

7.1: DOT covered employee's discharged for second positive - Claimed another person "spiked" his drink - defense not credible - discharge sustained.



REVIEW COMMITTEE



IBEW

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**CASE CLOSED
FILED & LOGGED**

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, AFL-CIO
LOCAL UNION 1245, I.B.E.W
P.O. BOX 4790
WALNUT CREEK, CALIFORNIA 94596
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R.W. STALCUP, SECRETARY

MARGARET A. SHORT, CHAIRMAN

- DECISION
- LETTER DECISION
- PRE-REVIEW REFERRAL

**San Jose Division Grievance No. SJ0-97-06
Fact Finding File No. 6536-97-062
Pre-Review Committee No. 2116**

KATHY RICHARDS
Company Member
Local Investigating Committee

KATHY MAAS
Union Member
Local Investigating Committee

Subject of the Grievance

This case concerns the discharge of a Fieldman for a second positive DOT test.

Facts of the Case

The grievant had 11 1/2 years of service at the time of discharge. The grievant first tested positive for cocaine on August 7, 1995. He was precluded from working until release by the Medical Review Officer (MRO) and the providing of a negative return to work test on August 24, 1995. On August 28, 1995 the grievant signed the "Agreement For Return To Work After A DOT Positive Drug Screen". The Return to Work Agreement includes a provision which subjects the employee to unannounced post-rehabilitation drug testing for up to 60 months following a return to work.

Following his return to work the grievant was tested as follows:

| | | |
|-------------------|------------|----------------------|
| October 16, 1995 | Random | Negative |
| February 29, 1996 | Post Rehab | Negative |
| April 22, 1996 | Post Rehab | Negative |
| June 28, 1996 | Post Rehab | Negative |
| October 15, 1996 | Post Rehab | Negative |
| November 18, 1996 | Post Rehab | Negative |
| February 18, 1997 | Post Rehab | Positive for Cocaine |

In a letter dated February 25, 1997, the MRO reported the quantitative level of the grievant's test as 344 ng/mL. The legal GC/MS cutoff level for Cocaine is 150 ng/mL. The grievant tested at more than twice the cut-off level.

The grievant had no active discipline at the time of his discharge, as the discipline for the first positive had deactivated.

The grievant first told the MRO and the LIC that the Cocaine entered his system through sexual activity. This explanation was given to the MRO before the MRO determined the confirmed positive test to be a verified positive test. The grievant later provided a letter from the female friend who engaged in this activity with him that indicated she had spiked his drink with the drug.

Discussion

At the outset the Union acknowledged that there was a second verified positive test result from a specimen given by the grievant. The question then becomes one of credibility, whether the grievant knew he had been exposed to the drug. In assessing the credibility of the grievant's explanations, a reasonable person would come to the conclusion that the stories do not hold up given the high level of Cocaine in his system which would have certain physiological effects with which he would be familiar having experienced them before. It is also difficult to accept that accidental or inadvertent ingestion could have triggered such a high test result level. Finally, the spiking of the drink explanation is strikingly similar to Arbitration Case No. 202 which states in part:

"A second verified positive drug test, obtained in conformity with the requirements of the Drug-Free Pipeline Agreement, establishes a prima facie case for just cause discharge. Where, as here, the Union argues that discharge is not appropriate in spite of a second verified positive test, the burden shifts to the Union to establish that there is not just cause for discharge. Given the mutual agreement of the Parties to the terms of the negotiated Drug-Free Pipeline Agreement, that burden is a heavy one. Contrary to the argument advanced by the Employer, the Board of Arbitration anticipates that it will be the rare case in which sufficient evidence is adduced to meet that burden."

DECISION

Based on a review of the facts of this case the Pre-Review Committee agrees that the discharge was for just and sufficient cause. This case is considered closed.

Margaret A. Short
Margaret A. Short, Chairman
Review Committee

10/9/96
Date

Roger W. Stalcup
Roger W. Stalcup, Secretary
Review Committee

10/9/97
Date