IN THE MATTER OF ARBITRATION

BETWEEN	)	
	)	**Grievance No. 1234-072522**
AIRCRAFT MECHANICS FRATERNAL ASSOCIATION (Union)	)	[redacted] **Grievant (Discharge)**
-and-	)	
ALASKA AIRLINES, INC. (Company)	)	

Arbitrator: Lynne M. Gomez, neutral arbitrator selected by the Parties; Nic Kula, AMFA Board Member; and Christopher Reverski, Company Board Member.

HEARING

A Hearing was held on June 14, 2023, by Zoom, commencing at 9:00 a.m. PST. The witnesses were sworn and sequestered. The Hearing was transcribed and the Board was provided with a copy of the transcript. The Parties submitted post-Hearing briefs and authorities, which were received by the Arbitrator by August 4, 2023. The record was closed on August 4, 2023. The Parties were given full opportunity to present testimony and evidence at the Hearing.

APPEARANCES

FOR THE COMPANY

N. Joe Wonderly	Attorney for the Company
Sonia Alvarado	Managing Director of Labor Relations, witness
Chad Hastie	Drug Abatement Department, witness
Orville Hunt	Regional Maintenance Director, witness

FOR THE UNION

Lee Seham	Attorney for Union
[redacted]	Grievant, witness
Jarod Mills	AMFA Airline Representative, witness

AGREED ISSUE

Did the Company have just cause to terminate Grievant [redacted] and, if not, what shall be the remedy?

BACKGROUND

On July 25, 2022, the Grievant, a Lead Line Aircraft Technician who had worked for Alaska Airlines ("Alaska" or the "Company") for about 22 years, was advised by Notice of Discipline or Discharge ("Notice") as follows:

> **INFRACTION/UNSATISFACTORY PERFORMANCE**:
>
> On July 5, 2022, you completed a DOT random drug test. You failed this DOT random test when you tested positive for marijuana. When questioned, you had no explanation for this positive test.
>
> Your actions as described above are in direct violation of the Alaska Airlines People Policies, General Rules of Conduct as follows:
>
> Rule #6 "Follow all orders, instructions, and assignments. Failure to do so may result in discipline up to and including discharge."
> Rule #17 "Work safely and in accordance with all posted and published safety regulations."
> Rule #28 "Follow all rules and regulations within the Drug and Alcohol Use Policy."
>
> **ACTION TAKEN**: Given the critical nature of what we do, safety in performing all of your duties is paramount. Your actions as described above are unacceptable and you are discharged from your employment with Alaska Airlines, effective immediately. * * *

This grievance was initiated, generally asserting that the Grievant's discharge was unjust and seeking his reinstatement. The grievance was appropriately processed and remains unresolved. The Parties stipulate this matter is properly before the Board for Opinion and Award.

RELEVANT PROVISIONS

AGREEMENT
between
ALASKA AIRLINES, INC. and
the AIRCRAFT MECHANICS FRATERNAL ASSOCIATION
for
Technicians and Related Crafts Employees
October 17, 2016 ending October 17, 2023

ARTICLE 3
STATUS OF AGREEMENT

B. The right to hire, promote, discharge or discipline for cause and to maintain discipline and efficiency of employees is the sole responsibility of the Company, provided it is not in conflict with any paragraph in this Agreement.

ARTICLE 16
GREVANCE PROCEDURE

K. No employee will be discharged, suspended or disciplined without just cause.

POSITION OF THE COMPANY

The Company makes the following arguments and contentions in support of its position:

This Company reasonably exercised its managerial discretion to terminate a safety-sensitive employee who tested positive for THC on a random Department of Transportation ("DOT")-mandated drug test. Given the critical importance of ensuring non-impairment, the Company is justified in terminating employees who test positive for drugs both due to the severity of the misconduct itself, and the need to deter other employees from similar violations. Anything less than termination would give employees the impression they would have one "get out of jail free" card if testing positive and that would substantially undermine the Company's important objective of deterring drug use. Moreover, federal regulations impose strict requirements for returning a "safety-sensitive" employee to work following a positive drug test, resulting in substantial compliance burdens for the Company. That burden further buttresses the reasonableness of the Company's decision to terminate "safety sensitive" employees who test positive on DOT mandated drug tests. The Company consistently terminates "safety sensitive" employees who test positive on such drug tests, and its policies and training clearly and unequivocally warn employees of that consequence. AMFA failed to present competent evidence of any Alaska employee who was not terminated for having a positive DOT-mandated drug test, instead focusing on the fact that other labor unions (specifically, those representing pilots and flight attendants) have successfully negotiated agreements that allow for a potential, discretionary path back to employment following a lengthy and complicated return to work process. Those agreements merely provide for a possible return to work, not a guarantee that the employee will be allowed to continue working. Those negotiated agreements do not apply to AMFA-represented individuals and relying on them as a basis to reduce the penalty in this case would, in effect, grant the Union a benefit that it has failed to achieve through bargaining. And Alaska Airlines cannot be bound by the disciplinary processes of a different employer. The record shows that "second chance" policies for mechanics who test positive for drugs are the exception, not the rule, as most carriers do not even have such a policy. Finally, the Union offered no mitigating circumstances specific to Grievant, who refuses to take accountability for his actions. His speculation that he may have unknowingly and accidentally ingested a marijuana edible at a block party simply is not credible. The Company had substantial justification for discharging Grievant and its decision to do

so is consistent with its clear policies and prior practice. The Union has failed to demonstrate disparate treatment or other basis to reduce the discipline and the grievance should be denied.

The Company has established just cause by demonstrating Grievant engaged in the misconduct alleged and that the penalty was appropriate. The CBA does not contain a drug and alcohol policy, or address federal drug testing requirements for technicians or the disciplinary consequences of testing positive for drugs. But the Company's Drug and Alcohol Use Policy (which sets out the requirement that safety-sensitive employees not report for duty with illegal drugs in their systems) and the People Policies (which provide that employees will be terminated for positive drug tests) are an appropriate exercise of management rights that the CBA expressly grants to the Company. There is no dispute Grievant violated Alaska's Drug and Alcohol Use Policy and its People Policies: The MRO who reviewed the results of his drug test determined it was a "verified positive test" for THC. The Parties stipulated that this drug test complied with all applicable federal regulations, under which a verified positive test must be accepted as valid and cannot be changed or overturned by anyone besides the MRO. 49 CFR 40.149(c) (MRO has "the sole authority under this part to make medical determinations leading to a verified test," and specifically noting that "an arbitrator is not permitted to overturn the medical judgment of the MRO that the employee failed to present a legitimate medical explanation for a positive, adulterated, or substituted test result of his or her specimen"). In other words, the fact that Mr. [redacted] had THC in his system cannot be challenged or disputed. The evidence clearly established Grievant violated Alaska's properly promulgated policies and there is no dispute that he had clear notice of Alaska's Drug and Alcohol Use Policy and understood that a violation would result in termination. He knew that safety-sensitive employees must not have illegal drugs (including marijuana) in their systems while on duty and that failing to comply will result in termination. All employees are required to complete training on the Drug and Alcohol Use Policy annually, and Grievant had done so approximately nine (9) months before his positive drug test. He also had been subjected to random drug tests numerous times during his employment and testified that he was familiar with the policy and understood he would be terminated for violating it. He had clear and unequivocal notice that he would be terminated for testing positive for marijuana on a random drug test.

Alaska's interest in promoting safety, preventing impairment at work, and deterring violations of its Drug and Alcohol Use Policy justifies termination. When misconduct has been established, arbitrators apply a deferential standard in reviewing the level of discipline imposed by the employer. Numerous arbitrators have recognized it is primarily the function of management, and not the arbitrator, to decide upon the proper penalty, and arbitrators are cautioned not to substitute their judgment for that of the employer with respect to the severity of the disciplinary

penalty imposed by management. Grievant's discharge is consistent with Alaska's practice of terminating employees who violate policies directly related to the safe and efficient operation of the airline. Alaska has a substantial interest in ensuring that employees who perform critical safety functions, such as technicians, perform their work safely and reliably, free from any impairment from illicit drugs. No test exists that can detect whether an employee is actively impaired from marijuana so the only way to ensure absence of impairment is by demanding that employees not have illegal drugs in their systems while on duty and performing random drug testing to enforce that rule. Given the direct threat drug use poses to safety, it is eminently reasonable for the Company to terminate employees who violate its policies. As observed in TWU and Southwest Airlines, 2013 AAD 110 (LaRocco, 2012)(at pp. 16-17), employers would "take[] an enormous and unreasonable risk [by] reinstat[ing] to service an employee who has tested positive for an illegal drug" and "Automatic discharge [for a positive drug test] sends a clear and unmistakable message to all employees that any illegal drug use will not be tolerated. If employees know that they would resume employment after failing the drug test, they would undoubtedly wait until they failed that test rather than seeking treatment before being detected." Arbitrators routinely uphold "zero tolerance" policies for drug and alcohol violations in the airline industry, approving airlines' mandatory termination policies for safety-sensitive employees who test positive for illegal drugs. At least one case on Alaska property reached the same conclusion. See, e.g. Alaska Airlines and AFA, 2013 AAAD 212, at p. 8 (Perkovich, 2004); IBT and Northwest Airlines, 101 AAR 0034, at p. 7 (Wittenberg, 1999); TWU and Southwest Airlines, 2013 AAAD 132, at p. 12 (Lemons, 2013); IBT and Northwest Airlines, 2011 AAAD 45, at p. 22 (Boyer, 2003); ALPA and Northwest Airlines, 101 AAR 014, at p. 15 (Horowitz, 2001); and AFA and US Airways, 105 AAR 43, at p. 11 (Conway, 2002). While the Union may argue that federal regulations do not require air carriers to terminate "safety sensitive" employees for a first-time positive drug test, it must be noted that federal regulations do not dictate any particular disciplinary outcome, instead leaving such decision to the individual air carrier's discretion. The federal regulation's silence on the issue of discipline has no bearing on whether Alaska reasonably exercised its discretion in choosing to terminate Grievant. See, e.g., AFA and US Airways, 105 AAR 43, at p. 11 (Conway, 2002)

Alaska's practice of terminating "safety sensitive" employees who test positive for drugs is also supported by practical considerations. Pursuant to federal regulations, employees who are returned to "safety sensitive" positions are subject to individualized testing plans developed by a Substance Abuse Professional and, if an employee is brought back to work, Alaska is responsible for ensuring compliance with those personalized testing plans and can face fines for any noncompliance. Requiring Alaska to return safety-sensitive employees to work following a positive

drug test would impose substantial additional burdens on Alaska's Drug Abatement department and would inject significant compliance risks, which further reinforces the reasonableness of its "zero tolerance" policy. Based on the seriousness of Grievant's offense and the resulting risks to the Company associated with reinstatement, as well as the substantial need to deter future misconduct, termination was a reasonable and appropriate penalty.

The Union may argue that Grievant was subjected to disparate treatment but none was established. Unions representing Alaska pilots and flight attendants have successfully negotiated agreements that allow for the possibility for employees in those bargaining units to return to work following a positive drug test. There has been no showing of the Company treating other employees guilty of similar offenses less severely than it did Grievant. The government and other carriers may call for less stringent responses, but Alaska is not required to do so. Nothing in the federal regulations requires Alaska to return an employee to work after a positive drug test. The Union has failed to identify any Alaska employee in a safety-sensitive position—technician or otherwise—who tested positive on a random drug test and was not terminated. Rather, the record establishes that Alaska consistently terminates employees who test positive for drugs. Any claim of disparate treatment fails. Other union groups may have negotiated an agreement concerning the consequences for positive drug tests but AMFA has not done so. Pilots and flight attendants are not appropriate comparators because their collectively-bargained work rules are different, and pilots and flight attendants who test positive on a random DOT drug test are not "similarly situated" to Grievant. Even if the Board were to consider the pilots' and flight attendants' negotiated agreements, they do not guarantee any pilot or flight attendant the ability to return to work. Those agreements provide an avenue for the employee to seek reinstatement but that determination is left to the Company's discretion. It is well established that a party cannot achieve through arbitration what it did not achieve through bargaining, so a party clearly cannot rely on a different labor union's negotiated agreement to obtain a benefit for which it did not bargain.

The Union likewise cannot rely on American Airlines and United Airlines having negotiated agreements with their respective labor counterparts that allow technicians a "second chance" after a positive random DOT-mandated drug test. Such agreements do not reflect any "industry standard" and the fact that these other airlines elected to negotiate a "second chance" process with the labor unions representing their technicians is irrelevant. Alaska is plainly entitled to devise its own rules and enforce its own policies, and is in no way bound by the policies, rules and negotiated agreements that other airlines choose to adopt. The agreements on which AMFA relies serve only to highlight a fundamental flaw in its argument here—that is, if AMFA wants a process that allows for a path back to work for technicians who test positive for drugs, it is incumbent upon

AMFA to bargain for that process. It has not done so, even though the Parties are currently negotiating a successor agreement. AMFA's invocation of the American and United agreements is nothing more than an attempt to gain through arbitration what it has not obtained through bargaining. Moreover, as AMFA's Airline Representative testified on cross examination, he reviewed handbooks and collective bargaining agreements from approximately eight airlines and only two (United and American) maintained a policy of affording a "second chance" to technicians who tested positive. If such evidence is relevant at all, it suggests that affording technicians a path back to work following a positive drug test is exceedingly rare. Indeed, the industry standard is a zero-tolerance approach toward drug and alcohol violations.

The Union's suggestion that the Company must prove actual impairment should be rejected. Alaska's drug policy prohibits the presence of illegal drugs in an employee's system—proving impairment is unnecessary. That policy tracks federal regulations and is plainly reasonable given that no test exists that can determine impairment. Adding a requirement that Alaska affirmatively establish impairment would rewrite its policies and create an impossibly high burden to establish a violation. Numerous arbitrators have held that a non-impairment claim is neither a defense nor a mitigating factor. *See* Alaska Airlines and AFA, 2013 AAAD 212, at p. 8 (Perkovich, 2013); and IBT and Northwest Airlines, 2011 AAAD 45, at p. 22 (Boyer, 2003).

The fact that marijuana is legal under Washington law is irrelevant and any argument that this entitled Grievant to some sort of leniency should be rejected. First, Alaska's Drug and Alcohol Use Policy is clear that it prohibits employees from having "illegal drugs" in their systems, which are defined to mean "any substance where use or possession is illegal under federal, state, or local law." Possession of marijuana is illegal under federal law pursuant to the Controlled Substances Act, 84 Stat. 1242, 21 U. S. C. §801 et seq. Thus, the fact that it is legal under Washington law has no impact on the Company's policy. And treating technicians within the bargaining unit differently based on whether the state in which they work has legalized marijuana would create different disciplinary outcomes within the system-wide bargaining unit, thereby creating a risk of disparate treatment among bargaining unit members. Thus, the legal status of marijuana under Washington law is irrelevant and provides no basis to disturb the Company's discharge. There are no mitigating factors in this case warranting reduction of the penalty. The Union may argue that Grievant's length of service with Alaska warrants reduction of the penalty but it is generally recognized that high seniority might mitigate minor offenses, but not major offenses. Seniority does not offset a fundamental breach of employee responsibilities. Grievant ignored the Drug and Alcohol Use Policy, which serves a critical role in promoting the safety of Alaska's employees and the flying public in general, and the Company's zero-tolerance stance toward violations of that

policy is essential to deter future misconduct and promote compliance. Hence, Grievant's length of service does not warrant mitigation. And Grievant's continued refusal to take accountability for his actions is an aggravating factor that provides further support for Alaska's decision to terminate his employment. Rather than admit to his misconduct, he concocted an implausible story that he attended a block party with 20-30 people where he may have unknowingly ingested marijuana at a table containing "sweets." He conceded that theory was a "guess," that he had no specific reason to believe that any of the "sweets" contained marijuana, that he felt no physical effects that would suggest he had consumed marijuana, and that he did nothing at all to determine whether, in fact, any of the "sweets" contained marijuana (such as, for example, asking other attendees if they knew who brought the food items in question or whether they felt any effects after eating the food). Aside from the absolute lack of any evidence supporting this fantastical story, it is utterly unbelievable that a person would put out marijuana edibles on a table at a block party for any unwitting person (including children) to consume without any warning whatsoever to partygoers. Similarly flimsy claims of accidental ingestion have been rejected. See, e.g., ALPA and Northwest Airlines, 101 AAR 014, p. 13 & 15 (Horowitz, 2001) (rejecting Grievant's claim of accidental ingestion due to absence of competent corroborating evidence). A far more reasonable conclusion is that Grievant had THC in his system because he chose to use a marijuana product. Alaska is not required to prove that his ingestion was intentional—which would impose an impossibly high burden—but that is a far more plausible explanation than Grievant's bizarre speculation that he may have eaten a marijuana edible that someone put out for general consumption at a block party without any warning that it contained illegal drugs. In sum, Grievant's denials are utterly incredible and his continued refusal to accept responsibility for his actions further reinforces that discharge was appropriate. A positive drug test is conclusive proof that the employee ingested the substance at issue. Any employee, however, could claim accidental or unknowing ingestion, a claim that is nearly impossible for an employer to rebut. If any employee were able to escape the consequences of a positive drug test by simply denying drug use and claiming accidental ingestion (without any corroborating evidence), Alaska's Drug and Alcohol Use Policy would be utterly toothless and the Company would have no meaningful way to deter drug use among safety sensitive employees. That is an unacceptable outcome for Alaska's operation and for the flying public, and the Board should reject Grievant's implausible "explanation" for his positive test.

There are no mitigating factors that would warrant modifying the Company's reasonable and appropriate conclusion that termination was an appropriate penalty. For the reasons outlined above, the Company respectfully requests that the Board uphold the Company's decision to terminate Grievant's employment and deny the Union's grievance in its entirety

POSITION OF THE UNION

The Union makes the following arguments and contentions in support of its position:

Alaska Airlines maintains that an Aviation Maintenance Technician (AMT) with a random test result for marijuana must be terminated irrespective of his culpability, yet has allowed a Pilot who tested positive for heroin and a Flight Attendant who tested positive for methamphetamine to be reinstated. All three job classifications are subject to the same Drug and Alcohol Use Policy but Alaska justifies its radically discriminatory approach to discipline based on the argument that the Pilot and Flight Attendant unions have negotiated exceptions to Alaska's policy. That is no answer as AMFA has negotiated a just cause standard applicable to all disciplinary actions – without exception. Moreover, the facts of this particular case are truly extraordinary. Grievant is a twenty-two year employee with a clean record; who was never impaired at work; who, unfortunately, lived in a state where marijuana is legal and ubiquitous; who denied, without contradiction, intentional marijuana use; and who has satisfied all DOT/FAA requirements for reinstatement. The particular facts in this case prevent a finding of just cause for discharge as required by the Parties' CBA. Reinstating Grievant as of February 4, 2023, the date he satisfied DOT/FAA reinstatement requirements, will still impose on him a seven-month unpaid suspension. Even if Grievant deserved punishment -- and he does not -- that lengthy suspension would suffice. AMFA agrees that any System Board decision ordering reinstatement may be conditioned on Grievant's execution of a Last Chance Agreement (LCA) modeled on those American Airlines applies to AMTs testing positive at that carrier.

Alaska unilaterally implemented its Drug and Alcohol Use Policy. Its random testing program applies to all safety sensitive employees, which includes Pilots, Flight Attendants, Dispatchers and AMTs and states that employees who violate its terms are "subject to discipline including discharge." It further provides that safety-sensitive employees who receive a positive DOT drug or alcohol test must be immediately removed from performing DOT safety-sensitive duties and referred to a Substance Abuse Professional (SAP) agreeable to the Company. Should the employee be allowed to return to work and perform safety-sensitive duties, the employee must comply with and complete any SAP-recommended education/treatment, submit to a DOT return-to-duty test and submit to the follow-up as prescribed by the SAP as detailed by DOT regulations. Thus, it recognizes an option for reinstatement of employees who satisfy DOT regulatory requirements. As the Parties stipulated, Grievant completed his SAP evaluation and education program satisfactorily and there is no regulatory bar to his re-employment. Alaska maintains programs by which Pilots and Flight Attendants can return work after a verified positive test if DOT/FAA requirements are satisfied and a LCA is signed or committee approval is obtained.

Grievant advised Alaska during the termination hearing that he never used marijuana and he did not know why he had tested positive but speculated he might have accidentally ingested something caused him to test positive when he recently attended a block party barbecue. Management representatives are not permitted to question the MRO's verification of the laboratory result, and the MRO is not permitted to consider the possibility of accidental ingestion as part of the verification inquiry. But Director Hunt, Alaska's terminating supervisor, took no steps to investigate Grievant's denial of intentional use despite the fact that he conceded he was left "wondering" about the possibility of unintentional ingestion. Under Washington State law, medical and recreational use of marijuana is legal and, per federal regulation, Grievant's positive marijuana test only required that he be removed from "safety sensitive" duties until such time as the applicable return-to-duty requirements were completed. Grievant has successfully completed his SAP evaluation and education program and there is no regulatory bar to his re-employment.

Alaska violated CBA Article 16.K because Grievant's termination lacked just cause in many ways. It failed to investigate the cause of Grievant's positive test result or conduct a meaningful pre-termination investigation. Alaska did not make a reasonable inquiry or investigation before assessing punishment which is essential for a showing of just cause. The mere fact that alleged substance abuse is involved does not relieve the employer of its obligation to properly investigate the matter prior to termination. While Alaska's termination letter asserts that it conducted a "thorough investigation" that is not true. Grievant insisted that he did not use marijuana and suggested that the positive test was due to accidental ingestion, which Director Hunt conceded was a "concern" for him although he conducted no investigation and, instead, applied what he understood to be a policy of absolute liability. But the Company readily accepted another AMT's account of accidental ingestion and permitted that AMT to return to work within a few days. The only discernible difference between this AMT and Grievant was utterly fortuitous: That AMT's wife disclosed to her husband that the neighbors had given her marijuana-laced cookies, she had left them in the pantry and the AMT ate one without knowing what they were. Irrespective of which party might ultimately bear the burden of proof, Alaska's application of an absolute liability policy foreclosed any consideration or investigation of Grievant's culpability. Such a total abandonment of a pre-termination investigation precludes a finding of just cause. Drug-related termination bears a great stigma, and employers should exercise greater investigatory diligence. When the cause for termination involves alleged criminal behavior, many arbitrators apply the evidentiary standard of proof beyond reasonable doubt or clear and convincing proof of culpability.

Just cause also is lacking because of Alaska's discriminatory application of discipline. The Drug and Alcohol Use Policy provides, in part, that "All employees will be subject to discharge for a

verified positive DOT or non-DOT drug test…." However, the evidence reflected that this policy is applied to "all safety sensitive employees," a small minority of its workforce. Alaska allows Pilots and Flight Attendants to return to work after a verified positive test upon satisfying DOT/FAA requirements and signing a LCA or obtaining committee approval. Just cause demands that rules and assessment of discipline be exercised in a consistent manner and all employees who engage in the same type of misconduct must be treated essentially the same. AMFA considers the existence of these programs to be dispositive of the just cause issue. If a Pilot who tests positive for heroin, or a Flight Attendant who tests positive for methamphetamine are eligible for reinstatement, there is no basis for finding just cause for termination with respect to an AMT who: (1) has twenty-two years of service, (2) never came to work impaired, (3) tested positive for a substance that is legal in his state, and (4) has already satisfied all DOT/FAA requirements for reinstatement. That wildly discriminatory approach to discipline under a company-wide policy cannot be countenanced.

The standards of the Railway Labor Act (RLA) are well known. The RLA prohibits the unilateral modification of provisions of the parties' collective bargaining agreement other than through the negotiating process set forth in Section 6 of the Act. Recent arbitration decisions in the airline industry involving employees testing positive for a DOT/FAA regulated substance have held that a carrier's unilaterally implemented drug policy must yield to the parties' negotiated just cause provision even where the facts were decidedly less favorable for the grievant than in the present case. *See* Southwest Airlines Co. and Transport Workers Union, Local 555 (Arbitrator M. Franckiewicz, 2015); Southwest Airlines Co. and Transport Workers Union, Local 555 (Arbitrator R. Kelly, 2011). Moreover, Arbitrators generally consider that they have the authority to examine the reasonableness of the employer policy, either in general as written, or in its application in a specific case, including that the peculiar circumstances of a specific employee may call for a different result than the standard one. Multiple facts in the instant case militate strongly in favor of reinstatement, including that Alaska's policy specifically provides for a pathway for the reinstatement of drug positive safety sensitive employees who fulfill DOT/FAA re-employment requirements. Grievant has satisfied all DOT/FAA reemployment requirements and there is no regulatory bar to his re-employment. AMFA has submitted numerous cites in which arbitrators and courts have determined that an employer's unilateral rule cannot substitute for proof of "just cause" and cannot diminish the arbitrator's role in determining whether discharge is a "reasonable" penalty. AMFA recognizes that the DOT/FAA program still requires marijuana testing using methodologies that do not reflect impairment but, perhaps for that very reason, the DOT/FAA program does not require

termination. There is no obstacle to the System Board reinstating Grievant to his position consistent with basic concepts of fairness and equity.

Equitable considerations favor Grievant's reinstatement. The Parties stipulated that there is no evidence that Grievant ever compromised safety and, as to consistency, it has been established that over 90 percent of Alaska employees in safety sensitive positions are eligible for reinstatement after testing positive. AMTs who fortuitously have prior knowledge of accidental ingestion are reinstated to their position in a "couple of days" and, per Alaska's self-disclosure program, can remain employed even if intentionally using marijuana, heroin, or cocaine. The DOT/FAA reinstatement requirements are designed to address safety to the satisfaction of the federal government. Alaska's air operations adhere to that standard and have not been compromised. If Alaska's professed objective is consistency, Grievant must be reinstated. System Board disciplinary decisions are based on the facts before it and the unique facts herein -- Grievant's long employment and clean record, who tested positive for a legal drug and where the Company concedes safety has not been compromised, and who has already satisfied all DOT/FAA reinstatement criteria -- would in no way impact Alaska's existing program. There would be cost involved in creating a system to monitor Grievant's reinstatement process, because that already exists. As to the actual testing, the DOT/FAA program requires that the reinstated employee be subject to a minimum of six tests in the twelve months following his return to work. 49 CFR § 49.307(d) and Grievant agrees to absorb these costs and cost is not an issue in this case.

Grievant was terminated on July 25, 2020 and completed the DOT/FAA SAP program on February 4, 2023. If reinstated as of that date, he already will have suffered an unpaid suspension of over six (6) months and been deprived of health benefits. Upon reinstatement, he will be on the shortest of leashes. AMFA anticipates the imposition of an LCA and the FAA will prohibit Grievant's re-employment as an AMT at any carrier if he should ever test positive again. Grievant should be given an opportunity to continue his loyal service to the carrier. Termination is the capital punishment of the workplace and the Board should not permit the destruction of Grievant's economic world. For all these reasons, the Union requests that the System Board grant the grievance and reinstate Grievant with full seniority and back pay dating from February 4, 2023

OPINION

THE FACTS

The evidence is undisputed for the most part, and demonstrated the following:

Grievant began working for Alaska Airlines when he was 24 years old and had been employed for about 22 years at the time he was terminated. Grievant was an Aircraft Maintenance

Technician ("AMT") who had held a lead position since 2017 and his "clean file" indicated lack of any prior discipline issues. AMTs are responsible for maintaining and repairing Alaska's aircraft, and their work is critical to the safety of the operation. Under federal law, AMTs are classified as "safety sensitive" and must be randomly drug tested as part of their employment. Grievant estimated he had undergone random drug testing six (6) to eight (8) times and had never had a positive result prior to the one resulting in his termination. Alaska never required Grievant to undergo testing on a reasonable cause basis. Grievant testified he does not use drugs of any kind and that beer is the only intoxicant he uses.

Alaska's policies expressly prohibit "safety sensitive" employees from coming to work with THC in their system. That rule was well publicized through the Company's policies and trainings, and there is no dispute that Grievant understood that requirement and the consequences for violating it. On July 5, 2022, Grievant was selected for a random DOT-mandated drug test and provided a urine sample. His sample was analyzed by a laboratory, and a Medical Review Officer ("MRO") reported that THC metabolites were present in Grievant's sample that met the minimum quantitative value of 15 ng/mL for confirming a "positive" test result. The positive result was confirmed through a test of a split specimen in "Bottle B." The verified positive drug test conclusively establishes a policy violation. The Union does not dispute the accuracy of the result reported by the laboratory, and the Parties stipulate that the collection and testing complied with federal law and that the MRO's conclusion regarding the test result is binding. Grievant, who acknowledges he was familiar with the Drug and Alcohol Use Policy and the consequences for violating it, was immediately removed from duty.

After learning of Grievant's positive test, Director of Line Maintenance Hunt interviewed Grievant, who confirmed he knew Alaska's Drug and Alcohol Use Policy and understood he could be terminated for violating it. Grievant denied using marijuana or other drugs, and could not explain the positive drug result other than speculating he may have unwittingly ingested a marijuana edible at a block party/barbecue he had recently attended. Director Hunt shared the information he had gathered during his question and answer session with Grievant and presented it to the PRM team, which considers discipline and is designed, in part, to ensure consistency in decision-making. The matter was discussed and PRM unanimously decided that termination is appropriate whenever there is a positive drug test based, in large part, on strict requirements imposed by federal regulations and Alaska's zero tolerance for drug and alcohol violations with regard to safety-sensitive employees who test positive for drugs. After the PRM group approved termination, the Notice was given to Grievant on July 25, 2022.

The Parties also stipulated to the following:

1) A positive THC result does not demonstrate impairment.
2) There is no evidence that [redacted] was performing his job in an unsafe manner at or around the time of the drug test at issue.
3) [redacted] completed his SAP [Substance Abuse Professional] evaluation and education program satisfactorily and there is no regulatory bar to his re-employment.
4) The medical and recreational use of marijuana is legal in Washington State.
5) The collection and testing process at issue in this case complied with the requirements and standards in 49 CFR Part 40 and 14 CFR Part 120.

The Company and the labor unions representing Pilots and Flight Attendants have negotiated agreements that provide a potential path to return to work after a positive drug test but the Parties have not negotiated such an agreement. In a prior situation, the Company allowed an AMT who had self-reported eating a marijuana-laced cookie by mistake to return to work.

THE ARGUMENTS

Reasonableness of Underlying Policy

As Alaska notes, significant arbitral authority supports summary termination of safety-sensitive employees who test positive for marijuana in DOT random drug screens. Arbitrator Diane Dunham Massey's award in Southwest Airlines, 1991 BNA LA Supp. 102674 (1991), which upheld such a termination, succinctly explained the reasons for such policies and the dangers associated with their violation:

> The Arbitrator finds the Company's [zero-tolerance] rule to be reasonable. If, in fact, the Company apprehends an employee in a safety sensitive position using illegal drugs, then it is not unreasonable to discharge that employee. Such a policy is based in sound business-related rationale. It is accepted that employees under the influence of certain drugs may not perform their work safely. The promotion of optimal safety conditions is an essential objective of the Company. Moreover, a clear message to employees that drug use will absolutely not be tolerated is essential to the safe operation of an airline. Employees of the Company are offered rehabilitation without job forfeiture as long as the employee takes the initial and voluntarily effort to correct the problem. If discharge is not the invariable result of a positive drug test, then drug abusing employees would be able to wait to seek treatment until they are caught by a drug screening. Such a policy could possibly promulgate drug use among those so inclined until they are apprehended and forced to rehabilitate. A drug free workplace, in safety sensitive positions, obviously helps to meet the reasonable business objective for the airline industry. Thus, if a safety sensitive employee is proven, by a reliable and properly administered drug test, to be an illegal drug user, then discharge, under most circumstances, may be considered for just cause and is within the reasonable discretion of the Company (at pages 7-8).

As Arbitrator Massey's award and other arbitral awards submitted by the Parties reflect, an airline's zero-tolerance for drug usage by employees in safety sensitive positions is reasonable and summary termination for testing positive in DOT random drug screens will be upheld under "most

circumstances." The Parties have not negotiated any agreement addressing a potential return to work after a positive drug test, and agreements negotiated by other unions cannot be applied in this case. However, Article 16.K of the Parties' CBA provides that "no employee will be discharged, suspended or disciplined without just cause." As a result, the circumstances surrounding Grievant's termination must be considered to determine if that discipline was supported by just cause.

Just Cause Considerations

It is undisputed that Grievant failed a DOT random test, thereby violating Alaska's zero-tolerance policy. The Union is not challenging[1] the positive drug test result but argues that, under the particular facts of this case, Grievant should be allowed to return to work. The Union notes that Grievant has worked for Alaska for over twenty (20) years with no prior discipline and no prior failed random drug tests; that he has repeatedly denied use of any drugs and, specifically, marijuana, and has never been suspected of drug use; that he has successfully completed his SAP evaluation and education program; that he has expressed his willingness to pay for post-reinstatement testing required by the DOT/FAA; and that there is no regulatory bar to his re-employment. These facts, by themselves, do not entitle Grievant to a "second chance" but they do tend to substantiate his belief that he had to have unintentionally consumed something containing marijuana at a potluck block party barbecue he had attended a few days before being randomly tested. Grievant brought this up during his investigatory interview with Director Hunt and repeatedly stated he does not and never has used marijuana. AMFA Airline Representative Mills, who accompanied Grievant in the meeting with Director Hunt, testified Grievant did not specifically claim he had "accidentally ingested marijuana," but that he did offer an explanation for the presence of THC in his system:

> (Grievant) could only surmise that it could have been from a barbecue or some other place that he had been. But he was very explicit, "I don't smoke weed." Tr., page 104, line 24 – page 105, line 7.

Director Hunt acknowledged while testifying that Grievant's denial of using marijuana or other drugs concerned him somewhat because it made him wonder "how did the THC … you know, (find) its way in his system." Tr., page 62, lines 15-23. Although Grievant could not positively state how the THC entered his system, he did advise Director Hunt he could have unknowingly ingested something containing marijuana at a block party/barbecue attended by 20 to 30 people. Grievant testified that none of the potluck food offerings was labeled or otherwise identified as containing

[1] There are very few grounds for such challenges, and none exist in this case.

"marijuana." He did not attempt to determine if any of the food set out at the potluck party had contained marijuana but fully believes that the failed test resulted from unintentional ingestion because, " I don't use drugs, right, and this would be to me the only avenue that I would have ingested it." Tr., page 118, lines 8-14. Director Hunt testified that he presented "all the facts that we gathered from the Q and A" to PRM so a decision could be made, but admits he did not "specifically" discuss with anyone else that Grievant had denied intentional use of marijuana and speculated he may have eaten something containing it at the party, or discuss whether that possibility should have been further investigated.[2] *See* Tr., page 63, lines 13 – 25. LR Director Alvarado testified that, as far as she knew, Grievant did not claim to have accidentally ingested marijuana and had provided no other potential explanation "other than he just didn't use marijuana. And so there -- we didn't see any reason to pursue accidental ingestion because that wasn't offered as a potential reason." Tr. page 77, line 18 – page 78, line 1. But Grievant did offer that potential reason, and did communicate to Director Hunt that unintentional ingestion of marijuana at the block party several days earlier would be the sole reason for testing positive. Despite his concern as to how marijuana had gotten into Grievant's system, Director Hunt did not perceive Grievant's belief to be a "claim" of accidental ingestion – possibly because Grievant did not know for a fact that that had occurred -- and that appears to be why that information was not shared.

The Company has had at least one prior situation involving an AMT who accidentally ingested marijuana and was permitted to return to work within a few days (Tr., page 78, line 12 – page 79, line 22). LR Director Alvarado related that the AMT's wife had been visited by neighbors who had brought over a plate of cookies containing marijuana and, when the neighbors left, she put the cookies in the cupboard and went to bed. Later, when the AMT got home, he found the cookies and ate some for a snack but, when he went upstairs, he "had a conversation with his wife. And it dawned on him through conversation with her that he had eaten one of these marijuana-containing cookies." Tr., page 79, lines 5-8. The AMT called his manager to report what had occurred, and the Company sent him through the substance abuse process and he returned to work. That AMT's self-reporting of accidental marijuana ingestion played a significant role in the Company's decision to allow him to return to work, according to LR Director Alvarado. But Grievant could not self-report unintentional ingestion of marijuana because he did not know or have reason to suspect that had even occurred, until he tested positive. While the other AMT was able to self-report unintentional ingestion when he realized what had occurred Grievant was not

[2] If such an attempt had been made – and assuming Grievant even knew who the other attendees were -- there is no indication it would have yielded useful information.

informed or otherwise given any indication[3] he had ingested marijuana. And the other AMT's incident suggests that it may not be as fantastical or utterly unbelievable or bizarre as the Company argues that someone attending a potluck block party in Washington would contribute unidentified marijuana edibles for other attendees' consumption. That anyone whose spouse held a safety-sensitive position such as airplane mechanic -- whether or not living in the state of Washington -- would leave unidentified marijuana cookies accessible in the home with no warning as to the ingredients suggests a callous, or at least lackadaisical, attitude toward making unidentified marijuana-laced edibles available for the unsuspecting to ingest.

Grievant was unable to conclusively establish that he had unintentionally consumed marijuana. However, he did share his belief that, because he does not use drugs, he must have unknowingly eaten something containing marijuana. This potential explanation for the presence of TCH metabolites in his sample should have been made known to and considered by PRM before it decided termination was warranted, as Article 16.K 's just cause provision requires that all pertinent information and mitigating factors[4] be considered before a disciplinary decision is made. Had PRM known Grievant had asserted potential accidental ingestion and considered that in light of Grievant's lengthy, discipline free employment history, the absence of any prior positive drug test result over two decades, his promotion to a Lead position in 2017 and the facts that Grievant never came to work impaired or gave the Company any reason to suspect drug usage or subject him to reasonable cause testing, its decision may have been something other than termination. Based on the unique facts of this case, the Board concludes that Grievant's termination was not supported by just cause.

Remedy

The Parties have stipulated that there is no regulatory bar to Grievant's re-employment. The termination is rescinded and Grievant is to be reinstated subject to execution of a Last Chance Agreement (LCA) comparable to LCAs that have been issued to other Alaska employees who were reinstated after a positive drug test.

[3] The Company speculates Grievant should have noticed the "effects" caused by any marijuana edible he may have accidentally ingested at the block party, but there was no evidence concerning whether, or how, effects of marijuana vary or might have been perceived in different people, or whether someone who does not use marijuana would even notice any effect.

[4] The Company argues that Grievant's "failure to accept accountability for his actions" is an aggravating factor. Despite the positive drug test, the totality of the evidence fails to demonstrate dishonesty or any attempt to evade responsibility on Grievant's part.

CONCLUSION

This Award is not intended to suggest, nor should it be interpreted as suggesting, that the Company should relax its critical safety standards and policies for deterring drug use; or that employees testing positive after a random drug test can avoid termination simply by claiming "accidental ingestion;" or that safety-sensitive employees who test positive after a random drug test are entitled to a "second chance." The outcome of this matter has been determined based on its unique facts, applicable contractual language and just cause standards.

AWARD

The grievance is sustained. The Company did not have just cause to terminate Grievant [redacted] Grievant's termination is rescinded and he shall be reinstated subject to execution of a Last Chance Agreement (LCA) comparable to LCAs that have been issued to other Alaska employees who were reinstated after a positive drug test. The Board will retain jurisdiction for sixty (60) days.

Signed this 2nd day of October, 2023

Lynne M. Gomez

Date: 10/2/2023

Nic Kula
AMFA Board Member

Agree ✓

Disagree _____

Date: 10/2/2023

Christopher Reverski
Company Board Member.

Agree _____

Disagree X