work, as he was encouraged to do, and, in the case of the STAT Royal Flush, to treat a stomach condition. He testified that he asked [redacted] and [redacted] for "help" prior to the time that he was tested.

testified that told at the suspension meeting that Grievant had asked for help. According to Grievant and to , made no response in either instance.

The Parties agreed, notwithstanding any limiting language in the Agreement, that the practice at the Yard is that employees who test positive in non-accident situations are afforded the opportunity for rehabilitation, except in situations where the employee refuses to cooperate or attempts to manipulate the testing process.

The Company did not offer Grievant opportunity to enter treatment. Instead, it suspended Grievant pending discharge and did discharge him effective May 16, 2008. It also rejected Union efforts during meetings with the Company to allow him to enter treatment in lieu of discharge. The Union grieved the imposition of the discipline as being without just and proper cause. The Company denied the grievance, and the Union invoked arbitration. This proceeding followed.

POSITIONS OF THE PARTIES

The positions of the Parties were set forth at the hearing. They are summarized as follows:

The Company argues that it proved just and proper cause for the discharge of the Grievant. It asserts that the un rebutted evidence is that Grievant's April 28th sample was diluted and that he was told he would have to return to clinic for retest. NGNN points out that, during this period, Grievant admitted he used drugs and maintains that the May 2nd drug test is conclusive proof that he did so. It contends that Grievant also prepared for the next test by having large quantities of water and a bottle of STAT Royal Flush in order to "beat" the test.

The Company argues that when, four days later, Grievant was taken for that second test, he ran to get his backpack which

contained the liquids and kept running, initially ignoring instructions to stop, and, at the Clinic, fled again. NGNN would have me infer that Grievant was looking for a place to consume the liquids in an effort to beat the test, which was, as indicated, positive for cocaine and marijuana. The Company argues that Grievant was, by his conduct, attempting to manipulate the test results and thereby conceal his drug use. It points out that Grievant had previously been issued a copy of the Agreement and the Yard Regulations and that he had signed a form stating that a lack of cooperation in testing would subject to discharge.

The Company argues that Grievant is a substance abuser, whose presence in the workplace compromised safety. It asserts that the Agreement establishes standards and procedures to deal with drugs, including testing, in which neither party intended to allow employees to be uncooperative in the testing process and still have the opportunity to receive treatment and reinstatement.

The Company argues that Grievant's conduct running away from to the second floor, attempting to eat a sandwich on the way to the Clinic, running away again at the Clinic, claiming the need to use the restroom - twice within 15 minutes - constituted an effort to avoid a valid drug test. It asserts that Grievant's denial that he attempted to flee or that he intended to use the water and/or Royal Flush to dilute his sample is implausible and unconvincing. It asserts that he never claimed not to have run at any time prior to the hearing.

The Company points out that Grievant denied involvement with drugs, but tested positive and, indeed, had been criminally indicted for possession of cocaine. As for the Union's argument that Grievant sought help for his problem and was entitled to the benefit of treatment and rehabilitation, NGNN points out that he only did so after he was "caught".

The Company argues that Grievant was obligated to cooperate in the drug testing and that, having failed to do so, is not entitled

to the benefit of rehabilitation. To rule otherwise would, in the Company's view, send the wrong message. It urges that Grievant's non-cooperation and attempt to influence test results constitutes just and proper cause for his termination. The Company maintains that it met its burden of proof and urges me to find that Grievant was discharged for just and proper cause and deny the grievance.

The Union argues that the Company failed to prove just and proper cause for Grievant's discharge for alleged violation of Article 49 and Rule 5 for evading a drug test. It points out that Grievant did not refuse a drug test, but took the test - twice. USW rejects any claim of fault by Grievant in connection with the first test. It points out that the second sample which he provided was regular and not diluted.

The Union points out that Supervisor alleged that Grievant broke away, but that Grievant denied having done so. It points out that he admitted he was going to go to restroom and that the Supervisor told him to stop, which he did. USW complains that, although it attempted to present witnesses to dispute the Supervisor's version, no one in the Shop was willing to stand against the Supervisors.

As to testimony as to what happened at the Clinic, the Union asserts that was countered by the Union Representative as well as Grievant. It points to testimony that he had no idea what was in Grievant's backpack, although he had suspicions, and that he called and Security on that basis. However, points out the Union, when Grievant testified, he stated that believed there to be a weapon in the bag and had Security look for a weapon, which Security told afterward they did not find. It points out that neither or the security guard disputed that testimony, thereby effectively conceding the statement as true.

In each situation, urges the Company, if Grievant had something to hide, a direct order would not have stopped him. It

asserts that the circumstances point toward Grievant's credibility and against .

The Union points out that both Grievant and testified that they asked for help and asks, rhetorically, that if Grievant were trying to evade the test and conceal his drug involvement, why would he ask for help? It points out that when Security searched Grievant's backpack, it found only water - the use of which Co encourages - and STAT Royal Flush, which Grievant testified he was legitimately using for stomach problems. Moreover, argues USW, if Grievant was seeking to camouflage drug use, he would have taken any cleansing substances earlier so he could work. The Union points out that Grievant went to the party at which he had drug problems, after having been told he would be tested. It asks, again, that if he had been hiding something, he would have taken the liquids before.

The Union points out that the agreed upon practice at the Yard, confirmed by the testimony of , is that employees who test positive for prohibited substances in non-accident situations are afforded an opportunity for rehabilitation. It concedes that there are exceptions for situations where the employee refuses to cooperate and/or attempts to manipulate the process, but asserts that the Company failed to prove Grievant's culpability in this regard. It points to the testimony of both Grievant and as establishing that Grievant did not refuse to cooperate or attempt to manipulate the process.

The Union argues that both YRs 4 and 10 prohibit failure or refusal to comply with Company instructions, as the Union claims Management is asserting, but points out that Grievant was not charged with violation of either of those Rules, despite the allegations of falsification and deception.

The Union argues that the Company failed to prove just and proper cause for Grievant's discharge and urges that the grievance

be sustained, Grievant's discharge rescinded and that he be restored to employment and made whole for wages and benefits lost. The Union argues that Grievant should be allowed to receive the benefit of rehabilitation and to be returned to employment. It concedes that, if the rehab program he underwent during the time he was off the rolls is not accepted; he can repeat the process.

DISCUSSION AND ANALYSIS

It was the burden of the Company to prove just and proper cause for the discharge of the Grievant. For the reasons which follow, I am persuaded that the Company met its burden.

Article 49 of the Agreement and Y.R. 5 prohibit employees from involvement with controlled substances and recognizes that the use of controlled substances on Company property or during work time constitutes just cause for discharge. Article 49 also establishes the Company's right to test employees for drug and alcohol use. Article 6 of the Agreement gives the Company the right to manage the Yard, direct employees and promulgate Yard Regulations and directives. The Union does not challenge the prohibition, the right of the Company to test employees or to require their cooperation in the testing process. Neither does it challenge the validity of Yard Regulation 5.

The Parties have stipulated that the practice at the Yard is that employees who test positive for controlled substances in non-accident situations are afforded an opportunity for rehabilitation, except in situations where the employee refuses to cooperate or attempts to manipulate the testing process.

Grievant came to be drug-tested on May 2, 2008 because the Company concluded that the sample he had provided on April 28, 2008 was dilute. While it is quite possible that the dilution was the result of manipulation of the sample by Grievant, there is no proof that Grievant tampered with the sample, and there are other possible explanations for the low specific gravity and creatinine;

and the Company has not charged Grievant with misconduct in connection with the earlier test. The Company's response to the dilute sample was to subject Grievant to a retest. Grievant's conduct with respect to the first sample is not at issue in this proceeding.

The evidence clearly establishes that Grievant had been using controlled substances and had those drugs in his system at a time when he was in the Yard and in work status. The positive drug test results for cocaine and marijuana from the May 2nd are conclusive proof of that. His conduct clearly violated both Article 49 and Yard Regulation 5 and constitute just and sufficient cause for his discharge.

Grievant's violations notwithstanding, the practice at the Yard is, as indicated, to afford employees who test positive in non accident situations an opportunity for rehabilitation except when they do not cooperate in the testing process or engage in conduct to manipulate test results. Thus, it would appear that an employee who refuses a test, adulterates a sample or absents himself from work so as to avoid a test would not be entitled to undergo rehabilitation and retain his employment. There are obviously other forms of conduct which would subvert, or be intended to subvert, the testing process and Management's authority in connection with that process which might warrant exclusion from any right to rehabilitation in lieu of discharge.

The question at the bottom of this case is whether Grievant's conduct fits into the exceptions to the practice with respect to rehabilitation so as to exclude him from participation. For the reasons which follow, I conclude that his conduct was improper and constituted attempts to subvert the testing process and manipulate the process.

The testimony of Supervisor describes Grievant as fleeing from him twice during the time he was being taken to be tested, first at Building 213, where he ran to the second floor,

carrying his backpack, and again at the Clinic, where he fled down the hall, also carrying his backpack. testimony was credible. Grievant denied fleeing, although it appears that he acknowledged going down the hall at the Clinic to use the restroom, despite having done so just prior to being placed in the truck to drive to the Clinic. I find Grievant's testimony not to be credible, and I conclude that he ran away from Supervisor twice during the time he was taken to be tested. I find his actions to be contrary to the instructions given to him by .

The record does not contain any explanation of why Grievant would have fled, and I find no innocent or valid reason for him to have taken the actions. When there is no explanation, circumstances can be examined to determine a reason. The record contains facts which warrant an inference as to his intention. The inference to be drawn from Grievant's conduct is that he was attempting to manipulate the system so as to conceal his cocaine use.

There are a number of reasons from which this inference derives. First, Grievant was dirty - the test results were "off the chart" - on cocaine. He knew, or should have known, that he was going to test positive. Like virtually all substance abusers, he had incentive to conceal his use of illegal drugs; and he knew he would be subject to discharge if he tested positive. Second,

told him not to eat or drink anything, but Grievant knew that in his backpack were five bottles of water and a bottle of STET Royal Flush. Drinking the water prior to being tested would dilute the sample; drinking the Royal Flush would add color to the sample and - the advertising clearly implies - would tend to flush "toxins" from his system. Grievant's testimony that he was taking the Royal Flush for stomach problems is unsupported by the purposes listed in the advertising for the substance and is not credible. The clear implication of the advertising for STAT Royal Flush is that it will help beat drug tests. If Grievant could get to a place where he could consume the liquid, he could increase his chance of a negative drug test or, at the least, dilute the sample and avoid having it tested.

The proof of Grievant's intention is less than conclusive, and would not likely suffice to prove criminal conduct; but the standard of proof in discipline is a preponderance of the evidence, and I am persuaded that the Company met that burden to show Grievant's improper actions and intent. There is no legitimate reason for Grievant to have fled twice, other than to seek opportunity to drink the liquid without being observed, and there was no other reason for him to have taken his backpack with him when he fled. I conclude that his purpose was an improper attempt to subvert the testing process. To be sure, Grievant was not successful in getting to a place where he could have ingested the liquid, but circumstances establish that to have been his intent and the evidence is that he took actions to carry out his intent.

Both Grievant and testified that Grievant acknowledged his drug problem and asked the Company for help, for the first time while waiting at the Clinic. That request would ordinarily suffice to trigger Grievant's right to access to rehabilitation; it came prior to any positive test result, albeit after he was placed in a situation where he was going to be tested, the sample would not likely be dilute and would - Grievant knew - almost certainly be positive. More importantly, Grievant's acknowledgment and request came after he had attempted to manipulate and undermine the integrity of the testing process. I am not persuaded that Grievant could cure his violations by asking for help after the fact.

Grievant asserted that the Company was "out to get him" and that he had been told that he was being set up to be fired. The Union submitted no proof in support of those allegations. To the contrary, the evidence establishes that Grievant was abusing controlled substances and tested positive while in the Yard and working, in violation of the contract and Yard Rules and then attempted to conceal that fact. Grievant, not the Company, is responsible for his conduct.

Grievant represented that he had undergone treatment for his substance abuse following his termination. He is to be commended for his efforts. However, I am not convinced that Grievant's efforts can be used to negate the Company's proof of just and proper cause for his discharge or the proof that Grievant was improperly attempted to manipulate and undermine the testing program. I conclude that Grievant's conduct negates his right under the applicable practice to rehabilitation. The Award so reflects.

A W A R D

The company proved just and proper cause for the discharge of the Grievant for violation of Article 49 and Yard Regulation #5. Grievant's conduct attempting to manipulate and undermine the testing process negates any entitlement to rehabilitation in lieu of discharge. The grievance is denied.

Issued this 18th day of June, 2009.



M. David Vaughn
Arbitrator

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