

In the Matter of Arbitration Between

Delta Air Lines,
Employer
and
Air Line Pilots Association,
Union

Appearances:

For the Employer:

Tom Kassin, esq. Ford & Harrison
Sarah Aufdenkampe, esq. Ford & Harrison
Also for the Employer:
Chris Puckett, Delta
Captain Patrick Burns, Delta
Dr. Howard Taylor, Addiction Labs of
America

For the Union:

Lee Seham, esq.
Seham, Seham, Meltz, Petersen LLP
Also for the Union:
Rachel Samuda, esq. ALPA Sr. Labor
Relations Counsel
Michael Danford, Grievant
Emilio Marcos, Delta MEC Contract Admin.
Committee Chair

Location of Hearing: Webex Video Hearing
Administered by Storycloud

Date of Hearing: October 28,29, 30, 2020
December 1, 2, 8, 9, 2020

Arbitrator's Opinion and Award

Case: Discharge of Michael Danford,
Case # 18-14

Before the System Board of Adjustment:

Mark L. Burdette, Neutral Chair
Mike Doyle, Delta Representative
Brian Pickett, Delta Representative
Steve Mayer, ALPA Representative
Kevin Morris, ALPA Representative

JURISDICTION

The hearing in this matter was held on October 28, 29, and 30, 2020 and December 1, 2, 8, and 9, 2020, under the provisions of Sections 18 & 19 of the Delta ALPA Collective Bargaining Agreement. The Arbitrator was selected to serve pursuant to the parties collective bargaining agreement. Both parties were afforded a full and fair opportunity to present their cases. Witnesses were sworn and their testimony was subject to cross examination. Witnesses were sequestered. Hearing days were reported by Damien Stoneberger and Candice Green, of Storycloud. The parties submitted Post-hearing Briefs which were received, by the Arbitrator, from the Union and the Company on February 11-12, 2021. The Briefs were timely by agreement of the parties. The record closed on February 12, 2021, when the matter was taken under advisement.

Issue

The issue before the System Board: “Did the Company have just cause to terminate First Officer Danford for failing to maintain abstinence in violation of his Contract A terms? If not, what is the appropriate remedy?”

Background

First Officer Michael Danford had been employed by Delta for approximately 20 years, when, on January 5, 2017 Mr. Danford rear ended another vehicle at a stop sign in the township of Black Wolf, Wisconsin, while off duty. The police responded to the scene of the accident and believed that Danford was impaired. The Officer conducted a field sobriety test, and then transported Danford to a hospital for an evidentiary chemical test of his blood. At the time of the blood draw, approximately an hour and a half following the accident, Danford’s blood alcohol level was measured .229. Therefore, he was charged with an OWI (the Wisconsin terminology for a DWI). No notice was provided to Delta of this incident, and Danford continued to fly. However, when his First Class Medical came up for renewal in June 2017, it was not renewed due to the OWI in Wisconsin. He called in sick for his July flights, until July 31, when he underwent an assessment required by the FAA. Following the assessment, he entered the Talbot Recovery Center on August 1, 2017. On September 13, he signed his Contract A as part of Delta’s recovery policy and program for pilots, completed his treatment at Talbot on September 14, 2017 and was admitted to the program on September 17, 2017.

Delta, as many other airlines, has a pilot assistance and recovery program for pilots who have tested positive for alcohol off duty, or who have voluntarily sought treatment, which is approved by the FAA and jointly administered by Delta and ALPA through the Delta Pilot Assistance Committee. This program is commonly referred to as the “DPAC Program” or Delta/ALPA’s program”. Pilots who have an off duty issue or who voluntarily join the program are placed on what is called Contract A. Contract A requires pilots to maintain complete abstinence, attend meetings, participate in an aftercare program, and they’re subject to

random unannounced alcohol testing. All of this is agreed to in their Contract A. Pilots who enter the DPAC program through on-duty positive test, but who do not operate an aircraft with alcohol in their system are placed on a Contract B. Contract B incorporates Contract A, but it also includes a last chance provision. A pilot who relapses while on Contract A is offered the opportunity to once again attend an inpatient treatment facility, but if that offer is declined, is terminated.

Pilots on Contract A are subject to 14 unannounced random tests per year. Delta uses urine test to measure ethyl glucuronide (EtG) and ethyl sulfate (EtS). Delta also uses phosphatidyl ethanol or PEth, which is measured using a whole blood or dried blood spot collection method.¹

Over the next several months, Danford had several random tests. On November 28th, 2017 he tested negative on a random alcohol test. He again tested negative on December 14th, 2017, January 4th, 2018, and February 12th, 2018 on random tests. He received his FAA special issuance Medical on February 26, 2018, and started the process to come back to flying at Delta. He had another random test on March the 9th, 2018 and tested negative. He was negative March 27, 2018 on another random test. On April 26, 2018 he tested negative in another random test. On May 1st, he was notified of a random test (one of the 14 scheduled annually under the DPAC program) through Choice Laboratories. On that random test, he tested positive for EtG, although his EtS was negative. In accordance with the protocol of the substance abuse policy and DPAC program at Delta, he was directed to take a PEth test. When the initial urine screen indicates a split EtG/EtS a followup Peth is administered. The dried blood spot collection process was used on May 9th, 2018. The initial test result of Danford's confirmatory PEth test was 69 ng/ml. The cut-off established for Delta/ALPA's program is 20 nanograms per milliliter. When a PEth test indicates a positive, a confirmatory PEth test is done. Danford's confirmatory PEth test was at a concentration of 98 nanograms per milliliter. USDTL has a standard of 30% deviation to report a valid test, which was marginally satisfied by these results.

In this case, due to the split EtG/EtS test, the followup Peth test confirmed a failure to maintain complete abstinence. At that point, he was in violation of his Contract A. Danford was then given the opportunity to obtain re-treatment at a facility mutually agreed upon by Delta and ALPA. Claiming he did not drink alcohol, he refused re-treatment. Danford's HIMS AME, Dr. Harper Jr. withdrew as his medical sponsor on May 18th, 2018 and the FAA revoked his special issuance Medical the same day. Delta issued what is referred to as a Notice of Intent to Terminate or NOI on July 12th, 2018. A grievance was filed on his behalf by ALPA on July 20th 2018. There was an initial hearing on July 30th, 2018 with Captain Graham and Captain Burns. Following the initial hearing, Danford's grievance was denied and Delta issued a letter of termination on August 6th, 2018. Danford took at least 3 tests on his own to support his contention that he had remained abstinent as required by his Contract A. These negative test

¹ US Drug Testing Laboratory (USDTL) is the only laboratory in the United States that is commercially using dried blood spot as the collection procedure in order to test for PEth. This process is a laboratory developed test which had not been approved by the DOT or FAA, until August 2020, when the FAA advised AMEs to utilize PEth testing for pilots subject to monitoring for substance abuse issues. While there is a detailed procedure for collection, USDTL does not certify collectors and has no confirmation that the specified procedures were followed.

results that were provided to Captain Graham were discounted as they were not administered under the Delta/ALPA program protocol.

Relevant Provisions of the Contract

SECTION 14

SICK LEAVE

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I. Drug/Alcohol Rehabilitation Leave

A pilot is covered by the provisions of the Flight Operations Policy and Procedures (FOPP) Manual 00-30-50, as it may be amended in consultation with the Delta Pilot Assistance Committee.

SECTION 19

SYSTEM BOARD OF ADJUSTMENT

A. Definitions

1. "Board" means the Delta Pilots' System Board of Adjustment.
2. "Five Member Board" means the System Board of Adjustment when comprised of two members appointed by the Company, two members appointed by the Association, and a neutral member selected by the parties, to decide a specific dispute.
3. "Four Member Board" means the System Board of Adjustment when comprised of two members appointed by the Company and two members appointed by the Association, to decide a specific dispute.

B. Establishment

The Board has been established in compliance with Section 204, Title II of the Railway Labor Act, as amended, for the purpose of adjusting and deciding properly submitted disputes that may arise under the terms of the PWA.²

C. Composition

1. The parties will each appoint up to eight persons to serve as Board members. A Board member will serve until a successor has been appointed. Each party will promptly notify the other in writing of any change of members.
2. Each party will endeavor to appoint the same Board members to hear all disputes in a particular monthly session.
3. A Company appointed Board member may not be appointed to hear a dispute if he:
 - a. served as the hearing officer on the grievance.
 - b. initiated the action that is a subject of the grievance.
4. Each Four Member Board will have a Chairman and a Vice Chairman. Chairmanship of the Board will alternate between the Association and the Company on a yearly basis. When an Association member is Chairman, a Company member will be Vice Chairman, and vice versa.
5. Each Five Member Board will have a Chairman, who will be its neutral member.
6. In discipline and discharge cases, at least one member of the Board from each party will be a pilot.

D. Jurisdiction

1. The Board will have jurisdiction over disputes growing out of grievances or out of the interpretation or application of any of the terms of the PWA.

² PWA is the abbreviation used for the Pilot Working Agreement – the collective bargaining agreement between Delta and ALPA covering pilots.

Exception one: The Board's jurisdiction will not extend to changes in rates of pay, work rules or working conditions covered by the PWA.

Exception two: The Board's jurisdiction will not extend to disputes arising out of

Section 1 L. 1.

2. The Board will consider any dispute properly submitted to it by the President of the Association or by the Senior Vice President - Flight Operations provided that the dispute has not previously been settled.
3. The Board will not consider any dispute submitted by the President of the Association unless it has been handled under **Section 18**.
4. If an unresolved dispute is not heard by the Board within 24 months of the earliest date the dispute may be submitted to it, the Company's prior decision will be final and binding.

Exception one: The postponement of a scheduled hearing due to the unavailability of the neutral member or Company representatives will toll the 24-month limit.³

Exception two: For any dispute pending as of December 1, 2016, the 24-month limit will begin to run on December 1, 2016.

5. Upon a finding by the Board in the dispute before it, that the Company repeatedly or intentionally violated a previous decision of the Board which held that the Company breached its contractual obligation(s) on the same or a substantially similar issue(s), the Board may order the Company to pay the full cost of the neutral member's and court reporter's fees and expenses and the expenses (including flight pay loss, hotel, per diem) of the Association Board Members, grievant(s) and witnesses in the dispute before it.
6. Upon a finding by the Board in the dispute before it, that the Association has submitted a frivolous grievance, the Board may order the Association to pay the full cost of the neutral member's and court reporter's fees and expenses and the expenses (including time loss, hotel, per diem) of the Company Board Members and witnesses in the dispute before it.

E. Submission of Disputes

1. Disputes will be referred to the Board by the filing of a submission with the Company's Manager – Labor Relations and the Association's MEC Contract Administration Committee Chairman.
2. The submission will include:
 - a. the question(s) at issue,
 - b. a statement of facts,
 - c. the position of the pilot(s) and the relief sought, and
 - d. the position of the Company.

F. Deadlock – Four Member Board

1. A deadlock of a Four Member Board will exist in any dispute if:
 - a. two members of the Board declare a deadlock, or
 - b. the Board does not reach a decision within 60 days (30 days in a discipline/discharge dispute) of the conclusion of the hearing.
2. The Chairman will notify the other Board Members, the Association's MEC Contract Administration Committee Chairman and the Company's Manager – Labor Relations, in writing, of the fact that a deadlock exists.

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G. Scheduling and Procedures

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³ In this case, the 24 month time limit was waived by mutual agreement due to the Covid 19 pandemic and restrictions placed on in-person hearings.

2. Scheduling – Five Member Board

- a. The parties will establish and maintain a standing list of 11 neutral members to serve on a Five Member Board in the event of a deadlock of a Four Member Board.
- b. The parties will select a neutral member from the standing list, utilizing the alternate strike-off method. The parties will alternately strike first in successive disputes.
- c. Following a deadlock or the filing of a submission directly to the Five Member Board under **Section 19 G. 1. B.**, the party desiring to schedule the dispute for hearing will make a written request to the other party that a neutral member be selected. Within 30 days of receipt of the request, the parties will select a neutral member and within 60 days of receipt of the request the parties will schedule the hearing date(s). The hearing will be scheduled as soon as possible, depending upon the neutral member's availability.
- d. If the neutral member is not available within six months of the deadlock or the filing of a submission to the Board under **Section 19 G. 1. B.**, the parties will select another neutral member.

3. Procedures

- a. A pilot may be represented at a Board hearing by any person(s) he selects. The Company may be represented by any person(s) it selects. Evidence may be presented either orally, in writing or both.
- b. On or before 1200E on the business day before a Five Member Board hearing, Company and Association attorneys will:
 - (1) exchange documents expected to be introduced into evidence, and
 - (2) inform each other of expected motions.
- c. The Board will summon any witness employed by the Company or the Association at the request of a majority of the Board members appointed to decide the dispute or an Association or Company attorney. The number of witnesses summoned at any one time will not be greater than the number that can be spared from the operation of the Company or the Association.
- d. Decisions of the Board will be made by majority vote, and will be final and binding upon the parties.
- e. The Chairman will have a vote in all actions taken and will preside at all meetings and hearings of the Board.
- f. The parties will conduct at least one and up to two Five Member Board hearings in a month that have been scheduled under **Section 19 G. 2.**
- g. Except as provided in **Section 19 D. 4. And 5.**, the cost of the reasonable expenses and compensation of the neutral member will be shared equally by the Association and the Company.

H. General

1. Nothing herein will be construed to limit, restrict or abridge the rights or privileges accorded either to the pilots or to the Company, or to their duly accredited representatives under the provisions of the Railway Labor Act, as amended.
2. The Company and the Association will each maintain a complete record of all matters submitted to the Board and of all findings and decisions.
3. Except as provided in Section 19 D. 4. And 5., each party will assume the costs of the compensation and expenses of its appointed Board members and summoned witnesses.
Board members and grievants will be provided positive space passes to attend meetings and hearings of the Board.
4. Expenses of the Board that are jointly authorized by the Chairman and the Vice Chairman will be shared equally by the Association and the Company.
5. Board members will be released from duty to attend hearings of the Board and meetings of the Board and, when jointly authorized by the Chairman and Vice Chairman, to perform other Board duties.

6. A Board member will be free to discharge his duty in an independent manner, without fear that his individual relations with the Company, the Association or their employees may be affected in any manner or by any action taken by him in good faith.
7. A witness will be free to testify without fear that his individual relations with the Company, the Association or their employees may be affected in any manner by his testimony in good faith.
8. The Board will have the authority for the administration and interpretation of Section 19.
9. The time limits specified in Section 19 may be extended by agreement between the parties. Written confirmation of such agreement must be received before the end of the business day following the day in which such agreement has been reached.

Other Relevant Documents

Flight Operations Policy and Procedures 00-30-50 Substance Abuse Policy (Relevant Provisions)

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II. Mission Statement

Delta's preeminent goal is to ensure a safe operation. Delta's Substance Abuse Policy recognizes the disease aspect of addiction and provides incentives for recognition and recovery of employees with this disease. Delta's Flight Operations Leadership Team is committed to supporting an environment conducive to identification, rehabilitation, and recovery.

III. Scope

This policy applies to all pilots and provides guidance for the identification and treatment of alcohol/drug dependent pilots as defined within this policy.

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IV. Terms and Definitions

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C. "Alcohol Positive" refers to a Blood Alcohol Content ("BAC") of .020 or above, taking into account any margin of error for the testing device employed.

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E. "Contract A" refers to the Delta Pilot Alcohol and Drug Recovery Program Aftercare Contract, as attached.

...

I. "DPAC" refers to the Delta Pilots Assistance Committee, which is constituted by the Air Line Pilots Association to deal with substance abuse.

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K. "DPAC Steering Committee" refers to the body consisting of the DPAC Committee Chairman, the Managing Director of Flying Operations, the Delta Alcoholism Consultant, the National HIMS Program Manager, and a Special AME (if desired), and is empowered to coordinate all aspects of substance abuse policy.

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V. Authority/Responsibility

The Senior Vice President of Flight Operations is responsible for the development and maintenance of this Substance Abuse Policy with the cooperation and involvement of the Air Line Pilots Association and the Delta Pilot Assistance Committee (DPAC). The SVP of Flight Ops acknowledges the cooperative nature of this process, and changes to this policy will be mutually agreed upon and coordinated with the DPAC steering committee. The DPAC maintains responsibility and will manage content accuracy.

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VI. Procedures

A. Identification.

Identification of a pilot requiring a substance abuse evaluation may occur through several means.

A. Self Referral: A pilot may self-refer due to personal circumstances such as a driving under the influence offense ("DUI"), marital relationship problems, after discussions with members of DPAC, or for numerous other reasons. Any such self-referral will establish the pilot as a volunteer for the purposes of the substance abuse program. Self-referral is not an option if you have been directed to undergo a substance abuse evaluation by PWA Section 15 action or DOT regulations.

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E. Volunteer Pilots. Pilots who volunteer for evaluation and subsequent treatment will not be suspended or terminated. Such pilots, upon successful completion of treatment and medical re-certification, will be offered an opportunity to return to work under the provisions of the attached Contract A. If the pilot has been absent for treatment for less than six months, he will normally return to his previous category. However, the Company and the Association may approve a return to a different category if they mutually agree it is in the best interests of the pilot's recovery and so long as the pilot's seniority is sufficient to hold such category.

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G. Relapsed Pilots, A pilot who uses alcohol or drugs that have not been expressly approved by his attending physician, following receipt of his special issuance medical certificate, will be considered as having relapsed.

1. ... A volunteer pilot with a primary diagnosis of alcohol abuse or dependence who relapses will not be suspended or terminated provided that relapse is limited to one occurrence.

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K. Contract Compliance. Compliance with the provisions of Contract A or B, as applicable, is mandatory. Non-compliance may result in disciplinary action. If such non-compliance is ongoing, it may constitute grounds for termination.

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VII. Attachments

Delta Pilot Alcohol and Drug Recovery Program Aftercare Contract (Contract A)

This Aftercare Contract outlines my individual aftercare program for continuing recovery. I understand that it is offered by the FAA, Delta, and ALP A as a special program to allow me to return to flying under monitoring. I acknowledge that I am solely responsible for the execution of this contract and for making use of any services recommended. I understand that I will need to involve others in my recovery to ensure the effectiveness of my aftercare program, and I agree to do so. I hereby give permission for the Aftercare Team, (made up of my Medical Sponsor, Aftercare Counselor, Chief Pilot, Delta Alcoholism Consultant, and Peer Monitor) to contact others herein named for the purpose of furthering my recovery.

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1. I, _____, agree to the terms specified in the Aftercare Contract.

Periodically, the Contract will be reviewed and progress will be noted. I hereby grant the Aftercare Team the authority to modify the Aftercare Contract, as it deems necessary, based upon such reviews of my progress towards self monitoring. Near the end of the minimum FAA monitoring period, my Aftercare Team will review my progress in order to determine whether or not to recommend that my monitoring under this contract be concluded.

2. I agree to completely abstain from any mood altering drugs (alcohol, sedatives, stimulants, narcotics, over-the-counter drugs, etc.) on or off duty, except on approval of Dr. _____ * at _____ (phone). I specifically acknowledge that if I partake of any alcohol or drugs (other than those prescribed by my physician) during or after the period of my

monitoring, on or off duty, my Airman's Medical Certificate will be immediately invalidated. Under such circumstances, I will not act as the pilot of any Delta aircraft.

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13. I agree to be available for random blood alcohol level tests, ETG tests, PeTH tests, and/or drug screens at any time upon notice by my Medical Sponsor* or Chief Pilot*. Upon my return to flight status, I will make available a copy of my monthly schedule, as far in advance as possible, to my Medical Sponsor* or Chief Pilot* in order to allow him to schedule me for random blood alcohol testing. If it is the decision of my Aftercare Team that I should acquire and carry a beeper to notify me of required testing I will do so. I agree to be subject to random alcohol tests and/or drug screens as directed by my Chief Pilot* for the period of my FAA monitoring plus an additional 36 months.

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18. I understand that strict compliance with all these provisions is mandatory, and noncompliance with any responsibility on my part may result in disciplinary action, up to and including termination by Delta. I will comply with all requirements of my FAA special issuance. Any violation of any drug or alcohol restriction associated with my Airman's Medical Certificate will constitute a violation of this agreement.

Position of the Employer⁴

Following his off duty accident in January 2017, Danford's FAA medical was not renewed when it came due in July, 2017. He was then directed by his Aero Medical Examiner (AME) to the Talbot Recovery Center, where he was assessed for alcohol dependency and admitted to their treatment program.

Delta has a long standing program for pilots who are chemically dependent – the Delta Pilots Assistance Committee (DPAC). The Company, the Association and the FAA cooperatively administer and participate in the negotiated program, which allows pilots who are substance dependent to be identified, treated, supported, and monitored. Tr. 437. One goal of the DPAC Committee is to provide an environment in which pilots who are struggling with substance abuse issues or addiction can receive support and treatment that will allow them to save their jobs. Tr. 222-23. That goal is served by managing the risk that pilots who are in the DPAC Program may relapse. Tr. 236-37. “[I]t’s important for the program itself, both the pilot participants and ... the [Association] and for everyone to manage their recovery in such a way that risk is minimized and that the program is available for pilots that receive that diagnosis in the future.” Tr. 237. (Testimony by Captain Storbeck, one of the pilot leaders of the program from 1999 to 2012.) DPAC’s goal for each pilot who participates in the DPAC Program is that the pilot will learn to accept that he/she has a chronic illness and the best way to manage that illness is to embrace recovery and establish long-term sobriety. Tr. 223.

On September 13, 2017, the day before he completed initial treatment for alcohol dependency, Grievant signed a Delta Pilot Alcohol and Drug Recovery Program Aftercare Contract (“Contract A”). In his Contract A, Grievant agreed to completely abstain from all mood-altering drugs, including alcohol. He also agreed to random alcohol testing using EtG, EtS, and PEth testing,

⁴ This is a summary of the relevant arguments made by the Company. All evidence and arguments presented, while not specifically mentioned herein were also considered in the rendering of this Opinion and Award.

while acknowledging that strict compliance with the terms of his Contract A was mandatory and that noncompliance on his part could result in disciplinary action, up to and including termination.

With respect to the types of tests that would be used in the DPAC Program to monitor alcohol abstinence, the goal was to use tests that would allow an early detection of a relapse and also be able to confirm whether a relapse had actually occurred. Tr. 249, 261-62. Both EtG and PEth tests met the DPAC Program's goals. Tr. 249. Ethyl Glucuronide ("EtG") is a metabolite that is left behind as the body processes ethyl alcohol. CX 18; CX 32; UX 52. It is formed in the liver by combining alcohol with the liver's natural glucuronic acid. CX 18; CX 32. Depending on how much alcohol was consumed, EtG tests can provide a look back period of up to five days. UX 52; UX 78. Ethyl Sulfate ("EtS") is another metabolite formed as the body metabolizes ethyl alcohol and is tested for when EtG is present. CX 18; UX 78. Delta and ALPA were aware that drinking an alcoholic beverage would definitely produce EtG, but research showed that at lower levels it could sometimes come about through incidental exposure (e.g., hand sanitizer). Tr. 266. Additionally, so called "split tests" -tests that showed EtG but not EtS (or vice versa) - could show alcohol consumption but may also result from incidental exposure. Tr. 445, 465. For that reason, the DPAC program instituted "a layered approach" to testing advocated by many experts and began using Phosphatidylethanol ("PEth") tests to confirm whether a positive EtG test was in fact from alcohol consumption. Tr. 246, 249, 265-66; CX 18; CX 19. PEth is a series of abnormal phospholipids that are formed only in the presence of ethanol, making PEth a long-term direct ethanol biomarker. Tr. 32, 290-91, 897; CX 13; CX 28 at pp. 1635, 1638; UX 82. After ingestion of ethanol, PEth attaches to fatty acids present in an individual's body. Tr. 33-34; CX 13. When PEth forms, it is incorporated into the phospholipid membrane of red blood cells. Tr. 34-35; CX 13; CX 28 at p. 1635. Scientific studies have found positive PEth tests over 20 ng/ml to be a reliable indicators of alcohol consumption.

When making his recommendation to the ALPA Master Executive Committee ("MEC") to include both EtG and PEth testing in the DPAC Program, Captain Storbeck informed the MEC:

"In general terms, I believe that robust testing programs, which ... in the case of Delta Air Lines and the [DPAC Program] we construed to include both EtG and PEth testing ... and off-duty testing as well as on-duty testing was an important component in terms of supporting the pilot's sobriety. And so what that meant was that it was in the interest of the individual pilot's health, long-term health. It was ... important in terms of helping this Company identify a relapse pilot who would represent ... an inappropriate risk to the Company, and it would also help [engender] support overall for the Program if there was this, by having a ... robust effective program, the likelihood would be that both that the Program would continue to the future and be available for other pilots."

Delta and ALPA deliberately agreed to use a low cutoff for EtG testing (100 ng/ml) to ensure that all pilots who may have relapsed would be identified. Tr. 266-67. Due to the sensitivity of

the EtG test, in situations in which a positive EtG test did not clearly demonstrate a relapse, or where a split test occurred, the Company and ALPA agreed a PEth test would be used to verify whether a pilot who tested positive on an EtG test had in fact been drinking alcohol. Tr. 266, 466-67.

The DPAC Program recognizes that relapse is part of the disease of alcoholism. Tr. 240, 442; CX 4. The Substance Abuse Policy defines a relapse as, "Any prohibited use of alcohol or drugs subsequent to receiving a Special Issuance Medical Certificate related to a diagnosis of alcohol or drug dependence." CX 4 at §IV.T. If a pilot in the DPAC Program relapses, the pilot is removed from flight status, and offered retreatment. Tr. 241, 243, 257, 945. A pilot must undergo retreatment to be returned to his/her pilot position. Tr. 443, 945. This long standing and unbroken practice has been in place since Captain Storbeck first became involved in the Program over 30 years ago. Tr. 257. Retreatment after a relapse is critical because, according to Captain Storbeck, it is "important to reestablish sobriety and ... promote a continued commitment to ... that sobriety. And that was best accomplished by sending a pilot to retreatment." Tr. 243-44.

Once he was discharged from Talbot Rehabilitation Center (TRC) in November, as set forth in his Contract A, Grievant was given periodic random alcohol tests. Tr. 725-26; CX 1. On April 26, 2018 he tested negative on a urine test, and that test was followed shortly by another on May 1. Tr. 725-26; CX 1. On May 1, 2018, Grievant went to Any Lab Test Now in Marietta, Georgia to submit a urine sample for a 50.2K-3-EtG1 test, which screens for a panel of 10 drugs of abuse and EtG. Tr. 317-18, 669; CX 9 at p. 6. The collector verified Grievant's identity and collected the urine sample. Tr. 671-72; CX 10 at p. 6. The collector signed certifying that the urine sample was "collected, labeled, sealed, and released to the Delivery Service noted in accordance with applicable requirements." CX 10 at p. 6. Grievant also signed certifying, "I certify that I provided my specimen to the collector; that I have not adulterated it in any manner; each specimen bottle used was sealed with a tamper-evident seal in my presence; and the information and numbers provided on this form and on the label affixed to each specimen bottle is correct." CX 10 at p. 6.

Grievant's urine sample was sent to Quest Diagnostics for analysis. Tr. 316. The Custody and Control Form was signed, verifying that the bottle seal was intact on the specimen when it was received by Quest on May 3, 2018. Tr. 318-19; CX 9 at p. 6. With regard to the EtG test, the aliquot of Grievant's urine sample was analyzed by liquid chromatography/tandem mass spectrometry. Tr. 342. The result of the initial EtG test was 126 ng/ml, over the 100 ng/ml cutoff. Tr. 320; CX 9 at p. 63. The analyst who reviewed the testing data, however, scheduled the specimen for reanalysis due to the chromatograms not being symmetrical. Tr. 321. Barry Sample, Ph.D., the Senior Director of Science and Technology at Quest, testified that it is not at all unusual to have other substances in a urine sample that may cause the chromatography to not be as symmetrical as desired. Tr. 321. The issue is easily resolved by diluting the sample and performing a reanalysis. Tr. 321. After reanalysis, Grievant's sample tested positive for EtG at 116 ng/ml. Tr. 322; CX 9 at p. 76. At this point, Quest considered the sample to be presumptively positive for EtG. Tr. 322.

After a presumptive positive, Quest performs a confirmation test on a new aliquot taken from the original sample. Tr. 322. During the confirmation test, Quest tests for EtG and EtS. Tr. 322-23. On the confirmation test, Grievant's specimen tested positive for EtG at a concentration of 117 ng/ml. Tr. 323; CX 9 at p. 107. The sample tested negative for EtS. Tr. 323.

On May 9, 2018, Quest reported Grievant's positive EtG result of 117 ng/ml to the Company. Tr. 324; CX 9 at p. 111.

On May 9, 2018, Captain Harry Miller, then the International Chief Pilot for Atlanta, was notified of Grievant's positive EtG test. Tr. 951. Upon receiving the results and understanding a relapse may have occurred, in the interest of safety, Captain Miller immediately removed Grievant from flying. Tr. 951. Because Grievant tested positive for EtG but negative for EtS (colloquially known as a "split sample"), the DPAC Program protocol required the Grievant to undergo a PEth test to confirm whether the positive EtG test was the result of consuming alcohol. Tr. 445-46, 465-66, 951. Captain Miller called Grievant to report the results and to inform Grievant, because the EtG was positive but the EtS was negative, he would need to take a PEth test. Tr. 951.

On the morning of May 9, 2018, Grievant went to Any Lab Test Now in Marietta, Georgia to submit a dried blood spot sample for PEth testing. Tr. 680; CX 10 at p. 5. The collector verified Grievant's identity and collected the dried blood spot sample. Tr. 680; CX 10 at p. 5. The collector signed the custody and control form certifying that the sample was collected, labeled, sealed, and released to the delivery service in accordance with applicable requirements. Tr. 160; CX 10 at p. 5. Grievant also signed certifying, "I certify that I provided my specimen to the collector; that I have not adulterated it in any manner; each specimen was sealed with a tamper-evident seal in my presence; and that the information and numbers provided on this form and on the label affixed to each specimen is correct." CX 10 at p. 5. On May 10, 2018, Grievant's dried blood spot specimen was received by USDTL for PEth testing. CX 10 at pp. 3, 5. Upon receipt, USDTL certified that the specimen was sealed in an appropriate container with the seal intact, the identification number and name on the form matched that on the specimen, and the specimen was transferred to temporary laboratory storage. Tr. 79; CX 10 at p. 5.

On the initial test, which used a cutoff of 20 ng/ml, Grievant's specimen was positive at a result of 69.6756 ng/ml. Tr. 76, 88; CX 10 at p. 2-3, 22-23. Because Grievant's result was greater than 20 ng/ml, it was considered a presumptive positive and subject to confirmation testing. Tr. 89. On the confirmation test, which used a cutoff of 20 ng/ml, Grievant's specimen was positive at a result of 98.8857 ng/ml. Tr. 76, 94-95; CX 10 at pp. 2-3, 42-43. At this point, Grievant's result was a confirmed positive. Tr. 95.

On May 14, 2018, Grievant's positive PEth result was reported to Captain Miller. Tr. 951; CX 10 at p. 3. Because the Company had confirmed that Grievant had not maintained

sobriety pursuant to his Contract A, under the DPAC Program protocol, Grievant was required to undergo retreatment. Tr. 443. On May 14, 2018, Captain Miller informed Grievant he had tested positive on the PEth test and he was required to go to treatment at MARR. Tr. 694, 951. Grievant denied he had relapsed and refused to go to retreatment. Tr. 952.

After Grievant refused to go to retreatment, the Company began an investigation. Tr. 487-89.

After Grievant's positive PEth test, Captain Miller spoke with him several times and listened as Grievant claimed he did not relapse. Tr. 952. Captain Miller was well aware that denial is a part of the disease of alcohol dependence. Tr. 952-53; CX 4. Thinking objectively and understanding that Grievant had two positive alcohol tests, Captain Miller believed that Grievant had relapsed and was in denial. Tr. 952-53. He explained, if Grievant refused retreatment, Delta would terminate his employment. Tr. 694, 952. During their conversations Captain Miller encouraged Grievant to go to retreatment, but Grievant continued to refuse. Tr. 702, 758, 952. Captain Miller testified he discussed the situation with Grievant on several different occasions because he did not want to see Grievant lose his job.

Grievant also spoke with then DPAC Committee Chair Captain Warren Mowry, who urged Grievant to go to retreatment. Tr. 754-55. Moreover, after testing positive on the PEth test, Grievant reached out to his HIMS AME, Dr. Harper, Jr., to discuss the positive result. Tr. 702. Like Captains Miller and Mowry, Dr. Harper, Jr. listened to Grievant's denials and advised Grievant that he needed to go to retreatment. Tr. 702, 753. On May 18, 2018, after learning that Grievant was refusing to go to retreatment, Dr. Harper, Jr. notified the FAA and Delta that he was withdrawing his sponsorship of Grievant. CX 1; Tr. 447, 710. Also on May 18, 2018, the FAA withdrew Grievant's special issuance medical certificate. CX 1; Tr. 447.

On June 28, 2018, the Company reached out to Dr. Howard Taylor, a forensic toxicologist, to discuss the results of Grievant's May 1, 2018 positive EtG test and May 9, 2019 positive PEth test. Tr. 1015, 1089. The Company asked Dr. Taylor to review the litigation package for the May 1 EtG test (Company Exhibit 9) and the litigation package for the May 9 PEth test (Company Exhibit 10). Tr. 1015. Dr. Taylor reviewed both for scientific validity and accuracy, chain of custody, quality control, and the appropriate analytical techniques. Tr. 1015-16. After reviewing the litigation packets, and speaking with Dr. Joseph Jones, Ph.D., Chief Operating Officer and Executive Vice President of USDTL, on one question, Dr. Taylor concluded that the PEth test results were scientifically valid. Tr. 1016.

Approximately one to two weeks later, Dr. Taylor had a telephone conversation with representatives from Delta's Flight Operations Department. Tr. 1016, 1090. With respect to the May 1 positive EtG test result, Dr. Taylor informed the Company representatives the litigation package was scientifically valid and the EtG test result was positive. Tr. 1017. With respect to the May 9 positive PEth test result, Dr. Taylor told the Company representatives the PEth test was positive, and the positive PEth test result was consistent with the positive EtG test result. Tr. 1017-18. Dr. Taylor informed the Company, in his opinion, Grievant had consumed alcohol

within the two weeks prior to the May 9 PEth test. Tr. 1018.

On July 12, 2018, pursuant to Section 18.C. of the PWA, the Company issued Grievant a Notice of Intent to Terminate. Tr. 448; CX 5. In the Notice of Intent to Terminate, Captain Graham wrote that Grievant's use of alcohol, as indicated by the positive EtG and PEth tests, violated Grievant's Contract A and invalidated his medical certificate. CX 5. In accordance with the Substance Abuse Policy, Grievant was given the opportunity to go to retreatment, but refused retreatment. CX 5. Captain Graham concluded that Grievant's failure to maintain abstinence and refusal to undergo retreatment created a safety risk, and Delta intended to terminate Grievant's employment. CX 5. Captain Miller presented the Notice of Intent to Terminate to Grievant, and, as he had previously, Captain Miller again attempted to persuade Grievant to go to retreatment; Grievant continued to refuse. Tr. 702.

On July 30, 2018 the parties held an initial hearing on the grievance the Association filed on Grievant's behalf. Tr. 448, 727; CX 7. The purpose of the initial hearing is to ensure the Company has all information it needs to make an appropriate decision and importantly, to provide the Grievant with the opportunity to present any information he believed was relevant to the Company's decision. Tr. 449, 728. Grievant presented the results of three tests he claimed to have taken after the May 9 positive PEth test. Tr. 449, 728; CX 20. Grievant represented that those tests were the only tests he had taken since the positive PEth test. Tr. 450. Grievant did not raise any other concerns or issues during the initial hearing. Tr. 451, 760-62. After the initial hearing, Captain Graham considered whether Grievant had presented any information that would require reconsideration of the Notice of Intent to Terminate. Tr. 451. He decided that the self-directed tests produced by Grievant were not relevant because they were not taken pursuant to the DPAC Program and its protocols and controls. Tr. 450. After reviewing the information presented by Grievant, Captain Graham concluded termination was still the appropriate penalty for Grievant's refusal to undergo retreatment after a relapse. Tr. 451. Captain Graham determined that Grievant had ample opportunity to go to retreatment after his relapse, and, if he had successfully completed retreatment, he could have been returned to his First Officer position. Tr. 451. Grievant's insistence that he had not been drinking was refuted by the positive EtG and PEth tests. Tr. 451.

On August 6, 2018, Captain Graham denied the grievance and issued Grievant a Letter of Termination.

Because air carriers bear the crucial responsibility of ensuring the safety of the traveling public, courts and arbitrators have long recognized a carrier's determination that a pilot is unable to operate its aircraft in the safest possible manner is not to be lightly disturbed. Arbitrators have held, if a carrier's decision to discharge a pilot is in the interest of safety, the decision can be set aside only if it is shown to be arbitrary, capricious or discriminatory. Arbitrators routinely apply the arbitrary, capricious, or discriminatory standard in grievance arbitrations involving violations of a carrier's substance abuse policy.

Taken together, the May 1, 2018 positive EtG test, the May 9, 2018 positive PEth test,

and the June 20, 2018 positive hair EtG test⁵ establish conclusively that Grievant was not maintaining abstinence as required by his Contract A.

Testing under the Substance Abuse Policy and the DPAC program is distinct and different from the DOT mandated drug and alcohol testing program. The purpose of each program is different. The DOT mandated program is to ensure that safety sensitive employees are not impaired while on duty. It does not preclude an employee from using alcohol subject to some limitations during off duty periods. Testing under the DPAC program is designed to test for total abstinence from drugs and alcohol recognizing that participants have a disease whose remediation requires total abstinence. Consequently, the Company and the Association have adopted testing mechanisms different from the DOT, and which are appropriate to accomplishing the objectives of the DPAC program.

Arbitrators reject self directed tests. (The Company listed numerous examples of cases in which Arbitrators rejected self directed tests, which will not be repeated here.) Typically, the reasons are that they lack the same protocols or standards for being verifiable.

For all the reasons outlined above, the Company requests that the grievance be denied and the termination of Michael Danford be upheld.

Position of the Union/Grievant⁶

Michael Danford has been flying since he was ten years old. He served honorably in the United States Navy and flew as a Delta pilot for over eighteen years on the MD-88, Airbus 330, 757/767, 727, 737, and L1011. In over fourteen schools, he passed all training events with flying colors. He never failed a check ride. He was never disciplined in any manner. In short, Mr. Danford was an exemplary employee who displayed unsurpassed airmanship.

On January 5, 2017, while off-duty, he was arrested for driving while intoxicated. He paid a fine and was not required to appear in court. (Tr. 656). Notwithstanding the absence of any physical health issue related to alcohol, he entered Delta's alcohol recovery program as a volunteer.

The program included a 42-day stay at the Talbott Recovery Center (TRC), a facility located in a high-crime area with pervasive drug use and car break-ins occurring in the immediate vicinity. (Tr. 664-65). While there, he was housed with an overt racist and convicted felon who boasted of beating victims into submission during robberies. (Tr. 659-662). His requests for a change in accommodation were denied; instead, he was forced to confront his criminal roommate, which served only to further aggravate the unsettling environment. (Tr. 662-64). After a 15-minute

⁵ Danford had a hair EtG test done on June 20, 2018, which came back positive for EtG at a concentration of 4.8 pg/mg. Tr. 1038; UX 75. Although the test result is above the cut off used, the report states that EtG was "DETECTED" and under Test Result it says "Positive," Grievant insists that the June 20, 2018 result is not really a positive result because it did not exceed 7 pg/mg. Grievant did not submit this test result during his investigative hearing.

⁶ This is a summary of the relevant arguments made by the Union. All evidence and arguments presented while not specifically mentioned herein were also considered in the rendering of this Opinion and Award.

interview, the TRC medical director summarily diagnosed him with a pointed warning that any challenge of the diagnosis would be futile.

Notwithstanding these difficulties, Mr. Danford fully cooperated with the TRC program and received the following evaluation upon his completion of that program:

Mr. Danford's prognosis for long-term recovery is good. He was attentive to the process, often contributing insightfully in groups, recognizing patterns and the need to be more honest with oneself and others. The main potential for extra caution for Mr. Danford identified at this time is his relatively new relationship and the emotional potential therein.⁷

Prior to his return to the flight line, Mr. Danford was required to sign a form document referred to as Contract A, which required him to abstain from drinking alcohol during his remaining employment with Delta. Pursuant to Contract A, Danford was required to submit to a program of peer monitoring, psychiatric and psychological examination, AA meeting attendance, monthly Chief Pilot meetings, and random testing for abstinence from alcohol. The document makes no reference to the quantitative values that would be treated as a positive. Contract A provided that noncompliance with its terms "may" result in disciplinary action, up to and including termination. (CX3). However, Delta's Flight Operations Policies and Procedures Manual (FOPP) provides that a volunteer participant in the HIMS program who suffers an alcohol-related relapse "will not be suspended or terminated provided that relapse is limited to one occurrence." (CX4, Section G.1 at 5-6).

Mr. Danford returned to the flight line and performed three international trips in the spring of 2018 without incident or complaint. (Tr. 668-69). From early November 2017 through the end of April 2018, he submitted to a series of eight monthly random alcohol tests, all of which yielded negative results. (CX1).

On May 1, 2018, Mr. Danford was required to provide an additional urine specimen pursuant to the random alcohol testing program. The specimen he provided was split into two specimen bottles – bottles A and B – so that, in event of a positive test result, Danford could have the B bottle sent to a second laboratory as a means of challenging the initial result. (Tr. 673-74; CX9 at 7(collection form)). The urine contained in bottle A was tested by Quest Diagnostics Laboratory (Quest) utilizing two distinct chemical methodologies – ethyl sulfate (EtS) and ethyl glucuronide (EtG). The EtS methodology measures sulfur molecules that may be produced by alcohol consumption. Danford's EtS test for the May 1 urine collection was negative, supporting a finding of abstinence. (Kassin, Tr. 10; Sample, Tr. 323-24). EtS has a higher stability than EtG and may be considered the more reliable biomarker. (Shults, Tr. 849-50).

The EtG methodology measures ethyl-glucuronide molecules that may be produced either by an individual's consumption of, or exposure to, alcohol. EtG at significant levels may be

⁷ (UX63). The referenced "new relationship" related to Artis Todd, a Delta flight attendant who is a teetotaler and with whom Mr. Danford has had a stable and exclusive relationship since 2017. (Todd, Tr. 611-13).

produced by an individual's use of hand sanitizer or mouthwash, or his consumption of a long list of common items, including pralines, non-alcoholic beer, pharmaceutical products, fruit juice, sauerkraut, or soy sauce. (Jones, Tr. 71-72, 188; Sample, Tr. 352; CX28 at 1635). Laboratories, therefore, generally use a "minimum threshold" of 250 ng/mL to indicate the intentional consumption of alcohol. (Jones, Tr. 1112-13; CX28 at 1635). Nevertheless, Delta instructed Quest to apply a cutoff of 100 ng/mL to indicate a "positive" test result. (Sample, Tr. 323, 328). Delta's aggressive approach is distinguishable from other airlines, which apply an EtG cutoff for positives of 150 or 200 ng/mL. (Storbeck, Tr. 269). Quest reported a quantitative EtG of 117 ng/mL for Mr. Danford's urine sample. (CX9 at 112).

Michele Gable, Director of Operations for Delta's testing program, described Danford's EtG quantitative result as "not considered a true positive because the EtS was negative." (UX66 at 1). Quest's test results also reported that the urine sample had a very high creatinine level of 256.9 mg/dL, indicating that the specimen was unusually concentrated due to Mr. Danford's dehydration. (CX9 at 112; Danford, Tr. 673). Average creatinine for human urine is approximately 100 mg/dL. (Jones, Tr. 200; Skipper, Tr. 519). Applying a process referred to as "creatinine normalization" would have reduced the effective quantitative result of the May 1 EtG test to below even the 100 ng/mL cutoff level selected by Delta. (Jones, Tr. 200-01; Skipper, Tr. 519; Shults, Tr. 848).

In response to the EtG test result, Mr. Danford made requests to Michele Gable and Delta Chief Pilot Harry Miller that his split sample be tested. (Tr. 677-78). Under the federal program applicable to airline industry drug testing, where a split sample test fails to confirm the presence of the target metabolite, or even if the split sample is simply unavailable for testing, the original test is cancelled. (49 CFR § 40.187(b); 49 CFR §§ 40.187(e)(1); 40.201(e)). Mr. Danford's requests to have his split sample tested were denied. (Danford, Tr. 677-78; UX66). Instead, Ms. Gable instructed him to submit to a blood-based test for phosphatidylethanol (PEth).

PEth is an abnormal phospholipid formed in the presence of ethanol. (UX50 at 3). Typically, PEth tests are performed on whole blood; however, Mr. Danford was instructed to provide a dry blood spot (DBS) specimen for testing at United States Drug Testing Laboratories (USDTL). According to USDTL, there are no other labs that do commercial dried blood spot testing.

The Collection facility to which Mr. Danford was directed had no DBS collection materials, which Ms. Gable was required to ship. (Tr. 678). While USDTL asserts that it maintains a specimen collector certification program, it is not mandatory and no training was provided to the individual who collected Mr. Danford's specimen. (UX12 items 4 and 5; UX14 items 4 and 5; Jones, Tr. 108-09).

USDTL specifies collection protocols that it states are imperative to the collection and testing process. The May 9 DBS collection failed to comply with several "imperative" requirements. In bold lettering, the protocol mandates that certain practices must be avoided, including "milking the finger", direct contact of the finger with the card, layering of successive blood spots, and

the enclosure of the card in an airtight shipping bag. Further, the specimen must be shipped with a desiccant pouch, which was not provided or utilized with Danford's specimen.

USDTL has not done validation studies to indicate the impact of factors on the process, such as: specimen collection process, sample volume effect, hematocrit effect, creatinine effect, volcano effect, or the shipment of a specimen without the desiccant pouch.

USDTL reported two quantitative results: 69 ng/mL and 98 ng/mL. (Jones, Tr. 76; CX10 at 5). The two varying results were produced despite the use of the same sample card, same type testing instrument, and same controls for both tests. USDTL reported the test as positive based on the cutoff of 20 ng/ml.

On May 14, Chief Pilot Miller advised Mr. Danford via telephone that his DBS PEth test result was "positive" and, as a result, he was obligated to return to in-patient treatment at Metro Atlanta Recovery Residences (MARR) the next day or be terminated. Entry into the MARR program would have required Mr. Danford's acceptance of an internment of 90 to 180 days. (Graham, Tr. 443).

Mr. Danford denied that he had been drinking and requested Miller's assistance with getting a medical review of the test result. Miller declined without explanation and advised that Danford should go to MARR and fight it from there.

On May 15, Danford contacted Michele Gable, who endorsed Danford's proposal of seeking additional testing to demonstrate that the May 9 DBS PEth test had been in error. Gable advised him that he needed to have the second test conducted that same day and that the test be performed at the testing laboratory's limit of detection (LOD) of eight ng/mL. (Tr. 696-97). Referring to the prospective results, Gable promised that "we'll take a look at it." (Tr. 697). That same day – May 15 – Danford initiated a whole blood PEth test with LabCorp and entered on the collection form that he requested testing at the LOD of 8 ng/mL. (Tr. 698-99)

LabCorp reported a negative test result applying the standard cutoff of 20 ng/mL. (Tr. 699; UX71).

At the recommendation of the collection site personnel, Danford also submitted, on May 15, and again on June 20, 2018, to EtG hair tests due to its six-month detection window. ExperTox Laboratory subsequently reported results consistent with total abstinence from alcohol consumption over the prior six months. (Danford, Tr. 700-01; UX72, UX75). The next day – May 16 – Danford submitted to a DBS PEth test to be sent to USDTL. This time, the specimen collector complied with the collection procedures that USDTL deemed "imperative to the integrity of the collection and subsequent testing process." (UX11; UX73; Danford, Tr. 703). The May 16 DBS specimen tested negative at both the cutoff of 20 ng/mL and the LOD of 8 ng/mL. (UX74; Danford, Tr. 704-05). According to USDTL, PEth has a half-life of approximately 4.5 days, which means the level of PEth in the blood decreases by half every 4.5 days. (Jones, Tr. 128; UX19 at 2). Thus, it would have been expected that if USDTL had

accurately reported a 98 ng/mL or 69 ng/mL quantitation for Danford's DBS PEth quantitative test result of May 9, the May 15 and 16 tests conducted just six and seven days later, respectively, would also have produced a detectable result. In short, the May 9 and May 15/16 tests could not both be accurate assuming an average half-life of 4.5 days. When Danford attempted to present the May 15 and May 16 test results to Michele Gable, she would no longer speak to him. (Danford, Tr. 706). Chief Pilot Miller told him that he could present the test results at his post-termination arbitration if he cared to.

Graham terminated Mr. Danford based on his conclusion that Mr. Danford had knowingly consumed alcohol. (Graham, Tr. 454). Graham conducted no investigation other than to apply the testing protocols as he understood them to exist; in his view "there was no reason to" conduct an investigation. (Graham, tr. 458). Thus, at the time of the termination, Graham had no knowledge as to the forensic reliability of the EtG testing process but nonetheless accepted the EtG methodology as providing a "reliable result with respect to the abstinence or non-abstinence issue." (Graham, Tr. 460-61). He did not consult with a Medical Review Officer or any other medical doctor. (Graham, Tr. 461-63). Nor did he engage in any pre-termination consultation with Michele Gable or representatives of either Quest or USDTL. (Graham, 472-73). He did not consider any of the numerous available sources of clinical information, including, but not limited to, Mr. Danford's peer monitor, psychiatrist, psychologist or performance record. (Graham, Tr. 477-78).

As a result of the testing commissioned by Delta, the FAA asked for the return of Mr. Danford's first class medical certificate. The FAA subsequently re-issued Mr. Danford's first class medical certification, without requiring in-patient treatment, based on its determination that full consideration of the clinical and testing data cast doubt on the reliability of the May 9 DBS PEth test result. (UX35).

Pursuant to the Pilot Working Agreement (PWA), a pilot cannot be terminated without the Company establishing just cause. (JX1 at Section 18.D.1). Since termination constitutes the capital punishment of the workplace, the burden of proof that must be borne by the Company is a heavy one; the evidentiary predicate for termination must be established by clear and convincing evidence in order for Delta to prevail.

Contract A does nothing to eliminate the applicability of the just cause standard to Mr. Danford's termination. Rather, it permits Delta to argue that just cause may be established if there is clear and convincing evidence that Mr. Danford suffered a relapse. The standard seven elements of just cause still apply, including the requirement that Delta prove that it engaged in a meaningful pre-termination investigation. *See Delta/ALPA*, Case No. NWA 2710-08 (Arb. Frederic Horowitz, 2018) at 7 (even in the context of a last chance agreement (LCA), the Company bears the burden of proof of establishing just cause by proving that the Grievant breached the LCA and related policies as alleged).

However, for two reasons, Delta's failure to give *any* consideration to the available clinical evidence preclude a finding of just cause irrespective of any test results. First, because of the

unanimous opinion of both the toxicological experts and laboratories holding that test results should be considered as just one source of information in a more comprehensive clinical analysis. Second, as confirmed by both Dr. Skipper and the FAA, the clinical evidence in this case overwhelmingly supports the conclusion that Mr. Danford did not have any relapse.

Even according disproportionate weight to Delta's proffered test results of May 1 and May 9, the evidentiary record establishes that the testing data could never satisfy Delta's burden of proof. Among other factors, which disfavor a finding of relapse, are the following: (1) the negative May 1 EtS result, (2) the May 1 EtG result would be considered negative at standard cutoff levels, (3) the May 1 EtG result would have been considered negative even at the non-probative Delta-selected cutoff of 100 ng/mL if the quantitative result had been normalized for creatinine, (4) EtG, in general, is non-probative of the source of alcohol, (5) the May 9 PEth test result is inadmissible due to collection errors USDTL has deemed imperative to the integrity of the collection and subsequent testing process, (6) USDTL's application of a "cutting-edge" PEth DBS testing process that has never been scientifically validated, (7) USDTL's deliberate deviance from the manufacturer's DBS testing protocol without scientific validation, and (8) the uncontroverted evidence that USDTL has produced inaccurate testing results during the relevant time period, and has no system in place to investigate false positives.

At most, Delta's testing evidence produced a clinical question as to whether Mr. Danford might have had a relapse. The PWA provides a method for resolving such disputes related to a pilot's physical fitness. In view of Delta's failure to avail itself of the mandatory process for resolving disputes relating to pilot's fitness for duty, the grievance must be sustained.

Even the purveyors of EtG and PEth testing services readily acknowledge that their test results must be treated as one data point in a broader clinical analysis of whether an individual has relapsed.

The vital importance of due process in the grievance and arbitration process, and, in particular, the need for a meaningful pre-termination investigation is well established. As Arbitrator Daugherty held in his seminal case establishing the seven tests for just cause, a fair investigation conducted "prior to the termination" is essential for a showing of just cause. The mere fact that alleged substance abuse is involved does not relieve the employer of its obligation to properly investigate the matter prior to termination. The grievance should be granted on the grounds that Delta failed to engage in a meaningful investigation prior to its termination of Mr. Danford.

USDTL's PEth test of May 9, 2018 should be deemed not to be valid based on the deviations in the collection process which also represent deviations from the manufacturer's protocol. Strikingly, the collection violated virtually every item on USDTL's bulleted list of "What to Avoid," including:

- * Avoid "milking" the finger;
- * Do not press the finger against the collection paper;
- * Do not layer successive drops of blood;

* Do not touch the already filled collection circles;

* **DO NOT place the box in an airtight plastic specimen transport bag**

USDTL's disregard of essential forensic validation practices is beyond the pale. A test conducted in violation of a manufacturer's protocols, without any documented scientific validation renders that test invalid.

For all the reasons outlined above, the Union requests that the grievance be granted/sustained and Michael Danford be reinstated.

DISCUSSION

This case presents the Board with some difficult decisions which could have significant consequences for the parties whichever way the decision goes. This case involved seven days of hearing evidence, numerous specialists with varying views of the facts of this case, several witnesses testifying in support of one position or the other. The grievant's counsel presented over 81 documentary exhibits. The company's counsel presented 42 documentary exhibits.

On the one hand, we have the DPAC / HIMS program which has been negotiated between Delta and ALPA and continues to be jointly administered under which pilots with substance abuse issues have been participating for years. The negotiated provisions of Contract A specify the terms and conditions, including the types of testing that participating pilots are subject to – EtG, EtS, and PEth. While not specifically outlined in Contract A, the cutoff values for determining positive tests are also an agreement between Delta and ALPA, and are purposefully intended to identify pilots who could be in relapse by using low standards to designate a positive test. (And to preclude relapsing pilots from 'slipping under the radar.')

Therefore, the Board must accept those provisions as they are, since the System Board is precluded from changing the terms and conditions of the contract. It can only interpret the application of those terms, and rule as to whether or not they were appropriately applied to the case before it. Danford was treated no differently under that program than any other pilot.

On the other hand, we have a long service pilot with an otherwise unblemished record who continues to maintain that he has not suffered a relapse and has not consumed alcohol, which would constitute a violation of his Contract A. Michael Danford lost his First Class Medical in July 2017 as a result of a OWI in January, 2017. In accordance with FAA and Delta/ALPA protocols, he underwent an assessment and treatment for substance abuse at the Talbot Recovery Center. Just prior to his release from TRC he signed Contract A. His testimony was that the experience at Talbot was unpleasant due to his assigned roommate and resulting living conditions. Until May 1, 2018, he tested negative for alcohol on 8 random tests. On May 1, 2018 he tested positive for EtG, at 117 ng/ml but negative for EtS.⁸ The established EtG cutoff at Delta is 100 ng/ml. When EtG is positive and EtS negative, the protocol is to require a

⁸ His creatinine level on this test was quite high, and as argued by counsel, if normalized, would have resulted in a negative test – below the cutoff level. There was conflicting testimony about the necessity or desirability of normalizing the test result based on creatinine level. That is not a part of the Delta/ALPA protocol.

confirmation using PEth. As a result, he was directed to submit to a Dried Blood Spot PEth test for confirmation. The results of that test were positive at 69 and 98 ng/ml⁹ – above the Delta/ALPA established cutoff of 20 ng/ml. The collection procedures were called into question by Danford’s testimony at the hearing, which had not been provided to Captain Graham during his initial hearing. As such, the company argues that it is “new evidence” that is impermissible in a System Board hearing. However, there is no scientific evidence in the record as to the impact of deviations in the collection procedure on the test results.¹⁰ Captain Miller informed Danford of the positive test, and that he would need to undergo a second round of rehab at MARR or be terminated. Danford declined to attend the remedial rehab, always maintaining that he had not relapsed and consumed alcohol. Because relapse and denial are known traits of the disease, Delta did not give his statements much credence. He was terminated on August 6, 2018, based on his choice to accept termination rather than attend a second round of rehabilitation.

A finding for Delta would support the negotiated conditions of Contract A, the substance abuse policy and DPAC program at Delta, and the testing protocol – at the expense of Michael Danford’s career. A finding for Danford requires that the Board either accepts the notion that there were false positives on two different types of test by two different labs, or that the negotiated cutoffs to report a positive result for those tests were inappropriately set at values which were below the prevailing values used in industry. The latter situation is precluded by the fact that the testing protocol and cutoff values are negotiated between Delta and ALPA, and beyond the scope of the System Board to alter. The evidence for false positives is at most entirely empirical and unfortunately not well tested or documented scientifically, but failing to accept the possibility of false positives leaves no clear explanation for the tests that were negative in very close proximity timewise to the positives that ultimately cost Danford his career, since he continued to maintain that he had been abstinent and refused further treatment on that basis.

The issue before this board is:

“Did the Company have just cause to terminate First Officer Danford for failing to maintain abstinence in violation of his Contract A terms? If not, what is the appropriate remedy?”

What constitutes “just cause” generally causes a turn to the “seven tests” first articulated by Professor Carol Daugherty in 1966:

1. The employee knew of the company’s policy
2. The company’s policy was reasonable
3. The company investigated to determine that the employee violated the policy.
4. The investigation was fair and objective

⁹ Two tests were run on his sample. Since the screening test indicated a positive at 69 mg/ml, a confirmation test was conducted and yielded a result of 98 mg/ml. The lab uses a standard of 30% deviation between results, to report a valid test, which these values barely meet.

¹⁰ There is also no evidence apparently in scientific terms of the impact of deviation from the collection procedures on the test results, based on the testimony of the USDTL lab director.

5. Substantial evidence existed of the employee's violation of the policy
6. The company's policy was consistently applied
7. The discipline was reasonable and proportional

In spite of the Grievant's attorney's allegation that the just cause analysis fails based on the lack of an adequate and appropriate investigation, we find that the seven tests were in fact met, and that "just cause" for Danford's termination existed. The "investigation" was handled in accordance with the provisions that Delta and ALPA negotiated and administered under the DPAC/HIMS program and have been consistently applied to similarly situated employees. By signing Contract A, Danford knew of the policy, which was reasonable in the view of the company, the Association, and Danford since he agreed to it. The investigation resulted from objective, negotiated standards of testing, a review of the litigation packages by Dr. Taylor, as well as the Grievant having the opportunity to present evidence in support of his position. One case of potentially disparate treatment which was presented was significantly different in factual circumstances as to not be persuasive or relevant. The discipline was again, negotiated between the company and ALPA as part of Contract A, and the grievant had the opportunity, which he did not take, to avoid discharge by attending a second round of remedial rehabilitation through a different facility.

Do we know whether or not Danford maintained his abstinence from alcohol as required by Contract A? To answer this question, the Board must evaluate widely conflicting opinions and evidence. We can never be certain whether or not Danford was abstinent and simply had some false positives, or whether he is exhibiting the traits of the disease by denying a relapse. Danford comes across in testimony as being an earnest and credible grievant. He has made a choice based on his desire to be honest in his belief that he did not consume alcohol. That resulted in his termination from Delta, even though there was another alternative – attending a second round of rehab at MARR. However, given the lack of verifiable evidence that his tests were false positives, we must land on the side of what is scientifically supported, and conclude that Danford is in denial about his disease and relapse, and that the testing protocol agreed to by Delta and ALPA and applied to so many other pilots wins the argument in this case.

Opinion and Award

The grievance is denied. Michael Danford tested positive for alcohol on May 1 and May 9 in violation of his Contract A, and failed to avail himself of the opportunity to maintain a position at Delta by undergoing rehabilitation treatment at MARR. His discharge was for just cause.

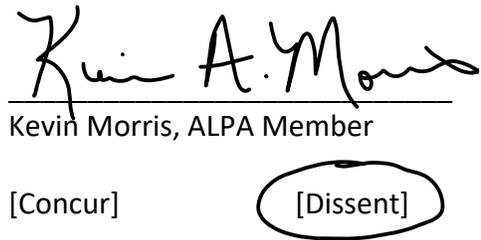


Mark L. Burdette
Arbitrator, Neutral Chair



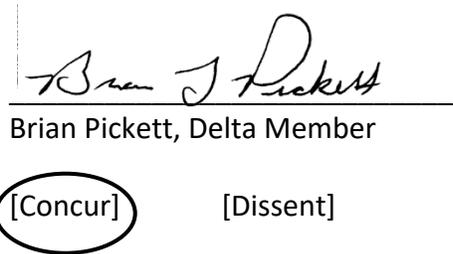
Mike Doyle, Delta Member

[Concur] [Dissent]



Kevin Morris, ALPA Member

[Concur] [Dissent]



Brian Pickett, Delta Member

[Concur] [Dissent]

Steve Mayer, ALPA Member

[Concur] [Dissent]

Opinion and Award

The grievance is denied. Michael Danford tested positive for alcohol on May 1 and May 9 in violation of his Contract A, and failed to avail himself of the opportunity to maintain a position at Delta by undergoing rehabilitation treatment at MARR. His discharge was for just cause.



Mark L. Burdette
Arbitrator, Neutral Chair

Mike Doyle, Delta Member

[Concur] [Dissent]

Kevin Morris, ALPA Member

[Concur] [Dissent]

Brian Pickett, Delta Member

[Concur] [Dissent]



Steve Mayer, ALPA Member

[Concur] [Dissent]

