FMCS Case No. ----------

In the Matter of Arbitration between: **Grievant: Ryan RF**

Union

and **Hearing: January 14, 2020**
Brief exchange: May 18. 2020

Authority **Award date: May 25, 2020**

Opinion and Award

I. Facts

The City Water and Sewer Authority (the Authority) is responsible for the water treatment and delivery systems for the City, as well as the City's sewer system. The Authority employs several different trades in connection with its operations, including a unit of plumbers represented by the Union. The various trades, including the Union, negotiate a single collective bargaining agreement with the Authority through the City Joint Collective Bargaining Committee (JCBC). The Authority-JCBC Agreement (CBA) governing this grievance is dated January 1, 2017 and was introduced as Joint Ex. 1.

RF, Grievant, is a full-time four-year plumber for the Authority with no disciplinary history other than the present Grievance. His job responsibilities include installing and changing water meters, responding to service line and main line leaks, and tapping service lines for new construction. This work requires him to frequently kneel, stoop, and crouch. Mr. RF also drives a work van to transport tools and supplies, but he is not required to carry a valid Commercial Driver's License (CDL).

The Pennsylvania Medical Marijuana Act (MMA) became effective in May 2016, though medical marijuana did not actually become available until nearly two years later. Under the MMA, patients may under Pennsylvania (though not federal) law legally use medical marijuana in its various forms, with a physician's approval, to treat a range of qualifying medical conditions. The statute prohibits such patients from performing certain employment duties while under the influence, and permits employers to prohibit dangerous work activities while under the influence, but does not define "under the influence".

Mr. RF obtained MMA authorization to use medical marijuana beginning in early November 2018 to alleviate various medical ailments including anxiety, PTSD, and chronic back pain. He testified that he has tried other forms of medical treatment—such as chiropractic care and over-the-counter medication—but that only medical marijuana has proven consistently

effective at alleviating his pain. He also testified that he has never used medical marijuana before or during work hours.

The CBA provides that employees are subject to one mandatory random drug test each year. Joint Ex. 1, Appendix D. The Authority has contracted with XYZ to administer the tests.

On July 10, 2019, shortly after arriving at work, the Authority informed Mr. RF that he had been selected for a random drug test. Mr. RF completed the necessary paperwork, provided a urine sample, and returned to work. Two days later, XYZ informed Mr. RF that he had tested positive for marijuana (THC). Mr. RF responded by informing XYZ that he had a valid MMA prescription for medical marijuana and sent XYZ a copy of his authorization card. This was the first time he had notified either XYZ or the Authority of his marijuana use.

On July 15, 2019, XYZ sent test results indicating that Mr. RF had tested positive for marijuana to the Authority's Human Resources Department. Authority Ex. 2. Later that day, KM, Human Resource Manager, called Mr. RF to tell him he was subject to discipline for his positive test result. Mr. RF told Ms. KM that he had a valid MMA prescription for medical marijuana.

The Authority issued Mr. RF a five-day suspension pending potential discharge to be served July 22-26, 2019 for violating the Authority's drug policy. Joint Ex. 3. Mr. RF responded in writing to again inform the Authority that he had a valid medical marijuana prescription. *Id*. In that communication, Mr. RF also stated that he did not intend to violate any Authority policy and that he believed his off-duty complied with the Authority's employee handbook and the CBA. *Id*. Pursuant to the CBA, the Authority offered to forgo discharge if Mr. RF agreed to a Last Chance Agreement (LCA) and participated in the Authority's Employee Assistance Program (EAP). *Id.* Mr. RF signed the LCA, returned to work following his suspension, and successfully completed the EAP.

Mr. RF grieved his discipline on or about July 15, 2019 by filing a grievance form. In this form Mr. RF alleged:

Contract Section Allegedly Violated:	Appendix D Drug Policy
Statement by Grievant or Union:	Disparate treatment of employee.
Date of Alleged Violation:	July 12, 2019

The disparate treatment allegation refers to the prior non-discipline of RT. RT was a plumber for the Authority at Mr. RF's work location. Like Mr. RF, RT had MMA authorization to use medical marijuana. In December 2018, RT tested positive for marijuana. XYZ notified Ms. KM of RT's positive test on December 26, 2018. Ms. KM replied to that email a few minutes later. According to her testimony, however, she then completely forgot about the positive test. She testified that she received the email at home during the holidays, and when she returned to her office she had forgotten about RT's positive drug test. Consequently, she never followed up by initiating the disciplinary process. She testified that she did not learn of her mistake until it was brought to her attention in the context of Mr. RF's grievance. RT went on approved

medical leave beginning May or June of 2019 – shortly before Mr. RF's positive drug test – and remains on leave. Ms. KM testified that when he returns to work, she will initiate the same disciplinary procedures against him that she applied to Mr. RF.

II. Issue

Did the Authority have just cause to discipline Ryan RF? If not, what is the appropriate remedy?

III. Relevant CBA Provisions

SECTION 3 – MANAGEMENT

A. The Authority shall have the right to manage and to direct the working forces including the right to schedule and assign work to be performed and the right to hire or re-hire, promote, recall, demote, suspend, discipline, discharge, transfer, or layoff employees. It is the intent of the parties that any rights, privileges, or obligations which are not specifically granted to the Union and the employees by this Agreement or by law are retained by the Authority. It is understood, however, that the Authority shall not discipline or discharge an employee except for just cause.

B. When the Authority promulgates new work rules of such a nature as to be applicable to every employee in the bargaining unit, such rules shall be uniform across the Authority.

* * *

SECTION 4 – RESPONSIBILITIES OF THE PARTIES

The Authority, its officers and representatives at all levels, are bound to observe the provisions of this Agreement. The Union, its officers and representatives at all levels, are bound to observe the provisions of this Agreement. In addition to the responsibilities that may be provided elsewhere in this Agreement, the following shall be observed:

* * *

E. The applicable procedures of the Agreement shall be followed for the settlement of all grievances.

* * *

SECTION 5 – GRIEVANCE PROCEDURE

A. The purpose of this Section is: (1) **to provide the opportunity for discussion of any request or complaint by an employee**; and (2) to establish the exclusive procedures for the processing and settlement of grievances. Grievances, as defined herein, may not be initiated or processed in any other manner or appealed to any other intermediary including the Authority Board of Directors. A "grievance" as used in this Agreement is any complaint, dispute, or request by an employee or the Union which involves the interpretation, application of, or compliance with the provisions of this Agreement. Grievances must be initiated and processed promptly and the time limits observed, provided, however, that any time limit provided in the grievance procedure may be changed by mutual agreement of the parties. Appendix "B" of this bargaining agreement will represent the approved written grievance form of the parties. The parties agree that no grievance will be accepted unless submitted on this form. (Emphasis added).

* * *

Step II – If a grievance has not been satisfactorily resolved in Step 1, it can be presented in writing to the Director of Operations, or his designated representative, on a standard grievance form after the conclusion of the discussion with the employee's Section Manager or Director, but not later than ten (10) workdays after the initiation of such discussion. **The written grievance** must be dated and signed by the affected employee or employees, (subject to the provisions of Paragraph E) and **should include the information and facts giving rise to the grievance**. A grievance in Step II shall be discussed in an attempt to reach a settlement at a mutually convenient time between the employees, his grievance representative and/or Union representative and the designated representative of the Authority. (Emphasis added).

* * *

SECTION 6 – ARBITRATION

Any grievance that has been processed in accordance with the provisions of the preceding Section of this Agreement, but not satisfactorily settled shall be submitted to arbitration before an impartial arbitrator to be selected by mutual agreement of the parties.

* * *

The arbitrator shall not have the right to add to, subtract from, modify, or disregard any of the terms or provisions of this Agreement.

* * *

APPENDIX D
City Water and Sewer Authority
Mandatory Drug Testing Policy

The Authority and the JCBC agree that the parties will comply with the drug and alcohol testing requirements for all CDL drivers as required by U.S. Department of Transportation Federal Highway Administration Regulations 49 C.F.R. Part 382. **Such requirements shall also apply to all drivers of Authority equipment regardless of whether or not such drivers are required to have a CDL to operate such equipment**. (Emphasis added).

The City Water and Sewer Authority believes that a drug-free workplace is essential to the welfare of its employees and the general public. It has been the policy of the Authority to test for drug abuse as part of employee physicals or when there is probable cause to believe that an employee is involved with or under the influence of drugs in the workplace. In addition, each employee will undergo one mandatory drug test administered on a random basis each calendar year.

Testing will be for illegal substances, including some medications available by prescription.

Prior to submitting a sample, the employee must notify the testing agent that he or she is taking a prescription medication that may cause a positive test result. If the employee tests positive for the prescribed drug, the testing agent will verify usage through the prescribing physician. Once verified, the testing agent will record the test result as negative and report a negative result to the WSA. If the testing agent is not able to verify the prescription, the positive result will be reported to the WSA.

All test results will be strictly confidential. Results will be reported to the WSA Human Resources manager. Test results will not be discussed with any WSA employee, including managers and directors.

<u>First Positive Result</u>

The Human Resources Manager will discuss the positive result with the employee. He or she will be suspended pending discharge. In order to avoid discharge, the employee must immediately enter into a Last Change Agreement and enter into a treatment program through the EAP. Employees entering the EAP program will be required to fulfill all requirements of the program, including any additional drug testing. The program, not the WSA, will establish requirements for successful completion. The EAP program will provide periodic reports on the employee's progress, including the results of all drug tests, to the WSA.

If the employee refuses to sign the Last Chance Agreement and enter into the EAP program they [sic] will be discharged.

If the employee successfully completes the EAP and tests negative the following two (2) years, record of the positive test will be removed from the employee's file and their Last Chance Agreement will end.

If an employee fails a drug/alcohol test while on the Last Chance Agreement, they [sic] will be immediately discharged.

IV. Other Relevant Work Rules

DRUG AND ALCOHOL-FREE WORKPLACE

The City Water and Sewer Authority (WSA) recognizes the importance of maintaining a safe, productive and efficient work environment for its employees, stakeholders and any person conducting business for and/or on behalf of the Authority. **The use and abuse of alcohol, drugs and/or controlled substances can impair the ability to perform job responsibilities and also can result in the potential for accidents on-duty and other failures that may pose serious safety and health risks to employees, co-workers, customers and the general public.** (Emphasis added).

* * * *

To comply with U.S. Federal Motor Carrier Safety Administration (FMCSA) regulations (49 CFR Parts 40 and 382), we have implemented and administer a controlled substance and alcohol testing program for all Commercial Driver's License (CDL) drivers who operate Commercial Motor Vehicles (CMV) for WSA.

The use, possession, transfer, sale, purchase, manufacturer, distribution, dispensation, solicitation, or being under the influence of any controlled substance drug or other intoxicant, including alcohol, at any time while on WSA premises, or when performing any WSA business, including while driving WSA-provided vehicles, is prohibited. The only exceptions to this rule are:

Individuals may use legal over-the-counter medications or prescription drugs while at work strictly in accordance with the product instructions or a physician's prescription provided, however, that the use of such substances does not adversely affect the individual's ability to perform his or her job, or to do so in a safe manner.

* * * *

CONTROLLED SUBSTANCE

The term "controlled substance" has the meaning set forth in 21 U.S.C. Section 802(6) and includes all substances listed on Schedules I through V of 21 C.F.R. §1308 (§1308.11 through §1308.15), as they may be amended from time to time. (Emphasis added).

* * * *

ILLEGAL DRUG

"Illegal drug" means any **controlled substance** (including the presence of their metabolites) of which the sale, possession or use is prohibited under state **or federal law**. Illegal drugs include but are not limited to: marijuana . . . (Emphasis added).

LEGAL DRUG

"Legal drug" means prescription medications and over-the-counter medications that have been legally obtained and are being used only in the manner, combination or quantity for which they were prescribed or manufactured.

POSSESSION OR USE OF DRUGS OR ALCOHOL

Use of illegal drugs on or off duty, on or off WSA premises is prohibited. (Emphasis added).

* * * *

We recognize that employees may need to use legal drugs from time to time for medical reasons. The possession or use of legal drugs while on WSA premises, during work hours and/or when performing any WSA business, including when driving vehicles, is permitted, provided such use or influence does not affect the safety of an employee, co-workers, customers or the public, an employee's job performance or the safe or efficient operation of WSA facilities, equipment and vehicles.

An employee using a legal drug has an obligation to inquire and determine whether the legal drug he/she is taking may or will affect his/her ability to safely and efficiently perform job duties. If an employee is using a legal drug at the direction of a physician, dentist or other licensed practitioner, an employee is required to obtain a written statement of any work-related restrictions. Any such restrictions must be reported to his/her supervisor prior to reporting to work while using any legal drug.

* * * *

An employee may continue to work while using a legal drug provided that the WSA determines that an employee does not pose a threat to his/her own safety or the safety of co-workers, customers or the public, or that an employee's job performance will not significantly be affected by the legal drug. Otherwise, an employee may be required to take a leave of absence or comply with other appropriate action as determined by the WSA.

V. Analysis

Both the CBA and the Authority's Drug and Alcohol Free Workplace Policy prohibit Authority employees from using illegal drugs. Because I find that the CBA alone provides a sufficient basis for upholding the Authority's discipline of Mr. RF, I need not discuss the Policy.

As set forth above, the CBA Appendix D explicitly incorporates by reference U.S. Department of Transportation Federal Highway Administration Regulations 49 C.F.R. Part 382 (the Regulations). These Regulations were promulgated for drivers holding a commercial driver's license (CDL), but CBA Appendix D states that the Authority's drug testing policy applies "to all drivers of Authority equipment regardless of whether or not such drivers are required to have a CDL to operate such equipment." Mr. RF drives Authority work vans.

The Regulations, at 49 CFR § 382.213, state that "[n]o driver shall report for duty or remain on duty requiring the performance of safety sensitive functions when the driver uses any drug or substance identified in 21 CFR § 1308.11, Schedule I." Marijuana is a Schedule I Controlled Substance and thus is illegal under federal law. 21 CFR § 1308.11(d)(23). Because the CBA Appendix D incorporates by reference the Regulations, and the Regulations define marijuana as a prohibited substance, the CBA likewise prohibits Authority workers from using marijuana, notwithstanding the Pennsylvania MMA. This prohibition on "using" marijuana extends beyond being under the influence during work times, and includes off-duty use for medical purposes. *See* 49 CFR §§ 392.2 and 392.4; *see also* Federal Motor Carrier Safety Administration FAQs.

This interpretation of Appendix D is further reinforced by the fact that the CBA became effective January 1, 2017, approximately seven months after the effective date of the Pennsylvania MMA. If the parties had intended to exempt the medical use of marijuana, they presumably would have bargained for something other than the federal definition of illegal drugs.

I find that this, alone, justifies the Authority's discipline of Mr. RF.

Mr. RF testified that he believed that because he had a Pennsylvania prescription to use medical marijuana, his use of marijuana was not prohibited by the CBA Appendix D. However, as described above, the CBA Appendix D explicitly incorporates federal – not state – law. Moreover, even if he was correct that his prescriptive use of marijuana was not prohibited by Appendix D, he would still be subject to discipline because he failed to follow the Appendix D procedures for disclosing medical prescriptions before being drug tested.

The third and fourth paragraphs of Appendix D provide:

> Testing will be for illegal substances, including some medications available by prescription.
>
> Prior to submitting a sample, the employee must notify the testing agent that he or she is taking a prescription medication that may cause a positive test result. If the employee tests positive for the prescribed drug, the testing agent will verify usage through the prescribing physician. Once verified, the testing agent will record the test result as negative and report a negative result to the WSA. If the

testing agent is not able to verify the prescription, the positive result will be reported to the WSA.

These paragraphs put Authority employees on notice that they can be tested for prescription drugs, and impose a duty on employees to provide notice of prescription use *before* submitting a drug-testing sample. Mr. RF did not do that. Instead, he notified XYZ of his medical marijuana card only after his drug test came back positive.

The Union argues that the Authority (through |MMC) violated Appendix D because according to the fourth paragraph of Appendix D, "when an employee tests positive for a prescription medication and then verifies legitimate use of that medication, the testing agent must return a negative result to the Authority." Union's Brief at 17-18. The first sentence of this same paragraph, however, requires an employee on prescription medication that might cause a positive test result to notify the testing agent *before* the test. The purpose of this prior-notice requirement was not discussed at the arbitration hearing, but it doesn't matter. The CBA Appendix D requires it, and I am obliged to follow the language of the CBA. Because Mr. RF did not follow the requirement imposed by the first sentence of the fourth paragraph of Appendix D, he is not entitled to rely on the protections of the rest of the paragraph.

The Union argues that Mr. RF's discipline constitutes disparate treatment because RT, who was otherwise similarly situated to Mr. RF, received no discipline.[1] I agree with the Union that RT was, in all respects relevant here, similarly situated to Mr. RF; that their discipline varied widely; and that unexplained differential treatment is inconsistent with industrial due process. Here, however, Ms. KM credibly testified that she made an unintentional mistake by not invoking the disciplinary process following RT's positive drug test. A single instance of differential treatment because of a mistake is not the kind of arbitrary or intentional differential treatment that violates industrial due process. Moreover, because the failure to discipline an employee following a positive marijuana test occurred only once, it does not constitute a pattern or past practice.

The Union similarly argues that at the time Mr. RF tested positive, he knew that RT had previously tested positive but had not been disciplined, and inferred from this that the medical

[1] The Authority argues that because Mr. RF's initial grievance alleges only "disparate treatment", this is the only basis on which the Union can challenge Mr. RF's discipline. I disagree, for three reasons. First, while I agree generally that the parties cannot raise new issues after the initial grievance and employer's response, here I find that challenging the employer's application of the Drug Testing Policy is within the scope of the original Grievance. If Mr. RF were now to try to challenge the Authority's calculation of vacation days or something similar, that would clearly be beyond the scope of the original Grievance. Second, the Grievance specifically lists "Appendix D Drug Policy" as the CBA provision allegedly violated. If the Union had intended to confine its argument to unequal treatment, a more appropriate reference likely would have been to Article III, Section 3.B ("When the Authority promulgates new work rules of such a nature as to be applicable to every employee in the bargaining unit, such rules shall be uniform across the Authority."). Third, the Grievance's reference to "Appendix D Drug Policy", together with its identification of the date of violation as July 12, 2019 (the date Ms. M informed Mr. RF of his positive drug test), sufficed to put the Authority on notice that the Union was challenging the Authority's application of its Drug Testing Policy generally.

use of marijuana with a prescription is not prohibited by the CBA Appendix D. I would find this reliance argument highly persuasive if either the language of Appendix D were ambiguous, or if the Authority had repeatedly failed to discipline employees who tested for positive for marijuana and had a medical prescription. Here, however, Appendix D unambiguously adopts the federal definition of illegal substances, and the Authority failed to discipline an employee for testing positive only once. Moreover, even if Mr. RF reasonably thought he could rely on the Authority's treatment of RT, Mr. RF was still required to notify XYZ of his marijuana prescription *before* he was tested. He did not.

Likewise, the Union argues that the Authority should have given employees better notice that it intended to treat marijuana as a prohibited substance notwithstanding an employee's MMA prescription. I agree that such notice would have been a best practice, especially since a nonlawyer reading Appendix D may not have understood that the Appendix incorporates federal law by reference, or that federal law makes possessing marijuana illegal notwithstanding possession of a state medical marijuana card. But even if Mr. RF did not understand this, his Union most certainly did, because it had negotiated for precisely this language. Under these circumstances, I find that the Union was in at least as good a position to notify its members that Appendix D applies notwithstanding possession of a state medical marijuana card. I thus find that it would be inappropriate to reverse the Authority's imposition of discipline for lack of notice.

The Union argues that interpreting Appendix D as a categorical ban on medical marijuana use places employees with a medical marijuana card in a catch-22: forgo prescribed medical treatment or get fired. But even if this is so, it is precisely what the Union bargained for when it agreed to the language in Appendix D incorporating the federal definition of illegal substances.

Similarly, the Union argues that the language of Appendix D is outdated because Pennsylvania law now recognizes medical marijuana as legal, and that interpreting Appendix D as a categorical ban on medical marijuana use is out-of-step with the medical community. Again, even if so, it is my duty as arbitrator to interpret the contract the parties have bargained for, not to re-write it for them. And the parties knew what they were bargaining for because they agreed to incorporate federal law by reference notwithstanding Pennsylvania's legalization of medical marijuana some seven months before. The fact that medically prescribed marijuana did not become available until nearly a year after the CBA became effective does not change the analysis because the CBA drafters knew that medical marijuana would eventually come available and yet bargained for language providing that it would not be permitted under the CBA.

The Union argues that "The CBA and the [Drug and Alcohol Free Workplace] policy both reference [Department of Transportation] regulations but there is no legal obligation to follow these rules with respect to Mr. RF because he is a non-CDL driver." I agree that the DOT regulations do not require the Authority to apply those regulations to Mr. RF. However, the Authority is *contractually* obligated to do so because the Authority and the Union have

bargained for language in Appendix D that applies the DOT regulations "to all drivers of Authority equipment" and Mr. RF's job duties include driving Authority work vans.

The Union argues that MMC's test results for Mr. RF are invalid because they contain raw numbers but no units of measure. This argument might be persuasive if Mr. RF had been taking a prescription medication and the Authority had alleged that the level of the medication in his body exceeded his prescribed dose. Here, however, the Union has bargained for rules under which there is no permissible level of marijuana. According to Appendix D, any positive test triggers an immediate suspension followed by either discharge or successful completion of an EAP. Thus, it is the mere presence – not the level – of THC in Mr. RF's body that triggers discipline under Appendix D.

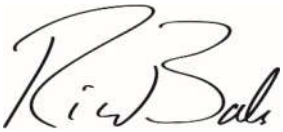
The Union argues that the Authority has created ambiguity with respect to medically prescribed marijuana by stating that "[t]he possession or use of legal drugs while on WSA premises, during work hours and/or when performing any WSA business, including when driving vehicles, is permitted provided such use or influence does not affect the safety of an employee, co-workers, customers or the public, an employee's job performance or the safe or efficient operation of WSA facilities, equipment and vehicles." Union's Brief at 22, citing Authority Ex. 1 at 5. I disagree that this language creates ambiguity. The CBA Appendix D unambiguously incorporates federal law, which defines marijuana use as illegal and contains no exception for medically prescribed use. The quoted language about using legal prescription drugs thus does not apply to prescribed – but illegal under federal law and proscribed by Appendix D – marijuana.

Finally, the Union argues that the Authority has failed to prove that Mr. RF was ever impaired at work by his off-duty medical use of marijuana, and that there is no connection between Mr. RF's off-duty conduct and his work performance. The Union further argues that "a positive drug test alone does not prove that an employee was impaired or under the influence while at work and past marijuana use may remain detectable in an employee's system for weeks after actual use." Union's Brief at 13; *accord*, Authority's Brief at 9.

This, however, is precisely why, according to Ms. KM, the Authority prefers a standard under which *any* positive test for marijuana triggers discipline, and has bargained with the Union for such language in Appendix D. Because no reliable standards exist that would allow the Authority (or any other employer) to determine if an employee is "under the influence" of medical marijuana or otherwise able to safely perform his or her job duties, the Authority and Union have bargained for contractual language providing that *all* marijuana use is prohibited, notwithstanding an employee's possession of a state-authorized medical marijuana card.

VI. Disposition

For the reasons described above, I find that the Authority had just cause to suspend Mr. RF's employment for five days. The Grievance is denied.



_____ May 25, 2020

Richard A. Bales, Arbitrator Date