



MONTANA ARBITRATION & LABOR RELATIONS CONFERENCE

September 30, 2025

Nate McConnell, “What Doesn’t Fly With Your Supply”

ACTUAL SITUATION...

Meet “The Dude”

- Employed at Weed County’s Public Health Dept.
- Receives federal funding
- Member of Local 420



Mr. Lebowski goes to work one day...

- Shows up on time
- Has a group meeting with team including supervisors
- Has a one-on-one meeting with supervisor
- At work for two hours

Gets called into an office...



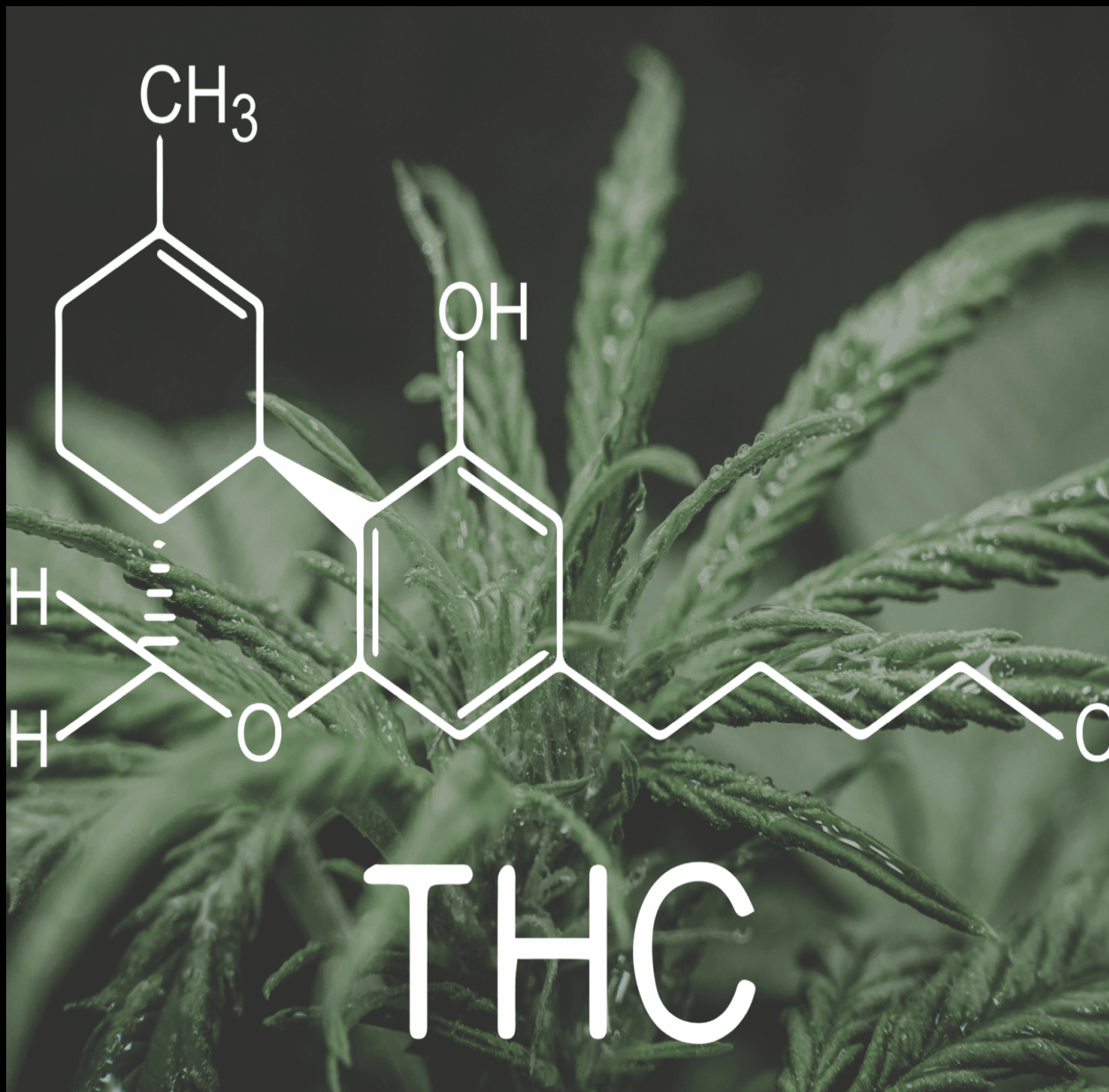


THE MEETING

“You have been randomly selected to undergo a drug test.”

Random Test: No suspicion that the Dude was under the influence

The County told him to drive himself to the testing facility, which was over a mile from work.



A NOTE ON METABOLITES

Active vs. Inactive

Urinalysis tests for inactive metabolites

Testing typically establishes *that* the donor ingested THC, not *when* ingestion occurred, or even whether the donor was under the influence

Fat-soluble – the metabolite from MJ takes longer for the body to process

Alcohol is water-soluble

The Dude tests positive.



TEST RESULTS

The Dude had marijuana in his system, but does that mean he was stoned when he took the test?

Marijuana testing is anything but reliable to show impairment. “Unlike alcohol, there is currently no reliable test to determine if an individual is currently impaired by THC ... there is no consensus on the level of THC at which an individual is ‘impaired.’” Huggett & Greubel, *Heightened Scrutiny for Medical Marijuana at Work*, 45 ABA J. Lab. & Emp. L., Spring 2017.

“The Company’s substance abuse policy prohibits employees from coming to work with alcohol in their systems, but the Company would never even think of discharging them for drinking while off duty....” *King Soopers Inc.*, 131 LA 459, 471 (Sass, 2012).

Beware The Drug Test



Two managers observe employee who smelled of marijuana and had glassy, bloodshot eyes. Managers told employee to submit to drug test. Employee refused, demanding union representation. Managers terminate.

Result: Employer violated *Weingarten* by continuing interview after employee requested union rep. Legitimate legitimate need to conduct drug test, but it cannot come at the expense of the reasonable time it takes to secure a union rep. *Manhattan Beer Distributors, LLC*, 362 NLRB 1731 (2015).

Where a drug test is part of a broader investigation, *Weingarten* attaches to an “interview” whose sole purpose is to conduct a drug test. *Safeway Stores*, 303 NLRB 989 (1991).

WHAT NOW?

Workplace Behavior:

- The Dude was punctual
- Met with supervisors and colleagues
- Drove himself to testing facility

Positive Test Result:

- “Cutoff” is 50 ng/ml
- The Dude tested at 420 ng/ml



WEED COUNTY POLICY



“It is the policy of Weed County to adopt a program to test for controlled substances and alcohol in order to ensure a worker’s fitness for duty and to maintain a safe working atmosphere.”

“Prohibited substances within this policy include any illegal drug or substance identified as a Schedule I through V of the Controlled Substances Act (21 U.S.C. 812).”

“No employee will be allowed to drive themselves if they are believed to be under the influence of alcohol or have a measurable quantity of an illegal drug in their system.”

“An employee who has a confirmed positive drug test, a confirmed alcohol concentration greater than 0.04, or otherwise violates the policy shall be terminated.”

I know my rights, man.



CBA says,

Members of Local 420 are employees of Weed County and subject to the policies and procedures adopted by the Board.

Management rights include the right to: Test for the use of controlled substances in accordance with applicable law.

No permanent bargaining unit member shall be disciplined without just cause.

The Health Officer may discharge any staff member with permanent status for just cause. At least one reprimand letter shall be given any staff member subject to dismissal

How about you, Law Man?



§ 16-12-106, MCA: The following acts are lawful and may not be an offense under state law or the laws of any local government within the state ... :

Possessing, purchasing, obtaining, using, ingesting, inhaling, or transporting 1 ounce or less of usable marijuana...”

§ 16-12-108 (4), MCA: Nothing in this chapter may be construed to:

(d) prohibit an employer from including in any contract a provision prohibiting the use of marijuana for a debilitating medical condition.

21 USC § 812 – Schedule I: (c)(10):
Marihuana

Were you listening to the Dude's story?



Goes to work on time;
Meets with supervisors and
colleagues for two hours;
Ordered to take random drug test;
Drives himself to the testing
facility;
Test results show over 10 times
the cutoff level.

The Process

Discipline

- County receives test results, places The Dude on paid admin leave
- Informal hearing with The Dude and his Union Rep, Walter
- Admits using marijuana while off duty
- Suspended that same day

Grievance

- Local 420 grieves discipline and random drug testing policy
- Process followed without resolution
- Arbitration



The Hearing

Two Issues:

1. Whether the County had just cause to discipline the Grievant; if not, what is the remedy?
2. Whether the Employer's policy of subjecting employees to random drug testing for marijuana violates the Agreement, and, if so, what is the remedy?



Here we go again...



Two years ago, discipline for marijuana went to hearing

County argued that the policy of random drug testing and zero tolerance for marijuana were justified, despite marijuana's legalization in the state.

Union argued that the County violated the progressive discipline policy and made no arguments regarding the nexus between off-duty behavior and on-duty performance.

Arbitrator reduced discharge to suspension based on progressive discipline policy.

Arbitrator's Decision on Just Cause

County argued that it seeks to enforce its policy of a “drug-free workplace” and that Health Department employees must abide by the federal prohibition on using marijuana.

Union argued that just cause for discipline requires a nexus between off-duty behavior and on-duty performance.

Arbitrator found that there was no nexus and that the voter-backed legalization constituted a major change in circumstances, thus obviating the past practice of zero tolerance.



Other Interesting Conclusions

Management Rights Clause says County may “test for the use of controlled substances in accordance with applicable law.”

Contract’s Preamble says “it is mutually understood” that employees covered by the CBA are “subject to the policies and procedures adopted by the Board” and that “Policies not expressed herein are delineated in the Personnel Policies and Procedures of Weed County.”

Policy says any employee with a positive drug test shall be terminated.

Contract says cannot discipline without just cause and County must have at least one reprimand letter prior to termination.

Arbitrator: “I do not interpret this stated ‘mutual understanding’ to mean that in any case where a subject is not specifically covered by the terms of the Agreement, but is found in the policy manual or elsewhere, the Union or an affected employee agree to be bound to accept and cannot dispute the Employer’s treatment of the subject Such an approach could open up every provision in the policy to negotiation....”

What about Precedence?



Earlier marijuana case allowed the County to discipline a bargaining unit member who failed a drug test.

What makes this case different?

The question in that case, according to the Arbitrator here, was “whether the County could discharge the Employee without first giving them a reprimand letter.”

“The issue in this case is whether the County can show that it had just cause to discipline the Grievant at all.”

Arbitrator's Decision on Mandatory Drug Testing

Parties bargained for the language in the contract:

The County may “test for the use of controlled substances and alcohol in accordance with applicable law.” Thus, “random testing for the use of marijuana is allowed under Montana law, provided it is carried out as provided in the law.”



“The current limitation on the usefulness of the results of random testing for marijuana does not provide a basis for concluding that the County does not have the right to test.”

Test results “can help provide the County with information about the prevalence of marijuana use among its employees; help clear or incriminate an employee” for violating workplace rules; “help an employee who wishes to or needs to quit; or provide corroboration or repudiation of the validity of other test results.”

That's just, like,
your opinion, man.

“ ‘Zero tolerance’ policies conflict with the principles of just cause set forth in CBAs. Just cause still applies even if management has promulgated a zero tolerance rule.” *MV Transportation, Inc. Decatur Division*, 2025 LA 30 (Fowler, 2025).

Nurse at Veterans Affairs Medical Center's ICU failed drug test. No evidence of intoxication in the workplace, but federal facility and nature of job permits the regulation of off-duty behavior. *Dept. of Veterans Affairs*, 2024 LA 307 (Wilson, 2024)





Adios, pardner.