
In the Matter of the	*	
Controversy Between:	*	Appellant: Mike Morton
	*	
THE CITY OF ANYWHERE	*	CSMCS: 00-XXXX
	*	
and	*	Issue: Discharge
	*	
ANYWHERE CITY EMPLOYEES'	*	*
ASSOCIATION	*	Arbitrator: Judy A. Gust
	*	

PRELIMINARY INFORMATION

The hearing in this matter was held on November 3, 2001, at the City Attorney's Office, Anywhere, California before Judy A. Gust, an arbitrator selected from a list provided by the State Mediation and Conciliation Service. The parties stipulated to all material facts and submitted documentary evidence. A stenographic recording was made of the proceedings by a Certified Shorthand Reporter. At the conclusion of the hearing, the parties agreed to submit post-hearing briefs that were received on or about January 7, 2002, at which time the hearing record was closed.

APPEARANCES & WITNESSES

For the City

Pam Nichols Senior Deputy City Attorney
June Sims Assistant Personnel Director

For the Appellant

Ron Paul Counsel, Goyett & Associates
Mike Morton. Appellant

BACKGROUND AND FACTS

The appellant, Mike Morton, had been employed with the City of Modesto for approximately five and one-half years. At the time of his termination on April 27, 2001, he was a Water System Operator. (CB pp. 3)¹

During his employment, Morton's job performance was regularly evaluated by his supervisors where he was consistently rated as "Exceeds Expectations". Morton also received recognition awards and completed specialized training. (AB pp. 2)

¹ CB = City Brief; AB = Appellant Brief; CX = City Exhibit; AX = Appellant Exhibit

Morton's job responsibilities included excavating trenches and operating heavy construction equipment such as dump trucks, front end loaders, and cranes. Additionally, he was frequently required to excavate around gas, water, and sewer pipes and fiber optic cable. In order to perform his job, Morton had to possess and maintain a Class B license. To obtain such a license, one must pass an air brake test, a special driving test, and a written test, all of which are designed to ensure that the driver is familiar with vehicle lengths and maximum braking distances. Possession of a Class B license also subjects the licensee to Department of Transportation regulations for "safety sensitive" positions. DOT requirements include random and reasonable suspicion drug testing and follow-up testing of any employee who has been certified by a Substance Abuse Professional (SAP) as in need of assistance in resolving problems associated with the use of controlled substances. If such an employee tests positive for drugs or alcohol, he or she is subject to discipline, up to and including termination. City of Anywhere employees, including Mr. Morton, were notified of the City's Alcohol & Drug Testing Policy and Procedure. (CB pp. 3-4; CX 5-7)

During a coaching session on April 27, 2000, concerning Morton's attendance, Morton admitted to using drugs as the reason for his increased use of leave time. Based upon this admission and his attendance problems, Morton was sent for a "reasonable suspicion" drug test on April 28, 2000, to confirm his admission. This test confirmed Morton's use of amphetamines. (AB pp. 2)

As a result of this positive test, Morton was placed on a leave without pay. On May 8, 2000, he entered into an agreement with a Substance Abuse Professional (SAP) at the Employee Assistance Program (EAP). The terms of the agreement between Morton and EAP were to be in effect until May 31, 2001, and provided, in part, that:

- Morton would enroll in the Time for Health inpatient treatment program;
- Morton might be required to submit to urinalysis by the City under the terms and conditions of a Return-to-Duty Agreement;
- Morton was to abstain from alcohol and all mind altering substances for the duration of the contract which extended to May 31, 2001;
- Upon completion of the intensive phase of the above program, Morton was to contact EAP once a week for three months and once a month thereafter;
- Morton was to attend a minimum of three 12-step meetings per week following discharge from the above program and provide weekly written verification of his attendance to EAP for three consecutive months;
- Morton's breach of any of the terms of the agreement would be cause for EAP to notify the City that he had failed to comply with the treatment monitoring program.

Morton completed his treatment program on June 8, 2000, took a return-to-duty drug test on June 9, 2000, that was negative, and returned to work on June 12, 2000. The City postponed disciplinary action pending Morton's successful rehabilitation efforts. (CB 5)

The status report received from the EAP on July 28, 2000, showed that Morton was in compliance with his agreement. Status reports dated September 29, October 25, and November 22, 2000, revealed that Morton was not in compliance as he was "behind on checking in with EAP" and "behind on sending meeting attendance sheets to EAP". Morton signed a new contract with EAP on December 13, 2000 and was released to a "non-safety sensitive position until further notice". That new agreement extended his monthly status reporting to his employer until December 31, 2002. The monthly EAP reports for December 28, 2000 and January 25, 2001 indicated that he was in compliance with EAP expectations and up to date on checking in and meeting and support group attendance. On February 7, 2001, Morton was released to work again in a safety-sensitive position. (CX J)

Approximately two weeks after being released back to his safety sensitive position, Morton was sent for a random follow-up test in accordance with his EAP contract. While at the testing facility, Morton and his Supervisor were informed that the initial urine sample provided was "cold" (the temperature fell outside the normal range) and that a second sample would be required. Morton provided a second sample and both samples ultimately tested positive for amphetamines/methamphetamines. The following day Morton admitted that he had adulterated the initial urine sample provided to lab personnel on the prior day. Disciplinary action was then initiated and resulted in Morton's termination on April 27, 2001.

ISSUE

Did the City of Anywhere have just cause to terminate the employment of Mike Morton for his violation of the City's policies governing the use of alcohol and drugs and prohibiting dishonesty? If not, what shall be the remedy?

RELEVANT CONTRACT PROVISIONS

Memorandum of Understanding Article 42 – Disciplinary Actions

- (3) *Violations of the Personnel Rules or Personnel Administrative Orders*
- (9) *Dishonesty*

Personnel Administrative Order 12.3-88-60, Section B.2

In addition to the causes set forth in Personnel Rule 1.6, each of the following shall constitute cause for disciplinary action against an employee:

- (f) *Dishonesty.*
- (g) *Being under the influence of alcohol or controlled substance while on duty.*
- (l) *Violation of any established departmental rule, regulation, policy and/or manual.*

POSITION OF THE CITY

The City argues that there is no dispute that Mr. Morton is guilty of the violations that form the basis of the discharge. The DOT Policy prohibits any City employee who is required to maintain a Class B license from testing positive for any illegal drugs while on duty. Morton's position is a "safety sensitive" position that subjects him to testing under the DOT Policy. (CB pp. 7)

The essential functions of Morton's job require him to operate heavy construction equipment. He routinely drives and operates equipment with gross vehicle ratings ranging from 15,000 lbs. to 24,500 lbs. He frequently drives these vehicles on City streets and around other City employees, pedestrians, and vehicular traffic. If his conduct is repeated, it could lead to highly aggressive driving behavior, potential confusion while driving or operating heavy construction equipment, panic while driving or operating the equipment, and the inability to concentrate while driving or operating equipment. In addition, he is frequently required to excavate around gas, water, and sewer lines and fiber optic cable. Again, if his conduct is repeated, Morton might sever a gas pipe and cause an explosion, sever a sewer line causing raw sewage to escape and contaminate homes, the ground and/or groundwater. He might sever a water line and flood residential, commercial or industrial properties or sever a fiber optic cable causing interruption to phone lines, e-mail and other business tools within the community. Considering the potential risks at stake, the magnitude of harm should an accident occur, and the practical reality that it is difficult, if not impossible, for the average supervisor to identify impaired drivers until after the damage is done, the City's disciplinary action for this policy violation is a reasonable one. The City has an overriding need to ensure the safety of its employees and the general public. The City argues that its most viable and effective method of combating this pervasive problem is to continue educating its employees about the dangers of driving with drugs in their system and to attempt to deter such violations in the future. Sending a strong message that such misconduct will not be tolerated, and that employees who violate the Policy will be disciplined, will aid that deterrence. (CB pp. 11-12)

Mr. Morton was aware of the City's drug and dishonesty policies and had forewarning of the possible consequences of a violation of policy. Nevertheless, he tested positive for amphetamine/methamphetamine on April 28, 2000 and again on February 22, 2001. Additionally, the initial urine sample provided to the lab on February 22, 2001 had been adulterated. Morton ultimately confirmed that he had adulterated the initial sample of February 22nd. (CB pp. 8-9)

Honesty is a basic job requirement. Morton is a member of a crew that works in the field. It is not feasible to subject him and others like him to the kind of day-to-day scrutiny that may be possible in a traditional office environment. Therefore, the City must be able to trust that when Morton reports for work, he has not used any drugs that may affect his work. Morton's behavior has destroyed that trust.

The City also rebuts what it anticipates would be Morton's argument concerning mitigation. Although Morton did admit his drug problem in a coaching session with his

Supervisor, it refutes the Appellant's position that Morton voluntarily stepped forward to seek help in getting treatment. The coaching session and his first drug test was the result of Morton's change in attendance and his admitted drug use. (CB pp. 9)

Although Morton initially appeared to be successfully complying with his rehabilitation agreement, within a few months he was not in compliance with EAP's expectations. He was behind in checking in with EAP and behind in sending in his meeting attendance sheets. Further, within two weeks of being returned to his "safety sensitive" position in February 2001, Morton's follow-up drug test was positive and he contaminated the first specimen provided at the February test. (CB pp. 8)

The City acknowledges that Morton has a good work record. However, the City also recognizes that when an employee combines drugs and heavy equipment, the results can be disastrous and even deadly. Morton also demonstrated dishonest behavior and the City has lost confidence and trust in him. The City submits that the determination to discharge Morton was appropriate and that the discipline imposed is not excessive. The City asks that the decision be affirmed.

POSITION OF THE APPELLANT

The Appellant advances two basic arguments regarding the severity of the discipline and asserts that consideration of the mitigating circumstances would support a reduction in the level of discipline to something less than discharge from employment.

The first argument contests the legitimacy of the first negative "reasonable suspicion" drug test on the basis that there were no "objective facts sufficient to lead a reasonably prudent supervisor to suspect that an employee is under the influence of drugs. . ." Rather, Morton's absenteeism and his own voluntary admission led to the test on April 27, 2000. Appellant argues that neither Morton's admission nor absenteeism form a basis for a reasonable suspicion that Morton was under the influence of drugs on that date. (AB pp. 3) In reality, the first and only verified positive test that subjected Morton to the disciplinary process was the follow-up test in February 2001. (AB pp. 7)

Appellant's second argument alleges that three other employees who were referred to the Employee Assistance Program as a condition for returning to duty during the reporting period had a verified positive drug test and yet, only one employee, Mr. Morton was terminated. Appellant's implication is that Morton suffered unequal treatment. (AB pp. 5, AX 4)

There are also mitigating circumstances that should be considered in determining the appropriate level of discipline for Mr. Morton's infractions. Morton had suffered the loss of a very close childhood friend and attended the funeral on Monday, February 19, 2001, the President's day holiday. Morton relapsed during the weekend of the funeral. Although the use of the illegal drug was done on a non-work day, the substance was still in his system three days later when tested. As Morton stated in his Skelly meeting, "I was at the top and then when my friend passed away, life came crashing down. Well, what does a drug addict do or an alcoholic do? What he knows best. Use." (AB pp. 6, AX 4-7)

The Appellant also urges consideration of Morton's work history. He was employed by the City for approximately six years and had exceeded expectations on all of his annual performance evaluations. (AB pp. 6)

In summary, Appellant argues that Morton voluntarily admitted he was using an illegal drug and sought help through the Employee Assistance Program. He successfully completed the program and returned to work. Although he had remained "clean" since completing the drug treatment program, Morton relapsed during the weekend of the funeral of a close childhood friend. Because the first test administered in April, 2000 was conducted based upon Morton's admission to using drugs, it was not a legitimate reasonable suspicion test and, consequently, the follow-up test conducted in February 2001 was the first and only verified positive test that subjected Morton to the disciplinary process. (AB pp. 6-7)

Although Morton's admission that he altered the first sample on the follow-up test would justify some form of discipline, he asks that it be something less than termination. During the Skelly meeting, it was suggested that Morton be given a "last chance" agreement to salvage this valuable employee. (AB pp. 7)

Appellant prays for reinstatement to his former position with the City, payment of all lost wages and benefits from the date of termination through the date of reinstatement, reinstatement of all seniority, vacation and sick leave balances to which he would have otherwise been entitled,, recommendation of appropriate discipline for the admitted violations, and other remedies to make Appellant whole as the Arbitrator sees fit. (AB pp. 7-8)

DISCUSSION AND FINDINGS

The burden to prove that just cause existed for the termination of Mr. Morton's employment rests with the City. The factual basis for the City's decision with regard to Mr. Morton – two failed drug tests and his dishonesty – is not disputed. What is disputed is the severity of the discipline.

Generally, to disturb the decision of management as to the appropriateness of discipline, one must prove that the decision was discriminatory, arbitrary or capricious. In this case, the City points to the essential functions of Morton's "safety sensitive" position and the potential harm to people and property that could occur as the result of an impaired employee in his position, as the basis for its decision to terminate Morton's employment. The significance of this potential harm is compelling and supported by the fact that his position is one that is subject to Department of Transportation drug testing procedures.

The City also notes that Morton was aware of the policies on drug use and testing and of the possible consequences for a violation of the policy. As argued by the Appellant, the City's position is obvious. The test following Morton's admission, April 28, 2000, was the first reasonable suspicion test. The follow-up test in February 2001, was the second and last chance. The City's offer of an employee assistance/drug treatment program and delaying of disciplinary action pending his successful completion of the program should not be held against it. The Appellant argued at his Skelly hearing for a "last chance agreement". It is clear from the record

submitted by the City, particularly the contract signed by Morton when he entered drug treatment with the Employee Assistance Program, that he was being given *another chance* and would need to comply with the terms of that treatment plan that included sending periodic reports to his employer. Morton knew or should have known that failure to comply could result in his termination from employment. Further evidence of the importance of his compliance with the terms of the program was made known to him when, after failing to comply with his reporting and attendance requirements following his inpatient treatment, he was required to sign another contract on December 13, 2000 and was restricted from returning to duty in his "safety sensitive" position. There is no reasonable basis to believe that Mr. Morton was unaware of the potential consequences should he fail to successfully complete his treatment program.

The Appellant argues that Morton only failed one drug test. There was no objective evidence, as defined by the City's policy, that would support the "reasonable suspicion" drug test that was administered on April 28, 2000. Not being a "valid" test, according to the Appellant, he then concludes that the follow-up test conducted on February 22, 2001 constitutes only one violation. It is true that an *admission* of drug use by an employee is not listed in the Alcohol & Drug Testing Policy and Procedure as one of the factors that may constitute "reasonable suspicion". However, in the paragraph preceding the listed factors, it also defines reasonable suspicion as "a belief based on objective facts sufficient to lead a reasonably prudent supervisor to suspect that an employee is under the influence of drugs or alcohol. . ." That the supervisor engaged in a counseling session with Mr. Morton concerning his attendance record is a legitimate managerial function. That Morton offered in that counseling session that he was a drug user, perhaps to explain his attendance problem, is an objective statement that would provide a reasonable basis upon which a supervisor could rely to request a drug test. Given such notice, for the supervisor to disbelieve Morton's admission and ignore another possible manifestation of drug use – altered attendance patterns -- just because he did not observe "physically objective" signs of drug usage at that particular time would be tantamount to negligence on the supervisor's part. Common sense, if nothing else, supports the supervisor's decision to confirm Morton's admission and ascertain whether or not Morton was currently under the influence of a controlled substance. Evidence in the record clearly shows positive results for amphetamines in two drug tests of Mr. Morton irrespective of what prompted the tests.

The City also emphasized a basic responsibility of every employee to be honest. In Morton's case, this is even more significant than might be the case with other employees who hold different positions. Morton's position requires him to perform his job in the field, away from the kind of supervisory oversight that might be available in another type of work setting. Morton did not voluntarily disclose that he had altered the urine sample at the time of the specimen collection, when it was found to be out of the acceptable temperature range. It was not until the next day that he finally admitted to having altered the urine specimen. It is clear that his deception was intentional to protect his own personal interests. It also underscores *his understanding* of the seriousness of his failure to adhere to his treatment contract and his promise to abstain from alcohol and all mind-altering substances for the duration of the contract.

The Appellant argues that mitigating factors should be taken into consideration in determining the appropriateness of the penalty. The transcript from Morton's Skelly meeting makes clear Appellant's position on mitigation – that he had suffered the loss of a close personal

childhood friend causing his relapse. Additionally, it is argued that his long-term, excellent work record evidences the skills and value he brings to his position.

In regards to Appellant's first mitigating factor, it is certainly understandable that one's emotions and behavior can be disrupted by the loss of a close friend. However, that loss in February of 2001 does not explain Morton's failure to comply with his treatment plan reporting requirements in the fall of 2000. Admirably, Morton got on back on track again in December 2000, signed another agreement with EAP, and was not terminated by the City at that time. As stated by Mr. Morton at his Skelly hearing, "the most important thing in my life is staying clean". It is not known whether Morton held this belief in February 2001. However, staying clean is his responsibility during good times and bad. A difficult personal situation cannot excuse Mr. Morton's responsibility to comply with his treatment program and remain free of controlled substances when performing in his safety sensitive position..

More persuasive mitigating facts might have been Morton's totally voluntary entrance into a drug treatment program, not one arising from concerns about his attendance. Some evidence of post-termination continuance with his treatment program and successful testing may also have been convincing as to his ability to stay "clean" after having experienced the emotional turmoil of losing his job. Additionally, clear acceptance and articulation by Mr. Morton of his responsibility for the situation he finds himself in would have been helpful.

While Mr. Morton has an exemplary work performance record, there was evidence that his work record and his longevity was considered when the decision was made to discharge him. A five and one-half year record, while not unimpressive, does not rise to the level of a 10 to 20-year employee such that a discharge might be more questionable under these circumstances.

Finally, the Appellant's suggestion that he received unequal treatment is unpersuasive. First, there was no evidence that the Appellant and the other three persons who were referred to the Employee Assistance Program were similarly situated. The FHWA report relied upon to show unequal treatment shows three people who were returned to duty following a positive drug test. There was no evidence of who these individuals were, what kinds of positions they held or the level of supervision they received, whether they had participated in or completed a similar treatment program and/or were under similar compliance requirements for continuing treatment. Morton *was* returned to duty following a positive drug test – in June of 2000, following his inpatient treatment program. He did not successfully complete his treatment program as the contract for treatment extended, on the first occasion, through December of 2001. When Morton failed to report in to the program or provide meeting verification in September, October and November, he was then required to sign another treatment contract that extended his monitoring time through December of 2002. Based upon the reasoning above, there can be no finding that Mr. Morton was the subject of disparate or discriminatory treatment.

In summary, there was no evidence that the consequence imposed by the City was discriminatory, arbitrary or capricious. Accordingly, there is no reason to disturb the City's decision to terminate Mr. Morton's employment. Mr. Morton's positive results on two drug tests, coupled with his failure to adhere to the reporting requirements of his treatment program in the fall of 2000 and his dishonesty in adulterating the follow-up specimen, counterbalance any

mitigating effect that might accrue from his exemplary work record and sole relapse due to a personal loss. The City's need to protect the public from impaired employees in "safety sensitive" positions outweighs the employee's request for another last chance. The City had ample and just cause to discharge Mr. Morton for violation of its drug policy and for dishonesty.

AWARD

For all of the reasons set forth above, it is recommended that the City's discharge of Mr. Mike Morton be affirmed.

Judy A. Gust, Arbitrator

Ramona, California
January 10, 2002