

**ARBITRATOR'S OPINION AND AWARD**

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In the matter between:

MASSPORT FIREFIGHTERS IAFF, LOCAL S-2

and

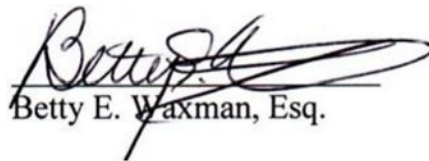
MASSACHUSETTS PORT AUTHORITY

Grievant: [REDACTED] – 30-day suspension  
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**AWARD**

The Undersigned, having been designated in accordance with the parties' Collective Bargaining Agreement and having duly presided at the parties' arbitration hearing, AWARDS as follows:

The Massachusetts Port Authority violated the parties' Collective Bargaining Agreement when it issued a 30-working day suspension to Firefighter [REDACTED] on December 11, 2019 prior to issuing an official notification to its fire force that medical marijuana cards are not "prescriptions" under the parties' drug policy. As relief, the 30 working day suspension shall be vacated and the Grievant shall be reimbursed for lost pay and other benefits during the suspension period. Reimbursement shall not include lost overtime and/or detail work.

  
Betty E. Waxman, Esq.

Dated: September 13, 2021

**ARBITRATOR'S OPINION**

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MASSPORT FIREFIGHTERS IAFF,  
Local S-2

and

Grievance: [REDACTED]  
30-day suspension

MASSACHUSETTS PORT AUTHORITY  
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Appearances: For the Union: Leah Barrault, Esq.  
For the Employer: Joseph McConnell, Esq.

**I. STATEMENT OF THE CASE**

On September 17, 2019, the Grievant [REDACTED] (hereinafter the “Grievant”) participated in an annual hair test for controlled substances. Employer Exhibit 4. His hair specimen tested positive, resulting in the Grievant being placed on suspension without pay status and charged with violating Massport’s rules and regulations regarding controlled substances. Id. The suspension was subsequently converted to a thirty (30) working-day suspension without pay, effective October 2, 2019 through November 12, 2019, after which the Grievant returned to work on December 11, 2019.<sup>1</sup> Employer Exhibit 5.

The Union grieved the 30-working day suspension on behalf of Firefighter [REDACTED]. Employer Exhibit 7. Chief [REDACTED] denied the grievance on October 18, 2019.

<sup>1</sup> Prior to returning to work, the Grievant was required to produce a negative drug screen, engage in three hours of substance abuse education, and submit to a testing plan involving eleven random drug screens over twelve months. Employer Exhibits 9 & 10.

Tr. at 32. A “two-plus-two” grievance hearing was subsequently held by Massport’s Office of Labor Relations. The grievance was denied on January 7, 2020. Employer Exhibits 6 & 7; Tr. at 32.

The matter proceeded to an arbitration hearing over the Zoom platform on May 25, 2021. The following individuals testified: [REDACTED] [REDACTED] [REDACTED] [REDACTED] and the Grievant. The Employer submitted fifteen (15) exhibits and the Union submitted five (5) exhibits.

Following the arbitration hearing, briefs were submitted, at which time the record was declared closed.

II. ISSUE (agreed upon)

Did the Massachusetts Port Authority violate the parties’ Collective Bargaining Agreement when it issued a 30-day suspension to Firefighter [REDACTED] on December 11, 2019 and if so, what shall be the remedy?

III. RELEVANT PROVISIONS

AGREEMENT BETWEEN THE LOGAN AIRPORT FIRE FIGHTERS, LOCAL S-2, IAFF AND MASSACHUSETTS PORT AUTHORITY (July 1, 2019-June 30, 2022) – Joint Exhibit 1

ARTICLE XIV

The Authority shall not discharge nor suspend any employee without just cause. . . .

ATTACHMENT # 1

CONTROLLED SUBSTANCES HAIR TESTING POLICY FOR UNION EMPLOYEES WITHIN LOCAL S-2

a. PURPOSE AND SCOPE

In a joint desire to achieve and maintain a work force that is 100% drug free, effective October 1, 2011, employees in Local S-2 shall be subject to annual Hair Analysis Testing for controlled substances to be conducted through a fair, reasonable and objective hair analysis testing system. Each Local S-2 employee shall submit to such annual test on or within forty-five (45) calendar days of the employee’s birthday regardless of the employee’s status (out on worker’s comp., FMLA, etc.). Hair testing does not contemplate or include testing for alcohol.

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b. DEFINITIONS

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Controlled substances: Testing will be for the following six controlled substances: Marijuana (“THC”), Cocaine, Amphetamines (including methamphetamine), Opiates, Opioids, and Phencyclidine (PCP, Angel Dust).

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c. PROHIBITIONS

1. Prohibited Misuse of Controlled Substances.

Employees are prohibited from: (1) using controlled substances except pursuant to a physician’s prescription, or (2) refusing to submit to a controlled substances test required under this Policy.

All employees are required to report the use of any prescription or therapeutic drug that may affect the performance of their job to their supervisor. Employees must also provide documentation to the Human Resources Department that includes, but is not limited to, the following: documentation of a prescription, the length of time the medication is prescribed, the effect that the medication may have on the employee’s ability to perform his or her job functions, the employee’s ability to work while taking the prescribed medication, and the relevant time periods before reporting to work during which the employee must abstain from taking the medication. An employee is further prohibited from using or reporting to work impaired by or under the influence of an over-the-counter drug that could affect the employee’s safety or job performance.

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e. CONSEQUENCES FOR MISUSE OF CONTROLLED SUBSTANCES USE

5. Positive Test Results for Controlled Substance Use

Once the Authority has been notified that an employee has tested positive on the first hair sample, the employee will be immediately suspended without pay. . . .

An employee who undergoes hair analysis testing and the final determination is that the test result is positive for Controlled Substances shall be suspended without pay for a period of thirty (30) working days. . . .

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IV. EVIDENCE

Massport’s mandatory drug testing policy set forth in the parties’ CBA lists marijuana as one of six controlled substances. Employees are prohibited from using these substances except pursuant to a physician’s prescription. Employer Exhibit 1 at 64-65; Tr. at 97. Under the policy, a positive test for a controlled substance results in an

immediate suspension followed by a re-test which, if positive, results in a non-discretionary, 30-working day suspension. Exhibit 1 at 65; Tr. at 27.

Massport's Human Resource ("HR") Department annually issues the controlled substances testing policy to bargaining unit members. Tr. at 98, 108-110; Employer Exhibits 2 & 3. The Grievant signed a receipt on January 17, 2017 that he had received a copy of the drug testing policy. Tr. at 39-40.

Massport Fire Chief [REDACTED] testified that medical marijuana cards are not accepted as a defense to a positive marijuana test, that firefighters were never informed that they could use medical marijuana with a state-issued card, and that the Union was aware of Massport's stance on the medical marijuana issue. Tr. at 25, 43, 51. He acknowledged, however, that Massport has never issued a directive prohibiting medical marijuana use or clarifying that a medical marijuana card is not considered a physician's prescription under the policy.

When Firefighter AM tested positive for marijuana in 2018, his situation was handled differently from the Grievant's. Tr. at 35-36, 47. After AM had a positive drug test, he was not subjected to disciplinary action; instead, he was placed on restricted duty on June 18, 2018 and prohibited from operating Massport vehicles. Union Exhibit 3; Tr. at 45. Two days later, AM received a letter returning him to full operational status based on his "full cooperation and engagement in the interactive process that has taken place over the last months." Union Exhibit 4. According to Chief [REDACTED], AM did not receive a mandatory 30-day suspension because he took the initiative, prior to his 2018 annual drug test, to commence an interactive process by sending his medical marijuana

card to Massport's HR Office and then by providing additional information at Massport's request. Tr. at 36, 45; Union Exhibit 2.

The Chief testified that Union members were aware of Massport's rejection of medical marijuana cards based on Massport's notification to AM in June of 2018 that it could not reasonably accommodate his use of medical marijuana in a firefighter position. Tr. at 47-48; Union Exhibits 2 & 4. Massport's stance led to the Union filing a general grievance approximately six months later on the issue of Local S-2 members seeking to use medical marijuana cards and a January 2019 "two-plus-two" grievance meeting about the prohibition attended by the Union's president (AM), vice president, secretary, and attorney. Tr. at 55-57, 60-61; 155-157.

According to Chief ██████████ AM "was the Union" because he was its president at the time. Tr. at 50, 56. The Chief testified that he assumed AM notified Union members that medical marijuana cards would not be accepted as a valid excuse for a positive drug test. Id. Chief ██████████ also maintains that he had "informal in-house conversations" with Union leadership about the AM issue. He acknowledges, however, that he did not issue "a letter or anything like that" about the prohibition against Massport firefighters using medical marijuana. Tr. at 51, 52, 54.

AM served as Union president from 2010 to 2020. Tr. at 142. He testified that in December 2017, based on a diagnosis of sleep apnea, he obtained a medical marijuana card which he presented to HR. Tr. at 118. According to AM, he took this step based on knowledge that another Union member identified as "G" was allowed to use medical marijuana for a different ailment. Tr. at 119-121.<sup>2</sup> AM testified that he presented the

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<sup>2</sup> According to AM, G handed in a medical marijuana card in 2016 and thereafter went out on injured leave pursuant to Chapter 111F between August of 2017 and July of 2019. Tr. at 149-150.

card to Assistant Director of Employment and Leave Management [REDACTED] in December of 2017, that she made a copy of it, and that she told him he was “all set.” According to AM, when he submitted his medical marijuana card in 2017, the use of such cards was “out there.” Tr. at 132-133. AM stated that he recalls telling employees in his group that he had submitted a card and thinks that the Grievant was present. Tr. at 135.

AM denied that he requested a medical accommodation in 2017. He maintains that he just let Ms. [REDACTED] know that he possessed a medical marijuana card. Tr. at 125. AM states that approximately six months later, in May of 2018, he was informed that he needed to present more information regarding his use of medical marijuana which he provided. Tr. at 126, 130. AM does not believe that he had an interactive process despite references to such a process in Massport’s correspondence because there was no “back and forth.” Union Exhibit 5; Tr. at 137-138, 154. He asserts that his meeting with Massport personnel focused only on his positive drug test and was not an interactive process. Union Exhibit 5.

According to AM, another Union member “D” also got a letter asking for more information about his use of medical marijuana, Tr. at 128. AM and D both went to Ms. [REDACTED] office to voice their concerns about testing positive for marijuana. Tr. at 128-129. AM then received a June 6, 2018 letter, addressed to his home address, stating that he could not use medical marijuana. Tr. at 131. He also learned that D was told that he could not use medical marijuana either. Tr. at 150. On June 18, 2018, AM was informed that Massport would not institute any disciplinary action against him but that he was restricted from operating any vehicles while on duty. Union Exhibit 3. On the following

day, AM and other Union officials met with Massport's Labor Relations and HR personnel. Union Exhibit 4; Tr. 1t 130, 135. Following the meeting, AM was informed that he would receive his driving privileges back. Union Exhibit 4; Tr. at 137.

AM testified that he did not forward his June 6, 2018 letter to Union members and that he was not directed by HR to disseminate any information about medical marijuana cards to the Union. Tr. at 132, 140, 150. He acknowledges having informal conversations about not being allowed to use medical marijuana but states that he refrained from making an official Union announcement because it was his personal situation and he thought that Massport would communicate its position to employees. Tr. at 140. AM concedes that Massport officials made clear at the parties' "two-plus-two" grievance meeting in January 2019 that it was not going to permit Massport firefighters to use medical marijuana. Tr. at 157. Even so, AM testified that he did not communicate the Employer's position to Union members. Tr. at 157-158.

Massport Deputy Director of Human Resources ██████████ testified that Massport does not accept medical marijuana cards as a valid excuse for a positive drug test although she has never issued a policy or directive to that effect. Tr. at 72-73. Ms. ██████████ stated that in September of 2019, the Grievant tested positive for marijuana and oxycodone. Tr. at 66. According to Ms. ██████████, the oxycodone result was not communicated to Massport by its test administrator "AllOne" because the Grievant had a valid prescription for the drug "so therefore it's not reported as positive." Id.

Assistant Director of Employment and Leave Management ██████████ testified that she oversees reasonable accommodation functions. Tr. at 76. The reasonable accommodation process involves communicating with employees about



accommodations being sought, the medical conditions underlying accommodation requests, and any alternatives to requested accommodations. Tr. at 77. Ms. [REDACTED] notes that the Grievant did not request a reasonable accommodation. Tr. at 78.

According to Ms. [REDACTED], AM, unlike the Grievant, provided a physician's letter in December of 2017 which stated that AM was going to obtain a medical marijuana card due to a medical condition. Tr. at 79-80. Ms. [REDACTED] testified that an interactive process was initiated with AM five months later, in May of 2018, when she requested additional information from his authorizing health care provider about the parameters for, and the alternatives to, AM's marijuana use. Ms. [REDACTED] testified that she received: 1) an October 2017 letter from AM's doctor stating that AM had been certified for medical marijuana; 2) a May 2018 medical letter outlining AM's restrictions on the use of marijuana; and 3) a list of firefighter duties. Tr. at 81-82, 90-92; Union Exhibit 1. According to Ms. [REDACTED], the interactive process ended on June 6, 2018 when Massport decided that medical marijuana could not be reasonably accommodated in a safety-sensitive position such as Massport firefighter. Union Exhibit 2; Tr. at 82, 99-100, 105-106. Ms. [REDACTED] could not recall if AM asked for an accommodation or whether Massport initiated the interactive process. Tr. at 103-105. She does not recall telling AM when he submitted his doctor's letter in December of 2017 that he was "all set." Tr. at 107.

Several days after the June 6, 2018 notification to AM that his use of medical marijuana could not be reasonably accommodated, he tested positive for it during an annual hair test. Union Exhibit 3. However, based on the individual circumstances of his situation, AM was not disciplined and his operating restrictions were lifted. Union

Exhibits 3 & 4. Notification of this outcome was placed in AM's confidential personnel file. Union Exhibits 2- 4; Tr. at 94. According to Ms. [REDACTED] the letter was not intended to be an advisory to everyone at Massport that medical marijuana cards were unacceptable. Tr. at 94.

Turning to the Grievant, he has been a Massport employee for 22 years and holds the rank of firefighter. The Grievant obtained a medical marijuana card during the summer of 2019 at the suggestion of his neurologist in order to help with insomnia. Tr. at 170, 176. He testified that he did not notify Massport of the card because he understood the practice to be for an employee to submit a prescription after, not before, testing positive for a drug. Tr. at 168-169. The Grievant testified that he "never notified them for any of the prescriptions that I was on . . . The way the drug test works is AllOne will call you and then you present it to them . . . That was the way we always did it." Tr. at 160. He acknowledged being aware that Massport's drug policy requires employees to report the use of any prescription or therapeutic drug "that may affect the performance of their job" (accompanied by a prescription, the length and effect of the drug, and its effect on job performance) but states that he didn't submit his medical marijuana card because he wasn't using marijuana at work and didn't believe his off-duty use of marijuana would affect his job performance. Tr. at 175-177.

In September of 2019, the Grievant's annual drug screening came back positive, resulting in the issuance of a notice of suspension pending re-testing which he declined to take. Employer Exhibits 4 & 5; Tr. at 29-30, 162. The Grievant's test failure prompted him to inform AllOne about his medical marijuana card.

The Grievant is friendly with AM and learned in 2017 that Massport had accepted AM's medical marijuana card. Tr. at 161, 167-168. The Grievant also learned that G had turned in a medical marijuana card to Massport and that the Employer accepted it as well. Tr. at 162, 167. The Grievant testified that in 2018, he was out of work with an injury for almost a year and seldom saw AM. Tr. at 170. According to the Grievant, he thought AM and G took proactive steps to turn in their cards just to see if Massport would accept them but that he didn't know he was supposed to do so as well. Tr. at 168. According to the Grievant, it was not until after he failed his September 2019 drug test that he learned that Massport refused to treat AM's medical marijuana card as a valid excuse for a failed drug screen. Tr. at 163, 167.

The Grievant testified that prior to obtaining a medical marijuana card, he never received any written policies, directives, or notifications from Massport that indicated that medical marijuana cards would be rejected nor did he attend any Union meetings where Massport's position was communicated. Tr. at 164. He asserts that he did not talk to AM (then-Union president), the Union vice president, or the Union secretary-treasurer about the process to follow after receiving a medical marijuana card. Tr. at 170-171.

After failing his 2019 drug test, the Grievant served a 30 working-day suspension during which he was prohibited from working overtime or details. Tr. at 164-165. He testified that he is not someone who typically does a lot of overtime and details. Tr. at 165. Following his suspension, he was allowed to use vacation time until he was able to pass a drug test in order to return to work. Tr. at 165-166.

#### IV. THE PARTIES' POSITIONS

##### *THE UNION'S POSITION*

The Union withdraws its argument that Massport must grant the Grievant a reasonable accommodation for using medical marijuana on an off-duty basis. It argues, however, that Massport did not have just cause to suspend the Grievant for 30 days because prior to doing so it did not make clear that the Grievant would be subject to discipline as a result of testing positive for the off-duty use of medical marijuana pursuant to a physician-issued card.

In arguing that the 30-day suspension is unfair, the Union makes the following points: 1) Massport's annual hair testing policy permits the use of controlled substances pursuant to a physician's prescription; 2) the policy does not require Union members to report prescribed medications that do not affect their job performance prior to taking a drug test; and 3) Massport has never made clear that a medical marijuana card issued by a physician is different from a physician's prescription. Compounding the foregoing is the failure of Massport to discipline two to three other Union members who previously tested positive for marijuana as a result of using it off-duty under similar circumstances.

The Union disputes the Employer's assertion that AM, unlike the Grievant, submitted his medical marijuana cards during an interactive process. The Union characterizes the interactive process cited by the Employer as a "sham." According to the Union, several employees were allowed to use medical marijuana on an off-duty basis for months or years before their right to do so was revoked.

Even after the use of medical marijuana was prohibited, Massport did not communicate this decision to the Union's membership at large. The Grievant, who was out of work for most of 2018, was unaware of the decision. Based on the foregoing, the Union contends that the Grievant's 30-day suspension was a misguided vehicle for

providing notice to Union members that they are prohibited from using medical marijuana on an off-duty basis.

*THE EMPLOYER'S POSITION*

Based on the annual hair testing policy incorporated into the parties' CBA, the Employer takes the position that Massport's firefighters are prohibited from using medical marijuana both on and off duty, whether they possess a medical marijuana card or not. Under the policy, controlled substances, including marijuana, are prohibited except pursuant to a physician's "prescription." The Employer distinguishes between a physician's prescription for drugs dispensed by a pharmacist and a registration card for marijuana obtained from a licensed dispensary based on a written certification of need by a healthcare provider.

The Employer rejects the assertion that similarly-situated Union members have been treated differently than the Grievant. The Employer argues that the other members identified by the Union submitted marijuana registration cards to the Employer prior to their annual hair tests, sought reasonable accommodations in order to use marijuana off duty, and engaged in interactive processes with the Authority. The Grievant, by contrast, waited until after he tested positive for marijuana on his annual hair test in order to submit his medical marijuana card, did not seek an accommodation, and did not participate in an interactive process. Moreover, even if he had sought a timely accommodation and participated in an interactive process, his request to use medical marijuana would have been denied under Barbuto v. Advantage Sales and Marketing, LLC, 477 Mass. 456 (2017) and the Matter of Arbitration Between International

Brotherhood of Teamsters, Local 25 and Massachusetts Port Authority (James Litton, Arbitrator, 11/27/20).

## VI. FINDINGS AND CONCLUSIONS

Under the parties' controlled substances hair testing policy, Union members are prohibited from using six specified controlled substances (Marijuana, Cocaine, Amphetamines, Opiates, Opioids, and Phencyclidine) except pursuant to a physician's prescription and with proper notification to the Employer. The Employer argues that a medical marijuana card is not the same as a physician's prescription for a controlled substance and, hence, the Grievant, as a Massport firefighter, was not authorized to use medical marijuana. In support of its argument, Chief ██████ notes that six months prior to the failed drug test at issue, the Grievant's friend/Union president "AM" was informed that his own medical marijuana card would not be accepted as a physician's prescription and that his medical marijuana use was prohibited.

Chief ██████ assumption that the Grievant was aware of the prohibition on medical marijuana use is understandable in light of Massport's response to AM, the Union's grievance about Massport's refusal to recognize medical marijuana cards, and the "2-plus-2" grievance meeting about the refusal at which Union officials were present. The Chief's informal in-house conversations with Union leadership about the AM issue lend credence to his assumption.

Nonetheless, a mere assumption that the Grievant had actual knowledge of Massport's position regarding medical marijuana cards fails to satisfy the just cause standard. See Saxon Coffee Shop, Inc. v. Boston Licensing Board, 380 Mass. 919 (1980) (license revocation based on conducting business in an "improper manner" deemed to

provide insufficient notice where not clarified by: 1) published regulations, 2) judicial decisions, or 3) prior official warnings). The Grievant testified under oath that he was not aware that the Employer refused to equate a state-issued medical card for marijuana with a physician's prescription for controlled substances. His testimony is supported by the fact that AM did not disseminate the fact that he was prohibited from using medical marijuana to Local S-2 members and did not make an official Union announcement about Massport's prohibition against medical marijuana use.

The Employer focuses on the Grievant's failure to turn in his medical marijuana card prior to taking his September 2019 drug test, but the Grievant's action is consistent with his past practice of submitting a prescription for the controlled substance oxycodone after, not before, it was identified in a drug test. HR Deputy Director [REDACTED] concurred that it was not the practice for positive drug test results to be reported to Massport by AllOne in cases where a firefighter had a valid prescription for the drug.

To be sure, the situations of AM, G, and D are distinguishable from the Grievant's in that they turned in medical marijuana cards at work prior to being screened for controlled substances and were led to believe that Massport would accept their cards as a valid defense to a failed drug test. Massport points to this distinction in refuting the Union's claim. However, the Grievant credibly asserted that he thought they took proactive steps to turn in their cards just to see if Massport would accept them. After it was established that Massport would accept their cards, the Grievant did not believe that he, too, needed to submit his medical marijuana card prior to taking a drug test.

Another distinction cited by the Employer is the claim that Firefighter AM participated in an interactive process prior to failing his drug screen whereas the Grievant

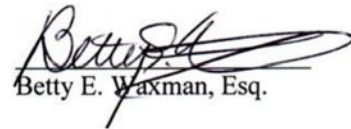
did not. This is not a meaningful difference, however, because AM was not aware that he was engaging in such a process. The so-called interactive process was simply a request by HR that Firefighter AM provide more information. There was no dialogue about AM's request that he be permitted to use medical marijuana off-duty pursuant to a doctor's suggestion. AM testified convincingly that he did not believe an interactive process took place because there was no "give and take."

It also bears noting that the Grievant was out of work for most of 2018 with an injury and seldom saw AM during that period of time. The Grievant claims that he did not talk to AM, to the Union's vice president, or to its secretary-treasurer about how or when to report his possession of a medical marijuana card. I credit the Grievant's assertion that it was not until after the Grievant failed his September 2019 drug test that he learned that Massport had refused to treat AM's medical marijuana card as a valid excuse for a failed drug screen.

Finally -- and most significantly -- it is undisputed that prior to obtaining a medical marijuana card, the Grievant never received any policies, directives, or notifications from Massport that medical marijuana cards would be rejected rather than accepted as a doctor's "prescription." Notwithstanding its prior acceptance of medical marijuana cards from two to three other firefighters, Massport issued no clarifying communication to the workforce at large when it decided to reject the cards as a valid excuse for a failed drug test. The Union's grievance about the rejection of medical marijuana cards and the 2-plus-2 meeting which followed alerted Union officials to Massport's position on the matter, but there is no evidence that Massport communicated its position to all members of the Massport fire force.



Based on the foregoing circumstances, the Grievant cannot be charged with actual knowledge that the Employer would refuse to accept his medical marijuana card as a valid defense to a failed drug test. In the absence of issuing a clear notice that the use of medical marijuana was prohibited, the Employer did not have just cause to impose a 30-day suspension on the Grievant when it had refrained from doing so in one or more instances of other firefighters using the same controlled substance. See Elkouri & Elkouri, *How Arbitration Works*, 5<sup>th</sup> Ed. at p. 934 (recognizing that an employer can turn to strict enforcement but first needs to give clear notice of the intent to do so). Accordingly, the grievance is allowed and the Employer's imposition of a 30 working-day suspension on the Grievant is reversed.



Betty E. Waxman, Esq.

Date: September 13, 2021