IN THE MATTER OF ARBITRATION BETWEEN

IAFF Local 22	*	**AAA Case No.**
	*	
	*	**01-22-0003-5795**
	*	
Union	*	**Firefighter**
	*	**William Judd**
	*	**Discharge**
AND	*	
	*	
City of Philadelphia	*	
	*	
	*	
	*	
Employer	*	

For the Union: Marc Gelman, Esq.

For the Employer: Lindsey Cordes, Deputy City Solicitor
Kristin Bray, Acting City Solicitor
Renee Garcia, Chair, Litigation Group
Nicole S. Morris, Chief Deputy City Solicitor

OPINION AND AWARD

Dates of Hearing: June 28, 2023 and September 20, 2023

Date of Award: January 12, 2024

Arbitrator: Samantha E. Tower, Esq.

BACKGROUND

The City of Philadelphia (City) and the IAFF Local 22 (Union) are parties to a Collective Bargaining Agreement (CBA). Firefighter William Judd (Grievant) worked as a firefighter for the City of Philadelphia Fire Department (Department) from 2016 until the time of his discharge on June 30, 2022. The Notice of Dismissal states in relevant part:

> You are hereby notified that effective Thursday June 30, 2022, you are dismissed from your position with the City of Philadelphia as referred to the above for the following reasons:
>
> **Violation: 4.4.2 ALCOHOL INTOXICATION AND DRUG USE**
> **4.4.8 UNSPECIFIED**
>
> Sections: 2:03 Use of illegal drugs on or off duty, whether or not arrested confirmed by positive test results.
>
> Violation of Federal Regulation 40 CFR Part 40 and Directive 54, 7.2.7
>
> In that FF W. Judd, L08/B, 286438 was selected for random drug testing on 06/01/22. FF Judd submitted two separate urine samples on 06/01/22. The initial specimen was below the required temperature range which mandated a second direct observation specimen. On 06/07/22, the department received confirmation from the [redacted], at Employee Medical Services that the directly observed specimen tested positive for illegal substances and Dr. [redacted] determined that the initial specimen was scientifically proven to be a substituted urine sample.

> As a result of your actions, you have violated the Philadelphia Fire Department Disciplinary Code, and your oath of office thereby rendering yourself unfit to be a Firefighter in the Philadelphia Fire Department. For these reasons, effective **Thursday, June 30, 2022** you are Dismissed from your position at the Philadelphia Fire Department.
> (J5)

The Union filed the instant grievance on July 15, 2022, which states in relevant part:

> **Statement of Specifics of Grievances:**
>
> FF Judd was dismissed on June 30, 2022.
>
> **Statement of circumstances of Grievance giving rise to employees claim:**
>
> FF Judd was subject to a workplace drug test of unclear purpose and irregular protocol. He was dismissed without the opportunity to formally address the department's allegation(s) with union representation. The testing and investigation lack just cause to affect the level & type of discipline administered and is not in keeping with the standards used by the City when considering similar cases in the past.

The parties had a full opportunity to present evidence and question witnesses at the arbitration hearing on June 28, 2023 and September 20, 2023. The record was closed upon receipt of post-hearing briefs on November 30, 2023.

The following provisions from the Drug and Alcohol Policy are relevant:

> Directive 54
>
> 5.1.9 **ANY MEMBER SUBJECT TO A "REFUSAL TO TEST" (AS DEFINED IN FEDERAL REGULATION 49 CFR PART 40) AS MANDATED BY THIS DIRECTIVE WILL BE SUBJECT TO IMMEDIATE DISMISSAL.**
>
> ****
>
> 7.2.7 Any findings by the laboratory outside the "**normal**" ranges as defined by 49 CFR part 40 for creatinine, specific gravity and/or pH that indicate that a specimen is adulterated or substituted as a result of the fact that it contained a substance that is not expected to be present in human urine; a substance that is expected to be present however, is identified at a concentration so high that it is not consistent with human urine; or has physical characteristics which are outside the normal expected range for human urine shall be immediately reported to the Department's SIO and the Medical Review Officer at MEU. The MRO shall review the laboratory findings, communicate with the specimen donor, and offer the member the opportunity to provide a valid acceptable medical explanation for the reported abnormal laboratory findings. **Absent a valid acceptable medical explanation provided by the member for the abnormal laboratory findings, this will constitute an adulterated or substituted specimen and the MRO will render a "Refusal to Test" ruling which is a violation of this Directive and will result in dismissal.** (J6; emphasis in original)

The City uses a third-party drug testing company, Drugscan to conduct its drug testing. [redacted] of

DSI Medical Services [redacted] testified that Drugscan provides weekly random drug testing for the City of Philadelphia's Fire Department with the intention to test 50 percent of the Department over a 12-month period. [redacted] explained in detail about the computer generated process used by Drugscan to randomly select firefighters for drug testing. The results of the drug tests are subsequently confirmed by Fire Department's [redacted].

On June 1, 2022, Grievant, who was normally assigned to Ladder 8, was detailed to the Medic Unit at Engine 66 when he was randomly selected for drug testing.[1] [redacted] testified that each quarter there is a large number of firefighters who are on the possible list for random testing. Grievant was on the list in Zone 3 for June 1, 2022. (C1) The technician conducting the testing for Drugscan on June 1, 2022, conducted the testing in Zone 3, where Grievant usually works, and then went to Engine 66 in Zone 4 where he was detailed. [redacted] explained that when a firefighter is detailed, the Drugscan technician will go to the detail location if it is not too far away. Chief

[1] The Union challenges whether or not Grievant was subject to random or reasonable suspicion testing.

[redacted], who held the rank of Battalion Chief at the time, was present. [redacted] testified that the Drugscan technician secured the area at Engine 66. He said that he did not go to Engine 66 for the purpose of observing Grievant's drug test, rather, he makes rounds to various locations each day and his presence at Engine 66 meant that the Captain in that location did not have to be present for the testing. He explained that if the Captain in that location needed to be present then another Company would have been taken out service which could potentially increase response times.

When Grievant provided the first urine sample, the Drugscan technician deemed it not "in temperature," thus, Grievant was asked to give a second observed urine sample. [redacted] testified that he did not physically observe Grievant providing the sample but he was in the room. [redacted] testified that after the second sample he saw a plastic bottle near Grievant's foot. [redacted] provided a memorandum regarding Grievant's testing and the presence of the empty bottle after the room had been cleaned and secured. (C9)

On June 7, 2022, Grievant's first sample was deemed an adulterated sample by [redacted] because the temperature was too low. Grievant's second sample came back positive for alprazolam and marijuana. Per the policy, after [redacted] deemed the first sample adulterated, it was considered a "refusal to test," which results in dismissal. Additionally, although [redacted] acknowledged that he never attempted to speak to Grievant about the drug tests, at the arbitration hearing he said that the more serious aspect of the second urine sample was that Grievant tested positive for the presence of an illegal substance.

Deputy Chief Gerald Boyle, Special Investigations Officer, scheduled a disciplinary interview with Grievant on June 16, 2022 at 10:00 AM and sent a notice on June 10, 2022 notifying Grievant of the scheduled interview. There is no dispute that Grievant received notification of the disciplinary interview. Nor is there a dispute that Grievant did not attend the interview.

Grievant testified that he was under the influence of drugs and hit rock bottom on June 16, 2022. He further said that he was in no condition to attend the meeting at 10:00 AM and advocate for himself. Rather,

Grievant said [redacted].

[redacted], Supervisor [redacted], testified that he spoke to Deputy Chief Gerald Boyle on June 16, 2022 prior to the start of the interview on the phone and then went to speak with him in-person. [redacted]. [redacted] said that per Boyle's request he then sent a June 16, 2022 memorandum which states in relevant part:

> Chief,
>
> I am reporting that FF William Judd, 298655 Ladder 08/B will not be attending his S.I.O. interview at 10:00 a.m. today as scheduled. [redacted] I will make notification to your office of his availability for rescheduling this meeting. (U2)

[redacted] also sent Boyle a memorandum on July 7, 2022 which states in relevant part:

> Chief,

In response to your request for information regarding FF William Judd and the events which led to his not attending his meeting with you on 6/16/2022….

[redacted]

(U1)

Chief Karl Schujko worked with Boyle in SIO in June 2022 and was scheduled to attend the disciplinary interview on June 16, 2022. When asked why the meeting did not take place on that day, Schujko explained that Union Representative [redacted] was present but he did not know Grievant's location. Schujko testified: [redacted] (Tr. 22)

[redacted]

[redacted] He said that he did not know he had been discharged until he realized he had no money in his bank account. At that time, he called Human Resources and was informed that he had been discharged from his firefighter position.

The issues to be decided as is: Whether the City had just cause to discharge Grievant? And, if not, what shall be the remedy?

CITY POSITION

The City asserts that it had just cause to terminate Grievant for using a substituted urine sample and testing positive for illicit substances. It contends that Grievant knew the relevant work rules and that those work

rules reasonably related to the orderly, efficient, and safe operation of the PFD and the performance expected of firefighters like Grievant. Grievant had notice of the drug and alcohol policies and disciplinary procedures.

The City stresses that Directive 54 explicitly states that the use of adulterated urine results in an automatic dismissal. It points to Boyle's testimony wherein he said that had Grievant only tested positive, he likely would have received a suspension and referral to Employee Assistance Program. Moreover, the City points out that Grievant testified that he was aware of random drug testing and admitted that he used Xanax the day prior when he was not working.

Here, the City contends that it has established that Grievant used an adulterated urine sample on the first sample and then tested positive on the second sample. It asserts that [redacted] and [redacted] confirmed that the first sample was adulterated, out of temperature, and the second sample was positive for illegal drugs. Additionally, [redacted] testified that an empty testing bottle was found by Grievant's feet. According to the City, the only rational conclusion is that the existence of an empty bottle and an

out of temperature sample is that Grievant provided an adulterated first sample.

The City disputes the Union's claim that Grievant had no opportunity or time to review the evidence against him. Grievant testified that he was aware of his disciplinary meeting, yet the Union unilaterally decided to have Grievant skip the mandatory disciplinary interview and send him to inpatient rehabilitation. Moreover, the City contends that Grievant also skipped his second chance opportunity to provide his side of the story at the Step II hearing.

The City also disputes the Union's assertion that the testing on June 1, 2022 was not random and that Deputy Chief [redacted]'s presence violated Section 4.3.1 of Directive 54. It insists that the language in 4.3.1 actually refers to non-routine testing, not the quarterly random drug and alcohol testing required by the Department of Transportation. Moreover, it contends that the evidence establishes that the SIO conducted a thorough, fair, and objective investigation, including giving him the opportunity to explain or otherwise defend his actions.

Given Grievant's actions, [redacted] termination was the appropriate penalty. The Disciplinary Code establishes a penalty of 160 hours suspension to dismissal for 4.4.2 section .03 and Directive 54, Section 7.2.7 establishes that dismissal is the appropriate penalty for an adulterated urine sample. Here, the City asserts that the misconduct has been established and the penalty is appropriate. It stresses that Grievant's continued employment is impossible because Grievant elevated his own self-interest over the safety of his fellow firefighters and the public.

Finally, the City contends that it applied its rules, directives, Disciplinary Code, and penalties fairly and without discrimination. It rejects the Union's claim that the penalty was not administered fairly because the Notice of Intent to Dismiss and Notice of Dismissal were not sent directly to [redacted] where Grievant resided at the time of dismissal. The City challenges the Union's argument because it places an undue burden on the City to seek out employees outside of their registered address with the Department. The City also relies on the Civil Service Regulations which govern the City of

Philadelphia, specifically, Regulation 33.01 which provides that notice:

> "shall be deemed to have been given on the day on which such notice in writing has been deposited in the first class U.S. mail at Philadelphia, Pennsylvania, postage fully prepaid, addressed to the party to be notified at the last address recorded for such party in the files of the Department, Office, Board or Commission giving such notice."

The City asserts that the Union unilaterally decided that Grievant [redacted] rather than attend his disciplinary meeting and it made no attempt to reschedule the meeting in advance. Instead, according to the City, the Union deliberately withheld Grievant's decision [redacted] until 15 minutes before the start of the disciplinary meeting. Thus, by deliberately circumventing protocol, the Union prevented its member from providing an explanation for his use of a substituted urine sample. T

The City also insists that Grievant did not make the Department or the Union aware of his [redacted] concerns prior to June 16th. Additionally, [redacted], it insists that Grievant was terminated for attempting to deceive the

Department by using a substituted urine sample and deception isn't excused [redacted].

The City requests that the grievance be denied.

UNION POSITION

The Union asserts that the City did not have just cause to discipline Grievant. First, it stresses that the City disregarded the procedures and guidelines of Directive 54. The Union contends that Grievant's drug test was not a random test. Specifically, the Union questions whether the Drugscan technician made an independent decision to travel to Grievant for the purpose of his test. It points out that three witnesses -- [redacted], Boyle, and Captain [redacted] -- recalled different understandings of the circumstances which brought [redacted] to Engine 66.

The Union challenges [redacted]' recollection that he just happened to be at Engine 66 and Boyle's recollection that [redacted] was sent over to be the direct observer for the second sample. Rather, the Union stresses that Captain [redacted] provided the accurate version of events when he testified that he received a call from Captain [redacted]

who was questioned Grievant's behavior on June 1, 2022. It points out that Brown said that Chief [redacted] told [redacted] to send the "drug lady to Engine 66, and he would meet her over there." (Tr. 180) The Union insists that the facts establish that Grievant's testing should be considered "Reasonable Suspicion" testing as defined under Section 5.4.2.2 of Directive 54.

The Union also contends that the City violated Section 7.2.7 of Directive 54 because Grievant was deprived of the opportunity to speak with [redacted]. It points out that Grievant's Trial Board Charge Sheet was issued on June 10, 2022 and nobody from [redacted]' office had made any attempt to contact Grievant prior to the charges being proffered. According to the Union, the City's failure to provide Grievant with an opportunity to provide an explanation to [redacted] was a violation of Directive 54 and the federal regulation upon which the Directive is partly based. It points to 49 CFR part 40.133 which includes the requirement that an MRO interview the employee before verifying a positive test result or a refusal. It stresses that none of the three specific circumstances upon which the interview requirement may be waived were present here.

The Union asserts that the City violated the terms of Section 7.2.5 of Directive 54 because Judd's second test did not take place at the Medical Evaluation Unit. Section 7.2.5 states that a "member will be required to immediately submit an additional specimen collection under direct observation after being transported by the battalion Chief to the Medical Evaluation Unit at 19th and Fairmount or any contracted testing facility." (J6) It stresses that this requirement is non-negotiable. Here, Grievant's second test was not provided at either the Medical Evaluation Unit or "any contracted facility." The Union challenges the City's defense that the MEU was open by appointment only. (C2) It points out that [redacted] recognized that the requirement that the testing for the second specimen take place either at MEU or a contracted testing facility to ensure the integrity of the collection process. It stresses that the City may not unilaterally set-aside the veracity and reliability of the collection process by simply issuing a unilateral general memorandum.

The Union contends that the City violated the terms of Section 4.3.1 of Directive 54 due to [redacted]'s significant involvement in the testing procedure. While Directive 54 provides specific restrictions upon Battalion

Chiefs when "non-routine" testing takes place, [redacted]'s involvement with the test eviscerated the "integrity of the process" intended by Section 4.3.1.

According to the Union, the City also violated the terms of Section 5.4.2.2.3 by failing to articulate in writing the basis for its reasonable suspicion. It also violated the terms of Section 5.7.1 because Grievant was never provided the basis for his reasonable suspicion testing.

Finally, the Union asserts that Grievant's fundamental due process rights were violated. It stresses that these due process violations alone are sufficient to defeat the City's claims of just cause. It highlights what it stresses is the most offensive indifference to Grievant's right: the City's failure to speak with Grievant prior to making its speedy decision to let him go. Moreover, the City failed to provide an explanation for its self-imposed, accelerate disciplinary timeline. The decision to terminate Grievant was made sometime between June 16 and June 20, yet the SIO made no attempt to contact [redacted], Local 22 or Grievant. The Union stresses the ambiguities in the record and contends that the City

violated Grievant due process rights by taking employment action without affording Grievant the opportunity to explore those ambiguities.

The Union requests that the grievance be sustained and asks for the following remedy: City reinstate Grievant, remove all discipline from his record and that he be made whole in all respects, including lost wages and all other appropriate relief. It further requests that the Arbitrator retain jurisdiction of this matter for the purposes of implementation and enforcement of any remedy.

FINDINGS

A determination as to whether there was just cause for an employee's discipline must be made on a case-by-case basis, in light of the relevant facts and circumstances in each particular case. It is the City's burden to prove that it had just cause to terminate Grievant.

The City contends that it had just cause because Grievant's first sample was adulterated and his second sample was positive for alprazolam and marijuana. It also

insists that it conducted a thorough investigation prior to issuing discipline. The Union presents many reasons why the City cannot meet its burden of proving it had just cause to terminate Grievant. Initially it objects to the characterization of the drug test itself and insists that Grievant's drug test was the result of "reasonable suspicion" rather than "random" testing. Although the Union highlights the inconsistent testimony of [redacted], Boyle and [redacted], I do not find that there is sufficient evidence that the June 1, 2022 test was for "reasonable suspicion." [redacted] credibly testified about Drugscan's many decades of performing drug testing for the City, including the random drug testing process. There is no dispute that Grievant was on the random drug testing list for the time period in question.(C1) Nor is there any dispute that other firefighters in Grievant's typical location were drug tested on June 1, 2022. Even if Grievant was exhibiting behavior that concerned the Captain at his detailed location, I am not convinced that that was the reason for his testing on the day in question. I am not persuaded by the Union's claim that [redacted] unduly influenced the drug test. [redacted] testified that he traveled around to various locations in the normal course of his job duties. Moreover, his presence in the room for

the second test was consistent with the requirements for direct observation.

The Union contends that the City also impermissibly violated the procedure for "direct observation tests" in Directive 54, 7.2.5, which states that the member is to be transported to the Medical Evaluation Unit or a contracted testing facility. However, "direct observation" drug tests have been held at the firehouses since June 2020 when the MEU was closed to everyone without an appointment. The record is absent evidence that the Union has raised any issue with the memorandum that changed the procedure or raised an issue with any other test that may have occurred during the two years between June 2020 and June 2022. Given the facts in this particular record, I am not persuaded by the Union's assertion that the City impermissibly violated the procedure for "direct observation" tests by holding the test at the firehouse. Nor is there evidence – or any claim -- in this record that Grievant was harmed by Drugscan taking the second sample in the firehouse rather than the MEU or another contracted location.

The Union also asserts that the City failed to follow its own policy because [redacted] did not discuss the findings with Grievant prior to deeming the first sample adulterated and the second sample positive for alprazolam and marijuana. I agree. While it may be true that [redacted] would not have discovered any information in his discussion with Grievant that would have changed his ultimate determination, the evidence establishes that he did not do one of the required steps in 7.2.2. Section 7.2.2 states in relevant part:

> The MRO **shall review the laboratory findings, communicate with the specimen donor, and offer the member the opportunity to provide a valid acceptable medical explanation for the reported abnormal laboratory findings. Absent a valid acceptable medical explanation provided by the member for the abnormal laboratory findings, this will constitute an adulterated or substituted specimen and the MRO will render a "Refusal to Test" ruling which is a violation of this Directive and will result in dismissal.**

Even assuming -- without so deciding -- that Grievant would have been unable to provide a valid acceptable medical explanation for the results to his drug tests, the City is still obligated to give him an opportunity to do so.

The Union also asserts that the City did not have just cause to terminate Grievant because it violated Grievant's due process rights. While the City has the

reasonable expectation that firefighters remain drug free and they do not adulterate urine samples, it still must give employee's a meaningful opportunity to respond to the charges prior to discipline. Here, the City skipped over that step. Although the City insists that it does not have to meet the undue burden to seek out employees outside of their registered address, here, the evidence establishes that the City did have knowledge of Grievant's whereabouts on the same day as that the disciplinary hearing was scheduled. [redacted] credibly testified that he spoke to Boyle prior to the start of the interview and then went to speak to him in person. [redacted]'s two memorandum to Boyle corroborate his testimony that he first informed Boyle [redacted]. Additionally, Chief Schujko, who was involved with the disciplinary interview, consistently testified that [redacted] that the Union wanted to reschedule the interview in 30-days.

The City stresses that Grievant's adulterated sample results in immediate dismissal, however, even in situations which may lead to immediate dismissal, due

process requires providing a meaningful opportunity to be heard. On these facts, the evidence shows that the City made no attempts to reschedule or contact Grievant after June 16, 2022. The only other opportunity the City gave Grievant to respond to the charges was months later after he was already dismissed. Given that use of an adulterated sample is clearly a dischargeable offense, with good reason, the Grievant would have had to come forward with evidence that would have mitigated the discipline. There is no way to know in hindsight what the result would have been had the parties conferred when Grievant returned from the employer-sponsored rehab, but the evidence submitted in this arbitration clearly establishes that Grievant did not have a meaningful chance to respond to the charges. Nor is there any evidence in this particular case that the City would have experienced any prejudice by rescheduling the disciplinary interview. Moreover, [redacted]'s unrebutted testimony is that in the past there were instances when meetings were delayed for other employees in rehab.

Based on the foregoing analysis, I find that the City violated Grievant's right to due process, and, therefore, it did not have just cause to terminate Grievant.

AWARD

For the reasons set forth above, the grievance is sustained. The City shall remove all discipline from Grievant's personnel file. Grievant shall be returned to duty, and granted all wages and benefits lost as a result of his discipline, offset by interim earnings. I shall retain jurisdiction for the limited purposes of this remedy for sixty (60) days from the date of this Award.

_____
Samantha E. Tower, Arbitrator
January 12, 2024