In Re the Arbitration Between:	FMCS Case No. 230623-07153
Washington State Department of Corrections, Employer, and	**GRIEVANCE ARBITRATION**
Teamsters Local Union No. 117, Union.	**OPINION AND AWARD**
(Shawna Nissen – Termination)	

- Under **Article 9** of the collective bargaining agreement effective July 1, 2021, through June 30, 2023, the above grievance was brought to arbitration.
- The parties selected James A. Lundberg as their neutral arbitrator by alternately striking names from a list of arbitrators provided by the Federal Mediation and Conciliation Service.
- Attempts to schedule the hearing began on July 14, 2023. The hearing was scheduled using Zoom software for April 29, 2024, and April 30, 2024. The hearing was continued by mutual consent to September 4 and 6, 2024 and continued at the request of the State until October 3 and 7, 2024.
- At the hearing on October 3, 2024, the State raised the issue of procedural arbitrability.
- The arbitrator heard the arguments over arbitrability. Based on the arguments presented at the onset of the hearing, the arbitrator believed that the State had waived the contractual provision upon which the arbitrability argument was based. However, a final ruling was

not made. The arbitrator continued to hear the merits of the grievance on October 3, 2024, and October 7, 2024.

- Closing briefs were submitted by email on December 11, 2024, and the record was closed.

APPEARANCES:

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ISSUES:

Issue #1:

Whether the grievance shall be dismissed as not procedurally arbitrable due to untimely advancing the grievance to arbitration and selecting the arbitrator through a process not authorized in the collective bargaining agreement?

Issue #2:

Whether the Employer had just cause to terminate grievant Shawna Nissen on September 19, 2022? If not, what shall be the remedy?

ISSUE #1:

RELEVANT CONTRACT PROVISIONS:

Article 9 – Grievance Procedure

9.1 -- D – Failure to Meet Timelines – *Failure to comply with the timelines will result in automatic withdrawal of the grievance. Failure by the Employer to comply with the timeliness will entitle the Union to move the grievance to the next step of the procedure.*

9.2 – Processing *** **Step 3: Arbitration**. *If the grievance is not resolved at Step 2, the Union may file a demand for arbitration (with a copy of the grievance and response attached). For grievances challenging a disciplinary action taken against a correctional officer, the demand to arbitrate must be filed with the PERC in accordance with the arbitration process established by RCW 41.58.070. For all other grievances, the demand to arbitrate the dispute must be filed with the Federal Mediation and Conciliation Service (FMCS). The Union shall send a copy of the demand to arbitrate to OFM State Human /Resources Labor Relations and Compensation Policy Section. (OFM/SHR/LRS) at the email address labor.relations@ofm.wa.gov and the DOC Headquarters Labor Relations Office (doclaborrelationsadim@doc1.wa.gov) within fourteen (14) days of impasse at PARM.*

DISCUSSION OF PROCEDURAL STEPS:

The procedural issues in this grievance were first brought to the arbitrator at the beginning of the hearing on October 3, 2024. In a treatise produced by the National Academy of Arbitrators, ***The Common Law of the Workplace, "The Views of the Arbitrators,"*** **Second Edition (2005) p. 96.** Arbitrator Carlton Snow explained why the Arbitrator must determine issues of procedural arbitrability. "A typical procedural arbitrability issue is whether the

grievance was processed within contractually prescribed time limits. If, for example, a grievance must be filed within 30 days of its occurrence, but a grievant or union waits 45 days, a challenge to the procedural arbitrability of the dispute would probably ensue. The U.S. Supreme Court has made clear that such issues are to be resolved in arbitration and not in a court of law." *See* ***John Wiley & Sons v. Livingston, 376 U.S. 543, 55 LRRM 2769 (1964).***

- The Employer argued that the Union failed to timely move the grievance to arbitration and that the arbitrator should have been selected using the process established in **RCW** 41.58.070.
- The Union believed that the grievance had timely been moved to arbitration and based its' representation on internal documentation that indicated that the demand was made timely. The Union contended that the arbitrator had been selected using a panel provided by the FMCS and that the Employer had waived the process established in **RCW 41.58.070**.

The grievant's employment with the State of Washington Department of Corrections was terminated on September 19, 2022. The parties initially requested hearing dates from this arbitrator by email on July 14, 2023. Available hearing dates were provided to the parties, and a two-day Zoom hearing was set for April 29 and April 30, 2024. The parties agreed to continue the hearing to September 4 and September 6, 2024. The hearing was continued a second time over the Union's objection, to October 3 and October 7, 2024.

Since the initiation of the grievance and the initial contact with the arbitrator, the attorneys from the Attorney General's Office representing the Employer have changed. Additionally, the processing of the grievance by the Union began with a Union Representative and was moved to the attorney representing the Union. Consequently, the

attorneys appearing before this arbitrator do not have direct knowledge of all the actions of those who initially processed this grievance.

The arbitrator has determined that the failure to submit the grievance to the process established in **RCW 41.58.070** at this stage is not under the circumstances a sufficient reason to rule that the claim is not procedurally arbitrable or to rule that the case should be processed by **PERC** in accordance with **RCW 41.58.070.** The designated process is designed to move disputes promptly to completion and requires that the case be heard by an arbitrator who has received specific training and has been placed on the **PERC** law enforcement arbitrator panel. Removing the grievance to **PERC** after more than two (2) years when the parties have set and continued hearing dates twice before going forward would not serve the goal of prompt review. This arbitrator has been trained specifically for the **PERC** law enforcement arbitrator panel and is appointed to the panel. This arbitrator has heard cases brought by the Teamsters Local 117 and the State of Washington and has no reason to favor either party.

The State raised a last-minute objection to the arbitration process selected by the State in cooperation with the Union. The arbitrator must conclude that the use of "the process established in **RCW 41.58.070**" was knowingly and deliberately waived by both parties. To obtain an arbitrator through the FMCS procedure, the parties must alternately strike the names of a list of an odd number of neutral arbitrators provided by the FMCS. The process requires the participation of both parties. This arbitrator could not have been selected without both sides actively participating in striking names from the FMCS list. Moreover, the Employer had more than fourteen months to object to going forward based on a mutual mistake of a material fact and failed to do so.

The Union did not send a copy of the demand to arbitrate to the OFM State Human Labor Relations as required by **Article 9.2 (B),** and the Employer properly preserved its' objection on the issue of timeliness. In an email from the Employer to the Union, the State said "the State does not waive the time frames specified in the Collective Bargaining Agreement." (**Union Exhibit 6 and Employer Exhibit 13**). Nevertheless, the Union contends that the grievance should be allowed to go forward.

The procedural history of this grievance demonstrates that a good faith effort was made by the Union to move the grievance to arbitration within the contract's timeline. The Union met the time requirements at Step 1 and Step 2 of the procedure. The Union representative reviewed the merits of the grievance with legal counsel and determined that the grievance would go to arbitration. A review of the Union's internal tracking system reveals that the Union Representative emailed the Local 117 legal assistant three days before the deadline for filing to confirm that the grievance was to be arbitrated and provided the date when the grievance needed to be moved to arbitration. The letter moving the grievance to arbitration was drafted and the Union's internal tracking system confirmed that the grievance had been timely moved to arbitration. However, the Union concedes that no letter was actually sent to the Employer within the timelines.

The Union cites a number of arbitration cases and commentary from ***How Arbitration Works*** that discuss situations where a failure to follow strict contractual timelines is forgivable. The circumstances under which failure to meet strict timelines may be excused are essentially the same as circumstances that excuse failure to comply with filing deadlines in Federal Court, as discussed below:

***Lemoge v. United States of America*, 587 F. 3d. 1188, 2009, (9th Cir).**
"...Excusable neglect "encompass[es] situations in which the failure to comply with a filing deadline is attributable to negligence," Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd., 507 U.S. 380, 394, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993), and includes "omissions caused by carelessness," id. at 388, 113 S.Ct. 1489. The determination of whether neglect is excusable "is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." To determine when neglect is excusable, we conduct the equitable analysis specified in Pioneer by examining "at least four factors: (1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact on the proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith."..."

In this grievance the arbitrator finds:

1. The danger of prejudice to the State was not argued, nor is there any apparent danger of prejudice in allowing a discharged fourteen (14) year employee an opportunity to fully defend against the allegations of misconduct.
2. The length of delay and its potential impact on the proceedings is negligible or nonexistent in this case. The delay will not impact the evidence, as the evidentiary record was well preserved. The only party impacted negatively is the grievant, who had no role in the process of moving the grievance to arbitration.
3. The reason for the delay was an error whereby a Union employee inaccurately documented the submission of the demand to arbitrate. The Union official responsible for making the demand to arbitrate responsibly "double-checked" to be certain the demand was timely filed but was given inaccurate information from a source he reasonably believed to be reliable.
4. The Union acted in "good faith" and in reliance upon records it reasonably believed to be accurate.

In this situation, the only person prejudiced by the error made by the Union is the grievant, who would be denied the opportunity to defend against the allegations of wrongdoing that cost her a fourteen (14) year career. There is no prejudice to the State. The Union acted in "good

faith" but made a mistake. The arbitrator finds that the Union's mistake was excusable neglect and should not prevent the grievance from being reviewed by this arbitrator.

ISSUE #1 DECISION:

After reviewing all of the evidence, the State's position, and the Union's defense, the arbitrator finds that this grievance is arbitrable and properly before him for a final and binding determination.

ISSUE #2:

RELEVANT CONTRACT PROVISION(S):

Article 8 – Just Cause

8.1 *The Employer will not discipline any permanent employee without just cause.*

Article 14 – Drug and Alcohol Free Workplace

14.1 Drug and Alcohol Free Workplace

All employees must report to work in a condition fit to perform their assigned duties unimpaired by alcohol or drugs.

14.2 Possession of Alcohol and Illegal Drugs

****The unlawful use, possession, delivery, dispensation, distribution, manufacture, or sale of drugs in state vehicles, on Agency premises, or on official business is prohibited.*

14.3 Prescription and Over-the-Counter Medications

Employees taking physician-prescribed or over-the-counter medications, if there is a substantial likelihood that such medication will affect job safety, must notify their supervisor or other designated official of the fact that they are taking a medication and the effects of medication.

14.4 Drug and Alcohol Testing

***B. All Other Testing

All prospective and current employees will comply with Agency policy regarding pre-employment, post-accident, post-shooting, and reasonable suspicion testing.

14.6 Reasonable Suspicion Testing

A. Standards -- *Reasonable suspicion testing for alcohol or controlled substances may be directed by the Employer for any employee when there is reason to suspect that alcohol or controlled substance usage may be adversely affecting the employee's job performance or that the employee may present a danger to the physical safety of the employee or another.*

B. Specific Objective Grounds – *Specific objective grounds must be stated in writing that support the reasonable suspicion. Examples of specific objective grounds may include but are not limited to:*

1. *Physical symptoms consistent with controlled substance and/or alcohol use*;

2. *Evidence or observation of controlled substance or alcohol use, possession, sale or delivery; or*

3. *The occurrence of an accident (s) where a trained manager or supervisor suspects controlled substance/alcohol may have been a factor.*

POLICIES RELIED UPON IN DISCHARGE LETTER:

DOC 190.500 Nicotine, Tobacco, and Vapor Products states in part:

Directive:

II. Prisons

C. Disciplinary action may be initiated against employees, contract staff, or volunteers for the introduction/unauthorized possession of tobacco/vapor products or materials in a facility or on facility grounds.***

DOC 420.120 Facility Access Searches and Allowable Items states in part:

Policy:

I. The Department has identified items allowed inside the secure perimeter of a Prison and has established procedures to search employees, contract staff, volunteers, and facility guests when entering Prison to minimize the introduction of contraband and enhance safety and security.***

Directive:

1. General Requirements ***

   C. Items that may be brought into the secure perimeter of a facility and items that are not allowed are identified in Attachment 1.

   Allowable Items, Attachment 1: Personal items that are not allowed include, but are not limited to:

   - Narcotic drugs or controlled substances to include marijuana and/or marijuana containing products.

- Tobacco/vapor products per DOC 190.500 Nicotine, Tobacco, and Vapor Products

DOC 420.330 Searches of Vehicles, states in part:

Directive:

I. Visual Searches Outside the Secure Perimeter

A. Vehicles parked in a state-owned parking lot outside the secure perimeter of a facility are subject to visual interior and exterior inspection.

B. A canine may be used to assist in vehicle searches per DOC 420.360 Searches by Canines.

2. The Shift Commander will be notified of any canine alerts to a vehicle before initiating a canine search of the vehicle's interior.***

DOC 850.150 Drug and Alcohol Free Workplace, states in part: ***

Policy:

I. The Department is committed to maintaining a drug and alcohol-free work environment.

II. The Department recognizes that the presence or use of alcohol, illegal drugs, and other substances that may impair judgment, alertness, and/or physical capability, poses an extreme hazard to the safety security, and operation of the organization. The unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited.

III. Department employees covered by the Teamsters, Washington Federation of State Employees (WFSE), and Coalition Collective bargaining agreements (CBAs) may be

subjected to pre-employment, post-accident, post-shooting, and reasonable suspicion alcohol and/or drug testing. ***

Directive:

II. Employee Responsibilities

C. Employees will support the Department's commitment to maintaining a drug and alcohol-free workplace. Employees are strictly forbidden from:

1. Unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance,

2. Inappropriate use of alcohol, prescription drug(s), authorized medicinal marijuana, or over-the-counter substance(s).

D. Employees will report to work free from the influence of illegal drug(s), alcohol, or a lawful prescription or non-prescription drug(s) that impairs the employee's ability to perform his/her job effectively. ***

D. Employees will immediately notify their supervisor if they consume or plan to consume a prescribed or over-the-counter medicine that could impair their job performance. ***

F. Employees will submit to alcohol and/or controlled substance testing when required by the Department.***

FACTUAL BACKGROUND:

The grievant, Shawna Nissen, worked for the State of Washington as a Corrections Officer, whose specific role at Coyote Ridge Corrections Center, was as a "response and

movement officer". Ms. Nissen was responsible for the movements of inmates within the facility. Ms. Nissen was employed as a Corrections Officer at the facility for nearly fourteen (14) years.

Ms. Nissen lost her sister and a close friend between 2016 and 2018. The losses led to anxiety and depression, for which Ms. Nissen received professional help. Initially, Ms. Nissen's physician prescribed medication for her condition, but the side effects made her feel "foggy" and "lethargic, "and she tended to "oversleep." To better treat her condition, the physician prescribed "medical marijuana." Thereafter, the grievant successfully used marijuana at night to help her sleep.

According to the grievant, she used marijuana at approximately 7:00 PM on May 8, 2022. When the grievant went to work on the morning of May 9, 2022, she had slept, and she did not believe she was impaired in any way. She testified that she regularly used marijuana and melatonin to get to sleep at night but never used marijuana before going to work and was never impaired at work.

When the grievant arrived at work on May 9, 2022, for a 06:10 shift, the department in the prison where she worked was conducting a 100% staff search. A different (not Ms. Nissen) staff member was suspected of bringing drugs into the prison.

As staff members entered the facility, several tables were set up to allow items to be searched, and staff had to pass by dogs trained in drug detection. A drug dog reacted to Ms. Nissen, and her backpack was carefully searched. The grievant's backpack contained three empty wrappers that at one-time contained gummies with an unspecified amount of THC in them.

Officer Moreno was the individual who found the empty wrappers in Ms. Nissen's backpack. Approximately one and a half hours later, Office Moreno also participated in the

search of Ms. Nissen's vehicle. At the onset of the search, Ms. Nisson said that a "marijuana vape pen" was in her car. The search also produced an empty container that was labeled THC and presumably contained liquid THC at one time.

Ms. Nissen was escorted to Superintendent Andrewjeski's office where she was informed that she would be taken to a testing station away from Coyote Ridge for a urinalysis. Ms. Nissen was candid with the Superintendent and said she would probably test positive for marijuana, because she had used it to get to sleep on May 8th.

Throughout the investigation, Ms. Nissen openly explained that she used THC as sleep aid at night. She explained that she was staying in the local community of Connell with a friend and the vape pen was in her vehicle because she had trouble sleeping and would need to use THC to get to sleep. The grievant also informed investigators that she had a medical cannabis authorization card. However, no investigator asked her to produce the card.

The urinalysis was conducted about two- and one-half hours after the grievant reported to work. The results of the urinalysis came back positive for "marijuana metabolite." The "marijuana metabolite" was measured at 1910 ng/ml. In reviewing the urinalysis data, the investigators equated the urinalysis measurement of "marijuana metabolite" with the legal measurement of THC in the blood at a level to be considered under the influence **RCW 46.61.502**. The legal limit for driving under the influence of THC is 5 ng/ml based upon a blood test taken within 2 hours of driving, according to **RCW 46.61.502**. The legal limit is based on THC concentration in the blood and recognizes that THC passes through the body over time. A blood test taken to determine whether one is driving under the influence must be taken within two hours of driving.

A urinalysis measuring "marijuana metabolite" cannot determine whether an individual is currently under the influence. The measurement only determines that THC has at some time been introduced to a person's system and has been metabolized. The results of the urinalysis were received on May 19, 2022.

Following the urinalysis and the searches conducted by the Employer, the grievant was allowed to drive away from the facility. No witnesses identified any physical signs that the grievant was impaired on May 9, 2022. Officer Moreno, who had multiple interactions with Ms. Nissen on May 9, 2022, testified that the grievant did not give any indication that she was under the influence of drugs or alcohol that day.

On September 19, 2022, the Employer issued the grievant a termination letter. The letter cites the following reasons for job termination:

- You admitted that on or about May 9, 2022, at approximately 0610 hours, you brought unauthorized contraband into public access located at Coyote Ridge Corrections Center (CRCC) Medium Security Center (MSC) to include, but not limited to, three (3) empty packets of THC "gummies".
- You admitted that on or about May 9, 2022 at approximately 610 hours, you brought unauthorized contraband on facility grounds, in your vehicle, to include, but not limited to, a vape pipe containing THC, and an empty 100 mg bottle of THC liquid.
- On May 9, 2022, you consented to a urinalysis conducted at an off-site facility. Your results were received on May 19, 2022, and revealed you were positive for Marijuana Metabolite.

The termination letter cites violation of three specific policies:

- **DOC Policy 190.500** –Nicotine, Tabacco, and Vapor Products;
- **DOC Policy 420.12** – Facility Access Searches and Allowable Items; and
- **DOC Policy 850.150** -- Drug and Alcohol-Free Workplace.

In the termination letter, the Employer asserts that based on the urinalysis test it is "*more likely than not, you were under the influence when you came to work*."

The job termination was timely grieved on October 7, 2022. The grievance was denied, and the process described above in this opinion was followed. The arbitrator heard evidence and argument from both sides on October 3, 2024, and October 7, 2024. Closing briefs were submitted on December 11, 2024, and the record was closed.

SUMMARY OF EMPLOYER'S ARGUMENT:

The Employer met all seven tests[1] for "just cause" when it terminated the employment of Shawna Nissen.

The policies prohibiting the introduction of contraband into the facility and its grounds are reasonable. Similarly, the rules against reporting to work affected by mind-altering substances are reasonable. Ms. Nissen was fully aware of the policies and knowingly violated them. The grievant was not remorseful and said that she would continue violating the policies in the future.

The policies violated by the grievant are safety measures designed to protect the staff, the inmate population, and others not employed by Coyote Ridge or incarcerated at Coyote Ridge, who have some economic or personal relationship with the facility or inmates.

[1] See – ***Enterprise Wire Co. and Enterprise Wire Independent Union*, 46 LA 359, (1966) Daugherty.**

DOC Policy 850.150 says "*The Department recognizes that the presence of alcohol, illegal drugs, and other substances that may impair judgment, alertness, and/or physical capability, poses an extreme hazard to safety, security, and operation of the organization."* Ms. Nissen agreed with the statement and was aware of the policy but violated the policy.

DOC Policy 850.150 requires employees to immediately notify their supervisors if they consume or plan to consume substances that could impair their job performance. The grievant failed to follow the policy. Despite admitting that she regularly used THC in the evening as a sleep aid, the grievant never reported her use to a supervisor.

DOC Policy 420.120 says, "The Department has identified items allowed inside the secure perimeter of a Prison and has established procedures to search employees, contract staff, volunteers, and facility guests when entering a Prison to minimize the introduction of contraband and enhance safety and security." The 100% staff search on May 9, 2022, while not targeting Ms. Nissen, discovered contraband in her backpack that led to a reasonable suspicion search of her vehicle, where a THC vape pen was found. Having found contraband in the grievant's backpack and a THC vape pen in her vehicle, Ms. Nissen was given a reasonable suspicion drug test that showed 1,910 nanograms of marijuana metabolite in her system when she arrived at work. The grievant admitted that she was aware of the DOC policies prohibiting contraband and the drug and alcohol policy.

The grievant's conduct on May 9, 2022 is prohihited by DOC policy and the collective bargaining agreement, which says: "Unlawful use, possession, delivery, dispensation, distribution, manufacture or sale of drugs…on Agency premises or on official business is prohibited." Even the use of prescribed or over-the-counter medications when there is a substantial likelihood that using such medicines will affect job safety must be reported. **Article**

14.6 of the collective bargaining agreement says employees who test positive for a controlled substance as the result of reasonable suspicion testing "*may be subject to disciplinary action, up to and including discharge*."

The grievant also violated state law, which prohibits:

- Anyone from possessing any controlled substance on or in the buildings, grounds, or any other property associated with a state correctional institution and
- Keeping cannabus in a motor vehicle unless it is in the trunk of a vehicle, or in some other area of the vehicle not normally occupied or directly accessible by the driver or passengers.

A sign posted near the entrance of the parking lot at the facility informs any one, including the grievant that possessing controlled substances in the correctional institution property is a violation of state law.

Ms. Nissen knew of the policy prohibiting the introduction of contraband into the facility, and the policy prohibiting reporting to work affected by mind-altering substances and the consequences of violating the policies.

The investigation into Ms. Nissen's conduct was fair and thorough and conclusively established that she committed the alleged misconduct. The investigation was conducted by a neutral investigator. Ms. Nissen was given notice of the allegations made against her. The grievant was advised of her right to have Union Representation. She received a pre-disciplinary notice and had Union Representation at the pre-disciplinary hearing.

There was substantial evidence that the grievant engaged in misconduct that violated policies and the collective bargaining agreement. She admitted she brought contraband into the

facility and onto the grounds. She admitted to regular use of marijuana products and conceded that the urine analysis would be positive. The uncontroverted evidence at the hearing demonstrates that the investigation was fair and conclusively established that Ms. Nissen violated the policies as alleged.

The Employer has consistently applied the policies Ms. Nissen violated and the level of discipline was proportionate under the circumstances. The presence or use of substances that may impair judgment, alertness, and/or physical capability poses an extreme hazard to safety security by introducing contraband into its facilities and onto its grounds.

Despite being a 14-year employee, who was well aware of Department of Corrections policies, the grievant chose to regularly use THC products and not notify the DOC of her usage in violation of **DOC Policy 850.150** and **Article 14** of the collective bargaining agreement. Grievant's chronic use of THC products produced urinalysis results of 1,910 nanograms of marijuana metabolite. It was reasonable for the Department of Corrections to conclude that the grievant's ability to maintain safety and security at the facility and exercise good judgment was affected.

The grievant exercised poor judgment by bringing contraband past the secure perimeter of the Coyote Ridge facility and had contraband in her vehicle on Prison property. Her conduct violated the collective bargaining agreement, and DOC policies.

The grievant was mistaken in her interpretation of DOC policies. She believed she was not required to disclose her use of THC because she did not believe it impacted her work performance. The investigation determined that it was more likely than not that she was impaired on May 9, 2022.

The Department of Corrections has consistently held employees accountable for violations of **DOC Policies 850.150** and **420.120.** The fact that other employees received lesser discipline is explained by the egregious nature of the misconduct, the grievant's lack of remorse, and her prior discipline for exercising poor judgment.

The Employer asks that the discharge be upheld, and the grievance denied.

SUMMARY OF UNION'S POSITION:

To establish "just cause" for discharge the Employer must prove that the grievant engaged in the alleged misconduct. The Union asserts that the standard of proof in a drug case is by clear and convincing evidence. "*In cases involving criminal conduct or stigmatizing behavior, many arbitrators apply a higher burden of proof, typically a 'clear and convincing evidence' standard*." **Elkouri & Elkouri: *How Arbitration Works*, at ch. 15 §3.Dii.a.** The Employer failed to prove by any standard that grievant violated the collective bargaining agreement or any of the Department of Corrections Policies cited in the letter of job termination..

The following conduct does not constitute a violation of Employer policies:

1) Bringing three empty wrappers previously containing THC gummies into public access.
2) Bringing a "vape pen (incorrectly identified as a vape pipe) containing THC, and an empty 100 mg. bottle previously containing THC liquid onto facility grounds in her vehicle.
3) Testing positive for Marijuana Metabolite.

DOC Policy 420.120 says:

The Department has identified items allowed inside the secure perimeter of a Prison and has established procedures to search employees, contract staff, volunteers, and facility guests when entering a Prison to minimize the introduction of contraband and enhance safety and security.

The policy further provides that "*items that may be brought into the secure perimeter of a facility and items that are not allowed are identified in Attachment 1*" Attachment 1 lists items that may be brought into the secure perimeter and lists the following items that are not allowed:

"*narcotic drugs or controlled substances to include marijuana and/or marijuana containing products."* The policy also prohibits cell phones and credit cards.

DOC 190.500 Nicotine, Tabacco and Vapor Products prohibits anything made of glass, personal keys, and firearms from being brought into the **prison's secure perimeter**. **DOC 190.500** and **DOC 420.120** prohibit items from being brought into the **prison's secure perimeter**. The policies do not apply to the parking lot. If the policy did apply to space outside the secure perimeter, employees could be disciplined for having personal cell phones, credit cards, mail, keys, or anything glass in their vehicle. The secure perimeter outlines that part of the prison that lies beyond the security checkpoint. The staff may store items on the prohibited list in employer-provided lockers or in their vehicles. In this case, the vape pen (not a pipe) and the empty container for THC liquid were not brought within the secure perimeter. The two items were found in the grievant's car. Having the vape pen and the empty bottle that previously contained THC liquid did not violate **DOC Policy 190.500** and **DOC Policy 420.120.**

The grievant did not violate **DOC Policy 190.500** and **DOC Policy 420.120** by bringing empty wrappers that at one time were used to wrap and enclose marijuana-containing products. The wrappers were just "wrappers," not marijuana-containing products. Three empty wrappers

were the only items that passed the security checkpoint for which the grievant was disciplined. The wrappers were trash not contraband, which did not create a risk to the safety and security of staff, volunteers, contract personnel, or inmates of the facility.

The urinalysis which yielded a positive test for "marijuana metabolite" did not prove a violation of **DOC Policy 850.150**. The policy provides "*Employees are strictly prohibited from ***inappropriate use of alcohol, prescription drug(s), authorized medicinal marijuana, or over-the-counter substance(s).*" In general employees are required to report to work free from the influence of illegal drugs, alcohol, or prescription or non-prescription drugs that "impair's the employee's ability to perform his/her job effectively".

The Union moved into evidence a bulletin from the Center for Disease Control that says a positive urinalysis test only indicates that a person has used marijuana in the past. The test does not indicate that the person is under the influence or impaired. Because the urinalysis only tests for metabolite, the test does not and cannot test for impairment.

The Union cites ***Discipline and Discharge In Arbitration,* ch 6, §IIC (Norman Brand & Melissa H Biren eds., 2015) (ebook)** as follows:

Employers frequently equate a positive drug test with impairment or being under the influence. Evidence of past drug use may remain in the employee's system for several days or even weeks after actual use. Because no correlation exists between a positive drug test and impairment, a positive drug test does not necessarily prove that an employee was under the influence of drugs at work.

The Employer produced no evidence of impairment. Officer Moreno, who was near Ms. Nissen for extended periods on May 9, 2022, saw no indication that Ms. Nissen was under the

influence of drugs or alcohol. No observations of Ms. Nissen were made on May 9, 2022 that indicated she was under the influence of drugs or alcohol.

Ms. Nissen disclosed that she had a medical marijuana card and last used marijuana at 7:00 PM May 8, 2022, and was not under the influence on May 9, 2022. The record includes no testimony or documented observations of Ms. Nissen ever being under the influence or impaired at work. Moreover, Ms. Nissen was allowed to drive home following the urinalysis test.

If the arbitrator does find "just cause" to discipline in the case, the discipline of Ms. Nissen should be compared with other employees who were disciplined for bringing alcohol or marijuana into the secure perimeter. In response to a request for information, the Employer produced two examples of discipline for similar misconduct. One staff person, who accidentally brought a full can of alcohol into the secure area in her backpack, received a letter of reprimand. Another staff person who consumed alcohol while on duty received a one-month reduction in pay. The discipline of other employees for the same type of violation that grievant allegedly committed is much less severe. If the arbitrator finds just cause, the discipline should be reduced based on proof of disparate treatment.

The grievant did not violate any of the policies cited by the Employer in the discharge letter. The grievance should be upheld and the grievant should be made whole.

OPINION:

To establish "just cause," the Employer must prove the factual basis for the alleged misconduct. In this case, the evidence falls short of the standard of a preponderance of credible evidence.

If the Employer had reasonable suspicion to require the grievant to submit to a drug test, it was tenuous at best. The collective bargaining agreement in **Article 14, 14.6 Reasonable Suspicion Testing** B. Specific Objective Grounds says

Specific objective grounds must be stated in writing that support the reasonable suspicion. Examples of specific objective grounds may include, but are not limited to:

1. *Physical symptoms consistent with controlled substance and/or alcohol use;*
2. *Evidence or observation of controlled substance or alcohol use, possession, sale, or delivery; or*
3. *The occurrence of an accident (s) where a trained manager or supervisor suspects controlled substance/alcohol use may have been a factor.*

No witness observed anything about the grievant or her behavior that was out of the ordinary. When asked whether she observed anything that suggested the grievant was impaired on May 9, 2022, Officer Moreno, who interacted with the grievant repeatedly on that day, said the grievant did not give any indication that she was under the influence of drugs or alcohol. No one who came in contact with Ms. Nissen testified to any observation of the grievant that even suggested she may be impaired. People who came in contact with the grievant include a Captain, Officer Moreno, the Superintendent, and the person administering the urinalysis. The only evidence on which a suspicion could be based was three empty wrappers that previously contained THC gummies, an empty container that investigators believed had previously contained THC liquid, and a vape pen, the exterior of which tested positive for THC or similar compounds.

The grievant was required to take a urinalysis at a site away from the prison. The urinalysis did not provide evidence that grievant was impaired. The test revealed marijuana metabolite in the grievant's system, which is not evidence of impairment. The discharge letter argued that the measurement of metabolite was higher than the level of THC concentration needed to prove one was driving under the influence in Washington State. However, **RCW 46.61.506** does not establish concentration of metabolite as the standard. The statute says: "*a person is guilty of driving while under the influence of intoxicating liquor, cannabis or any drug if the driver drives a vehicle within this state: ***(b) The person has, within two hours after driving, a THC concentration of 5.00 or higher as shown by analysis of the person's blood made under **RCW 46.61.506***. The concentration of THC in a person's (5.00 ng/ml) blood within two (2) hours of allegedly impaired activity is the standard used to establish "under the influence." A urinalysis can not test for THC concentration in the blood.

Ms. Nissen's testimony that she took THC at 7:00 PM on May 8, 2022, should be considered in light of the limited time, 2 hours after driving, when a blood test for THC may validly be used to establish that a driver is under the influence. The grievant appeared at work eleven (11) hours after taking legally prescribed THC and did not have reason to believe that her use might adversely impact her job performance. Moreover, she had routinely used legally prescribed THC as a sleep aid without experiencing any adverse impact on her job performance. The grievant takes THC as a sleep aid because other legally prescribed drugs she took as sleep aids made her feel "foggy", "lethargic" and tended to cause her to "oversleep".

The evidence and testimony in this case demonstrate conclusively that a blood test measuring THC levels is a valid test for impairment. A urinalysis measuring metabolite measures metabolite, not impairment. There is no evidence to support the allegation that the grievant was

impaired or under the influence of marijuana and/or THC. There is no testimony that the grievant's behavior on May 9, 2022, was unusual or that the grievant appeared to be impaired or under the influence. Moreover, the urinalysis test given to the grievant could not detect a level of THC in the grievant's blood. The test given to the grievant determined a level of metabolite, which does not gauge impairment. Testing for THC must be done by blood test. To establish whether an employee is impaired, a blood test must be given to determine the level of THC in the blood. The Employer inaccurately argued that the high level of metabolite in the grievant's urine would suggest a violation of Washington State's driving under the influence law. The legal limit for driving under the influence of THC is 5 ng/ml based upon a blood test taken within 2 hours of driving, according to **RCW 46.61.502.** Impairment simply cannot be determined without a blood test. The Employer did not establish that it was more likely than not that the grievant was impaired at work, as the test given did not and could not establish impairment. Moreover, the Employer had no evidence beyond the urinalysis test results that indicated grievant was impaired.

The Employer failed to prove by a preponderance of credible evidence that the grievant brought contraband past the security perimeter of the prison. The three wrappers that at one time had contained THC gummies were trash. The Employer did not test the wrappers and, therefore, could not even establish the presence of THC residue. The grievant did not bring THC gummies into the facility beyond the security perimeter. Even if the wrappers technically qualify as "contraband" the Employer did not follow **DOC Policy 420.120 X. E.**, which says:

If an item is legal, but is considered contraband in Prisons is found, the employee will request that the person secure the item(s) in a locker or in the person's secure vehicle.

The existence of three empty wrappers in the bottom of the grievant's backpack was simply not a sufficient basis to establish just cause for discharge.

The vape pen and empty container that the Employer believes contained liquid THC were not brought past the prison security perimeter. The items were found in the grievant's vehicle in the parking lot. If they were considered contraband in Prisons but were otherwise legal, **DOC Policy 420.120 X. E.** says that the grievant's vehicle was the proper place for the items to reside.

The Employer failed to establish that the two items found in the grievant's vehicle in the parking area violated any Prison Policy. The items if brought past the Prison security perimeter would have violated Prison Policy, but the items were in the grievant's vehicle, which is allowed by DOC Policy. The existence of the vape pen and the empty container that may have previously held THC liquid in the grievant's vehicle on May 9, 2022 is not a sufficient basis upon which a "just cause" discharge can be sustained.

The arbitrator concludes that the Employer had insufficient evidence to establish that the grievant committed any of the Department of Corrections Policy violations alleged in the letter of termination or violated **Article 14** of the collective bargaining agreement.

AWARD:

The arbitrator finds:

- ***That the Employer did not establish by a preponderance of the credible evidence that the grievant, Shawna Nissen, violated Department of Corrections Policies or provisions of Article 14 of the collective bargaining agreement on May 9, 2022.***
- ***There is insufficient evidence to establish that grievant, Shawna Nissen, engaged in the misconduct alleged in the letter of termination Dated September 19, 2022.***

The arbitrator concludes:

- ***The Employer did not have just cause to terminate the employment of Shawna Nissen on September 19, 2022.***
- ***The Employer shall reinstate the grievant with full back pay, all benefits, interest, and seniority from the date of discharge to the date of reinstatement. Interest shall be paid as agreed upon by the parties or as authorized by the Washington State Statute.***
- ***If the parties are unable to agree upon the appropriate rate of interest, they shall submit arguments and proofs by email to the arbitrator no later than 30 days from the date of this award. The arbitrator will adopt one of the interest calculations submitted.***
- ***To assist the parties, the arbitrator will retain jurisdiction over the award for ninety days from the date of this award.***

Dated: January 7, 2025.

James A. Lundberg, Arbitrator