ARBITRATOR'S AWARD

In the Matter of the Arbitration
Between

Cleveland Cliffs
Weirton, West Virginia

and

Lydia Misenhelder, represented by
United Steelworkers and its Local Union No. 2911

Grievance No. 22SS80365

Case 131

David A. Dilts
Arbitrator

December 19, 2022

APPEARANCES:

For the Company:

Kerry Hastings, Attorney at Law

For the Union:

Timothy Cogan, Attorney at Law

Hearings in the above cited matter were conducted on Thursday, November 10, 2022 at the ICD Training Center, 1001 Hamilton Road, Weirton, West Virginia. The parties stipulated that the present matter is properly before the Arbitrator pursuant to Article 5, Section I of their 2018 Basic Labor Agreement. The record in this matter was closed upon receipt of the Parties' post-hearing briefs on December 16, 2022.

ISSUE

Was Lydia Misenhelder (herein the Grievant) suspended and subsequently discharged for proper cause? If not, what shall be the remedy?

INTRODUCTION

Cleveland Cliffs, Inc. (herein the Company or Employer) operates a steel mill in Weirton, West Virginia. Its bargaining unit employees are represented for purposes of collective bargaining by the United Steelworkers of America and its Local Union number 2911 (herein the Union.) Their current Basic Labor Agreement (Joint exhibit 1) became effective on September 1, 2018.

There is no dispute that the Grievant received a copy of the Company's rules (receipt for the document, Company exhibit 9). Among the Company rules (Company exhibit 8) is paragraph 2 which states:

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2. Employees are forbidden to report for work either impaired by and/or under the influence of alcohol or controlled illegal drug substances. An employee who violates this rule will be subject to suspension with intent to discharge. Employees that bring alcoholic beverages, hallucinogens or narcotics onto Company property with the intent to sell/distribute/consume shall be subject to immediate suspension and discharge. An employee's failure or refusal to submit to a required drug and/or alcohol-screening test

> will be treated as a positive test and which result in such employee(s) being placed on immediate suspension with intent to discharge. . . .

The Company transmitted a letter to the Grievant dated July 8, 2022 which details the disciplinary actions taken against her (Joint exhibit 3):

> Dear Ms. Misenhelder:
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> On June 26, 2022, you were suspended with the intent to discharge for violation of Plant Rules and Regulations.
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> This letter serves as confirmation that your suspension is being converted to discharge effective the date of this letter. . . .

A notification of violation of rules was issued by the Company on June 26, 2022 in the "Present Infraction" space on this form it was written: "*Insubordination - Refusal of D & A Screening & Leaving Property Without Permission.*" (Joint exhibit 2)

The Company contends that the Grievant on June 26, 2022, while on duty in the steel mill was reported to Supervisor Sam Clark by crew members working with her that she appeared to be under the influence of drugs or alcohol. These reports were made verbally and subsequently reduced to writing by at least one member of the bargaining unit who worked closely with her that day. The reports by her fellow crew members included poor coordination, slurred speech and abnormal work behavior. Upon receiving these reports Supervisors Clark and Supervisor Ron Lyons both observed the Grievant's behavior which was consistent with what had been reported to them. Mr. Clark, Mr. Myers and Mr. Ricci subsequently prepared a "Fitness to work checklist" for the Grievant which had boxes checked for abnormal work behavior including speech slurred, speech garbled, error in coordination, confusion, unsteady gait, paranoid or

suspicious, belligerent and argumentative, with an additional physical observation that she had dilated pupils. (Company exhibit 2).

The Grievant left the shop floor and proceeded to was the women's locker room in the Weld Shop of the Mill. Supervisor Clark knocked on the locker room door and the Grievant responded. As the Grievant subsequently left the locker room she was told by the Supervisor that she need to go with the Security Guard for a drug and alcohol test at the Weirton Medical Center. The Grievant refused the test, she exited the building and went to her car and was alleged to have used profanity towards Mr. Clark and the men in the hallway. The Security Guard followed her to her car and tried to engage her in conversation and asked her not to drive her vehicle, when she drove away.

The Union raises issues in her defense concerning her mental health and entered medical documents and expert testimony into this record. The Company objected to the expert witness' testimony claiming that it had not been given adequate information concerning his appearance and what the nature of his testimony was going to be.

The record shows that the Grievant has about two years seniority with the Company. At the time of her discharge she was in the Strip Steel Department and was a welder/sticker (Joint exhibit 2) The Grievant was assigned, on June 26, to break in a new employee, Mr. Daugherty who pinned a statement concerning the day's events (Company exhibit 5). There is nothing in this record that shows she had any previous disciplinary actions taken against her.

An arbitration hearing was conducted concerning this matter on Thursday, November 10, 2022 at the ICD Training Center, 1001 Hamilton Road, Weirton, West Virginia. The parties stipulated that the present matter is properly before the Arbitrator pursuant to Article 5, Section I

of their 2018 Collective Bargaining Agreement. The record in this matter was closed upon receipt of the Parties' post-hearing briefs on December 16, 2022.

COMPANY'S POSITION

This grievance protesting the Grievant's discharge for refusing a properly directed drug test should be denied. The critical facts requiring denial of this grievance are not disputed: (1) the Grievant refused the test; (2) the Company rules provide for discharge for refusing to test; and (3) Grievant had less than two years of service when she refused a properly directed drug test. None of these facts are in dispute in this matter.

. The record shows that the Company had reasonable cause to require the Grievant to submit to a drug test. The Company's reasonable cause includes statements and information provided to Supervisor Clark by five bargaining unit employees that morning: (1) Ryan Daugherty; (2) Noah Roth; (3) Bruce Clark; (4) John Ward; and (5) Jason Haddon (a Union representative). (Testimony of Clark and Meager; Company Exhibits 1 (Mill Video), 2, 5) These reports included slurred speech, problems maintaining balance, and coordination problems. Mr. Clark personally observed the Grievant that morning and there is video confirming her observed impaired behavior (i.e., walking unnaturally slowly, having problems with balance, having difficulty picking up dropped gloves and difficulty inserting hearing protection). (Mr. Clark's testimony; Company exhibit 1 (Mill Video)) Union Steward Haddon himself told Supervisor Clark that the Grievant was "fucked up" that morning and did not object when Mr. Clark told him he planned to have the Grievant tested for drugs.

The Union's defense in this case relies on red herrings. The worst of all is PTSD; a red herring relying on an expert witness the Union unfairly ambushed the Company with months after the Step 3 grievance meeting and only 15 days before the arbitration hearing. The Company objects to the admission of this expert testimony.

The expert witness and his report are entitled to no weight for a host of reasons. The Grievant had already decided to leave the plant before her encounter with management personnel in the hallway that Union claims were intimidating. Her decision to leave was obviously not influenced by the subject events in the hallway. Based on the undisputed evidence, it is virtually certain the Grievant decided to leave after Union representative Jason Haddon, who the Union did not call to testify and who the contract does not allow the Company to call to testify (Joint exhibit 1, p. 60), warned her she faced a drug test after Mr. Clark told Mr. Haddon about the impending drug and alcohol test.[1] The Grievant tried to escape the plant before she could be spoken with by management and then drug tested. The Grievant's departure was pre-determined and not caused by anything that occurred in the hallway as the Union alleges. The Grievant did not flee the hallway; she never intended to stay in the first place. PTSD had nothing to do with her departure.

Confirming this conclusion, the Grievant was already acting belligerent (assuming belligerence is a sign of PTSD) ***before*** her encounter with management in the hallway which supposedly "triggered" her PTSD. She profanely berated supervisor Sam Clark through the locker room door ***before*** she emerged and when she was undeniably not under the supposed

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[1] No weight should be given by the Arbitrator to any of the Union evidence concerning these matters.

influence of the four men present there. She acted the same way in the hallway after she emerged from the locker room as she did before she emerged from the locker room. (Company Exhibit. 1 – Hallway Video) She also acted the same way the very next day during her investigatory interview, when even her expert does not claim she was suffering from PTSD. (Meager; Company exhibits 10 – June 27[2] meeting notes) These facts belie the subjective and unverifiable PTSD claim.

The video of Grievant in the hallway does not support her subjective and unverifiable PTSD claim. (Company Exhibit 1 – Hallway Video) The Grievant is belligerent and profane in the hallway, as she was before she left the locker room and as she was the next day during her investigatory meeting. She is rational and lucid on the video and shows no sign of trauma. She did not express any mental distress to management at the time or ask for any time to calm herself. The management representatives behaved appropriately in the hallway under the circumstances and did nothing whatsoever to "trigger" her. Even Grievant's expert admitted the management representatives in the hallway appeared to have acted in good faith. (Testimony of Dr. Rachal) Confirming the absence of any PTSD on June 26, the Grievant did not claim to have suffered any trauma whatsoever, much less a recent PTSD episode, when she went to her own treating physicians on July 21 about three weeks after the June 26 hallway encounter. (Company Exhibit 19 – July 21 Medical Records) Although the Grievant testified at the hearing and could have explained why these records do not mention any such episode, she said nothing about the July 21 visit to her treating physicians. (Testimony of the Grievant) The Grievant's PTSD "defense" is

[2] Unless otherwise noted, all dates are in 2022.

totally unsupported by Grievant's physicians who treated her since late 2017, which speaks volumes about its lack of credibility.

The fact that the Grievant's treating physicians who treated her for various psychological ailments since at least 2017 are not supporting her in this case is not surprising because nothing in Grievant's medical history or work history supports the PTSD "defense." Grievant's expert admitted Grievant's mental conditions are "fairly well regulated." (Dr. Rachal) There is not a shred of evidence in Grievant's medical records that interactions with men, even stressful ones, trigger PTSD. The Grievant's incredible testimony that Clark profanely berated her for a full hour at work previously is completely false and cannot be credited. Yet the Grievant did ***not*** claim this supposed encounter (far worse than anything that happened in the hallway) triggered PTSD. It defies logic that this hallway encounter would be the only thing during her entire career in a male-dominated steel mill (particularly if the Grievant's claims of mistreatment by Clark are true) that would trigger PTSD. Yet that is what the Grievant and her expert would have the Arbitrator believe.

The expert was biased and his conclusions cannot be taken seriously. His conclusions are: (1) inconsistent with nearly five years of the Grievant's medical records, including the July 21 records where the Grievant made no PTSD claim; (2) inconsistent with Grievant's work history; (3) unsupported by the Grievant's treating physicians; (4) inconsistent with the video and other circumstances that morning including her pre-determined decision to leave; (5) based on the Grievant's statements which lack credibility as she has demonstrably lied during this process; and (6) biased by the expert's obvious desire to earn his money and help the Grievant win her case.

If the Grievant can avoid discharge by coming up with an expert at the last minute to make subjective, unverifiable, and biased arguments in her favor, the Company's anti-drug program will be enormously undermined. This outcome would affect the safety of everyone at the plant. The Grievant does not belong in a steel mill; two of the Grievant's co-workers signed statements that they will not work with her due to safety concerns after observing her behavior that morning. (Company Exhibits, 12-13 – Daugherty/Roth Statements).

This grievance should be denied.

UNION'S POSITION

There is no doubt that the Company bears the burden of proof to demonstrate that there was just cause to discharge the Grievant. It is the Union's position that since the alleged misconduct involved criminal claims (Cliffs called the police on her and they showed up, Company Exhibit 6), the Company must prove its case here – an absence of duress in a refusal of a test for illegal drugs – beyond a reasonable doubt. In the alternative, the Company faces the duty to justify its decision by clear and convincing evidence.

At the time of her discharge the Grievant had twenty-two months of acceptable service to the Company. In fact, Manager Ricci admitted at the third step of the grievance procedure that she was an acceptable employee. She had no write-ups. Surely the Company doesn't assign unacceptable employees to break in employees, as she was assigned to do on that day

The Company's opening misstated the record. It claimed that her "medical records reveal

no PTSD issues." The first Northwood reference occurs on 12/13/17 (p. 12), the next 4/11/18 (p. 12), and another on 7/18/19 (pp. 65-68, all Union Exhibit 2). Northwood diagnosed PTSD on 2/10/21, (see p. 345). Northwood recognized it on 5/12/22, a few months before the Company fired her: "determine if GAD [Generalized Anxiety Disorder] can be absorbed into PTSD (., p. 298). Further, the Company ignored her timely offers to undergo drug and alcohol testing that Meager and Ricci confirmed.

Manager Ricci testified clearly that the Company wants any refusal of a drug test to be a voluntary act. He indicated that a refusal of a drug test without information or under duress, does not amount to voluntary refusal.

On June 26, she arrived at the mill even more anxious than usual. She dreaded to be working with Sam Clark for a whole shift. She reasonably believed that he bore a grudge against her. Clark's testimony confirmed the grudge. He refused to talk to her that day, though the Front of the Mill video reflects a crew small enough that he would be expected to communicate with every member.

The video of the hallway confrontation shows Clark banging on the door which increased her documented anxiety. Mr. Lyons slapped the table to show how Clark pounded the door loud enough to be heard far into the locker room. He knocked loud enough to startle her as she, was taking her pants off, as she testified, preparing to go home sick. Further reflecting one of the four large supervisors or guards shouted "we fire her" after her in this small hallway. The Company intimidated her (Rachal Report, p. 6). It put her under enough duress that she refused the drug test amid what Dr. Rachal called a familiar

fight or flight pattern.

Men in the small hallway included a man with whom she had a history of disputes. While Clark denied it, the video shows how he helped isolate her near the back door in a small hallway. Along with the door banging, that the Company's conduct and environment led to an anxiety attack in a person with a history of them. Recall that Dr. Rachal wrote, "she has a history in which authority figures (such as police, see Union Exhibit 3, p 4) have not acted in her best interest and often inflicted harm." *(Id.*, p. 6).

The Company put her under duress. It should have excluded Clark from any group seeking to elicit her voluntary consent to a drug test. Indeed, any such request should have occurred in an office, as Dr. Rachal testified he conducts, with the door open and another female present. He related experience as a manager, supplying expertise in providing information that an employee, particularly one who has been abused as was this Grievant, might not want to hear. Against this background, he testified that the way that the Company demanded that she take a drug test was not the way it should be done.

All admitted – and the Arbitrator heard from the audio on the video – that no one in that hallway told her that the Company would take her refusal to submit to a drug test as a positive test. No fair listener can discern that warning on the

video tape of the incident in the hallway.

The Arbitrator retains his duty to consider her state of mind and history. This does not appeal to sympathy, rather it focuses upon her mental condition and capacity when she "declined" a drug test.

PTSD impaired her "capacity." So did being anxious, sick, tired, and her hip very sore. Mr. Ricci admitted seeing her hand on her hip (or in her pocket). He heard her words - she was tired and her leg was bothering her. She was the young woman that this Manager agreed could have felt frightened in the situation with which the Company confronted her. Dr. Rachal found it extremely oppressive. (See Union Exhibit 3, p. 6).

Arbitrators have concluded that a refusal to take a drug test does not mean that an employer can terminate an employee where special circumstances appear. This principle applies even where there is similar language about a refusal turning into a positive test. Here those special factors are the repeated offers to take such a test, a negative later test ("five times more sensitive than the test that she refused") and the anxiety attack that the Company caused and the Union cited. (Joint Exhibit 5, p. 3).

Again, her "unusual behavior" was explainable, in part, by shift changing. As she told Dr. Rachal "she had not moved from nights to days in a 24-hour period in the past so this short of a conversion was new to her." (Union Exhibit 3, p. 2). Despite getting this information well prior to hearing, the Company offered no contrary evidence.

The Company objected that the Union waived the issue of probable cause by not raising it earlier. This position is without merit, The issue of probable cause is embedded in the just cause

standards which were raised timely.

That this episode occurred on the first day the Grievant was back for a full shift with Mr. Clark was not considered, according to Meager. Clearly this record of evidence shows that there was bad blood between the Grievant and Mr. Clark. Clark was moved from his assignment and likely harbored hostility toward the Grievant. Nor was the fact that the Grievant was going home because she was ill was not considered in the decision to discharge.

Should the Arbitrator, arguendo, find some Grievant culpability in this matter it is clearly not sufficient to warrant discharge. At most some short suspension could be supported by the record before the Arbitrator.

The Union respectfully requests that this grievance be sustained in its entirety and that the Grievant be reinstated to her position with the Company with full back pay and benefits.

ARBITRATOR'S OPINION

There is no dispute in this matter that the Grievant was an employee with just short of two years of service at the time of her suspension and discharge and that she had been an otherwise satisfactory employee. There is also no dispute that on June 26, 2022 the Grievant left her job went to the women's locker room in the Weld Shop changed into her street clothes and left the building, got into her car and left. The final relevant area of agreement is that she was told to go with plant security to participate in a drug and alcohol test, which she refused. Much of the rest of this record is contested.

The burden of proof in discharge case such as this matter falls upon the Company to show

"proper cause" for the suspension and discharge.[3] The Union urges that because the allegations resulting in this discharge involved drugs, and a call to local law enforcement the Company should discharge its burden of proof with a high standard, and urges beyond a reasonable doubt. The Union argues that Management is also at fault in intimidating the Grievant thereby denying her the freewill necessary to make a decision to comply with the drug and alcohol test. In a related set of issues the Union contends that the Grievant has mental health issues which exacerbated her reaction. Further, the Company strenuously objected to the evidence and testimony offered by an expert witness called by the Union in defense of this Grievant. It is incumbent upon the Arbitrator to weigh the evidence concerning the Company's claim that the Grievant was culpable, that there were no mitigating circumstances arising from long service, and that the determination to suspend then discharge the Grievant is proper. The Arbitrator will then, in turn, examine the various defenses raised by the Union.

Just Cause

The undisputed facts in this matter show that the Grievant did not comply with the request to submit to a drug and alcohol test. Mr. Clark testified that he requested that the Grievant accompany plant security to the Weirton Medical Center for a drug and alcohol test. Mr. Clark provided a written statement (Company exhibit 3) stating in pertinent part: "*When*

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[3] Article 5, Section J uses the language proper cause; which is equivalent to just cause see Elkouri and Elkouri *How Arbitration Works, eighth edition,* Arlington, Va.: BloombergBNA, 2016 where they cite several decisions making this point, included among these is Worthington Corp. 24 LA 1, 6-7 (McGoldrick, Sutton, and Tribble 1955).

employee exited the locker room, I, and the security person, explained the situation, and that she would need to go to have a drug and alcohol screening. . . ." This request was witnessed by other management employees and the security officer. The security officer, Robert Myers, filed a "Plant Security Incident Report" dated June 26, 2022 (Company exhibit 6). That statement corroborated Mr. Clark's claim the Grievant was asked to accompany the security officer to the Weirton Medical Center for a drug and alcohol screen. The Grievant is reported to have responded: "*. . . She said she is not going to get tested because even if you pass the test you still get a last chance letter. . . .*"

Mr. Clark testified that the Grievant appeared to be impaired from drugs or alcohol when he observed her on the shop floor and in the hallway. Mr. Clark asserted that observed impairment was what prompted the request for her to submit to a drug and alcohol test (these observations are memorialized in Company exhibit 2). The Grievant denies that she was under the influence of either drugs or alcohol, but rather was tired, not feeling well and her leg was hurting.

From the video (Company exhibit 1) it is clear that the Grievant, while on the shop floor, was having difficulty walking and had her hand on her hip. There is no clear audio and therefore the Arbitrator is left with an incomplete record sufficient to determine for himself whether the Grievant slurred her words or exhibited other signs of impairment while on the shop floor. However, there are statements in this record which appear to corroborate Clark's testimony. The Incident Report filed by Robert Myers contained a description of the Grievant when she got in her car: "*. . . When she got to her car she asked me if I looked messed up. I told her she did and not to drive.*" (Company exhibit 6, p. 1). Supervisor O'Brien's written statement (Company

exhibit 4) states, in pertinent part: " . . . *Moments later she exited the locked [sic] room was slurring and appeared impaired she was extremely belligerent.* . . . " Mr. Daugherty's handwritten statement says in pertinent part (Company exhibit 5): "*I Ryan Daugherty, on June 26, 2022 observed Lydia while working day shift looked like she was staggering while she was walking. While we were in the sticker shanty she could not keep her eyes open while talking to me when we changed rolls on the mill she kept dropping her gloves and could hardly pick them up when she tried to put her ear plugs in her ear she couldn't find her ear, kept hitting her cheek while almost falling over.*"

The Union objects to these written statement because they are hearsay, not subject to cross examination and were not made available at the time of the discharge. Everything alleged by the Union in their objection is true. However, there is broad admissibility in arbitration and the court room rules of evidence do not apply[4]. Only the Incident Report is a normal business record, the other two documents were solicited for purpose of the Company's defense of its action against this Grievant. Under the parties' Basic Labor Agreement, the grievance machinery contains the requirement that[5]: " . . . *c. The Company agrees that it shall not, in an arbitration proceeding subpoena or call as a witness any bargaining unit Employee or retiree. The Union agrees not to subpoena or call as a witness in such proceedings any non-bargaining unit*

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[4] Article 5, Section I, 8 states: " *The parties agree that the prompt resolution of cases brought to arbitration is of the highest importance. Therefore, except as provided in Paragraph 8(b) below [concerning briefs] arbitration hearings shall be heard in accordance with the following rules: (3) there shall be no formal evidence rules. (4) the arbitrator shall have the obligation of assuring the hearing is, in all respects, fair.*

[5]Article 5, Section I 8 c.

employee or retiree."

The Arbitrator is obliged not to enforce the court room rules of evidence by the clear language of the parties' contract, and because the Company is barred from calling or subpoenaing bargaining unit witnesses the Arbitrator is obliged to allow these written statements into the record.

In this matter, there is video tape (Company 1) which allows the Arbitrator to see some, but not all, of the symptoms allegedly exhibited by the Grievant. Supervisor Clark makes allegations concerning why those observations are seen in the video, and the written statements are simply corroboration of Mr. Clark's testimony. If it were only the security guard's Incident Report the corroboration of Clark's observations would have left this Arbitrator with precious little confidence in what was reported. However, the second Supervisor's statement marginally bolsters the Company urged arbitral conclusion. The addition of the bargaining unit employee's statement raises the confidence in the Company's version of the events to a preponderance of the evidence – in compliance with the requirements of the Basic Labor Agreement.

The Grievant's testimony was that she knew of others who had been given a drug and alcohol screen and had "passed the test and still got a last chance letter." The Grievant also claimed that Mr. Clark held a grudge against her for previous disagreement that they had.[6] Besides the Grievant's testimony little else of probative value was offered concerning the issue of just cause.

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[6] Mr. Clark testified that about a year before June of 2022 he and the Grievant had issues and he moved off of that crew but there was no grudge. No further information concerning the prior issue was proffered.

This Arbitrator is persuaded that the record of evidence does not show the Grievant was disparately more harshly punished than others who refused to submit to a drug and alcohol test and there were no other deficiencies claimed by the Union in the application of the just cause standards that the Company has shouldered its burden of proof and it now rests with the Union to support its defense of this Grievant.

Union's Defense

The Union left no proverbial stone unturned in the defense of this Grievant. The Union contended that the Grievant's hip hurt and that she was tired from the constant changing of her work hours from day to night shift and back again. The Arbitrator has worked in an industrial setting where such changes in hours were common, and the Union's argument has merit, and undoubtedly contributed to the observations made by Mr. Clark and three other persons. For purposes of defending the Grievant's actions, however, it is not necessary that one theory of the case (Management's or the Union's) prevail. What is necessary for the showing of just cause, was that there was probable cause for making further inquiry into the observed behavior the Grievant exhibited on June 26, 2022. That further inquiry was, in the judgement of Supervisor Clark, a drug and alcohol test. That judgement, on its fact, did not impress the Arbitrator as unreasonable. While having a sore hip, being ill and being tired may result in momentary lapses in coordination, even difficulty speaking it is different than being under the influence of drugs or alcohol. After several reports, from different people, including other supervisors it was not unreasonable for Mr. Clark to make his own observations and if he suspected impairment order

her to submit to a drug and alcohol screen.

The Union correctly points out that when Supervisor Clark told the Grievant to accompany the security guard for a drug and alcohol screen, Clark did not warn her of the consequences of refusal nor did he tell her that his instruction was a direct order. What the record shows is that when Mr. Clark made the "request" the Grievant responded that she would not comply and offered an explanation why. At that point, there is no doubt in this Arbitrator's mind that the Grievant understood it was an order and what the consequences were for failure to comply. In this case it was not just a failure to comply, where further identification of consequences would have provided her with an opportunity to comply, it was an outright refusal with supporting contentions.[7]

Strained Relationship between Grievant and Mr. Clark

The Union posits a strained relationship between Mr. Clark and the Grievant, and portrayed that strained relationship as resulting in Mr. Clark holding a grudge against the Grievant. This is not a theory without some basis. The Grievant testified that she and Mr. Clark has a history of unpleasant relations. Precious little in the way of details were offered concerning when, where and what these relations were.

The record shows that Mr. Clark was moved to supervise a different crew at a time consistent with the Union's theory. In examining this record, the Arbitrator is left with little to

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[7] Crescent Metal Prods. 91 LA 11129 (Coyne, 1989) and Warehouse Distribution Centers, 90 LA 879 cited in Adolph M. Koven and Susan Smith *Just Cause: The Seven Tests, third edition,* Washington, D.C.: Bureau of National Affairs Inc., 2006, p. 95.

no basis for a finding in the Union's favor on this issue save the Grievant's claims; of course, claims not accepted by the Company nor elaborated on in this record such that the Arbitrator is persuaded that such an alleged grudge existed and contributed to the Grievant's predicament.

Even if this Union assertion was given full weight. It is not clear that such a problem would excuse the Grievant's conduct on June 26, 2022. The subordinate nature of the Grievant position at work to Mr. Clark requires compliance with his directives.

Expert Witness

The real meat of the Union's defense is its expert witness, a psychiatrist who diagnosed the Grievant with PTSD and determined that the events of June 26, 2022 resulted in a fight or flight response resulting in her refusal of compliance with the drug and alcohol test request. Naturally, the Company objected to the testimony, documentary evidence and even the theory proposed by the Union.

The Company's objections rest on various arguments from the expert was being paid by the Union and was therefore biased, his diagnosis and analysis differed from that of the Grievant's attending physician, and the Grievant's decision to leave the plant had been made prior to her encountering Mr. Clark or any other management employee. For all of these reasons there should be no weight assigned this evidence according to the Company. Further, its is charged that the Union ambushed the Company with respect to this theory of the case and the evidence supporting it. Management is entitled to discovery through the grievance procedure and that did not occur in this matter. For all of these reasons, the Company would have the Arbitrator

exclude the expert's testimony and proffered evidence.

The records before this Arbitrator show that Northwood Health System documents were entered into this record to show that there was no diagnosis of PTSD, rather the Grievant suffered Generalized Anxiety Disorder and was stable at her last visit (Company exhibit 19).[8] The attending health care provider was a Nurse Practitioner. The witness to which the Company objects is a Medical Doctor and Psychiatrist. The Arbitrator is persuaded that the latter being more credible than the former on the matters of PTSD, this Arbitrator is unpersuaded by the Company's objection on this basis.

There is no evidence in this record to suggest that the Union's expert witness presented himself and testified in any manner other than that consistent with his profession's ethical standards or that there was undue influence that biased his judgement in this case. Payment for services for his diagnosis, analysis and testimony is not persuasive evidence that he would offer other than his best scientific opinion on the matters before him. This Company complaint is also therefore dismissed.

The final Company objection is not an issue apart from the merits of this case, and therefore shall be examined with the merits. It is therefore the Arbitrator's considered opinion that the evidence created by and testimony proffered from this expert witness is fully credible and will be given the weight it should be within the context of the Grievant's conduct.

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[8] The Union would have the Arbitrator find that PTSD is not differentiable from Generalized Anxiety Disorder. Further there are numerous Northwood medical notes entered into this record, Company exhibit 19 through 24, providing a history of the Grievant's treatment there. The July 21, 2021 notes were the latest entered into the record (Company exhibit 19) and are the most relevant to the events of nearly a year later.

The Union's defense is parallel to that of reasonable accommodation.[9] Upon acceptance of the diagnosis of PTSD the Union would have the Arbitrator determine that, and especially under the context that existed in the plant on June 26, 2022, her disorder together with the stressful situation and the hostile people surrounding her made it improbable that a reasonable person, acting in accordance with acceptable order, could follow the instruction to submit to a drug and alcohol test. Following the principles developed in the arbitration of labor-management disputes concerning these issues, this theory of the case is not far-fetched. Arbitrators have, on a case by case basis, applied reasonable accommodation where the discipline was issued in matters where a medical malady was diagnosed, even mental or emotional disordered.[10]

Arbitrators have long recognized that there is a balancing of interests in these matters. Reasonable accommodation does not mean accommodation whether work could be done or not. Here the same idea is proffered in a disciplinary setting. Should the Employer be required to be tolerant of a refusal to test for alcohol or drugs when an underlying condition impaired the employee's decision-making skills in a work setting such as a steel mill?

Upon careful consideration the Psychiatrists fight or flight description of the Grievant's behavior rings true. This Arbitrator is convinced that this Grievant had traumatic events in her past that scared her emotionally and does create difficulties for her. However sympathetic this Arbitrator may be to the plight of this person, the fact remains, that as an employee of a Company she has certain obligations to that Employer. Impairment from PTSD may, in fact, impact the Grievant's ability to objectively view the world around her. This the Arbitrator does

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[9] See Adolph M. Koven and Susan L. Smith, *Just Cause: The Seven Tests, third edition.* Washington, D.C.: Bureau of National Affairs, Inc. 2006, Ch. 6.II.E.
[10] See Keystone Steel & Wire Co. 114 LA 1466, 1471 (Goldstein, 2000).

not doubt, neither does the Arbitrator doubt the expert's conclusion that a fight or flight situation may have developed for this Grievant. The Arbitrator does not doubt that the events in the hallway, and Mr. Clark's presence may have exacerbated her problems.[11]

A steel mill is an inherently dangerous place, safety in this particular Company, has been and is of utmost concern. An individual suffering from PTSD can have issues which are inconsistent with her own safety and those around her. Albeit, that is more general than what this Arbitrator is asked to decided. This Arbitrator is asked to decide if this employee's PTSD is a mitigating or even an excusing factor under these specific facts and circumstances.

The Grievant is charged with two specific transgressions. She is charged with being insubordinate in that she refused to accompany plant security to the Weirton Medical Center for a drug and alcohol screening. When she refused that instruction she was characterized by at least two observers as being belligerent (Clark and O'Brien). She further stated the reason she was not going to comply was that "even if it was negative the Company issued Last Chance Agreements." PTSD, according to the expert could impact the Grievant ability to make appropriate decisions. In other words, her otherwise good-judgement could be overwhelmed.

The Grievant did not leave that option open to the Arbitrator. The record shows that she took her refusal one step further, she stated that she did not believe a drug and alcohol test would result in anything better than a last chance letter -- not just bad judgement, but a false cause for

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[11] The allegation that someone present in the hallway yelled "we fire them" was not audible to this Arbitrator in the video (Company exhibit 1), after repeated running of the video there is noise and those words may have been what created that noise, but alas it was not something which this Arbitrator could ascertain with confidence. If such a thing occurred it is clear cause for severe discipline for the individual who uttered those words, but does not rise to a level to excuse the Grievant's conduct.

her bad judgement. Even so, there might still have been room to find that the PTSD constraint could serve to mitigate her bad decision. However, the Grievant left the Company's facility in her private vehicle even after Security Guard Myers told he not to drive and have a family member come and get her. This latter incident is also cited in the causes for the discipline and shows not just refusal of the drug and alcohol test, but a follow-on driving a vehicle when a security official asked not so. The combined conduct persuades this Arbitrator that the Grievant's conduct was not tolerable and was worthy of suspension pending discharge.

Conclusion

The preponderance of the evidence in this case demonstrates that the Grievant refused, not just failed, but refused to submit to a drug and alcohol test. Her refusal undoubtedly was tainted by her PTSD. Subsequently, she was confronted by Security Guard Myers who asked her not drive her vehicle because he thought her appearance and demeanor were reason to suspect inebriation. Together with her refusal to test, her operating a vehicle while suspected of inebriation provides a legitimate basis for Management to discharge the Grievant for proper cause. The record of evidence in this matter shows the Grievant likely suffers from PTSD, however, her conduct is sufficiently egregious to overcome the effects of PTSD may have reasonably had in contributing to her bad judgement or in this Arbitrator deciding to mitigate the penalty assessed. It would be unreasonable of this Arbitrator to require this Grievant's reinstatement after such conduct.

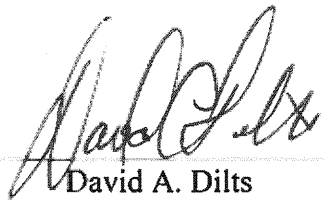
This Arbitrator has no alternative save to deny this grievance in its entirety as being

without merit.

AWARD

The grievance is denied as being without merit.

At Fort Wayne, Indiana
December 19, 2022



David A. Dilts
Arbitrator