IN THE MATTER OF

ARBITRATION BETWEEN

STATE OF OHIO, DEPARTMENT OF TRANSPORTATION

Employer

and Case #31-12 (10-18-96) 37-01-06

OCSEA, Local 11

Union

APPEARANCES:

For the Department: Edward A. Flynn
Assistant Administrator,
Labor Relations

and

William A. Tallberg
Labor Relations Officer

For the Union: Ann Light Hoke, Esq.
Associate General Counsel

OPINION AND AWARD OF THE ARBITRATOR

Frank A. Keenan
Labor Arbitrator

Statement of the Case and Credibility Resolutions:

This case, particularly well presented by the parties' advocates, was heard October 22, 1997. The case involves the discharge of employee Thomas Kearns. Testifying on behalf of the Department were: Highway Maintenance Superintendent Keith Miller; Labor Relations Officer William A. Tallberg; and the Grievant's fellow bargaining unit employee, Nicholas Pieronek. Testifying on behalf of the Grievant and the Union were: the Grievant; OCSEA Staff Representative Peggy Tanksley; and Union Steward Lucille Micatrotto. Both parties introduced documentary evidence as well. A voluminous record was compiled. In addition, the parties entered into the following stipulations:

1. Tom Kearns was hired by ODOT on June 18, 1984 as a highway maintenance worker 2.
2. Tom Kearns was promoted to a highway maintenance worker 4 position on June 3, 1990.
3. On September 11, 1996, Tom Kearns was scheduled for a load securement training class which Tom attended.
4. Tom Kearns tested negative on his return-to-duty drug test and six follow-up drug tests.
5. Tom Kearns was removed from his ODOT position on October 16, 1996.

Much of the evidence of record is uncontested. Thus the record shows that the Grievant, as he acknowledges, is a "Safety Sensitive" employee as defined by the Federal Omnibus Transportation Employee Testing Act. That Act requires random and other drug testing of such employees. Accordingly, on April 5, 1995 the Department promulgated a Drug and Alcohol Testing Policy, which prohibited "the use of illegal drugs"; set forth procedures

for random testing; and advised employees that "refusal to submit to . . . random testing . . . shall be considered a positive drug test . . . [resulting in] a loss of driving privileges and may result in disciplinary action up to and including termination." The Policy stated that "prohibited conduct" for purposes of the Policy included the following: "No employee shall refuse to submit to . . . a random . . . drug test . . ." The Policy provided that "follow-up testing may continue for a period of up to 60 months following the employee's return to duty." The Policy went on to provide that "the following discipline shall apply for violations of this Policy: . . . A positive drug test: 1st offense - suspension - removal; 2nd offense - removal; Refusal to take a drug . . . test: 1st offense - supervision - removal; 2nd offense - removal." The Grievant acknowledged receiving a copy of the Policy on 4-24-95. The Policy was revised June 26, 1996. The concepts noted above were retained and in addition the Policy stated that "a refusal to test for drugs occurs when the employee . . . 3) fails to cooperate with the testing process in any way that prevents completion of the test." It is noted the U.S. D.O.T. regulations at Section 382.11 refer to "Refusal to submit to a required . . . controlled substances test," and proscribe such refusal, but do not go on to explain or give examples of what constitutes a "refusal." The Grievant, on 7-19-96, acknowledged receipt of the 6-26-96 Revisions to the Policy.

In the time frame between the 4-5-95 Policy and its 6-26-96 Revision, namely, in July 1995, pursuant to a random drug test, the Grievant tested positive for cocaine. As a result of this positive test the Department determined to terminate the Grievant for his violation of the Act and the Department's work rules in the absence of the Grievant entering into a Last Chance Agreement. On August 15, 1995, the Grievant waived Union representation and participation in his Last Chance Agreement and entered into same, along with an Employee Assistance Program Participation Agreement. That Last Chance Agreement provided, so far as is relevant here, as follows:

> "The employee affirms that he . . . has been charged with WR 101 #27 other actions that could compromise or impair ability to perform duties and received a pre-disciplinary conference on these charges. The employee also agrees that the alleged offense is in violation of the above Act and the Department would otherwise confer the discipline of termination.
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> The parties agree that discipline for this offense will be held in abeyance contingent upon the employee's successful completion of the following requirements:
>
> [There follows a recitation of the EAP's provisions and requirements]
>
> . . .
>
> 6. The employee must never again violate any Departmental rule or policy relating to drug . . . use, or the terms of this agreement.
>
> . . .
>
> The employee further understands and agrees that upon his return to work he will be subject to not less than six random drug tests for up to one year . . .

> It is agreed by all the parties that if, at any time in the future, the employee violates this Last Chance Agreement or any subsequent agreement made between the employee and the Substance Abuse Professional or the EAP, or if the employee is found in violation of the employer's drug and alcohol policies, the employee will be charged separately for this second offense and afforded a pre-disciplinary meeting before the employer confers discipline, it is understood by the employee that any grievance arising out of his/her discipline shall have the scope of the arbitration limited to the question of whether or not the employee did indeed violate the conditions set forth above and the parties acknowledge the waiver of the contractual due process rights to the extent contained herein."

The Grievant was subjected to the six random drug tests referred to above and all tests came back negative for cocaine and all other tested substances.

On September 11, 1996, the Grievant's immediate supervisor, the Superintendent of the Mayfield Yard, Keith Miller, was informed by ODOT District 12 Labor Relations Officer William Tallberg that the Grievant was scheduled for a Federal DOT Random Drug test that morning. The following day, September 12, 1996, Miller prepared a memo for Tallberg setting forth his interchange with the Grievant concerning this random drug test. That memo reads in pertinent part as follows:

> "I was told that Thomas Kearns was scheduled for a Random Drug test at 9:00 a.m. I then informed Bill Tallberg that Kearns was scheduled to go to a training class at the Warrensville Yard. Bill Tallberg informed me that he would reschedule Kearns' test to Thursday, September 12 at 9:00 a.m. At 8:00 a.m. on Wednesday, September 11, 1996, Bill Tallberg called me again to inform me that he had found out the class Kearns was attending at Warrensville Yard, was to end at 11:00 a.m. that morning and that being the case, he would schedule Kearns' drug test for 1:00 p.m. that afternoon, September 11, 1996.
>
> At 9:00 a.m. on September 11, 1996, I went to the Warrensville Yard and when the training class ended at

11:00 a.m., I told Thomas Kearns that after his lunch break and the final half hour of the class which was to be from 12:00 p.m. to 12:30 p.m., he was to report to Company Health Care on Transportation Blvd. Across from District Headquarters for a Random Drug Test.

Thomas Kearns acknowledged that he understood by saying "OK" and then he walked away. I went back to Mayfield Yard right after speaking to Kearns and at approximately 11:35, Kearns came into my office in the Mayfield Yard and told me he was going to the doctors because he was sick. At that time, I told him this would probably be considered a positive test if he didn't report to the collection site as ordered and that he may not get paid for that afternoon. I also informed him that before he left the yard, he should call Bill Tallberg at District Headquarters. I told him a second time that not reporting for the scheduled test would most likely be considered a positive test. At 11:45, Bill Tallberg called to tell me that he received a voice mail from Thomas Kearns stating that he was going to a doctor because he had sinus problems and diarrhea and could not report for the drug test.

I went outside to see if Kearns had left the yard yet, which he had. Bill Tallberg informed me at that time, that in accordance with the Federal Omnibus Testing Act and ODOT Drug Testing Policy, Kearns' failure to report for the Drug Test was considered a refusal to test and positive.

Bill Tallberg informed me to contact Thomas Kearns and tell him that he is not to report to work and that he can take vacation leave, personal leave, comp time or leave without pay and that he would be receiving a notice of a scheduled date for a predisciplinary meeting by mail."

At the hearing herein Miller essentially reiterated same, expanding upon the content of this memo somewhat. Thus he indicated that the Grievant seemed nervous when he was first told he was to be tested. Miller also testified that he told the Grievant that he was 99.9% certain that they would regard his going home early sick as a refusal to be tested and hence the same as a positive test result. Miller further testified that while at the Warrensville Yard, the Grievant never told him that he was feeling

sick. Miller acknowledged that the Grievant was in the room when he took the call from Tallberg advising that Grievant had been selected for a random drug test, and that he told the Grievant he'd be tested the next day, since he was scheduled for training. It appears that a test the following day, with such advance knowledge, would not have qualified as a proper "random" test.

A pre-disciplinary notice letter, dated August 14, 1996, referring to Case No. 01-43-96 was sent to the Grievant reciting in pertinent part:

> "You are charged with violation(s) of WR 101, Item #27 - Other actions that could compromise or impair the ability of the employee to effectively carry out his . . . duties as a public employee. The Last Chance Agreement you signed August 15, 1995, is also in violation.
>
> The basis of these charges is that on Thursday, September 12, 1996 you were rescheduled for a random drug test that you failed to report to . . ."

A pre-disciplinary notice letter to the Grievant dated September 17, 1996 read as the prior letter except that it reflected that the "basis of these charges is that on Thursday, September 11, 1996 etc." and the pre-disciplinary meeting was set for September 23, 1996. The Grievant was unable to attend and it was rescheduled to September 27th. At the meeting the Grievant claimed he was too sick to go for his drug test. To corroborate his being too sick, a written statement dated September 12, 1996, from fellow employee Pieronek was brought forth. In it Pieronek asserted that: as early as 8:00 a.m. on September 11, 1996, Grievant told him, Pieronek, that he "wasn't feeling too good the night before and at the present time"; that he left the [class]

room three times; that he had to splash water on his face; and that he, Pieronek, told him he should go get some rest. Management, however, introduced statement from Pieronek dated September 25, 1996, asserting that the aforesaid statement was "false, null and void." In this regard Keith Miller testified that on 9-25-9 Pieronek came to him and told him that he'd written a statement on the Grievant's behalf but that it was not true. Miller referred him to LRO Tallberg. Pieronek told Tallberg his 9-12-96 statement in support of the Grievant was false. Tallberg said say so in writing.

It was Tallberg's testimony that Pieronek told him that he'd pressed assault charges against a fellow employee and that the Grievant was scheduled to testify on Pieronek's behalf but he didn't show up. According to Pieronek the defendant pled guilty and the Court took action against the defendant, but he nonetheless called the Grievant about not showing up. Grievant told him he was at a party. Pieronek indicated he was upset with the Grievant because he didn't come through for him. According to Tallberg Pieronek told him that given as the Grievant didn't come through for him, why should he jeopardize his own job for the Grievant with a false statement on the Grievant's behalf.

It was further Pieronek's testimony that earlier on September 11th the Grievant had not stated that he was sick; that he and the Grievant talked about Pieronek making up a statement about Grievant being sick; and that the Grievant indicated that he

didn't want to take the drug test. According to Pieronek, Miller told the Grievant to make sure he made his drug test.

Following the pre-disciplinary hearing of September 27, 1996, the Grievant was discharged. He was advised of his dismissal by ODOT Director Wray by letter dated October 11, 1996, reading in pertinent part as follows:

> "This letter is to inform you that you are hereby terminated . . . [I]t has been determined that just cause exists for this action. You are found to have violated Directive WR 101, Item #27 - Other actions that could compromise or impair the ability of the employee to perform his . . . duties as a public employee (and violation of Last Chance Agreement)."

The instant grievance followed, alleging that the Grievant was discharged "without just cause."

The Grievant testified that he was sick with flu-like symptoms and diarrhea and that indeed he'd soiled himself about mid-morning. In this state he needed to go home and see a doctor. He was seen by a doctor after 3:00 p.m. on September 11, 1996. The Doctor's notes refer to the "patient's complaint" as flu symptoms. "Vital signs" checked showed a sub-normal temperature of 98.4°. Also noted are: "frontal headache"; "sinus pressure"; and "had some diarrhea as well." The Doctor gave him an excuse to be off work two (2) days. On the following day, September 12, 1996, the Grievant was, at his own expense, tested for drugs at a lab not utilized by ODOT. He tested negative for cocaine. Tallberg contended that 24 hours plus could make a difference in a test for cocaine. Union witness Tanksley, who was shown to have some expertise in drug testing matters, agreed with Tallberg's

contention. The parties introduced into evidence a letter to Ms. Micatrotto from Dr. Thomas Mandat, M.D., dated December 10, 1996, stating that the Grievant's September 12, 1996 drug test "has the same thresholds as a NIDA drug screen. In fact it actually tested for further results. . . [T]hey were all negative on 9-12-96. I believe that [Grievant] should be given allowance for the above testing and cleared for his DOT license."

Another matter of note concerns the Grievant's concession that for him a second positive test or a refusal to take a test would warrant his removal. The record further reflects that the Grievant's evaluations since 1990 have been good, rating him as meeting expectations or above, and generally commenting favorably on his work performance.

Further with respect to employee Pieronek, the record shows that in 1996 he received a written warning for failure to follow policies; a two day suspension for using insulting language toward a fellow employee; and a three day suspension for sleeping on duty.

The Department's Position:

The Department takes the position that the record clearly shows that on September 11, 1996, the Grievant refused to report for a random drug test. The Grievant was clearly ordered to report for a drug screen at 1:00 p.m., but did not do so. His excuse for not doing so to the effect that he was too sick to do so is not only self-serving but bogus, as was made manifest by fellow employee Pieronek. The Department notes that while the Union argues that the statement written by Pieronek dated September 12, 1996, stating

that the Grievant was sick on the morning of September 12, 1996, is the true statement, and that Pieronek's disavowal of that statement was only because the Grievant failed to testify in Court for Pieronek in a personal matter that day, to the contrary, the Department has shown that the reason Pieronek refuted his September 12th statement was because it was completely false and only written by Pieronek in an attempt to help a fellow employee save his job, but Pieronek decided that the Grievant was not worth putting his own job in jeopardy by allowing the untrue September 12th statement to be used in any way.

The Department asserts that the Grievant was forewarned twice by supervisor Miller before Grievant left State property that if he did not report for the drug test, it would be considered a refusal to test, and as stated in ODOT's policy and the Federal Law, he would be considered as positive for that refused test. Indeed, having in effect refused to be tested, the Grievant's refusal is deemed to be the same as a positive test. Moreover the act of refusal standing alone, was violative of ODOT and Federal Policy. Thus clearly, the Grievant's refusal to report for the random drug test on September 11, 1996, as ordered, was a definite violation of the still viable Last Chance Agreement, specifically, item number 6, which states the employee must never again violate any departmental rule or policy relating to drugs, asserts the Department. Since he did again violate said Policy his actions gave just cause for removal. Moreover, asserts the Department, the

violation of the Last Chance Agreement limits the scope of the arbitration, waiving consideration of due process rights.

The Department asserts that the Grievant's negative drug test on September 12, 1996, is not relevant. It points out that the Union concedes that such a 24-hour plus delay could make a difference when it comes to testing for cocaine use.

As for the Weyerhauser case relied upon by the Union, the Department asserts it has no similarity to the instant matter.

On the basis of the foregoing, the Department urges that the grievance be denied.

The Union's Position:

If viewed as a drug testing related case the Union urges that the appropriate standard of proof is that of "clear and convincing" evidence, citing Atlantic Southeast Airlines Inc., 101 LA 515 (1993).

It is the Union's contention that the Grievant did not refuse to take a drug test on September 11, 1996. He initially agreed to take the test, but the Department changed its mind. The Grievant was sick and had told the Department he was going home when he learned that he was now to take the test at 1:00 p.m. To go home sick under these circumstances is not a refusal to submit to a test when all the surrounding circumstances show that Grievant had notified the Department that he was sick and where he was indeed sick. The Department acted unjustly when it fired the Grievant for being sick.

It is the Union's position that this matter should not be viewed as a violation of a Last Chance Agreement, but rather it should be viewed as an insubordination matter. This is really an insubordination case and not a drug testing case, argues the Union. The Union points to the Bambino case decided by Arbitrator Rivera (O.C.B. Grievance #G-87-0205) wherein Arbitrator Rivera found that "insubordination is an offense that requires very specific elements. To find insubordination, the Arbitrator must find at a minimum a direct order which has been deliberately and knowingly disobeyed." But here, asserts the Union, the Grievant was given conflicting orders.

Even assuming that the case were properly viewed as one involving a violation of the Grievant's Last Chance Agreement, there was no refusal to submit to a test here. In this regard the Union cites Weyerhauser Company Forest Products, 108 LA 26 (Levak, 1997), wherein it was held that the employee grievant's discharge for refusal to take a drug test was found to be without just cause because the employer's testing procedure violated U.S. D.O.T. rules; the Grievant therefore could not be held to D.O.T. standards, where the Employer itself failed to adhere to them. It is the Union's contention that when the Department postponed the Grievant's test to the following day, it no longer met the randomness requirements under the U.S. D.O.T. guidelines, and hence the Grievant couldn't be held to those guidelines either. Additionally, the Union relies on Bethlehem Steel Corp. (Helen

Witt, Arbitrator, [1993 WL 801 301 (Arb.)]. In that decision Arbitrator Witt found as follows:

> "I find that Grievant refused to take the drug screen urine test . . . because of his belief that it was discriminatory against black people and that the Company's refusal to accept a blood test from another well-known substance abuse facility . . . was arbitrary on the unique facts here, which include the Grievant's unblemished drug record . . . Therefore the decision to terminate Grievant was . . . improper."
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> Interim findings of Arbitrator Witt were as follows: "The fact that [Grievant] submitted to a blood test two days after he refused the urine test indicates that he was not simply trying to avoid a drug screen but wanted instead a customized version."
>
> - and -
>
> ". . . Grievant's reason for refusing the urine test . . . is found to be that he believed the test was discriminatory. His use of that word . . . can only refer to racial discrimination. . . . [I]t is clear that Grievant offered to take a blood test in the belief that it would be more accurate for him, a black man."

On the basis of the foregoing the Union urges that the grievance be sustained and that the Grievant be reinstated without loss of seniority and with full back pay and benefits.

Discussion and Opinion:

The record is clear that the Grievant was directed to report for a random drug screen at 1:00 p.m. in September 11, 1996. That he initially was told to report at 9:00 a.m.; then told to report the next day; and only later told to report at 1:00 p.m. is not truly relevant. The Union would analogize these shifting reporting times to the circumstances and outcome of the Weyerhauser case. There may have been some substance to that claim had the Grievant simply been told on September 11th to report for a test on

September 12th, but that scenario did not come to pass. And there was no showing that changing the test from 9:00 a.m. to 1:00 p.m. was violative of any ODOT, USDOT, or State of Ohio drug testing policy. True enough the changes in reporting time were different and hence conflicting, but the record is very clear that the initial change to a test on September 12th was rescinded and that the Grievant was expressly told to report at 1:00 p.m. on September 11th. Hence the Union's "conflicting orders" contention and "confusing" orders contentions are not made out.

Given the fact that this entire matter centers around failing to take a random drug test, it need not be belabored that the Department was simply correct in viewing the matter as potentially violative of the Grievant's still viable Last Chance Agreement, which came about because of a previous violation of the applicable drug policies. Under that Agreement the Grievant agreed at paragraph 6 that he would "never again violate any Departmental rule or policy relating to drug use . . ." But the Departmental rules and policy clearly provide that a refusal to take a test equates to a positive test and a positive test result discloses illegal drug use, which is proscribed by the Policy. Thus the logic is irrefutable: if the Grievant is properly regarded as having tested positive by virtue of having refused to be tested, such constitutes a clear violation of paragraph 6 of his Last Chance Agreement and his discharge must be deemed to therefore be for just cause. The case thus comes down to whether the circumstances here are tantamount to a "refusal," since concededly

the Grievant did not in haec verba state, did not expressly state, that he was refusing to take the test. In my view it's clear that circumstances "tantamount" to a refusal contemplate and constitute a refusal every bit as much as a refusal expressly stated. Indeed Arbitrator Witt implicitly finds such to be the case in the Bethlehem Steel case, cited by the Union, wherein she notes that the Grievant before her was not "simply trying to avoid a drug screen." One needs to look at the totality of the circumstances to determine, by inference, whether the Grievant here was "trying to avoid a drug screen" on September 11th. The linchpin to the Grievant's contention and assertion to the effect that he was not seeking avoidance lies in the credibility of his claim to the effect that he was sick at the appointed time, and not able to report for his 1:00 p.m. test.

The Grievant's testimony concerning his illness is self-serving and subjective. It therefore calls for some corroboration. At the pre-discipline hearing corroboration was proffered in the form of the corroborative September 12, 1996 statement of employee Pieronek. However, he later recanted his corroborative statement. This flip flop clearly creates a difficult issue with respect to Pieronek's credibility. Credibility issues such as the Grievant's and Pieronek's require close scrutiny. The Union understandably, in addition to the inconsistencies in Pieronek's statements, relies on Pieronek's purported bias against the Grievant, namely, that he recanted his corroborative statement purportedly in retaliation for the Grievant failing to testify on his behalf in a Court

proceeding, as persuasive of the proposition that Pieronek is not a credible witness. However, close scrutiny of the circumstances surrounding Pieronek's initial corroborative statement and subsequent retraction thereof persuade me that in retracting his September 12th statement, Pieronek was telling the truth. Thus it will be recalled that even without the Grievant's testimony, the Court took adverse action against the defendant in the Court proceeding, which was the result Pieronek clearly sought. In my view this outcome seriously undermines any conclusion that Pieronek would falsely withdraw his corroborative statement. Had the Court outcome been adverse to Pieronek's interest, one could arguably contend that Pieronek would have to wonder whether the Grievant's promised testimony on his behalf would have made a difference in the Court proceeding and outcome, and such could therefore arguably support a finding of a strong motive to get even with Pieronek, even if it meant wrongfully and falsely withdrawing from his statement in support of the Grievant. However, such circumstance did not come to pass. What happened here fully supports the inference that Pieronek was simply unwilling to step forward and stand up for the Grievant with a corroborative statement he knew to be false, when the Grievant was unwilling to step forward and stand up for Pieronek. But this inference is in essence what Pieronek claims to be his motivation in retracting his statement of September 12th corroborative of the Grievant. This claim comports with human nature and has the ring of truth to it. Moreover, Pieronek's retraction finds support in other circumstances. Thus,

while the Grievant purportedly told Pieronek he was sick early in the morning, he did not so tell Miller. Crediting Pieronek's testimony at the hearing herein, I find that he and the Grievant "talked about making up a statement about [Grievant] being sick," and that the Grievant told him that he did not want to take the test.

The Union also points to the report of Doctor Mallard of September 11, 1996, as corroborative of the Grievant. However, I note that it almost entirely rests on what the Grievant told the Doctor. And such non-subjective indicia as are related, such as the Grievant's body temperature, which was subnormal, are simply not consistent with any meaningful illness. In sum the Doctor's report lends little by way of corroboration to the Grievant's claim.

Finally, and certainly not the least, the Grievant must be found to be well aware of the applicable drug policy. He'd run afoul of it; was on a last chance agreement; had successfully mustered out of the EAP program; and had been randomly tested for drugs no less than seven times following the random test that put him into the Last Chance Agreement in the first place. I am therefore clearly and convincingly persuaded that when Miller twice admonished him that failing to report for his 1:00 p.m. test would probably be viewed as a refusal and hence as a positive test result, the Grievant was fully aware that such was a likely consequence. In sum the Department was simply justified in failing to credit the Grievant's justification for missing his drug test,

with the consequence that it was justified in concluding that the Grievant was trying to avoid taking the test and thereby in effect refusing to take it. Pieronek's credited testimony removes any doubt in the matter. The Grievant's bogus sickness constituted a failure to cooperate that prevented the completion of the test and hence a "refusal" is made out. In turn he is to be regarded as therefore having tested positive. Thus, both by having in effect tested positive, and by having refused to be tested, the Grievant was in violation of the applicable policy and hence in clear violation of his Last Chance Agreement. It must therefore be concluded that the Grievant was discharged for just cause. The Grievant's September 12, 1996 drug test was after the operative facts, and in any event, given the significance of the twenty-four-plus hour delay, probative of nothing relevant here. Finally, in light of Arbitrator Witt's observation in the Bethlehem Steel case that she was confronted with "unique facts," and that "notably Grievant was not disciplined for his refusal to take the test," contrary to the Union's contention, no sound analogy to that case exists here.

Despite the yeoman's job on behalf of the Grievant that the Union has put forth, the grievance must be denied.

Award:

For the reasons more fully set forth above, the grievance is denied. The Grievant was discharged for just cause.

Dated: December 17, 1997

Frank A. Keenan
Arbitrator