C#09551

REGULAR ARBITRATION PANEL

IN THE MATTER OF THE ARBITRATION Between	GRIEVANT: Harold J. Wright
UNITED STATES POSTAL SERVICE	POST OFFICE: Montgomery, AL
And	CASE NUMBER: S7N-3D-D-21933
NATIONAL ASSOCIATION OF LETTER CARRIERS	

BEFORE: P. M. WILLIAMS, ARBITRATOR, SOUTHERN REGION

APPEARANCES:

FOR THE POSTAL SERVICE:
Fred G. Ott, Labor Relations Representative

FOR THE NATIONAL ASSOCIATION OF LETTER CARRIERS:
G. E. Cruise, Regional Administrative Assistant

PLACE OF HEARING:
Main Post Office, Montogmery, AL

DATE OF HEARING:
October 20, 1989

DECISION AND AWARD

BACKGROUND:

The grievant was employed as a full time regular letter carrier and assigned to the Lagoon Park Station, Montgomery. His craft seniority date is April 15, 1985.

On April 21, 1989 he was issued a Notice of Proposed Removal (Notice), which in part stated as follows:

"*** This action is based on the following reason:

"You are charged with being under the influence of and illegal use of drugs while in the performance of your official duties.

"Specifically, on March 8, 1989, you were involved in a single vehicle accident at 1673 Yarbrough Street while in an official duty status. The postal vehicle you were driving left the street, traveled 107 feet and struck a utility pole. You stated you had passed out and awoke immediately prior to striking the utility pole. You were transported to the hospital by emergency vehicle where treatment and tests were conducted.

"You were released from the hospital March 11, 1989, and started scheduled annual leave until March 24, 1989, at which time you returned to work."

"Test results were received from the hospital on April 14, 1989. These tests revealed that a cocaine metabolite was found in your urine during your hospitalization. The assessment of medical personnel was that you were cocaine intoxicated on the morning of the accident.

"The use of illegal drugs is a violation of Part 666.55 of the Employee and Labor Relations Manual (ELM) which states, 'Illegal use of drugs may be grounds for removal from the Postal Service' as well as part 661.53 which advises that no employee will engage in criminal, dishonest notorioulsly disgraceful or immoral conduct. The Postal Operations Manual, Part 221.653 sets forth the prohibition of entering on property or operating a motor vehicle on property while under the influence of any drug defined as a controlled substance. Also, part 661.3 of the ELM states that employees must avoid any action which might result in or create the appearance of impeding the Postal Service efficiency or economy.

"You or your representative may review the material relied upon to support the reasons for this notice at the Administrative Offices, 708 East South Boulevard, Montgomery, Alabama, during the hours of 8:00 a.m. through 4:30 p.m. If you do not understand the reasons for this notice, contact the undersigned for further explanation.

"You and/or your representative may answer this notice within seven (7) calendar days from the time of your receipt of this letter ..."

"signed:
"Donald C. Baker
"Supervisor, Station/Branch Operations..."

A grievance was filed over the Notice. It was denied at Step 1 on May 8th. An appeal to Step 2 was dated May 17th. At both Steps 1 and 2 the Employer raised a procedural objection to the timeliness of the filing of the grievance. The procedural objection however was not re-asserted at Step 3. Rather the grievance was denied there by the Employer on what was claimed to be just cause for the action taken.

On May 11, 1989 the grievant was issued a "Letter of Decision" (Letter). The Letter was essentially a re-statement of the charges made in the Notice with minor embellishments, and with a slight variance in both style and form. The Letter was also grieved. The parties mutually agreed to hold that grievance at Step 2 pending the decision of the grievance to be considered here. Moreover, at the hearing the representative for each party further agreed that the Decision and Award to be rendered in this case would also resolve and dispose of the grievance relating to the Letter, thus rendering that grievance moot.

All interested parties appeared at the hearing where they were given an opportunity to present such evidence, though testimony of witnesses and presentation of exhibits, as was deemed appropriate to the matter. The grievant appeared and testified. The supervisor who issued the Notice was unable to appear due to illness; he was however (with the consent of the Union) presented by the Employer on a conference type telephone. All witnesses were placed under oath and were cross-examined by the opposing party. Each party timely filed (postmarked on or before November 10th) a post hearing brief. The record is deemed closed.

POSITION OF THE PARTIES:

United States Postal Service (Employer):

The Employer claimed the grievant's removal was for just cause. It said he violated Parts 661.55, 661.53 and 661.3 of the ELM as well as Pa221.653 of the Postal Operations Manual which prohibited entering on postal property or operating a postal vehicle while under the influence of a controlled substance type drug. It also claimed the circumstances of his "blacking-out" were such that it was appropriate for urine and/or blood samples to be taken from his body while he was at the hospital for purposes of determining whether he had used drugs. It further claimed that the two medical reports it had received from Baptist Medical Center, Montgomery, established the fact that he "had a cocaine metabolite in his urine and that the likely cause of his seizure was cocaine intoxication." It said the circumstances presented just cause for his removal. It asked that the grievance be denied.

National Association of Letter Carriers (Union):

The Union contended the taking of urine from the grievant's body without his consent or knowledge was a denial of his due process. It said it had requested a copy of the authorization for the urine analysis and also a copy of the results, but neither was forthcoming, which was another violation of his due process rights. Yet another violation of his due process was said to be the Employer's failure to respond to its request to be provided with copies of the Employer's Fitness for Duty exam and the request therefor. It contended the most probable basis for his "blacking-out" was that he had taken a Flexeril capsule shortly before leaving for the street on the morning of March 8, 1989. It also contended the circumstances were such that just cause did not exist for the removal action. It asked that the grievance be sustained with him being reinstated and made whole for all earnings and fringe benefits lost. It also asked that record of the removal action be expunged from his personnel files.

ISSUE: Was the grievant's removal for just cause and in accordance with the terms of the National Agreement (NA) and applicable rules and regulations, and if not, what is the proper remedy?

OPINION:

Speaking first to the due process question raised by the Union of the Employer having directed or having made the suggestion that the Baptist Medical Center's medical staff ought to subject the grievant to specific tests to determine whether his "blacking-out" might or could be due to his being under the influence of drugs or alcohol, or both.

The proof that the Employer was responsible for the tests being undertaken is far from conclusive. However, whether it was or was not responsible for them is not the crucial issue here. Rather I believe the real issue to be decided on that score is whether the circumstances surrounding the vehicle accident warranted the taking of a urine and a blood sample from his body for purposes of determining whether he was under the influence of unlawful drugs or too much alcohol, or both.

It is undisputed that he lost control of the Employer's vehicle and that he did so because he lost consciousness. Moreover, he travelled a distance of 107 feet before striking a utility pole which caused him to come to a stop. The most pressing question to be answered therefore is: do the circumstances just described warrant or tend to warrant the taking of urine and blood samples from his body in order that those samples might be the subject of medical tests designed to determine whether his loss of consciousness was drug or alcohol related? A great deal more will be said about overall test procedures in a moment. It is to be emphasized at this point however that the question under consideration now is the Union's claim that he was denied due process solely as a result of the urine and blood samples being taken without his consent, and in the case of the urine sample, also without his knowledge. The point of its claim is that the test results of the urinalysis should be excluded from the record.

Under these circumstances (emphasis mine) I am unable to agree with the Union's claim because I believe its thrust puts forth the notion that his right to privacy supercedes the right of the Employer to know the cause(s) for his "blacking out". It seems to me that at the very least the Employer's right to know the cause(s) underlying such an unusual occurrence is sufficiently strong that his right to privacy over his body parts and fluids must yield in the Employer-Employee relationship, even though the same would not be true in the government-citizen relationship. Moreover, if he or the Union which is charged with representing him are of the opinion that he need not timely provide the samples or submit to an examination that is necessary in order for definitive findings to medically be made, they certainly have a right to not make him available for those purposes. However, it seems to me that they do so at their peril because neither he nor the Union have a reasonable right to expect that the Employer-Employee relationship will continue indefinitely if the Employer chooses to remove him for failing to be cooperative in providing the data that is vital for solving what is obviously a pressing and most compelling issue. Having said this I will move on to other matters because the issue of whether he did or did not submit to appropriate examination or provide proper samples is not decisive in this case. To the contrary the samples were provided and the examination was made, and the results thereof do not support the charges that the Employer has made against him. More will be said about this finding in a moment.

Other procedural objections made by the Union were essentially to the effect that the Employer had failed respond to its requests for several documents which it said were vital to its defense in this case. I find the Union's point to be well taken, and supported by the record. For reasons that will become apparent in a moment I shall not however dwell on the argument it made, nor on my reasons for finding merit in its complaint. Rather, I will refer an interested reader to a Decision and Award of Arbitrator J. Earl Williams on August 15, 1987, (Case No. S4N-3D-D-37683), involving these indentical parties, wherein (pages 18 - 21) the issue of the Employer failing to provide documents requested by the Union in a removal case is discussed in some detail. I will say however that I fully support what Dr. Williams says there about what ought to happen if the Employer fails to provide requested and pertinent documents that are a part of its basic files on the matter.

The crux of the Employer's complaint against the grievant here stems from the content of a medical summary that was issued by Baptist Medical Center that was transcribed on March 10, 1989. The summary appears over the signature of "Alphonso Dial, M.D.", and seems to have the support of "Winston T. Edwards, M.D.", who indicated on it, "*** I agree with the findings noted in this summary." On a second summary that was dictated by Dr. Dial and transcribed April 13, 1989, Dr. Edwards also indicated that, "*** I agree with the observations noted in this summary."

When I began to study the above two mentioned summaries I formed the opinion that Dr. Dial was probably an intern at the Center and that Dr. Edwards was his supervising doctor. Even though I did not deem it critical to a decision in this case I nevertheless telephoned the medical records section of the Center. My opinion of Dr. Dial's status and also that of Dr. Edwards was confirmed. The reason for my wanting to confirm Dr. Dial's status is because my experience and study in matters relating to drug tests tends to persuade me that perhaps his original assessment of the cause for the "Syncope" was something of an overstatement insofar as the conclusiveness of the urinalysis is concerned. To briefly explain.

The word "Syncope" is a medical term. Its meaning is: "[sudden loss of strength]. Swooning or fainting; temporary suspension of consciousness from cerebral anemia."

In the first summary Dr. Dial prepared, which he dictated while the grievant remained confined to the Center, a portion captioned "ASSESSMENT" appears as its final part. In part the following is stated:

"1) SYNCOPE. Obtain CT scan of the brain, EEG to rule out any focus of seizure activity. Will check all of his metabolic parameters to make sure he does not have any metabolic abnormalities. Will check thyroid function studies to determine if he has any thyroid disease; however feel most likely cause of his seizure is cocaine intoxication as cocaine was detected in his urine. (Emphasis mine.)

"2) HISTORY OF ABDOMINAL PAIN, aware of that, (remainder deleted).

"3) STATUS OF APPENDECTOMY, AWARE.

"4) POLYSUBSTANCE ABUSE. Will consult social services to ask them if they can help in terms of discontinuing his activities..."

In the second summary prepared by Dr. Dial, which was dictated approximately a month after the grievant had been released from the Center, there is no portion captioned "Assessment". Rather the opening portion is captioned "FINAL DIAGNOSIS", and it states as follows:

"*** FINAL DIAGNOSIS: 1) SYNCOPE, SECONDARY TO FLEXERIL.
2) STATUS POSTAPPENDECTOMY.
3) HISTORY OF ABDOMINAL PAIN.
4) POLYSUBSTANCE ABUSE..."

The term "SECONDARY TO" mentioned immediately above is also a medical term. In the context it was used the purpose of the term was to

establish the primary cause for the grievant having suffered a Syncope. In stating "SYNCOPE, SECONDARY TO FLEXERIL", in lay terms the summary is actually stating that Dr. Dial and Dr. Edwards are of the opinion that the primary cause of the grievant experiencing "SYNCOPE" was that he had taken as a medication the prescription drug, Flexeril. It is to be emphasized that while Flexeril was mentioned in the first summary as having been prescribed for the grievant it was not mentioned as having any potential bearing on his condition. Rather Dr. Dial's "assessment" was the cocaine intoxication that I have underlined above.

Before proceeding a quick aside is in order at this point. On March 7, 1989, while in the performance of his regular street duties the grievant was attacked by a large, black Labrador Retriever dog. In his effort to escape being bitten by the animal his shoulder was injured. He called his supervisor, who instructed him to return to the station. The supervisor then took him to the Emergency Room of Humana Hospital, where the staff examined him and gave him several Flexeril tablets to take to relieve the muscle spasm of his injured shoulder. On the morning of March 8th, before leaving the station to begin his street duties, he took one of the tablets to relieve the pain that had begun to develop in his shoulder.

Precautions listed by the manufacturer of Flexeril to be concerned about in prescribing the drug's use is that it "may impair mental and/or physical abilities required for the performance of hazardous tasks, such as operating machinery or driving a motor vehicle."

The grievant testified that the nurse who gave him the Flexeril tablets informed him of the potential side effects and that she did so in the presence of the supervisor. The supervisor denied that he overheard any such explanation being given by the nurse.

Returning to the second (final) summary prepared by Dr. Dial, and to the portion captioned "HOSPITAL COURSE", which states as follows:

"*** The patient was admitted for syncope, placed on telemetry bed for monitoring, obtained CT scan of the head which was within normal limits. EEG was within normal limits. Telemetry did not reveal any rhythm disturbances. Myocardial infarction was ruled out through EKG and isoenzymes. The patient had a Cocaine metabolite found in his urine, but none in the serum. (Emphasis mine. It is also to be emphasized that the reader should bear in mind in reading the remainder of this opinion that no cocaine was present in the grievant's serum.) Therefore obtained referral for substance abuse for alcohol and Cocaine and he will be followed up in the outpatient program in Meadhaven. Discharge meds included Tylenol prn."

A medical dictionary defines a metabolite as: "A product of metabolic change." The same dictionary also defines serum as: "The amber colored fluid which exudes from coagulated blood as the clot shrinks... Serum is of a complex nature and is made up of water, albumin, globulins, metabolites, catabolites, lipids, hormones, salts, enzymes, etc. *** The fact that serums of ... man contain antibodies, etc., has resulted in extensive use of serums for diagnosis, prophylaxis, and therapy..."

At the hearing the Employer's representative examined the supervisor concerning the basis for his having issued the Notice. He said he issued it because he assumed the medical personnel had found cocaine in the grievant's urine, and because the grievant was aware of the drug policy of the Postal Service against the use of drugs or being under their influence while on duty. On cross-examination the Union's representative did not ask him if he knew the nature and/or the type of the tests used by Baptist Medical Center to determine whether the grievant had recently used drugs. Moreover, the Employer's representative did not ask those kinds of questions either.

After both representatives had completed their inquiry of the supervisor I asked if he knew what kind of urine test had been conducted. His response was that he did not know. I then asked if he knew the nature of the test that was used to make an analysis of the grievant's blood. Again he said he did not know. I then asked if he knew the cost for either test, and again he said he did not know.

At the hearing the Employer used but 3 witnesses for its case-in-chief, all were its employees. No employees from the Baptist Medical Center were called as witnesses and it was not said that none were available. The Employer did not therefore establish a chain of custody of either the grievant's urine or his blood for purposes of the tests. And the record is silent as to the nature and/or kinds of tests that were used on the body fluids mentioned. I therefore am wholly unaware of the nature of the tests that purportedly were conducted, and have no idea concerning the technical competence of either the person or the group that was responsible for conducting them. I also have no way of knowing whether the purported tests had as their basis fluids that actually came from the grievant's body.

It is not my purpose to make this opinion a primer for the parties in illegal drug matters. However, to my knowledge a case similar to this has not yet reached the level of arbitration in this Region. I feel somewhat compelled therefore to briefly recite what I have come to understand are some of the pluses as well as some of the minuses regarding the testing of employees for illegal drug use.

First it should be said that I believe it is quite correct to say that a urine test, no matter its type, is incapable of resolving whether a person is "impaired or under the influence of an illegal drug". The reason for this is due to the nature of the kidneys and bladder of we humans. They are essentially waste storage organs. Consequently, when a urine sample is secured while residue of an illegal drug may be found in the sample, it is quite possible that either the drug is still circulating through-out the person's blood supply, or conversely, it may have been purified from the blood as a result of normal body functions and only its residue remains in the person's system. Thus, if one (in this case the Employer) wants to confirm whether an employee is acting under the influence of a drug a blood test is the appropriate means for resolving that issue, a urinalysis will not provide that information. Moreover, because the metabolic rate of people, insofar as certain drugs are concerned, varies significantly, the detectibility period for drugs with a urinalysis will not be the same. In the case of cocaine the detectibility period is often quoted as being 3 to 7 days; whereas for use of marijuana the dectibility time frame can be as long as 60 days.

There are a number of tests that are available for use in determining whether there has been an illegal drug use. Perhaps the most widely used, insofar as urinalysis is concerned, is the immunoassay screening technique. Several national manufacturers are engaged in producing immuno-assays and perhaps the most widely known, if not the most widely used, is the EMIT test of Syva Corporation. The cost of the test is one of the more reasonable available, in the range of $10.00. But it is important to report also that Syva Corporation (and other manufacturers as well) urge that a user of its product undertake to confirm the results of a positive test by using either a thin layer chromatography test (TLC), or a gas chromagraphy/mass spectometry test (GC/MS), both of which are much more expensive, with the latter being in the range of $80.00 or more.

There are several reasons for the cautious approach of the manufacturers, not the least of which is the training, experience and competence of the people employed by the laboratory that is to conduct the tests.

It is well known for instance that various drugs which are identified as being illegal by one laboratory technician might well be deemed by another and more competent techinician as being caused by a therapeutic intervention of a perfectly legitimate medication, or even something that is a basic ingredient of a person's regular diet. For example, certain tea herbs that are regularly sold in grocery stores contain cocaine that might be detected and incorrectly reported in a urinalysis conducted by an untrained and inexperienced lab technician.

It is a certainty therefore that there are a host of pitfalls to be avoided in the field of illegal drug testing. Moreover, the field is far from an exact science at this point in time. That being true, basic fairness to the one(s) alleged to be involved in the use of the illegal substances suggests that their accusers at a minimum establish the primary right to obtain sample(s) of their body fluids, and to thereafter show a chain of custody of the source material used for the test(s). Moreover, a sufficient quantity of the sample that is used should be properly preserved in order that the employee will later be provided with an opportunity to have an independent analysis made, if that proves to be necessary. Needless to say the tests ought to be conducted by a competent laboratory that has the necessary equipment and employs qualified technicians that are trained and experienced in the field of testing for illegal drugs. These kinds of laboratories are not available in every city, nor even in every state.

The caveats listed in the preceding paragraph are not intended as being exclusive insofar as satisfying any just cause requirement that might be imposed by this NA or other collective bargaining agreements. Neither is intended as defining the limits of testing for illegal drugs because many tests are available that involve the testing of saliva, breath, hair, an obtaining of brain waves, as well as the known urine and blood tests. Rather it is only intended to point out the more essential elements that seem to be recognized and applied currently as the minimum elements to support a discipline/discharge action in the labor/management and/or the employer/employee relationships.

It seems to me in this case the Employer's mistakes were many as

as well as major. Perhaps its first was in the supervisor failing to recognize that Dr. Dial's original assessment of the grievant's seizure likely being caused by cocaine intoxication was dramatically altered by his final diagnosis when he stated that the grievant's syncope was the result of his use of Flexeril. It is to be recalled that the Flexeril was prescribed for him because he had been injured in an on-the-job accident the previous day.

I can understand that a first line supervisor might not be a medical expert and that such a sophisticated change in medical termilogically might escape his notice. However the same ought not be true of those in higher level authority who are charged with having to concur in his recommendation that the ultimate of discipline be instituted against an employee. But apparently that was the situation here. I am constrained to say that I am astonished and somewhat dismayed that those who had the authority to correct the injustice that was done to the grievant did not see fit to act while the grievance was being processed through the grievance-arbitration procedure or later. If they saw nothing else wrong in this case it seems to me they ought to have seen that the final diagnosis was different from Dr. Dial's original assessment. Moreover, if the effects of cocaine were unknown it seems to me it would have behooved someone to take the time to talk to medically informed people, in-house or outside, and had they done so I am inclined to believe they would have been told that cocaine intoxication would not likely cause one to pass-out. Rather the opposite would likely be true.

Another of the Employer's mistakes, and I deem it a major one indeed, was in not making available to the Union the documents necessary for it to properly defend this case. Standing alone, its violation of the terms of the NA in that regard would be sufficient reason for overturning the removal action taken and sustaining the grievance. It should cease and desist its practice in that regard. If it fails to do so in future situations it should be severely sanctioned therefor.

The Employer's remaining mistakes relate to its failure to prove at the hearing the allegations it made in the Notice. That is to say if it wanted to prove that the grievant was involved in the use of drugs, which is the crux of its case, it must first establish a chain of custody of the grievant's urine, assuming the test of it had validity in the first place, which it does not. At the hearing it made no attempt at showing a chain of custody. Neither did it seek to show the kind(s) of test(s) that were conducted, nor that confirmation was made. It also did not show who made the tests, or when, or if the labratory doing the tests was or tended to be a qualified one, or whether specimens were available for independent tests to be run. Each and all of these last enumerated factors are very relevant in matters such as this, yet the record is devoid of proof relating to any of them. I therefore believe I am powerless to find that the Employer has met the burden of proof that the just cause concept of the NA places upon it.

In plain and simple terms the Employer has wholly failed to prove that the grievant was guilty of "being under the influence of and use of drugs while in the performance of [his] official duties", which is the charge made by the Notice. That being true it necessarily follows that the grievance has merit and must be sustained.

On the basis of the entire record in this case, which includes a post hearing brief from each of the parties, the undersigned makes the following

AWARD

Just cause did not exist for the removal of the grievant. The grievance therefore is sustained in accordance with the opinion expressed above. He shall be reinstated to his former position within 7 days of the date of this award. He shall be made whole for all earnings lost, including any overtime that he would have worked, and including interest at the rate appropriate for the period involved. His reinstatement shall be without loss of seniority and shall be with accrued and accruing fringe benefits. Within 14 days of this date the Employer shall initiate the appropriate paperwork to set in motion the back pay portion of this award. All record of the removal action shall be expunged from his records immediately upon receipt of this award by either party.

IT IS SO ORDERED.

P. M. Williams
Arbitrator

Dated at Oklahoma City, Oklahoma
this 29th day of November, 1989.