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INVOICE

DATE OF INVOICE: 11/21/02

ACTIVITY: Arbitration with 1199/DYS at OCB held 10/7/02
Henry Jones discharge/DYS

PROFESSIONAL SERVICE:

1 day of hearing,	$700.00	
½ day of travel,	350.00	
2 days of study and writing @ $700 per day	1400.00	
		$2450.00

EXPENSES:

MILEAGE	296 mi ,nr	n/a
PARKING	10.00	n/a
MEALS	9.50	n/a
TRAVEL	Turnpike: nr	n/a
HOTEL		n/a
Tax on Hotel		n/a
SECRETARIAL, __hrs @ 14.00hr,Copying, Postage, LD calls, etc.		n/a
TOTAL EXPENSES		n/a
TOTAL FOR SERVICES AND EXPENSES		$2450.00

UNION SHARE **$1225.00**

MANAGEMENT SHARE **$1225.00**

THANK YOU! INVOICE # 7 H 0048 Robert G. Stein, SS # 282-46-0892

IN THE MATTER OF ARBITRATION

BETWEEN

THE OHIO DEPARTMENT OF YOUTH SERVICES

AND

SEIU 1199/AFSCME-AFL-CIO

Before: Robert G. Stein

PANEL APPOINTMENT

CASE # 35-03 -011213–0188-02-12
Henry Jones, Grievant

Advocate(s) for the UNION:

Bill Brandt, Staff Representative
SEIU 1199/AFL-CIO
13295 S. Dublin Road
Columbus OH 43215

Advocate for the EMPLOYER:

Michael Duco, Director, Dispute Resolution, OCB
OFFICE OF COLLECTIVE BARGAINING
Bank One Building
100 E. Broad St., 18th Floor
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INTRODUCTION

A hearing on the above referenced matter was held on October 7, 2002, in Columbus, Ohio. The parties stipulated to the fact that the issue was properly before the Arbitrator. During the hearing the parties were given a full opportunity to present evidence and testimony on behalf of their positions. The parties made closing arguments in lieu of submitting briefs. The hearing was closed on October 7, 2002.

ISSUE

The parties agreed upon the following definition of the issue:

Was the Grievant, Henry B. Jones, removed from his position as social worker for just cause? If not, what shall the remedy be?

RELEVANT CONTRACT LANGUAGE

(Listed for reference, see Agreement for language)

ARTICLE DISCIPLINE

BACKGROUND

This case involves the removal of Henry Jones, a social worker at the Cuyahoga Hill Juvenile Correctional Facility. Mr. Jones has been employed with the Department of Youth Services ("DYS") since December 2, 1991. At the time of the incident involving the Grievant's termination, he was under a "Last Chance Agreement" that was imposed for previously testing positive for cocaine on a normal random drug test conducted in February of 2000. The Last Chance Agreement was imposed on March 3, 2000 and was to be in place for a five-year period. The Last Chance Agreement contains specific language regarding drug tests and violations of the Agreement's terms. It states in pertinent part:

The Employee agrees to the following:

3) *"The Employee shall submit to at least six (6) randomly scheduled follow up tests, within the next twelve (12) months, or sixty- (60) months if required by the EAP provider. These tests must all be negative. A positive test result on any test shall result in termination.*

5) *The employee shall also be subject to the normal random Drug and/or alcohol tests. The tests must be negative. A positive test shall result in termination."*

"It is agreed by both parties that if the employee violates the Last Chance Agreement, the EAP Participation Agreement, or if continued violation of the Random Drug Testing Policy; the appropriate discipline shall be termination from his/her position. The Department need only prove that the employee violated The above agreement(s)/rule(s) and the arbitrator shall have no

authority to modify the discipline issued by the Department. All Parties acknowledge the waiver of the contractual due process rights to the extent stated above."

In addition to the Last Chance Agreement, the Grievant entered into an EAP Agreement on March 2, 2000. The EAP was for a period of 365 days (Jx 14). The Grievant passed several drug screens during this time. The Grievant was removed (fired) from his position on December 11, 2001. According to the Employer he was removed for violating the DYS B-19 Work Rule #18 Misuse of Drugs, C. violation of the Drug Free Workplace policy, and violation of the Last Chance Agreement.

The incident leading to the Grievant's termination occurred on November 19, 2001. Mr. Jones reported for work at 7:21 a.m. According to the Employer at 7:30 a.m., Ms. Lee Williams, the back-up drug coordinator, advised Mr. Jones that he was to have a random drug test that day. According to Ms. William's statement and her testimony she used slang when she addressed the Grievant. She stated "...come back to my around 9:00 a.m. cause you have to go 'potty' at 9:30 a.m. According to Ms. Williams, the Grievant said. "okay, I'll come back after my group." The Grievant states Ms. Williams never informed him that he was randomly selected for drug screen on that day.

Shortly after seeing Ms. Williams, the Grievant saw Ms. Tamara Wynn as she entered her office. Ms. Wynn was the Grievant's supervisor until June of 2001. The Grievant went to her and told her he was feeling ill and

needed to leave work. Ms. Wynn recommended the leave of absence for sickness w/diarrhea and a stomach ache. It was approved and the Grievant went home at 7:45 a. m.

The Employer claimed that the Grievant faked this illness in order to avoid the drug screen and removed him from his position based upon the reasons provided above. The Grievant disagreed and filed a grievance, claiming the Employer did not have just cause to terminate his employment.

SUMMARY OF THE EMPLOYER'S POSITION

The Employer contends the Grievant only became ill when he was told he was going to have to submit to a random drug screen. The Grievant attempted to avoid his drug test because he was afraid of the result, claims the Employer. The Employer argues that Ms. Williams had a cordial relationship with the Grievant, and her testimony in this matter is truthful and accurate. In contrast, the Grievant's motivation in lying is to conceal the fact that he was fearful of testing positive for drugs. The Grievant avoided taking the drug test, and according to the Employer, that is a violation of the drug policy and his Last Chance Agreement.

Based upon these facts, the Employer contends it had just cause to terminate the Grievant.

SUMMARY OF THE UNION'S POSITION

The Union does not disagree that the Grievant was under a Last Chance Agreement. However, it argues that the Employer failed to follow its own drug testing procedure. It argues that DYS policy required Ms. Williams to immediately send employees for drug testing and to notify the Grievant's supervisor of the drug testing appointment. This was not done, contends the Union. The Union also argues that the Grievant was not asked to sign a notification form, and in general Ms. Williams did not handle this situation in a professional manner.

Based upon the above, the Union requests the grievance be granted.

DISCUSSION

Did Ms. Lee Williams, back-up drug coordinator, inform the Grievant that he had to take a random drug test on November 19, 2001? If he was aware of having to take the drug test, did he evade taking it in violation of this Last Chance Agreement by claiming he was sick? Did the Employer violate its own policy in its request of November 19, 2001? These are the questions that need to be addressed in this matter.

This case largely depends upon the credibility of the witnesses' testimony. In attempting to determine the truthfulness of witnesses, the

distinguished Arbitrator, Clair V. Duff observed that there are at least four areas that should be considered: interest, perception, memory, and communication. In a case involving South Penn Oil Co., he comments on each of these areas. In the instant case two of these areas are of particular importance. They are:

> *"INTEREST. While having an interest or stake in the outcome does does not disqualify a witness, it renders his testimony subject to most careful scrutiny.***Few witnesses, will deliberately falsify but there is a tendency to 'put your best foot forward'. This tendency, either consciously or subconsciously, leads many witnesses to remember and express testimony in a way favorable to the result, which they hope the hearing will produce.*
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> *MEMORY. The remembrance of an event weeks or months after it occurred is frequently dim and inaccurate and a witness may be confused as to facts, which initially he correctly perceived. By lapse of time precise details may elude his memory"(29 LA 718,720 (1957).*

I found the testimony of Ms. Lee Williams to be authentic and not contrived. She recorded her recollection of the events of November 19th on the same day (Jx 2). She talked with the Grievant who stood in the doorway of her office at approximately 7:30 a.m., some nine minutes after he punched the time clock and asked him about his peer group and the time it met. This part of the conversation was verified by the Grievant's statements. Ms. Williams stated she used the euphemism " go potty" to tell the Grievant he had to take a random drug test at 9:30 a.m. Ms. Williams stated she has used that euphemism many times with other employees and most importantly at other times with the Grievant. Ms.

Williams unequivocally stated that the Grievant knew what she meant. She also told him it would be a "freebee" (i.e. he would not have to pay for this test as he had to pay for the ones related while under the EAP). The Grievant claims he had a conversation with her, but denies that Ms. Williams told him he had to take a drug test "euphemistically" or otherwise.

I find Ms. Williams had no apparent reason to be untruthful; however, there were no witnesses to her conversation with the Grievant. Ms. Jones stated she had a cordial work relationship with the Grievant, which he did not refute. I found Ms. Williams to be a sensitive and forthright witness. The Grievant's testimony needs to be scrutinized closely because he stands to benefit from claiming he was never told about the drug screen. However, his statements cannot be discounted solely on the basis of motive. He claims Ms. Williams never told him to take a drug test during his conversation with her, although his testimony validates the other things they spoke about (e.g. group times, etc.). Other factors and circumstances favor Ms. William's version of the conversation.

The evidence establishes the fact that the Grievant's name was on the random drug list and he was to be tested on November 19th. Ms. Williams was the back-up drug coordinator, in possession of the list and responsible for notifying employees that they had to take the test. This fact lends credence to Ms. William's version of events. As a practical

matter, it is logical that she notified the Grievant when she saw him at 7:30 a. m. This would save her the time of contacting him later, even though her actions were in part contrary to how the policy is supposed to be implemented.

The Employer carries the burden in this matter. If an employee is told he must take a drug test under a mandatory drug testing policy it is tantamount to being given a direct order. The Employer must establish that such an order was given to and understood by an employee. The informal manner in which Ms. Williams handled this situation did not comport with Departmental policy, which the Union raised in its defense of the Grievant. The Grievant testified that in the past he would receive a call at work informing him of the test, he would then have to sign a form, and immediately leave work and proceed to the test. This procedure is in conformance with the Employer's policy. It also minimizes an employee's opportunity to evade taking a drug test.

However, the fundamental question that first needs to be answered is whether the Grievant was notified he had to take a drug test. I find Ms. Williams used an unconventional method to inform Mr. Jones of the drug test and even though it was not in strict compliance with Departmental policy it did not disadvantage the Grievant in any meaningful way. She sent him to other drug testings using the same terminology and he understood what she meant. She also reinforced what she was

communicating to the Grievant by referring to the test as a "freebee." When a conflict in testimony develops between two witnesses, arbitrators eventually have to make a final judgment. It has to be made on the totality of the witness statements, the weight of the evidence, and the circumstances that surround the event. These three factors demonstrate that at 7: 30 a.m., Mr. Jones was informed he had to take a drug test. Mr. Jones' claim that he was never informed of the drug test is simply not credible and it casts a pall over his other assertions.

The Grievant claimed to become ill within minutes of being told he had to report for drug testing in two hours. While it is plausible that an employee could experience sudden illness, a negative or suspicious inference is easily drawn from the timing of the Grievant's alleged malady. The Grievant's Last Chance status also would cause any reasonable person to question his potential involvement with drugs. Yet, an inference, however plausible, does not equate to proof. Other evidence and testimony must be examined in order to attempt to discern the truth of this matter.

Ms. Wynn, Social Worker Supervisor and the Grievant's previous supervisor, stated she did not observe Mr. Jones to be in any type of distress when he came to her office in order to get her to sign a leave form. However, more important than her observation of the Grievant's physical condition was the behavior of the Grievant. Ms. Wynn stated

that the Grievant came to her office and said, "I don't know what to do." According to Ms. Wynn, the Grievant appeared to be reluctant to have to go to the Superintendent's office to get his leave approved. Mr. Jones left Ms. Wynn's office and came back again to argue why he had to go to the Superintendent's office for approval. Ms. Wynn stated that she and Mr. Jones "went back and forth over this issue."

The Grievant's resistance in getting the Superintendent's approval undermines his credibility in this matter. Why was he reluctant to follow a policy that Ms. Wynn claimed everyone understood since it was issued in the year 2000? I find it suspicious that The Grievant was distressed about having to get leave approval, unless he had something to hide.

The Grievant stated that he was already feeling ill when he reported to work and visited the bathroom immediately after clocking-in to work. He also submitted medical verification of a stomach disorder, albeit he did not see his physician until mid-afternoon. However, he never mentioned his illness to Ms. Williams when he spoke to her at 7:30 a.m. and was told he had to take a drug test in two hours. He also never mentioned to Ms. Wynn that he came to work ill, which had caused him to visit the bathroom upon his arrival at work. The Grievant's denial that he was notified of the drug test seriously undermines his immediate claim of illness that prevented him from taking the test at 9:30 a.m. The Grievant provided no other specific information regarding the severity of his

stomach disorder (e.g. a prescription form, a more detailed doctor's statement) that would help to validate his need to immediately leave work.

The consequences of evading a drug test are indeed serious and employees who attempt to do so place themselves at great peril. However, when there is a gap of time between notification and execution of the drug test, the Employer leaves itself open for the possibility that an employee would have a legitimate excuse not to take it. The question is did Mr. Jones have one on November 19, 2001. Undoubtedly the Employer approved his leave, and he produced medical verification in support of that leave. However, he was not forthright with the administrative people who recommended and granted the leave. I find that the Grievant's suspicious behavior in securing the leave and his prior dishonesty regarding being informed of having to take the drug test acted against him in this case.

The Union correctly demonstrated that Ms. Williams did not follow the random testing procedure. However, her failure to follow the procedure worked more to the potential disadvantage of the Employer than it did to the Grievant. It is quite conceivable that an employee who became legitimately ill while on the job and who was in the same position as the Grievant, would have had the right to take sick leave and would have had to be excused from taking a random drug test. Unfortunately,

the Grievant, a ten-year employee under a Last Chance Agreement, undermined the validity of his excuse for securing a leave by being untruthful and acting in a suspicious manner. He placed himself in the untenable position of using deception to evade a mandatory drug screen, which undermined what would have arguably been a legitimate basis for being absent.

AWARD

The grievance is denied.

Respectfully submitted to the parties this 21st day of November, 2002

Robert G. Stein, Arbitrator