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In the Matter of the Arbitration between

COMMUNICATIONS WORKERS OF AMERICA, LOCAL 4390

Union,

and

ALCATEL-LUCENT USA INC. (d/b/a NOKIA),

Employer.

OPINION AND AWARD

Re: Adam Palko Termination
Case No.: ALU15-003-4390

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Before **MELISSA H. BIREN**, Impartial Arbitrator

OPINION

Pursuant to the authority granted under the parties' collective bargaining agreement, I conducted a hearing at the Best Western Murray Hill located at 535 Central Avenue, New Providence, NJ, on September 1, 2016. Isa Shabazz (CWA Representative) represented the Communications Workers of America, Local 4390 ("CWA" or the "Union") at the hearing. Eric Rosen, Esq. (Corporate Counsel) represented Alcatel Lucent USA Inc., d/b/a Nokia ("Alcatel-Lucent" or the "Company") at the hearing. The parties agreed to submit the following issue to arbitration by me:

> Did the Company have just cause for the termination of the Grievant, Adam Palko, effective May 21, 2015? If not, what shall be the remedy?

Both parties had full opportunity to adduce evidence, to cross-examine each other's witnesses, and to make argument in support of their respective positions. A stenographic record was made of the proceedings. The parties submitted written post hearing memoranda. The record closed upon the arbitrator's receipt of the parties' memoranda. Neither party has raised any objection to the fairness of this proceeding. Whether or not expressly referred to herein, all of the evidence adduced, authorities cited and arguments set forth by the parties have been fully considered in the preparation and issuance of this Opinion and Award.

Background:

The Grievant, Adam Palko was hired by Alcatel-Lucent on May 20, 2013 as a call center technician, working in the Company's Remote Integration Test Center ("RITC") in Dublin, Ohio. Alcatel-Lucent sells telecommunications equipment and services to telephone companies such as AT&T, Verizon and Sprint. As a call center technician, Palko was responsible for remotely integrating and testing customers' cell sites making up the customers' wireless networks. Because call center technicians access customers' wireless networks, outages caused by a technician's performance (or non-performance) could impact cell service to the end-customers, with potentially significant impact to Alcatel-Lucent.

The events leading to Palko's termination began on April 9, 2015 when another call center technician, Thomas Conlan, reported to work demonstrably impaired. Both Conlan and Palko worked the 2:00 PM to 10:00 PM shift; Elvis Niangoran was their supervisor. Niangoran described Conlan's behavior on April 9, 2015 as follows:

> Conlan went back and forth to the bathroom throwing up, and then he couldn't stand still, he was sweating, and couldn't stand in one place, keep walking around, that is when Shawn [Rose] and I got together and contacted medical and find out what we needed to do from what we have been observing. (Tr. at 92-93.)

Conlan was sent for a drug test that day but returned to work the next day.

Kevin Numbers, an employee on the next shift, approached Niangoran on April 9, 2015 as Niangoran was leaving work at the end of his shift to share information he received from Conlan. Numbers testified that he knew Conlan for several years because Conlan had dated his daughter and that he had recommended Conlan for his job at the Company. According to Numbers, Conlan had used drugs before and, therefore, when Numbers saw Conlan on April 9, 2015, he asked Conlan what caused him to become re-involved with drugs. Conlan responded that it was stress. Numbers then asked him how he had obtained the marijuana. Numbers testified that Conlan responded "from Adam Palko." (Tr. at 79.) Numbers reported to Niangoran that Conlan told him that he got the drugs from Palko.

Numbers testified that he reported this information to Niangoran because Niangoran was also involved with Conlan in a personal matter. Specifically, Conlan had been arrested for driving when his driving privileges had been revoked and he was facing jail time. Company management, including Niangoran, supported Conlan in Court, submitting letters on Conlan's behalf and attending a Court hearing seeking leniency in sentencing. Conlan was granted

leniency, with a sentence of 30 days in jail instead of six months. Part of the agreement providing leniency was that Conlan would live with Numbers' son within walking distance of the office. Numbers further testified that part of his personal agreement with Conlan was that "there would be no drugs or alcohol or anything because I was signing the lease, he was living with my son, and that was part of the agreement." (Tr. at 80.)

Niangoran testified that on April 10, 2015 he reported what Numbers had told him to his manager, Stan Murrell. Murrell directed him to the link for reporting a violation of policy in the "Ethics Point" Website. Niangoran filed a report that day, stating: "Last night I was informed by Kevin Numbers (RITC tech) that one of the RITC techs (Adam Palko) was selling hydroponics drug to another tech (Thomas Conlan) here at the RITC." (Company Exhibit 1.) At that point an investigation was commenced.

Shawn Rose, a supervisor on the earlier shift at the RITC, testified that someone from Alcatel-Lucent Security ran the investigation; he "believe[d] his name was Bill Keleher." (Tr. at 22.) No one from Security, however, was called to testify at the hearing with respect to the investigation. According to Rose, Security discovered two instant messages on the Company system between Palko and Conlan in its investigation. The first, dated March 23, 2015, stated in pertinent part as follows:

> Conlan: If you get a second can we run back to my place real quick I forgot my head phones, and wanna smoke a bowl? LOL
> Palko: lol yea give me a few
> don't talk about that shit on here man
> seriously
> lol

(Company Exhibit 2.) A second instant message, dated April 10, 2015, stated as follows:

> Palko: We're square. I got with Kevin last night. FYI
> Conlan: yeah I know, has Elvis or Shawn talked to you yet
> Palko: no
> why
> Conlan: I texted you last Saturday and Kevin said he called you but you never answered me back, I had the money yesterday but I had to leave
> apparently everyone knows why already too.
> Palko: I was out at a birthday party last Saturday all night
> Conlan: ahhh
> Palko: yea it was a late one
> Conlan: sorry
> Palko: its ok

Sorry for trying to give me money??
lol
Conlan: no
for owing you so long in the first place
Palko: Oh
Conlan: kevin reported a bunch of people to HR for smoking
Palko: well it is what it is. If I couldn't afford to loan you then I wouldn't have
Conlan: you were one of them
They might drug test you. FYI
Palko: interesting
Conlan: they drug tested me
And I am going to fail it
Palko: well yea.
Conlan: and have to go to rehab for 30 days
lol
lol
lol
Palko: well that is better than getting fired. i suppose
Conlan: yeah
THC was positive, that's it
but remember what I told you about kevin said you were the "pot man"
Palko: I don't even know how that is even possible…
Conlan: idk
Palko: Well he was very friendly last night, talked about bikes and shit
Conlan: but I know of 8 people on nights that got reported
he called Elvis right in front of me
last night
they may or may not say something, idk
Palko: its whatever
Conlan: i guess
i had to take a breathalyzer yesterday too lmao
elvis thought i was drunk
because I kept running to the bathroom and throwing up
Palko: nice
You looked pretty rough yesterday man
Conlan: yesterday sucked ass
i feel like shit for last week
the xanny didn't show up, I hadn't taken any for a few days
just THC
Palko: that's good
Conlan: yep
Palko: don't think they would send you to rehab for just THC though
Conlan: well keep in mind I am already under a deal with them
I broke that deal
Palko: yea
Conlan: drug-free is drug free

its not a 20 days for drug, its also to assess the problems I have, the depression and shit

Palko: yea

(Company Exhibit 3.)

On April 15, 2015 the results of Conlan's drug test came back positive. On April 21, 2015 Conlan was given the option of resigning in lieu of termination. He chose to resign. He was not interviewed by Security or otherwise questioned, either before his resignation on April 21 or after, as to whether he ever smoked marijuana with Palko during working hours or whether Palko ever sold drugs to him. Nonetheless, Rose testified that the fact that Conlan tested positive for marijuana "seem[ed] to corroborate the allegations by Mr. Numbers that it was the grievant who supplied marijuana to Mr. Conlan." (Tr. at 34.) In addition, according to Rose the fact that Palko was older than Conlan also suggested that Palko bore responsibility for Conlan's positive test. Conlan was not called to testify at the hearing.

On May 4, 2015 Palko was called into Niangoran's office when he reported to work and was told that he was being taken for a drug and alcohol test. Palko was not told anything about the allegations that had been made against him or about the instant messages. Palko testified that he was simply told that he was required to undergo the drug and alcohol test; he did not believe that he could object. Niangoran testified that he did not observe that Palko was impaired in any way when he arrived at work that day, nor had he observed Palko impaired at any other time while at work. Further, Niangoran testified that Palko had never caused an outage, jeopardizing the customer or the Company. On the way to the test, Palko told Niangoran that he would likely fail the test. He was tested for both alcohol and drugs. His alcohol level was found to be .045 and .046 at 2:53 PM and 3:09 PM, respectively. As a result of the positive test, he was directed to sign a form entitled Alcohol Testing Form that stated:

> I certify that I have submitted to the alcohol test, the results of which are accurately recorded on this form. I understand that I must not drive, perform safety sensitive duties, or operate heavy equipment because the results are positive.

(Company Exhibit 4.) Because of the positive alcohol test, Niangoran drove Palko to his home and he was suspended that day, without pay. Some time thereafter, the drug test came back positive for marijuana. (Company Exhibit 6.) No specific level was indicated in the report.

Rose testified that following the drug and alcohol test, a compliance committee met to discuss what discipline should be imposed on Palko. Five different organizations are represented on the committee, including workforce relations, compliance, human resources, installation and legal. Rose, Niangoran and their two superior managers, Murrell and Len Koester were present on behalf of the installation line management group, although Koester was the only person in this group with a vote. Based on the instant messages, in particular the March 23, 2015 instant message, the committee concluded that Palko had smoked marijuana during working hours. According to Rose, the positive test for marijuana on May 4, 2015 corroborated that Palko had smoked marijuana with Conlan during working hours on March 23, 2015. Further, based on the April 10, 2015 instant message referencing that Conlan owed money to Palko and that he was the "pot man," along with Numbers' report as to what Conlan had told him about Palko, the committee concluded that there was "strong evidence" that Palko was selling or distributing drugs to at least one co-worker. Finally, the positive alcohol test on May 4, 2015 indicated that Palko came to work under the influence of alcohol.

On May 21, 2015 Palko and his Union representative were asked to attend a meeting with Rose where the compliance committee decision was reviewed. Palko was given the option of resigning in lieu of termination. Palko refused to resign. He was issued a termination letter that day. (Company Exhibit 10.) The Company maintains that Palko was terminated for three reasons: (1) for smoking marijuana during working hours; (2) for reporting to work under the influence of alcohol; and (3) because there was strong evidence to suggest that Palko was distributing illegal drugs to one or more co-workers.

Thereafter, on July 30, 2015, after Union objections that Palko had not been interviewed or otherwise given due process, the Company conducted an interview with Palko. Stephen Muscat (Senior Director for Labor Relations) testified that he conducted the interview. One of his colleagues took notes. (Company Exhibit 12.) According to Muscat, Palko denied using drugs and, while he answered all of the questions, Muscat concluded that Palko contradicted himself and was argumentative. The compliance committee reconvened on August 4, 2015 and affirmed the decision to terminate Palko's employment. Muscat testified that Company policies prohibit employees from working under the influence of alcohol or drugs and from distributing drugs to co-workers. (Company Exhibits 15, 16 and 17.)

At the hearing, Palko denied that he ever used drugs during working hours, that he ever sold or otherwise distributed drugs to Conlan or to anyone else or that he reported to work under the influence of alcohol or drugs. With respect to the March 23, 2015 instant message, Palko testified that Conlan had asked two questions – one about giving him a ride and the second about smoking marijuana. Palko maintained that his response was to the first question. He, along with other co-workers, had often given Conlan rides because he did not have his license. He also cautioned Conlan not to talk about things like "smoking a bowl" on the Company system, testifying that it is "just dumb to talk about stuff like that, period, and especially on company computers, like, I don't need that." (Tr. at 156.) In any event, Palko testified that they never left the facility that day. It was very busy and they did not take any breaks (including lunch) or otherwise leave the facility that day. He did not smoke marijuana with Conlan nor did he ever witness Conlan smoking marijuana.

With respect to the April 10, 2015 instant message, Palko testified that while he did not like the reference to him as the "pot man," it was not true so he saw no reason to address it. He stated:

> I wasn't accused by police. I wasn't accused by authority. I wasn't accused by my management. I hadn't been talked to by anybody. Why would I even care if – it doesn't affect my job, so I don't let minuscule things – I just brushed it off because it didn't affect my job. (Tr. at 173.)

Palko also testified that Conlan borrowed money from him and from several other Company employees, including Niangoran and Kitty Monk, an engineer. The money owed had nothing to do with selling drugs. The first time he lent Conlan money, it was repaid, so he continued to lend him money. At the time of these events, he had been asking Conlan to pay him back. Eventually, Numbers, who had Conlan's ATM card, got the money to repay Palko.

As to the failed drug test, Palko testified that he knew he would fail the drug test on Monday, May 4, 2015, because he had been at a party over the prior weekend and had "ingested some edibles." (Tr. at 153.) He testified that he does not regularly use drugs. "It was a party. I am into fitness, I'm into health, I don't do that sort of stuff. I made a bad choice at a party, and now it's coming to bite me in the butt." (Tr. at 154.) With respect to the alcohol test, Palko had a beer at lunch with a friend prior to the start of his shift at 2:00 PM on May 4, 2015. Palko, however, denied that he was impaired when he came to work. When questioned about signing the Alcohol Testing Form that indicated he tested positive and could "not drive, perform safety

sensitive duties or operate heavy equipment" (Company Exhibit 4), Palko testified that he was told to sign the form and did so; he did not read what it said in "tiny print" at the bottom of the page on his "way out the door" (Tr. at 182) and he believed that it certified that this was his sample and the result of his test. He did not believe he was signing anything that said he was impaired.

Although Palko knew that Conlan had smoked marijuana, he did not believe it was his obligation to report this to anyone.[1] He testified that to his knowledge:

> the entire RITC knew about Thomas Conlan's problems... Conlan constantly came in that place sweating. He constantly was rolling around in chairs. He disappeared for hours of the day. You know, techs complained about him. They couldn't get a hold of him. It is not our job as fellow employees to manage other people, it's the manager's job. It is not my business. I did my job, I came there. (Tr. at 183-184.)

Numbers testified that while he believed Conlan at the time Conlan initially told him that Palko had provided the drugs on April 9, 2015, he had doubts about the truth of this statement when he became aware of the April 10, 2015 instant message after Palko was terminated. According to Numbers, in that instant message Conlan attributed statements and actions to Numbers that were not true. Numbers never called Palko the "pot man," noting that this term was not even in his vocabulary. Further, he testified that he "did not report or [did he] know eight other people that were partaking in that." (Tr. at 81-82.) Given that Conlan's statements in the instant message were untrue, Numbers testified that he has "doubt in my mind now as to his validity and what he is saying." (Tr. at 82.) Numbers testified that although he was contacted by Security within a week of telling Niangoran what Conlan had said to him about Palko, he was not shown the instant messages. He was only asked to confirm what he had said to Niangoran.

Arthus Plas, President of Local 4390, testified that Conlan was "like the company clown." Nonetheless, people were trying to help him. The Company provided character references for Conlan, including a letter from the director of the RITC, Dave Sarkisian, when Conlan was in court and Rose had visited Conlan in jail. Several employees lent him money, including Monk and Niangoran. Numbers told Plas that Conlan owed over $2,000.00 to various employees at the RITC. When Plas learned that Palko was terminated based on statements

[1] Although the Company's Post Hearing Memorandum references Palko's failure to report Conlan for smoking marijuana as further support for finding that he was not a responsible employee thereby warranting discharge, the Company's reasons for termination did not include this allegation and, therefore, it is not properly considered as a basis for termination at this arbitration.

allegedly made by Conlan, he could not believe that the Company was relying on Conlan to fire Palko, especially without having asked Palko about the allegations. Plas began his own investigation. He questioned Palko's co-workers about whether they knew Palko to use drugs, and was told that Palko did not use drugs; he was "one of those gym guys." (Tr. at 190.) Plas spoke to management, Numbers and to Palko. Based on his investigation, he concluded that Palko had been denied due process, that he was treated differently than other employees and that there was no just cause for termination. He filed this grievance on Palko's behalf.

Relevant Policies:

The parties cited various provisions of the collective bargaining agreement (Joint Exhibit 1), the Alcatel-Lucent Code of Conduct (Company Exhibits 15 and 16), and the Alcatel-Lucent U.S. Alcohol, Substance Abuse and Drug Screening Policy (Company Exhibit 17.) Although all cited provisions have been reviewed and considered in deciding this case, set forth below are the most directly relevant provisions.

Alcatel-Lucent Code of Conduct:

> ***Workplace Safety***
> As a responsible company, Alcatel-Lucent is committed to maintaining a safe, secure, drug-free and healthful work environment for employees, non-employee contract workers, visitors and the public wherever we work around the world…
>
> Alcatel-Lucent is committed to a drug-free workplace. The misuse of drugs, both legal and illegal, or alcohol, while on company premises or business interferes with a safe, healthy and productive work environment and is strictly prohibited. In addition, Alcatel-Lucent prohibits the use, possession, distribution or sale of illegal drugs on its premises, in its vehicles and while conducting Alcatel-Lucent business.

(Company Exhibits 15 and 16.)[2]

U.S. Alcohol, Substance Abuse and Drug Screening Policy (the "Policy"):

> **1. Overview**
>
> Alcatel-Lucent is committed to maintaining a safe, secure, drug-free, and healthful work environment for employees, visitors, and the public at large. To that end, Alcatel-Lucent prohibits all employees, contractors and visitors from being under the influence of alcohol or any illegal drug or prescription drugs used by an individual other than the

[2] The Company admitted two versions of the Code of Conduct into evidence, including Edition 1.0, dated June 2012 and Edition 3.0, dated January 2014. Both versions are identical as to the provisions quoted herein.

person for whom the drugs were prescribed or any legal substance used for purposes other than intended that would constitute inappropriate use while on Alcatel-Lucent property or during the course of business on behalf of Alcatel-Lucent.

3. Policy

Alcatel-Lucent prohibits the possession and/or distribution of illegal drugs, prescription drugs to an individual other than the person for whom the drugs were prescribed and any legal substance used for purposes other than intended that would constitute inappropriate use on Company property or in the course of business…

Alcatel-Lucent also prohibits engaging in alcohol and drug-related activities while at Alcatel-Lucent work sites … during working hours, or during non-working hours that would otherwise affect the workplace…

3.3 Reasonable Suspicion/For Cause Testing

Testing for reasonable suspicion or for cause will be conducted. This includes if or when:

Employee reports for work or appears to be working under the influence of drugs, intoxicants or alcohol;… or

Employee indicates to management or Human Resources employee that he or she is illegally or illicitly using drugs, intoxicants or alcohol; or

Employee is arrested for Driving Under the Influence (DUI) while driving a company vehicle at any time or while driving any vehicle on company time or company business; or

Employee who has returned to work following the successful completion of an approved rehabilitation program; or

Employee who is selected for random drug testing, as required an in accordance with Department of Transportation (DOT) regulations or to comply with the Department of Defense (DOD) Drug-Free Workforce Rule mandating for-cause and random drug testing of employees working in a sensitive position on DOD contracts…; or

Required by law or in response to a customer's policy when compliance is a condtion on an agreement between Alcatel-Lucent and/or its affiliates and its customers; or

Appropriate, as part of a return to work assessment.

(Company Exhibit 17.)

Position of the Parties:

On this record, the Employer argues: (a) that the facts establish that Palko smoked marijuana during working hours, reported to work under the influence of alcohol on May 4, 2015 and sold drugs to Conlan; (b) that Conlan told Numbers that Palko sold drugs to him; (c) that Conlan is credible, with no motivation to have lied about this fact; (d) that Palko's testimony was not credible; (e) that Palko knew that he had to remain drug-free as a condition of his employment; (e) that the Company had the right to implement reasonable work rules; (f) that relevant Company work rules prohibit employees from being under the influence of drugs and alcohol at work and selling or distributing drugs to co-workers; (g) that Alcatel-Lucent's rules were reasonable; (d) that the Company's investigation was fair and objective; (h) that the Company's investigation need not be exhaustive; (i) that Palko had an opportunity to give his side of the story prior to termination; (j) that the Company agreed to interview Palko after termination to address the Union's concerns during the grievance process; (k) that even if procedural deficiencies are found, they do not require a finding that there was no just cause to terminate; (l) that the Company applied its rules and penalties without discrimination; (m) that the seriousness of Palko's actions warranted discharge; (n) that even if not all charges are deemed proven, any one of the three charges standing alone supports discharge; and (o) that the grievance must be denied.

The Union, on the other hand, contends: (a) that the Company failed to prove the charges against Palko; (b) that the Company inappropriately relied on what Conlan told Numbers in pursuing Palko for disciplinary action; (c) that the Company was aware that Conlan struggled with drugs, had been arrested and that he borrowed money from several employees; (d) that the Company's argument that Palko's positive test for drugs on May 4, 2015 corroborated that he smoked marijuana with Conlan during working hours on March 23, 2015 and that Palko provided the drugs is "ludicrous and proved nothing" (Union Post Hearing Memorandum at p.4); (e) that the Company's claims are unfounded and based on "outlandish assumptions" (*Id.* at p. 5); (f) that none of the Company's witnesses testified that they ever observed Palko smoking marijuana during working hours or selling or distributing drugs to Conlan or anyone else; (g) that that Company relied on hearsay; (h) that the Company failed to conduct a thorough and objective investigation; (i) that the Company did not administer discipline under its policies evenhandedly; (j) that the Company did not have reasonable suspicion or cause for testing Palko on May 4,

2015 as defined in the Policy; (k) that the Company and the Union agreed in the collective bargaining agreement that in the event of a positive test, an employee would be referred to the Employee Assistance Program; (l) that there is nothing in the collective bargaining agreement that provides for automatic suspension/termination for a first time failure of alcohol/drug testing; (m) that Palko was not impaired on May 4, 2015; (n) that the Company did not have any written policy advising employees that anything more than an alcohol level of zero would violate the policy; (o) that the Company may not hold its employees responsible for violating a rule never communicated to them; and (p) that the grievance should be sustained.

Discussion:

On the entire record before me, including my assessment of witnesses' credibility and the probative value of the evidence, the Company did not have just cause to terminate Palko's employment. I reach this conclusion for the following reasons.

First, the Company has failed to establish by credible, competent evidence that Palko smoked marijuana during working hours or that he sold or distributed illegal drugs to one or more co-workers.[3] The Company's case with respect to these very serious allegations is based on conjecture and hearsay. Significantly, none of the Company's witnesses had any first hand knowledge that Palko engaged in these activities. Rose, Niangoran and Numbers all testified that they did not observe Palko smoking marijuana on Company premises or during working hours nor did they observe Palko sell or distribute drugs to Conlan or anyone else. Rather, the Company relied upon Numbers communication as to what Conlan told him, as well as the two instant messages to support their claim that Palko is guilty of this misconduct. This evidence is insufficient to establish that Palko engaged in the actions charged.

Starting with Conlan's statement to Numbers upon which the Company relied in beginning an investigation into Palko's activities and in terminating his employment, this statement is entirely hearsay and is not, therefore, competent evidence of misconduct. Although the Company repeatedly states in its Post Hearing Memorandum that Conlan's statement was credible, that he had no ill will towards Palko and that he had no motivation to lie (See e.g., p. 1, 10, 24 and 26), on the entirety of this record there is little evidentiary basis to credit Conlan's

[3] The Company's own statements indicate that it is aware that it cannot prove by a preponderance of the evidence that Palko sold or distributed drugs, as it claims it had "strong evidence" or "strong suspicion" that Palko did so. As set forth, the evidence is not "strong" nor is "suspicion" a proper basis for finding just cause to terminate.

statement. Significantly, the Company did not interview Conlan at any time prior to his termination to be able to make a determination as to the veracity of this statement or whether or not he had a motivation to lie. He was not interviewed by Security nor did any management personnel ask him any questions about his statement to Numbers. There was ample time to do so between April 9, 2015 when the Company first learned of the allegation and April 21, 2015 when he was given the option to resign or be fired. Nor is there any evidence that the Company questioned Conlan about these allegations at any time after his termination.

In addition, the Company's claim that Conlan's statements should be credited is inconsistent with its own experience with Conlan. Management, including Rose and Niangoran, was aware that Conlan had prior problems with drugs and that he had been arrested for driving with a suspended license. They knew that he served 30 days in jail. They knew that he reported to work demonstrably under the influence of drugs on April 9, 2015 and tested positive for drugs that same day. Members of management were also aware that Conlan repeatedly borrowed money from various employees, including Niangoran. These facts raise serious questions as to whether Conlan's statements should have been credited by the Company, particularly without interviewing Conlan. That Conlan was a knowledgeable call center technician does not require a different conclusion. Under all of these circumstances, reliance on Conlan's statement without interviewing or questioning him was misplaced.

Moreover, while much of the Company's case is based on Conlan's statement, the Company did not call Conlan as a witness at the hearing. Conlan was not subject to any cross-examination to test the veracity of his statement, his motivation or any bias or to allow the arbitrator to assess his credibility. Hearsay statements, without other credible, competent evidence to support the charges, cannot form the basis for finding guilt for purposes of just cause at arbitration. Without Conlan's testimony at the hearing, his statement to Numbers that Palko provided drugs to him cannot be considered for the truth of the matter asserted. Not only did Conlan not testify to allow an assessment of his credibility, but Numbers, who reported Conlan's statement to Niangoran, testified credibly that he no longer believed Conlan to be truthful; he began to doubt Conlan's truthfulness when he became aware of the April 10, 2015 email wherein Conlan attributed various statements to Numbers that Numbers credibly testified were not true. While Conlan's statement to Numbers and communicated to Niangoran may have justified the

initial report to Ethics Point and the opening of an investigation, it is insufficient to sustain the charges in this case.

The Company also relies on the two instant messages as evidence that Palko smoked marijuana during working hours and that he sold drugs to Conlan. The instant messages, however, do not prove the Company's case. While these messages may allow for speculation and conjecture that Palko may have engaged in the charged misconduct, they do not prove by a preponderance of the credible evidence that he did so. As to the March 23, 2015 instant message, the Company did not take any steps to investigate whether Conlan and Palko left work on March 23, 2015 (or on any other day) to "smoke a bowl" during working hours nor did the Company present evidence that this, in fact, occurred. Palko, on the other hand, testified that it was never his intention to "smoke a bowl" with Conlan, but that he often gave Conlan a ride because he did not have his license. More importantly, however, Palko credibly testified that they never left the RITC that day because of a heavy workload. They did not take lunch or any other break and did not smoke marijuana during working hours as charged. The Company presented no evidence to refute this testimony. Indeed, the Company's witnesses from the RITC,[4] including Rose and Niangoran, did not see Palko or Conlan leave during working hours on March 23, 2015, nor did they ever see Palko smoke marijuana during working (or non-working) hours. Further, these witnesses testified that they did not observe Palko to be impaired or under the influence of drugs nor was he observed to be unable to safely and competently perform his duties.

Similarly, the April 10, 2015 email does not prove that Palko was smoking marijuana during working hours or that he was selling or distributing drugs to Conlan or to other employees. As noted above, the Company's witnesses did not observe Palko engaging in any such misconduct. That Palko did not take any action after Conlan told him that Numbers called him the "pot man" is not persuasive evidence that Palko engaged in the charged misconduct. Palko's response to the reference in the instant message, i.e., "I don't even know how that is even possible…" (Company Exhibit 3) cannot be construed as Palko agreeing that the reference properly described him. Further, he credibly explained why he saw no reason to take any action to clarify with management or Numbers that this reference was untrue. That Conlan owed money

[4] There is no evidence that Muscat worked at the RITC or would have had the opportunity to observe Conlan or Palko.

to Palko is also not evidence that Palko was selling drugs based on the record in this case. It is undisputed that Conlan owed money to several employees, including Niangoran (his supervisor) and Monk (an engineer). There is no suggestion that either of these employees were selling drugs to Conlan, although Conlan owed them money. Under these circumstances, there can be no reasonable inference that Conlan owed money to Palko due to a drug transaction.

According to Rose, the fact that Conlan tested positive for drugs on April 9, 2015 corroborated Numbers' statement to Niangoran that it was Palko who supplied drugs to Conlan. This testimony is pure conjecture. That Conlan tested positive for drugs does not prove that it was Palko who provided the drugs to him. This is particularly true where, as in this case, the Company did not question Conlan about this allegation or make any effort to determine the veracity of his statement to Numbers. Likewise, contrary to the Company's arguments, the fact that Palko tested positive for marijuana on May 4, 2015 does not support its claim that Palko smoked marijuana during working hours on March 23, 2015 (or during working hours on any other date) as charged. The Company provided no foundation to support the conclusion that a positive test on May 4, 2015 proves that Palko smoked marijuana during working hours approximately six weeks earlier.

With respect to the May 4, 2015 test, Palko credibly testified that he tested positive because he ingested an "edible" containing marijuana at a birthday party over the weekend, not during working hours. There is no evidence in this record to dispute Palko's testimony with respect to this issue. Although the Company argued that Palko knew that he must remain drug-free as a condition of his employment based on signing his offer letter that provided that he "may be asked to undergo and pass additional drug screens… in order to maintain [his] employment" (Company Exhibit 13) neither the Code of Conduct nor the Policy prohibit drug use during non-working hours and off Company premises, unless such use "otherwise affects the work place." (Company Exhibit 17.) The Policy, as relevant to this case, contemplates that any such drug use results in impairment on the job; it does not regulate off duty conduct absent a showing that the employee reported under the influence or was otherwise impaired. As stated above, nobody testified to observing that Palko was impaired at work on May 4, 2015 or at any other time or that he was otherwise unable to perform his duties in a satisfactory manner. Nor did the test results (or other evidence at the hearing) indicate whether the level suggested that he was under the influence of marijuana or otherwise impaired when he reported to work on May 4, 2015.

In its Post Hearing Memorandum the Company attempted to expand the charges against Palko, arguing that testing positive for drugs on May 4, 2015 was itself grounds for termination (see p. 30-32). This argument is rejected. Throughout this arbitration proceeding, the Company consistently stated that Palko was terminated for smoking marijuana during working hours, reporting to work under the influence of alcohol on May 4, 2015 and because there was "strong evidence to suggest" that he was selling or distributing drugs to one or more co-workers. (See, e.g., Tr. at 14-15 and Post Hearing Memorandum at p. 1.) In setting forth the reasons for termination, therefore, the Company did not claim that the positive drug test on May 4, 2015 itself was a basis for his termination, but rather, as discussed above, it claimed that the May 4, 2015 drug test corroborated that Palko smoked marijuana with Conlan on March 23, 2015 during working hours. The Company cannot add another basis for termination in its Post Hearing Memorandum arguments.

On this record, therefore, while I do not condone Palko's drug use during non-working hours (as reflected in the May 4, 2015 drug test), the Company has not met its burden of proving by a preponderance of the credible, competent evidence that Palko engaged in the misconduct charged regarding use or sale of marijuana, i.e., that he smoked marijuana during working hours or that he sold or distributed drugs to Conlan or to any other employee in violation of the Company's Code of Conduct or the Policy. These charges must, therefore, be dismissed.

Second, whether Palko violated the Company's policies on May 4, 2015 by a positive alcohol test depends upon consideration of: a) whether there was reasonable cause for testing on May 4, 2015 under the Company's Policy (Company Exhibit 17); and b) whether he violated that Policy by reporting to work under the influence of alcohol.[5] As to the first issue, it is undisputed that Palko was not subject to either DOT or DOD testing in his job as a call center technician.[6]

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[5] The Company does not assert that Palko consumed alcohol or smoked marijuana during working hours or on Company premises on May 4, 2015. He was called into the office and taken for the test upon reporting to work that day.

[6] The parties' collective bargaining agreement only addresses testing of employees pursuant to regulations of the DOD and the DOT "and any current or future customer requirements that may apply." (Joint Exhibit 1 at p. 200.) The Company's drug and alcohol testing policy, however, provides for testing based on reasonable suspicion or for cause for all employees, including those covered by a collective bargaining agreement. The Company notes that it has the right under the parties' agreement to promulgate reasonable rules applicable to its union and non-union employees alike and that the drug and alcohol testing policy is reasonable. On the limited record before me as to this particular issue, there is insufficient evidence to support that the language in the collective bargaining agreement was intended to preclude any other testing under the Company's policy for reasonable suspicion or for cause, in addition

The drug and alcohol test on May 4, 2015, therefore, was permissible provided that there was reasonable suspicion or cause for the test. The Policy expressly identifies those instances where testing is permitted for reasonable suspicion or for cause. None of the situations described in Section 3.3 of the Policy apply to this case to provide a basis for testing.

Significantly, Niangoran testified that Palko did not appear to be impaired or under the influence of drugs or alcohol when he reported to work on May 4, 2015. Nor had Palko reported to management or Human Resources that he "is illegally or illicitly using drugs, intoxicants or alcohol." (Company Exhibit 17.) He had not been arrested for a DUI nor was the test done in connection with a return to work or pursuant to any DOT, DOD or customer requirements. The sole basis for the test on May 4, 2015 was Numbers' report to Niangoran on April 9, 2015 that Conlan told him that Palko provided drugs to him and the instant messages obtained in the course of the investigation. Section 3.3. of the Policy does not appear to address this type of situation or to provide for testing under these circumstances. Nonetheless, assuming that information such as was provided to Niangoran along with the instant messages provided a valid basis for testing under the Policy, it is questionable whether information provided to management on April 9 or 10, 2015 can provide reasonable suspicion or cause for testing on May 4, 2015.

Notwithstanding the above, even if there was reasonable suspicion or cause for the testing under the Policy, there can be no violation of the Policy or Code of Conduct without proof by a preponderance of the evidence that Palko reported to work under the influence of alcohol or was otherwise impaired and unable to perform his duties. As indicated above, Niangoran testified that he did not observe that Palko was impaired in any way when he reported to work, despite that he had ample opportunity to observe Palko having driven him to the test and then home. Instead, the Company relies on the fact that Palko's test for alcohol indicated BAC readings of .045 and .046 at 2:53 PM and 3:09 PM, respectively. (Company Exhibit 7.) The Union contends that these levels do not establish impairment or reporting to work under the influence. While under Ohio law this level exceeds the limit for driving with a Commercial Driver's License (CDL), it is undisputed that Palko's job did not require that he have a CDL. The legal limit for driving (non-

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to DOT, DOD or customer required testing. The Company's Code of Conduct and Policy regarding drug and alcohol use prohibiting use during working hours or on Company premises or on Company business, or reporting under the influence, are reasonable on the record before me.

CDL) is .08 in Ohio (Tr. at 72); Palko's test result was under the legal limit for driving under the influence of alcohol in the state.[7]

The Company argues that any level of alcohol when reporting to work is a violation of the Company policy.[8] The Union, however, correctly notes that there is nothing in the Policy that provides notice to employees that *any* level of alcohol exceeding zero is grounds for disciplinary action, much less discharge. Rather, the Policy prohibits reporting to work "under the influence of alcohol or any illegal drug" and "engaging in alcohol and drug related activities while at Alcatel-Lucent work sites…during working hours, or during non-working hours that would otherwise affect the work place." (Company Exhibit 17.) If the Company intended to prohibit any alcohol consumption during non-working hours that results in a test level other than zero, whether or not the consumption results in impairment, the Company must provide notice of the same to employees. Neither the Policy, nor the Code of Conduct, provides such notice.

The Company also claims that Palko acknowledged he was impaired when he signed the Alcohol Testing Form presented to him at the testing facility that indicated that he could not drive, perform safety sensitive tasks or operate heavy equipment due to a positive test.[9] I credit Palko's testimony that he did not read this language which appeared in small print at the bottom of the form, stating that it was not pointed out to him and that when directed to sign the form, he did so believing he was acknowledging the test and the result, not agreeing that he was impaired.

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[7] Perhaps recognizing that the .045 and .046 level may not be considered sufficient to establish impairment or reporting under the influence, the Company repeatedly states in its Post Hearing Memorandum that the level of alcohol when Palko reported to work was .062. The Company relies on the opinion of Christy Giliori, a Company registered nurse. Giliori, however, was not qualified to testify as an expert on such matters. Indeed, she was not called to testify at the hearing and was not, therefore, subject to cross-examination as to the basis for her opinion. Moreover, her letter did not state that Palko's alcohol level was .062 when he reported to work. Rather, the letter states that Palko's "BAC *could have been approximately* .062 one hour prior to the testing done at 3:09 pm on 5/4/15." (Emphasis added) (Company Exhibit 5.) Given these facts, the statement that Palko's level was .062 is not given weight.

[8] The facts in the cases the Company cites are distinguishable. In *City of Oklahoma City,* 98-2 ARB ¶5210 (Caraway, 1998) and *KV Pharmaceutical Company,* 00-2 ARB ¶3619 (Cipolla, 2000), the employees reported to work demonstrably intoxicated, with a strong odor of alcohol and slurred speech. Moreover, in each case, the employee had previously been disciplined for being under the influence of alcohol (but had not been discharged) and was on notice of the Company's expectations. In *Exxon Pipeline Co.,* 109 LA 951 (Abercrombie, 1997), the arbitrator noted that the level over which an employee shall be deemed intoxicated (in that case .04) had been communicated to employees and the Union. See also, *Gaylord Container Corp.,* 99-2 ARB ¶3227 (O'Grady, 1999) (alcohol level used to find "under the influence" was communicated to the Union in negotiations.)

[9] Contrary to the Company's contention, this language does not contain an express acknowledgment by Palko that he was "impaired" or "under the influence."

The entire situation was stressful, particularly knowing that he would test positive for drugs because of his off-duty conduct the prior weekend.

As indicated above with respect to the off-duty use of marijuana, I do not condone any employee having any alcohol, including one beer, in the hours before reporting to work. It clearly would have been prudent for Palko to refrain from having a beer at lunch prior to the start of his work shift at 2:00 PM. Nonetheless, on the entirety of this record, I do not find that Palko reported to work under the influence of alcohol, that he was impaired or that his consumption of alcohol during non-working hours affected the work place on May 4, 2015. As such, I do not find that the .045 and .046 BAC reading or his signing the Alcohol Testing Form requires a finding that Palko was in violation of the Code of Conduct or the Policy on May 4, 2015. If the Company wishes to enforce the Policy such that any level of alcohol more than zero is a violation (whether or not impaired), it must give notice to employees of the Company's expectations.

Even assuming, however, that consumption of alcohol during non-working hours resulting in a level of .045 and .046 when reporting to work is properly considered a violation of the Code of Conduct or the Policy, discharge would not be appropriate in this case for this first offense. While it is true that arbitrators have held that drug or alcohol use at work or reporting to work under the influence of alcohol can support discharge, whether termination is appropriate depends on the specific circumstances of each case, including, for example, whether the penalty is consistent with the parties' collective bargaining agreement, past practices, or policies, whether the employee received prior warnings and whether the employer enforced its policies in an even-handed and non-discriminatory manner. In this case, the parties' collective bargaining agreement suggests that termination is not mandated for a first offense. The testing provision in the agreement provides as follows with respect to action to be taken for a positive drug test:

> The Company and the Unions further recognize that current DOD and DOT regulations as well as customer requirements do not require the imposition of sanctions or disciplinary action against any employee to be found to be using drugs illegally.
>
> Accordingly the Company further agrees that it will take no adverse action against such an employee, as a direct and immediate result of information obtained in a test applied under DOD or DOT regulation or as a result of a customer requirement, other than to transfer the employee from a position that is subject to the regulations or requirements and recommend that the employee begin an appropriate treatment program.

(Joint Exhibit 1 at p. 200.) While it is understood that Palko was not subject to testing under DOD or DOT regulations or a customer's requirement, this provision suggests that termination is not automatic for a first offense, notwithstanding the sensitive nature of the work performed.

In addition, while the Company claimed discharge is warranted for any violation of the drug and alcohol policies set forth in the Code of Conduct and the Policy given the potentially serious adverse consequences for customers and the Company, on this record it does not appear that the Company has been consistent in enforcing such a policy; even-handed enforcement is an element of just cause. For example, there is no evidence that the Company undertook any investigation of Patrick, who was identified as one of Niangoran's lead technicians, or otherwise imposed discipline, notwithstanding that Conlan's instant message suggested that he and Patrick smoked marijuana together on numerous occasions during working hours. Similarly, although Conlan was demonstrably under the influence of drugs on April 9, 2015, he was allowed to return to work the following day and was not discharged until April 21, 2015, several days after receiving the test results confirming that he was impaired. Under all of the circumstances, therefore, Palko's discharge for the positive alcohol test on May 4, 2015 is not appropriate even if an alcohol level of .045 and .046 were considered impairment or reporting to work under the influence of alcohol in violation of Company policies.

Finally, due process concerns would also warrant mitigation of the penalty in this case. Given all of the facts and circumstances and the seriousness of the charges against Palko, the Company's failure to undertake an adequate investigation and to provide Palko the opportunity to be heard before making the decision to terminate his employment (both important elements of just cause)[10] raise serious due process considerations that would properly be considered in assessing the appropriate penalty. While it is true that the investigation need not be exhaustive or entirely free from procedural error, the investigation in this case was substantially deficient for the reasons set forth in the discussion above, including, but not limited to, the failure to interview Conlan or Palko or to take other steps to determine whether Palko in fact left the facility on March 23, 2015 or otherwise smoked marijuana during working hours, the reason that Conlan

[10] Contrary to the Company's arguments, the fact that the collective bargaining agreement is silent as to these issues is not evidence that these elements are inappropriately considered or that consideration is a modification of the parties' agreement. A fair investigation and an opportunity to be heard prior to disciplinary action are important due process elements of a just cause analysis. It is undisputed that the parties' collective bargaining agreement provides for just cause for disciplinary action and, therefore, these factors are properly considered. (Joint Exhibit 1, Article 22.)

owed money to Palko and whether Palko sold marijuana to Conlan or others. Further, the Company's claim that Palko could have given his side of the story on May 4, 2015 when he was taken for drug testing is disingenuous. Palko had no knowledge at all that any of these allegations had been made against him. He could not respond to allegations that he was unaware of at that time. That the Company interviewed Palko on July 30, 2015, over two months after Palko was terminated and one day prior to the August 1, 2015 layoff, did not cure this deficiency under all of the circumstances of this case.

As set forth in the Company's Post Hearing Memorandum, citing *Safeway Stores, Inc.*, 93 LA 1147 (Wilkinson, 1989) and *Cameron Iron Works,* 73 LA 878 (Marlatt, 1979):

> The essential question for an arbitrator is not whether the disciplinary action was totally free from procedural error, but rather whether the process was fundamentally fair. [The arbitrator] must find in order to overturn the employer's action on procedural grounds, that there was at least a possibility, however, remote, that the procedural error may have deprived the grievant of a fair consideration of his case.

Company Post Hearing Memorandum at p. 17.) In this case, a more complete investigation, including providing Palko an opportunity to be heard prior to termination, would likely have led to the discovery of additional relevant information including potentially exculpatory evidence and, as such, these deficiencies were prejudicial, depriving Palko of fair consideration of his case.

For all of the reasons set forth above, the Company did not have just cause to terminate Palko's employment. As to the remedy, the parties stipulated that Palko is not eligible to be reinstated to employment at Alcatel-Lucent as he would have been separated from the Company on August 1, 2015 pursuant to a layoff.[11] The parties further stipulated that in the event that there was no just cause for termination, the available remedy is a back pay award and the SVTP benefits to which Palko would have been entitled if he had been employed at the time of the layoff. The Company maintains that back pay should be calculated from the date of termination, or May 21, 2015, whereas the Union contends that it should be calculated from the date he was suspended without pay on May 4, 2015. Under the particular circumstances of this case I agree that back pay is properly awarded from the date that Palko was removed from service without pay in connection with the charges leading to his termination, i.e., May 4, 2015. It was not a

[11] In light of this fact, it is not necessary for me to decide whether a lesser penalty, such as counseling or a warning, or referral to the EAP would have been appropriate under all of the circumstances of this case.

separate and distinct disciplinary action but rather was directly related to the ultimate termination of his employment.

By reason of the foregoing, I issue the following:

AWARD

The grievance is sustained. The Company did not have just cause to discharge the Grievant's employment.

Within thirty (30) days from the issuance of this Award, the Company shall provide a back pay award to Adam Palko for the period of May 4, 2015 through July 31, 2015 at the rate in effect during the back pay period, less replacement earnings, if any, and any unemployment benefits received during the back pay period. In addition, within thirty (30) days from the issuance of this Award, the Company shall pay to the Grievant the SVTP benefits to which he would have been entitled in connection with the August 1, 2015 layoff had he been employed at the time of the layoff.

I shall retain jurisdiction for a period of six months from the date of this Award solely with respect to clarification of the Award provisions set forth above, including calculation of the back pay award or the SVTP benefits.

Dated: December 5, 2016

Melissa H. Biren

State of New Jersey)

County of Essex)

On this 5th day of December 2016 before me personally came and appeared MELISSA H. BIREN, to me known to be the individual described in and who executed the foregoing instrument and acknowledged to me that she executed the same.

Robert D. Agree
Notary Public

ROBERT D AGREE
ID # 2429835
NOTARY PUBLIC
STATE OF NEW JERSEY
My Commission Expires February 8, 2018