American Arbitration Association
Arbitration Pursuant to Agreement of the Parties
Before Timothy J. Brown, Esquire

In the matter of:		
	:	
IAFF, Local 22	:	
	:	**AAA Case No. 01-24-0000-0942**
and	:	**(Granroth Suspension)**
	:	
City of Philadelphia	:	

Decision and Award

Appearances:

On behalf of IAFF, Local 22:
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On behalf of City of Philadelphia:
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Introduction

This arbitration arises from a grievance filed pursuant to the Collective Bargaining Agreement (the Agreement or CBA) between IAFF Local 22 (the Union) with the City of Philadelphia (the City or Employer) alleging the City's Fire Department (the Department) violated the Agreement by suspending Firefighter Daniel Granroth (Grievant). The parties were unsuccessful in resolving the dispute through their grievance procedure and the Union thereafter filed a demand for arbitration. The parties selected the undersigned arbitrator through the processes of the American Arbitration Association to conduct a hearing on the grievance and

render a final and binding arbitration award. The matter was heard by the undersigned on July 12 and July 30, 2024 at the offices of the AAA in Philadelphia, Pennsylvania. The Union and the City were afforded the opportunity for argument, examination and cross-examination of witnesses and the introduction of relevant exhibits. Grievant was present for the entire hearing and testified on his own behalf. A transcript of the hearing was taken. Following the hearing the parties elected to submit written post-hearing argument, upon the receipt of which by the AAA the dispute was deemed submitted at the close of business October 8, 2024.

This decision is made following careful consideration of the entire record in the matter including my observations of the demeanor of all witnesses.

Issues

The parties stipulated that: (1) there are no procedural bars to the arbitration of the matter; (2) the matter is appropriately before the arbitrator, (3) the arbitrator has the authority to render a final and binding decision and award in the matter, and (4) the issues presented by the subject grievance may accurately be described as:

> Did the City have just cause to suspend Grievant Daniel Granroth and if not, what shall be the remedy?

Facts

Notice of Suspension

By Notice dated October 19, 2023[1] Grievant was notified of his 160-hour suspension without pay at issue herein. The Notice provided in relevant part:

> You are hereby notified that you are suspended without pay from the above position for a period of 160-hours covering the period from 2000 hours Thursday, October 19, 2023 to 1200

[1] All dates are 2023 unless otherwise indicated.

hours on Saturday, November 18, 2023 for the following reasons…

Violation: 4.4.2 ALCHOHOL INTOXICATION DRUG USE

Section 2.03 Use of illegal drugs on or off duty, whether or not arrested confirmed by positive test results.

In that FF Daniel Granroth, E40/B PR# [redacted] was selected for random drug testing on September [redacted], 2023. The Department received notification from the MEU on September 22, 2023 that Daniel Granroth's urinalysis returned positive for illegal drugs.

As a result of the above charges, and your waiving a hearing before the Fire Board of investigation, you are suspended without pay for a period of **160-hours**. Your suspension will begin at 2000 hours Thursday, October 19, 2023 to 1200 hours on Saturday, November 18, 2023. You are warned that future like infractions will be delt with severely. This calculation of time, effective without pay, does not include your regularly scheduled platoon days off.

You are warned that any future disciplinary violations of Directive #54 will result in your dismissal. Additionally, as a condition of continued employment, if you have chosen the Substance Abuse Professional (SAP) program, you must successfully complete the SAP program, providing certification of completion. If you have chosen the program conducted by the Employee Assistance Unit, you must successfully complete Eighteen (18) months of the Department's Education and Counseling Program as scheduled.

You are advised that in instances of suspension without pay totaling more than ten (10) days in one year, an appeal may be made to the Civil Service Commission within thirty (30) days form the dates of the suspension without pay begins, or through the grievance procedure within seven (7) days of this notice.

Directive 54

Directive 54 is the Department's Drug and Alcohol Policy jointly drafted by the parties over a period of approximately ten years. Among other things, the Directive governs alcohol and drug testing under various circumstances, including the circumstance involved here, that of random testing. The Directive acknowledges that it is in the interest of all concerned, the employee, coworkers and members of the public, to assure that members of the Department are not influenced by alcohol, drugs or other substances in the performance of their important work. As a general matter sufficient for purposes here, the Directive addresses employee use of alcohol, prescription medications and illegal drugs.

In addition to the portions of the Directive quoted in Grievant's October 19 suspension notice, the following Portions of the Directive were cited by one or both parties as being relevant to this matter:

> 6. RANDOM TESTING
> …
> 6.2.5 The selected member will be provided the opportunity to discuss any legally prescribed medications with the Medical Review Officer (MRO) prior to the laboratory test findings being ruled and released to the designated Department Special Investigation Officer (SIO).
> …
> 6.3 OUTCOME OF A POSITIVE TEST RESULT
>
> 6.3.1 Disciplinary action in accordance with this Directive will be taken against a member for the confirmed use of illegal drugs, the illegal or improper use of controlled substances, use of steroids without a valid medical authorization, and alcohol use on duty with a "POSITIVE" test result…
> …
> 7.1.3 Examiners, whose urine specimens are confirmed "POSITIVE" for drugs will be provided with an opportunity to have another federally certified SAMHSA/DHHS (Substance Abuse and Mental Health Services Administration/Department of Health and Human Services) laboratory of their choice, and at their expense, conduct a reconfirmation test of the original

> specimen(s). Any request for this re-confirmation test must be made by the member in writing and reach the Fire Commissioner within ten (10) days of the initial suspension date.
> …
> 7.3.7.2 If the member is notified that the first (1st) urine sample tested "POSITIVE," …the member may, within seventy two (72) hours of notification by the MRO, request from the MRO & SIO that the second (2nd) urine specimen be forwarded by the initial testing laboratory to another independent and unrelated laboratory for GC/MS confirmatory testing for the presence of the drug or other confirmation testing for alterations…
> …
> 7.4.5 where Schedule "A" drugs are detected, the laboratory is to report a "POSITIVE" test based upon a forensically acceptable quantum of proof…

Grievant's Random Test

Grievant was the subject of a random alcohol breathalyzer test and urinalysis drug test collection on September [redacted]. The breathalyzer test was negative. Grievant supplied the urine as instructed, observed the separation of his sample into two containers and signed and sealed both as per the Directive 54 procedure. He did not learn of the results of his urinalysis until he learned of his suspension on October 19. At that time, as described in his written statement attached to the Department's "Review of Grievance" dated November 2:

> I walked into my first night work 10/19/23 and was notified after being there for 45 minutes that I was suspended and had to go home. I was then informed that my Battalion and Deputy Chiefs were notified of this meeting with the MRO I was supposed to have. I was never informed, and I even worked my second day shift at my regularly assigned station on my regular assigned platoon. I then contacted the Union representative who called the SIO and tried to get more information. I then contacted the SIO myself and they said; "you were supposed to have a meeting yesterday." I then informed the individual that I was never told, and the individual didn't have an answer. The SIO then asked me to text a picture of a prescription that showed up on the positive test and told me they would try and get me a meeting the following day, Friday 10/20/23. I sent the picture to the SIO and the individual replied saying "received." I did not hear anything

back, from anyone, from the SIO, or EAP. I contacted the Union representative again and let him know. The union representative then spoke to the SIO again and said the SIO wouldn't hear anything until Monday. Monday came around and I reached out but no answer. Tuesday, I contacted the union representative again and he advised me to call EAP. I did and went down Tuesday Morning with my wife. I was informed I no longer had the SAP option and was informed of my other options. I signed the SAP form anyway. A few days later I was notified by my company officer what happened regarding my notification. I was told, according to the "higher ups," I was supposed to be notified on 10/5/2023. I was told my notification never made its way to me. The notification was making its way through the channels where at some point my information was given to an "off-duty" individual, not working, at a funeral, of my notification. This is a violation of my confidentiality in reference to section 3.14 of directive 54, EMPLOYEE ASSISTANCE PROGRAM(EAP) A confidential program offered by the Department to provide individual and family counseling for behavioral, emotional and substance abuse problems as well as a full range of general assistance programs. Also in Directive 54, section 4.1.3 All members must adhere to strict confidentiality throughout the entire testing and reporting process. Results of tests, both "POSITIVE" and "NEGATIVE" will be shared only with those few individuals having authorization from the Fire Commissioner. Any breach of confidentiality may result in disciplinary action. In Directive 25, section 5:18 Communicating or imparting confidential Fires Department information either in writing or verbally to unauthorized persons. Anyway, my information was sent to an off-duty individual not involved in this process to my company officer. My company officer was informed later to submit a memo of the events that took place, which is now in circulation somewhere in the chain of command. I was then given the chance by notification from the EAP, to finally have my meeting with the MRO on my own time. I informed the MRO what had happened and he did not hear of or know of the circumstances, neither did the EAP. My life has been severely impacted by these circumstances, my new marriage is taking a toll, my finances are taking a toll, as well as my personal well-being and my reputation.

Testimony

Department Fire Service Paramedic Chief Karl Schujko testified that he works in the Department's Special Investigations Office (SIO). The work of the SIO, among other things,

includes matters involving Directive 54, the Department's drug and alcohol policy. People shouldn't be under the influence of alcohol or drugs, while on duty unless they are prescribed medications at amounts determined to be safe, Schujko testified. The Department enforces its policy through a self-disclosure process through the Employee Assistance Program (EAP), testing based upon reasonable suspicion, post-accident testing and random testing of approximately 50% of the members of the Department annually.

Schujko testified that in the event of a positive test result from a random drug test, the Department's response depends upon the results reported, whether the test results show a prescribed medication or an illicit drug. For example, if a member is positive for marijuana – even if the member has a medical marijuana card – the member would be suspended immediately. If the member's drug test shows a prescribed medication, the process is different, Schujko testified. In such a case the SIO provides the results to the City's Medical Review Officer (MRO) Dr. George Hayes to determine if there is a prescription for the medication. Common medications include pain medications or anxiety medications as well as A[redacted] can show up in tests results as amphetamines, Schujko testified. In the case of results showing a drug that is available as a prescribed medication, under the Directive, the MRO checks to see if the member has already self-disclosed the prescription or will ask the employee to come into an interview with the doctor to discuss the prescription.

In the event the random drug test shows the member to be positive for illegal drugs, Schujko testified, the employee is suspended for 160 days immediately, during which the employees should begin treatment and then continue with aftercare. After treatment the Department conducts an interview of the member, and the member is required to sign consents for random testing before the member can return to work.

Schujko explained that Drug Scan is the contractor for the City that preforms collection services and sample test result analysis. Grievant was subject to a random drug and alcohol testing in September and when the SIO received the results of the drug test showing a positive result on September [redacted] Schujko forwarded the report to Dr Hayes for interpretation. Schujko testified that Dr. Hayes is responsible for making the determination as to whether a test result shows the employee was or was not in compliance with Directive 54. At some point, the MRO's office contacted the SIO and asked that an appointment be made for Grievant to talk with Dr. Hayes. Schujko explained that at this point in the process an appointment with Dr. Hayes was appropriate because the initial results of Grievant's test showed he was positive for amphetamines and there are some medications available by prescription that can cause such a result. Schujko testified that his office then determined when Grievant would be on duty during a day when he could meet with Dr. Hayes and scheduled an appointment for October 18 at 10:30 am. Schujko then sent an October 3 email notification of the appointment to be moved through the chain of command to notify Grievant and relevant officers (for staffing adjustments) of the appointment. The time between October 3 and 18, Schujko explained was because of the platoon schedule involved and the requirement that the employee be on duty at the time of the appointment with the MRO.

Schujko learned that Grievant did not make the October 18 appointment with Dr. Hayes and sometime thereafter learned that the notice of the appointment had never made it to Grievant. In the meanwhile, Schujko testified, between October 3 and 18, he received an updated report (dated October 12) on Grievant's sample based upon an isomer test showing that Grievant was positive for 90% D methamphetamine. Schujko telephoned Dr. Hayes on October 19 to discuss the doctor's scheduled appointment with Grievant the day before and (for the first time) learned

that Grievant had not shown up for the appointment.[2] Schujko testified that during the telephone conversation he and Dr. Hayes discussed the isomer results and Dr. Hayes stated that in his opinion there was no medical reason Grievant would have had D methamphetamine in his system and stated that Grievant was in violation of Directive 54. As a consequence of the doctor's determination that Grievant was in violation of Directive 54, Schujko explained, his office made notifications of the suspension.

Schujko recalled that after the notice of suspension went out, he received a call from Grievant and Grievant (on October 19) provided him with a copy of a prescription (for A[redacted]) and Schujko agreed that he would forward the copy to Dr. Hayes for his review. Schujko testified that at the time he told Grievant that if he chose to, Dr. Hayes could reverse his determination of the Directive 54 violation, but unless Grievant heard otherwise, he was considered to be in violation of the Directive. Schujko testified that he understands that shortly thereafter Grievant met with Dr. Hayes to discuss the matter and that nothing changed as a result of the meeting. Schujko denied that he told Grievant he would arrange an appointment for the employee with Dr. Hayes. He also testified that there is no meeting necessary between the employee and Dr. hayes when the drug test is positive for an illegal drug, because there is no viable reason as to how someone's prescription medication could cause such a result. As for testing of the B bottle, Schujko testified, either the employee or Dr. Hayes may request such and the SIO will have the test performed, but along with the request the member has to provide a check made out to Drug Scan to cover the secondary test.

Grievant served his suspension and completed his treatment and evenually, Schujko

[2] At the time neither Schujko nor Dr. Hayes knew that Grievant had not received notification of the October 18 appointment.

testified, met with the Medical Evaluation Unit to provide another urine sample and then attended a meeting at the SIO office to complete paperwork and be interviewed prior to returning to work. Grievant's return-to-work interview occurred on December 6. His interview was recorded and the member completed the required paperwork, Schujko testified, including an after-care contract requiring 18 months of meetings, an agreement to be randomly tested, and a waiver of disciplinary trial board and acceptance of the discipline issued.

Schujko agreed that the rights and responsibilities, processes and procedures embedded in Directive 54 for firefighters are significant and important. He testified that Section 6.2.5 of the Directive provides for a meeting between the MRO and firefighter before discipline may issue. But, he testified, such a meeting is to discuss legally prescribed medications. He acknowledged that his office moved on the discipline of Grievant knowing that Grievant had not met with Dr. Hayes. He also testified that his office did not move on the discipline until Dr. Hayes said the Greivant's test results were not caused by a prescription medication and Grievant was in violation of Directive 54. His office moved on the discipline after Dr. Hayes determined that there was no way a medication could cause Grievant's results, Schujko testified.

City Medical Director of Employee Medical Services Dr. George Hayes testified that he is the City's Medical Review Officer (MRO). As MRO he is responsible for evaluating drug and alcohol test results. As for the result of Grievant's sample, he testified that the initial report showed amphetamine/methamphetamine as the first line of the report and that methamphetamine was the dominant drug detected, at a level of 1724. Hayes testified that methamphetamine has two sides; the right side is the illicit drug – the d isomer. The left side is the non-illicit l isomer. Any result above 20% d isomer is considered positive for illicit methamphetamine, he explained. Because the initial screening of Grievant's sample did not break down the methamphetamine

detected by isomer, his office then – as is its practice - ordered a chiral test to determine the level of d and l isomer present in the sample. In such cases where an isomer test must be requested, Dr. Hayes testified, his office waits for the results before making a conclusion because, he explained, something like the prescription drug A[redacted] can be the source of the initial result.

The amended report on Greivant's sample reflecting the isomer testing again showed a methamphetamine level of 1724 nanograms per ML, but Hayes testified, the results showed the d-methamphetamine, or dextro-methamphetamine, present in Grievant's sample to be 90%. That means, Dr. Hayes testified, that the dominant amount of the drug in the sample was the d-isomer and not the l-isomer. The analysis of Grievant's sample established, Hayes testified, that the dominant drug present was methamphetamine and that the methamphetamine present was the illegal street drug. There was no legal amphetamine/methamphetamine drug present, Hayes testified.

As for the prescription offered by Grievant, it was for dextroamphetamine, a generic A[redacted], Hayes testified. The generic A[redacted] would not give the results present is Grievant's sample and, he added, the prescription was dated after the fact of the sample date. Hayes recalled having a meeting with Grievant on November 1. He testified that even before he met with Grievant, he had communicated to Chief Schujko that Greivant had tested positive for the illegal street drug methamphetamine, should be taken off work immediately and seen by Haye's office as soon as possible. Hayes also testified that Grievant was required to give another sample prior to his return to work and that the return-to-work sample showed levels of amphetamine, but no level of methamphetamine. Because there was no methamphetamine detected, he explained, there was no need to order a chiral test on that sample. Grievant's level of amphetamine in that return-to-work test was consistent with the use of generic A[redacted] at the level prescribed.

Hayes testified that he recalled his November 1 meeting with Grievant and that at the meeting Grievant stated he had not taken methamphetamine. He would not have told Grievant that he could take over his care directly or take him out of the Department's system. Such is not permitted, but he would have monitored Grievant in addition to whatever the Department has in place. He confirmed that during his meeting with Grievant he could have told Grievant he would give Chief Schujko or Ms. Maldanoto of the EAP a call, and that he may have discuss hair follicle testing and testing of the B vile with Grievant. Hayes testified that retesting of the B vile was obviously not something Grievant requested because it would have been done had he so requested. Testing of the B vile would be very unusual given the time and circumstances, Hayes testified. Any such retest would be at the "level of detection" for all drugs and, to him, would be counterproductive.

Joseph Whelan testified that he is Senior Vice President of Medical Services for Drug Scan, the contractor of the City that performs workplace drug testing. Since the institution of drug testing in the Department in 2015, Drug Scan has administered random testing (as well as other testing) of the employees of the Department. He described the methods followed for randomization of tests and the procedures followed by the Company's certified technicians who perform collections. He testified that the protocol for specimen urine collection is for the technician to have the employee wash his or her hands, take the cup into the bathroom and privately fill the cup, the employee is told not to run any water in the bathroom- including flushing the toilet, and to bring the cup out and hand it to the technician. The employee is told to wash his or her hands while keeping an eye on the technician and the specimen cup. The employee then observes the technician check the temperature of the specimen and split the specimen into two bottles A and B. The custody control form is then completed with the

employee present and tamper evident A and B seals are removed from the form and used to seal the bottles. The donor then confirms that the seals on the bottles match the chain of custody and specimen ID numbers and once confirmed signs and initials the seals. Specimens are then FedEx to the lab or the technician may drop them off at the lab if the technician's assignment puts her in route to the lab. In this matter, Whelan testified, Dr. Hayes also requested that the lab perform an l and d isomer study on the specimen.

Whelan testified that he was not present and has no direct knowledge relating to the collection of Greivant's specimen and has no knowledge as to why it took five days for the specimen to travel by FedEx to the Horsham, PA lab.

First Deputy Commissioner Anthony Hudgins testified that Directive 54 is of such importance to the Department that cadets are ordered to read it, know it and sign off on it in the academy, and that the Directive continues to be available to members on the Department's drive. The Department's drug and alcohol policy is enforced through the Department's Disciplinary Code (Directive 25), and in this case, Hudgins testified, Grievant violated Section 2.03 of the Code; "use of illegal drugs on or off-duty whether or not arrested confirmed by positive test results." Grievant was issued the 160-hour suspension provided in the Code for a first offense. Hudgens explained that the 160-hour suspension provided by the Code for a first offense was agreed upon by the joint labor-management committee and has been consistently applied by the Department since 2015.

Dr. Richard Cohn testified as an expert witness in the field of forensic toxicology and pharmacology. He testified that based upon his review of the test results, particularly the second test to determine the nature of the methamphetamine identified in the initial screening of Grievant urine sample, he concluded that the 90% D methamphetamine in the sample was illicit

or street methadone. Cohn testified that he knows of no legally available prescription that can be written using only d-methamphetamine. In regard to Grievant's prescription/receipt, Cohn testified, it was dated after the sample was given and it is for generic A[redacted] "You cannot get methamphetamine from A[redacted]," Cohn testified, and added, "this prescription" referring to Grievant's prescription – "has nothing whatsoever to do with the methamphetamine findings, prior afterwards or anything else involving this case." The drug identified in Grievant's prescription is, Cohn testified, incapable of producing the results established by the test of Greivant's urine sample and is not a medical explanation for the presence of methamphetamine in the specimen. Cohn testified that his opinions expressed in his testimony are to a reasonable degree of medical certainty. On cross examination, Cohn again testified that the methamphetamine found in Greivant's sample specimen "under any circumstances, cannot arrive from the medication he was indicating he was taking."

Grievant testified that he has no prior discipline and has never had a positive drug or alcohol screen in his eight-and-one-half years of employment with the Department. He testified that he had been taking A[redacted] routinely for about a year prior to his giving a urine sample of September [redacted]. He described the process of giving his random sample on September [redacted] and testified that he was told by the technician not to wash his hands; that the technician said "don't run the water" before he went into the bathroom.

He explained that he travelled to Mexico at the end of September when he was married and returned October 4 or 5. He recalled arriving at his station in the afternoon of October 19 and that as he was having a cup of coffee his officer called him into the office and asked if Grievant had any recollection or knew why he was being suspended for violation of Directive 54. Grievant testified that he was shocked and was then told that he had to go home. He called his Union

representative and on advice of the representative telephoned SIO Schujko. Grievant expressed his concern about what was happening and asked what he could do to investigate the situation. He told Schujko about his A[redacted] prescription, and the SIO asked that he text him a copy. The SIO then informed Grievant that he had missed a meeting with the MRO scheduled for the day before. Grievant responded that he had no idea about a meeting. According to Grievant, Schujko said he would try to get Grievant in to see the MRO as soon as he could. When he texted his prescription to Schujko, the SIO responded "received."

Grievant testified that he did not hear anything from Schujko and the next week again called his Union representative and was told to call the EAP. He phoned the EAP and spoke with the director A[redacted] M[redacted] and then met with M[redacted] the following day. Grievant testified he was then told he had to immediately begin the 18-month after-care program. Grievant explained that he had not yet met with the MRO and M[redacted] said she would contact him.

Grievant met with the MRO, Dr. Hayes, on November 1. At the meeting, according to Grievant, the two discussed three main things. First the opportunity to have bottle B independently tested and, Grievant testified, Hayes said he would look into it. Second, the doctor raised a hair follicle test if Grievant wanted to do it. Third, Grievant gave a urine sample and, he testified, Dr. Heyes told him that if everything came back from the urinalysis negative and everything was okay, Grievant would be under his care for the next year. Grievant testified that he was under the impression that under those circumstances he would not have to go through the 18-month program. Grievant then met with Dr. Hayes again on November 8 or 9 and again raised the bottle B and hair follicle options. According to Grievant, Hayes said he would look into the bottle B test again and that the time for a hair follicle test had passed. According to Grievant the doctor also told him that he would have to follow the 18-month Department

protocol.

Grievant completed a 30-day intensive outpatient program (IOP) and then began 18 months of after-care. His suspension was up in the middle of November. To return to work, he was required to have a return-to-work interview with the SIO and provide another urine sample. Present at his interview were Chief Schujko, Chief B[redacted] and Union representative Ray Rosselli. Grievant testified that one of the documents he was required to sign waived his right to appeal the suspension and he let all know that he had already filed a grievance over the matter. He signed the paperwork to get back to work, from his perspective, Grievant testified, he did not admit to the charges.

Union First Vice President Thomas McKiernan testified that he is one of the coauthors of Directive 54 and is on the Directive 54 Committee. McKiernan testified that for positive results from a random drug test under the Directive there are a couple of different processes, that sometimes there is an interview process and sometimes there is not. If the results show an illegal street drug, he explained that sometimes there is not an interview, and the member goes into the recovery and a disciplinary procedure. As for the testimony given by Grievant, two things stuck out. McKiernan testified. First, the member requested a split test and such is permitted under the Directive, but Grievant did not have the test done. Second, the Department is authorized to do hair follicle testing and, he testified, he does not know why that wasn't done in Grievant's case. McKiernan further testified that the member has a right to ask for the follicle test, the member is required to initiate that and not the MRO. McKiernan testified that in a "normal" situation, where a prescription is involved, the MRO makes the decision if the Directive has been violated after an interview with the member. But, McKiernan further testified, if the initial test comes up positive for a street drug like marijuana, then the MRO is not going to

call the Union and ask for an interview. If a member, in the normal situation falls through the crack and an interview is not scheduled, a catch 22 is created and the MRO will send the member right into the disciplinary system and the only way to have the member not go through the discipline recovery process is for the MRO to reverse the determination.

McKiernan testified that immediate suspensions are permitted under the Directive. You can't let a person show up for work when the person is under the influence, he explained. If the MRO determines the employee is positive, the MRO calls the SIO and the disciplinary procedure then has to begin.[3]

Positions of the Parties

The parties provided detailed and lengthy written post hearing briefs in this matter; briefs that have been read and carefully considered by the undersigned. Only summaries of their respective arguments follow.

City Position

The City had just cause to suspend Grievant and the City followed all necessary protocols and procedures required by Directive 54. Grievant was randomly tested, his secondary test results established that he was positive for the illegal drug methamphetamine. Such is a violation of Section 2.03 of the Department's Disciplinary Code and the discipline for a first offense of such is 160 hours unpaid suspension. Dr. Hayes is the individual responsible for determining whether the Directive has been violated. When he spoke with the SIO on October 19 about Greivant's results it is true that the two discussed that Grievant had missed an appointment with

[3] The Union also presented Fire Fighter **A[redacted] C[redacted]** who also gave a random sample at Greivant's station on September [redacted] and testified he was given no instructions about washing hands and was told not to run water, and Lieutenant **J[redacted] D[redacted]** who testified that he received a forwarded email from an off-duty Battalion Chief related to Greivant's October 18 scheduled MRO meeting but did not open the email because of cyber awareness concerns and consequently did not forward the information to Grievant.

the doctor the day before. But Dr. Hayes also informed the SIO that Grievant was positive for the street drug methamphetamine, so should be taken off work immediately. The decision by Dr. Hayes is consistent with the Directive.

The evidence also establishes that Grievant's prescription could not have resulted in a positive test for illegal methamphetamine. Although the Department attempted to follow a normal process of have an employee meet with the MRO, and that process was not completed, it did not matter. This was not a normal situation where an employee had a prescription that could have been the cause of the positive result. As well established by the testimony of Dr Hayes and Dr. Cohn, Greivant's prescription could not have resulted in his positive street methamphetamine result.

As for Greivant's claims relating to a hair follicle test and retesting of bottle B, Dr. Hayes testified that "if" that came up he would have advised the employee it would be counterproductive as the second test detects at the lowest level of presence so that any amount of a drug whatsoever will be detected, and the Directive provides a process for the latter and there is no evidence that Grievant complied with the process.

Although Grievant was provided the opportunity to challenge the results of his test during his December interview, and interview in the presence of his Union representative, Grievant did not do so.

The City has established that the rule involved is important and reasonably related to the operation of the Department and critical to the safety of the employee, coworkers and people of the City, that Grievant knew of the rule and the potential discipline resulting from violation of the rule. The City conducted a thorough investigation as it had Grievant's specimen initially screened and, before any decision was made on discipline, had the specimen undergo a

secondary evaluation showing that Grievant was positive for the illegal drug methamphetamine. The evidence establishes that the City has, since 2014 consistently applied the discipline provided by Section 2.03 of the Disciplinary Code when an employee tests positive for illegal drugs. Contrary to the claim of the Union, the City provided adequate due process and did not violate Greivant's right by not having him meet with the MRO before the issuance of discipline. Greivant's was not entitled to such a meeting because he was positive for an illegal street drug, a positive test result that could not have been caused by Greivant's prescription for A[redacted].

Additionally, contrary to any claim of lack of due process, Grievant had a least three opportunities to offer a defense to the charge. He offered his prescription defense on October 19 and the City agreed to consider it. Second, Grievant met with MRO Hayes on November 1 and again raised his defense. But with both the October 19 and November 1 offers, the results of Greivant's urine sample test established that Grievant's proffered defense was unavailing as there was no circumstance where his prescribed drug could result in his positive result for methamphetamine. And third, Grievant could have again raised a defense during his December 6 return to work interview but declined the opportunity to do so.

The City has an incredible responsibility to keep the citizens of Philadelphia and its employees safe. As an employee of the City's Fire Department Grievant holds a dangerous job with incredible responsivity to the public. Directive 54 was created to safeguard the public and firefighters. Grievant was fairly selected for a random drug test and the results of that test showed he violated Directive 54 and the City applied a consistently applied level of discipline for Grievant's violation. The City has shown just cause for its suspension of Grievant. The grievance should be dismissed.

Union Position

The Union argues that Grievant was denied several protections, important rights, established by Directive 54. Directive 54, Section 5.2.5 establishes that the City may conduct random drug tests of firefighters but that if a firefighter test is non-negative, the fire fighter has a fundamental right to a meeting with the Medical Review Officer "prior to" the City issuing any discipline. Here, the record establishes that Grievant was not provided such a fundamental right. The City's defense of no-harm no-fowl is not sufficient as the meeting Grievant finally had with MRO Dr. Hayes came after he was already subjected to discipline and Grievant was faced with the MRO declaring it was too late for him to resolve the discipline. Similarly, Grievant had rights to a hair follicle test and testing of bottle B but such were delayed by the City until it was too late for the testing to be of any use as time had run out.

The fact is, the City has the burden, and the City does not know and has not shown what would have happened if Grievant had been given his important due process rights. The City does not know what would have happened had Grievant's bottle B been tested or if a hair follicle test had been done in a timely manner. The City doesn't meet its burden by guessing or assuming.

The City failed to meet the just cause standard by failing to provide Grievant due process. Grievant had an absolute right to a meeting with the MRO before any decision was made as to whether his test was negative under both Directive 54, Section 6.2.5 and the Federal regulations incorporated by the Directive. Grievant was never given notice of his scheduled October 18 meeting with the MRO. Grievant notified the City that he had not received such notice the next day. Grievant should have been provided 60 days after

his scheduled meeting to show that he was not given notice of the meeting. Grievant's meeting should have thereafter been rescheduled and should have occurred prior to the City making any decision as to the outcome of Grievant's drug test.

Additionally, the administration of Greivant's drug test was itself faulty and should not be relied upon. He was told, as was his coworker who was tested on the same day, not to run any water, not to wash his hands prior to giving his sample. The record establishes that Grievant had been using cleaning chemicals prior to his random test and there is no showing that such chemical could not have spoiled the test. Grievant's sample was thereafter mishandled by Drug Scan. Neither the City nor Drug Scan could offer any explanation as to why Greivant's sample was shipped by FedEx but inexplicitly took five days to travel just 25 miles to the Drug Scan lab for testing.

Grievant had an absolute right to meet with the MRO **prior to** any determination as to the positive or negative result of his drug test. At a meeting with the MRO Grievant could have explained and provided a copy of his A[redacted] prescription; a prescribed drug that can be detected in a drug test as amphetamines. Grievant could have further brought to the MRO's attention the flawed manner in which his specimen was collected, a process that did not have the employee clean and dry his hands prior to giving his sample. The City failed to provide Grievant that protected opportunity. Grievant had a right to have his bottle B tested. The City failed to give Grievant that opportunity in a timely manner. Grievant had a right to have a hair follicle test performed and, again, the City failed to provide Grievant the opportunity in a a timely manner.

By failing to comply with the important due process requirements of Directive 54, the City failed to satisfy the Just Cause requirement of providing Grievant due process.

The City also failed to satisfy the elements of just cause by failing to conduct an adequate investigation as the testing process of Grievant was substantively flawed and by concluding that Grievant had violated the City's policy prior to giving Grievant an opportunity to present his side of the story. The grievance should be granted, the suspension expunged and Grievant should be made whole for his losses cause by the suspension at issue.

Discussion

Just Cause

An analysis of whether Grievant's suspension was for just cause under generally recognized standards in labor arbitration, requires consideration of all of the circumstances in determining whether the issuance of discipline was "fair." Some of the several factors often considered by arbitrators when applying the just cause standard in the public sector in Pennsylvania include whether or not: (1) the rule or policy being enforced is reasonably related to the orderly, efficient and safe operation of the employer and reasonable expectations of employees; (2) there was prior notice to the employee of the rule and the consequences for its violation; (3) the disciplinary investigation was adequately and fairly conducted and the employee was afforded an appropriate level of due process under the circumstances; (4) the employer was justified in concluding that the employee engaged in the conduct as charged; (5) the rule has been consistently and fairly enforced and (6) whether or not the discipline issued was appropriate given the relative gravity of the offense, the employee's disciplinary record and considerations of progressive discipline.

It is well recognized that in arbitrations of cases presenting questions of discipline for just cause, it is the employer's burden to show that its discipline satisfies all of the requirements

of just cause. In the instant matter, considering the record as a whole, including all evidence and argument offered by the parties as well as my observation of the demeanor of all witnesses, I find that the City has met its burden of establishing just cause for its suspension of Grievant.

Overview

The parties have presented competing narratives of the obligation owed Grievant under just cause and Directive 54. I have interpreted the City's argument as asserting that the required elements of the just cause standard have been effectively incorporated into the provisions of Directive 54, and that by complying with the plain meaning of the Directive – which it claims it has done – the City has shown just cause for the suspension of Grievant. The Union offers a broader narrative, first arguing that the provisions of Directive 54 – particularly 6.2.5 - should be read to grant an employee such as Grievant with a prescription an absolute right to a meeting with the MRO prior to the issuance of discipline and, secondly, that outside of the considerations of Directive 54, just cause and applicable regulations independently require that Grievant be given the opportunity to meet with management and present his side of the story before discipline is decided.

Directive 54 Satisfies the Fairness Standard of Just Cause

The issue agreed upon by the parties and presented here is limited to just cause. The record establishes that Directive 54 is the product of some ten years of collaboration by the parties. Imbedded into the character of the Directive is an unmistakable attempt to be fair and honor the rights of individual employees and the interests of the City in keeping members of the public safe and its employees safe and healthy. Although I do not find that every potential instance of compliance with Directive 54 will be as a matter of course also compliant with the

requirements of just cause, I find that under the facts of this case, the City's compliance with the Directive also amounted to satisfaction of the just cause standard.

The Initial Screen, the Second Isomer Test and Grievant's Drug Test Result

The evidence establishes that the initial testing of random samples pursuant to Directive 54 amounts to a "screening" looking for "negatives." Consequently, where the initial screening produces a negative, the random test is complete. However, where the initial screening identifies a substance or substances that may or may not be a negative, the process requires that more detailed testing occur (as opposed to the more basic initial "screening.") In Grievant's case, his initial screen showed a positive value of 1724 for methamphetamine. Methamphetamine may be of two varieties or "sides," l and d. When an isomer test is performed on methamphetamine the test identifies the amount of l-methamphetamine and d-methamphetamine in the sample. According to the expert testimony in the record, there is no legally produced methamphetamine that has more than 50% d-methamphetamine. The isomer analysis conducted on Grievant's sample showed a 90% positive value of 1724 d-methamphetamine.

I find that the record establishes that the methamphetamine in Grievant's sample was illicit and that there was no lawful medication that could result in the isomer d value reported.

The City Complied with Directive 54

It is undisputed that the MRO has the authority within the terms of Directive 54 to determine if an employee has tested positive in a random drug test and to determine if an employee should be subject to discipline. The primary argument of the Union is that Grievant was absolutely entitled to a meeting with the MRO before, prior to, any decision by the MRO as to whether Grievant had a positive or negative test result. In support of it argument, the Union focuses upon; (1) the City's initial scheduling of an appointment with the MRO as an admission

that a meeting was manditory under Directive 54, (2) the City's botched effort to notify Grievant of the October 18 meeting, (3) Greivant's claim that he had a prescription for A[redacted], and (4) the City's failure to initiate and arrange for testing of Greivant's specimen B and his hair follicle.

The Union's first three arguments come within the context of language and practice relating to a drug test result that reports the presence of a drug that could be the result of a lawful medical prescription. I agree that the language of Directive 54, Section 6.2.5 grants an employee the right to meet with the MRO when the employee's test results show the presence of a "legally prescribed medication." As fully explained in testimony, the purposes of such a meeting is to determine if the employee has a medical prescription for the medication, if the employee is taking the medication in the manner and amount prescribed and if notwithstanding the prescription and compliance therewith by the employee, the presence of the medication in the employee's system presents a potential safety hazard or concern. However, as reflected by the consistent testimony of witnesses called by both parties, when the drug identified in a member's test results is not a drug that may be present due to a legal medical prescription – if the drug is illegal under any circumstance – there is no pre-discipline meeting with the MRO required and because of significant considerations of safety and health the employee is immediately placed on suspension.

As of October 12, Section 6.2.5 Was Not Applicable to Grievant

Although the Union repeatedly asserted its argument that in Grievant's case Section 6.2.5 provides for a mandatory meeting with the MRO prior to a decision to discipline, I find that Section 6.2.5 does not apply to, nor does it control, Grievant's circumstance. I this regard, I find the evidence establishes that any right to a meeting with the MRO under 6.2.5 based upon a prescription that Grievant may have had for A[redacted] wholly evaporated and was extinguished

upon the October 12 reported result of the isomer test of Grievant's sample showing that Grievant was positive for the illegal street drug form of methamphetamine. As of the result of the isomer test, I find the provisions of 6.2.5 upon which the Union relies did not apply to Grievant.

I am persuaded that Grievant was aware of the difference between a test outcome that could be a result of a lawfully prescribed and taken medication and a test outcome that could only be the result of an illicit street drug. In this regard, I find telling Grievant's initial written November 2023 account of his first telephone call with the SIO wherein he wrote, in part:

> …I then contacted the SIO myself and they said; "you were supposed to have a meeting yesterday." I then informed the individual that I was never told, and the individual didn't have an answer. The SIO then asked me to text a picture of **a prescription that showed up on the positive test** and told me they would try and get me a meeting the following day, Friday 10/20/23. I sent the picture to the SIO and the individual replied saying "received." …
>
> (Emphasis added)

As discussed above, there are at least two routes a positive test result can go. Grievant's written soon-after-the-fact recording of what he was told by the SIO plainly references the route designed to address *"prescription"* drugs *"that showed up on the positive test."*

Based upon the written statement of Grievant memorializing his first conversation with the SIO soon after the conversation and the credible testimony of the Schujko, I find the conversation between Grievant and the SIO did not address the procedure of the Department relating to positive results for illegal street drugs. I also find that at no time did any representative of the City inform Grievant that notwithstanding that his test came back positive for the street drug methamphetamine he was nevertheless entitled to a meeting with the MRO to discuss the employee's prescribed medication prior to being disciplined. When the City received

the October 12, 2023 Amended Report of Greivant's sample isomer test showing 90% d-methamphetamine, Greivant's prescribed medication was no longer relevant.

Importantly, and contrary to the argument of the Union, I find that at no time was Grievant disciplined when there was an existing issue of whether Grievant's prescription could have caused the positive result.

The evidence established that the MRO's decision to discipline Grievant occurred after the doctor's receipt of the isomer test of Grievant's sample establishing that Grievant was positive for illegal street methamphetamine. Grievant was not entitled under Directive 54 to meet with the MRO prior to the decision to apply the discipline provided in Section 2.03 of the Department's Disciplinary Code for a first incident of; "use of illegal drugs on or off duty, whether or not arrested confirmed by positive test results."

The City Met its Burden of Establishing a Bona Fide Test Process and Result

The Union makes two primary arguments to support its claim that Greivant's test was flawed and should be considered a nullity. First that he was not told to wash his hands before giving his sample and second that it took five days for his sample to get to the lab for its initial screen. I am not persuaded by the Union's arguments. As for the washing hands claim, when asked pointedly by Union counsel if he was told by the technician not to wash his hands, Grievant didn't directly answer the question and instead repeated only that he was told not to run water. I find Grievant hedged and that in this regard the record is insufficient to support the Union's argument. As for the five days for FedEx to deliver the sample to the lab, I do not find that such alone supports a finding that the test should be disqualified. The record establishes that such a period would not degrade a sample significantly and that if any such degrading would hypothetically occur, it would work to Grievant's benefit.

Retesting

The Union also asserted that Grievant was prejudiced by the City's failure to conduct testing on Grievant's sample bottle B and failure to offer Grievant a hair follicle test. I do not find the record supports the conclusion sought by the Union that Greivant's due process rights were thus denied. In this regard, Grievant testified that he was trained on Directive 54 when he was in the Academy and that he knew the Directive. In fact, Grievant cited many portions of the Directive to support his arguments in his November writing. Contrary to any claim that Grievant was unclear as to how to initiate further testing and was therefore unfairly prejudiced, I find the Directive provided notice to Grievant on both types of tests and the process to accomplish such testing. Particularly relevant here is the language of the Directive placing the burden of initiating the tests in a timely manner on the member. I am not persuaded that Grievant's failure to have such tests performed was the result of conduct by the City. Importantly, and further in contrast to the Union's primary argument that all testing and re-testing of Greivant's sample should have occurred prior to the MRO's decision to suspend, the Directive language on such re-testing plainly contemplates that the member has already been found to have tested positive and in the case of Section 7.1.3 anticipates the employee has already been suspended as it provides, in part: "any request for this re-confirmation test must be made by the member in writing and reach the Fire Commissioner ***within ten (10) days of the initial suspension date."*** (Emphasis addd.)

Conclusions

Based upon the full record in this matter, I find Grievant had notice of the Department's Directive 54 policy and related Code, the policies are plainly reasonably related to the orderly

efficient and safe operation of the Department, the random testing of Grievant and analysis of his sample was adequately and fairly conducted and the employee was afforded an appropriate level of due process under the circumstances, the City was justified in concluding that the employee engaged in the conduct as charged, the rule has been consistently and fairly enforced and the 160-hour suspension discipline issued was appropriate given the relative gravity of the offense, the employee's disciplinary record and considerations of progressive discipline.

Based upon the full record in this matter, I find the City has met its burden of establishing just cause for the suspension of Grievant. I will deny the grievance.

American Arbitration Association
Arbitration Pursuant to Agreement of the Parties
Before Timothy J. Brown, Esquire

In the matter of:		
	:	
IAFF, Local 22	:	
	:	**AAA Case No. 01-24-0000-0942**
and	:	**(Granroth Suspension)**
	:	
City of Philadelphia	:	

AWARD

The City has met its burden of establishing just cause for the suspension of Grievant.

The subject grievance is DENIED.

DATED: November 7, 2024