STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SHEBOYGAN COUNTY LAW ENFORCEMENT EMPLOYEES LOCAL 2481, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO,	
Complainant,	Case L No. 28979 MP-1283 Decision No. 19384-A
vs.	
SHERIFF VERNON R. BOECKMANN, SHEBOYGAN COUNTY,	
Respondent.	

Appearances:

Ms. Helen Isferding, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 2323 North 29th Street, Sheboygan, Wisconsin 53081, for Complainant Union.

Mr. Alexander Hopp, Corporation Counsel, Sheboygan County, 601 North Fifth Street, P.O. Box 128, Sheboygan, Wisconsin 53081, for Respondent County.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Sheboygan County Law Enforcement Employees Local 2481, American Federation of State, County and Municipal Employees, AFL-CIO, having filed a complaint with the Wisconsin Employment Relations Commission on December 16, 1981, alleging that Sheboygan County has committed a prohibited practice within the meaning of the Municipal Employment Relations Act; and the Commission having appointed Douglas V. Knudson, a member of is staff, to act as Examiner and to make Findings of Fact, Conclusions of Law and Order pursuant to Section 111.07(5), Wis. Stats.; and hearing on said complaint having been held before the Examiner in Sheboygan, Wisconsin, on March 9, 1982; and the parties having filed briefs by June 7, 1982; and the Examiner, having considered the evidence and the arguments of the parties, makes the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Sheboygan County Law Enforcement Employees Local 2481, American Federation of State, County and Municipal Employees, AFL-CIO, hereinafter the Union, is a labor organization having its offices at 2323 North 29th Street, Sheboygan, Wisconsin 53081, and represents, for purposes of collective bargaining, certain employes of the Sheboygan County Sheriff's Department.

2. That Sheboygan County, hereinafter the County, is a municipal employer with its offices at Sheboygan County Courthouse, 615 North Sixth Street, Sheboygan, Wisconsin 53081; that the County operates a Sheriff's Department; and, that at all times relevant herein Vernon R. Boeckmann was the Sheriff.

3. That the Union and the County were parties to a collective bargaining agreement for the calendar year 1981, which agreement provided for final and binding arbitration as the final step of the grievance procedure contained therein.

4. That the grievant had been employed as a Deputy Sheriff for the County for approximately nine years; that on October 20, 1980, the grievant was placed on a three-month unpaid leave of absence by Boeckmann, during which he was to attempt to resolve certain personal problems, including an alcoholism problem; that on January 13, 1981, Boeckmann discharged the grievant; and, that said discharge was grieved and ultimately was heard by Arbitrator Kerkman on July 13, 1981.

5. That on September 25, 1981, Arbitrator Kerkman issued his award wherein he found that the County did not have just cause to discharge the grievant; that in support of his conclusion Arbitrator Kerkman found in pertinent part:

> . . . that by discharging the grievant on January 13 the Employer has violated the committment (sic) made to the grievant at the time he issued the unpaid leave of absence by not permitting the grievant the full three months before consideration of the grievant's continued employment status would be made, and also by denying the grievant any opportunity to submit his resignation if he had been inclined to do so after discussions were held with respect to his employment status. The Arbitrator concludes that the denial of the opportunities promised the grievant when he was placed on the unpaid leave of absence establishes that the grievant's discharge fails to meet the test of just cause as set forth in Article V, subsection 2 of the Collective Bargaining Agreement.;

and, that Arbitrator Kerkman further stated:

> . . . the remedy should be to place the grievant in the position he was in when the discharge occurred, i.e., unpaid leave of absence status. The undersigned further concludes that in view of the intervening period of time, the unpaid leave of absence status should extend beyond the period which the original unpaid leave had left to run in order to afford the grievant an opportunity to demonstrate his ability to maintain sobriety. The Arbitrator now establishes the unpaid leave of absence period to be sixty days commencing with the date of this Award. During this period the grievant is to remain in counseling with Mr. Bronson, and further is to participate in the Employee Assistance Program which has been instituted by the Employer since the grievant's date of discharge. If the grievant demonstrates sobriety over the next sixty days, and providing there is professional recommendation that the grievant is then employable as a deputy sheriff, the grievant is then to be reinstated to employment as a deputy sheriff for the Employer, with full seniority but without back pay.

6. That during the sixty-day period following the Arbitration Award, the grievant received counseling from William Bronson, Project Director of Sheboygan County Alcohol and Drug Abuse, on October 7 and 21, and, November 4, 6, 10, 11, 18 and 24, 1981; that on or about October 21, 1981 the grievant told Bronson he had quit drinking; that on November 10, 1981, a staff psychiatrist with the Mental Health Center prescribed a daily dosage of 500 milligrams of Antabuse for the grievant for a two-month period; that Antabuse is a drug intended to cause a person to feel nauseous when alcoholic beverages are consumed while the person is on an Antabuse program; that during a period of time in 1980 the grievant had taken a daily dosage of 250 milligrams of Antabuse, but he had continued to drink alcoholic beverages during said period of time; that the grievant did not renew the Antabuse prescription in January of 1982 and he was not taking Antabuse at the time of the hearing on the instant matter; that in a letter to Boeckman dated November 12, 1981, Bronson stated the grievant was at that time abstinent from alcohol, was continuing in treatment services, and, had resumed Antabuse therapy with the Antabuse program being monitored at the Mental Health Center.

7. That at one point the grievant's testimony was "I'm sure I have a different definition of sobriety than other people do. I'm not saying I maintained sobriety" that the grievant later testified "In my opinion I have demonstrated sobriety in that sixty-day period in the Arbitration Award"; that the grievant admitted drinking alcoholic beverages on occasion during the sixty day period, but felt he had his drinking under control; that the grievant did not recall either how often he drank alcohol, or, the most drinks he had consumed on a single occasion during the sixty-day period; and, that during the sixty day period the grievant was taking certain medications, i.e., Librax and Lomotil, which he testified seemed to result in intoxication occurring from fewer drinks than when he was not taking said medications.

8. That a C. James Hermann testified to having observed the grievant drinking beer at the Pied Piper Tavern on October 17, 1981; that Hermann further testified that the grievant appeared to have "been drinking a little" before arriving at the Pied Piper Tavern, and, that he appeared to be "feeling good, or happy"; that a Doyle Warbler testified to also having observed the grievant at the Pied Piper Tavern on the same date, at which time he drank two or three vodka and

coke mixed drinks, and, that Warbler believed the grievant's behavior was affected as a result of his drinking at the Pied Piper Tavern on said date; and, that, although the grievant testified that he had been drinking alcoholic beverages on occasion during the sixty-day period relevant herein, he denied having been intoxicated on any occasion during said sixty days.

9. That Jerry Gall, who owns the Tipo Bar in Sheboygan, Wisconsin, had known the grievant for approximately two and one-half to three years, during which period of time the grievant was a regular customer at the Tipo Bar; that Gall testified he was able to recognize when the grievant was intoxicated based on said relationship; that on November 7, 1981, he observed the grievant stagger and bump into a wall while leaving the Pied Piper Tavern, and, that because of his previous association with the grievant he believed the grievant to be intoxicated at that time; and, that the grievant testified that he did have "a couple of drinks" on November 7, 1981, but denied being intoxicated.

10. That Shirley Gall is the wife of Jerry Gall and works at the Tipo Bar; that S. Gall testified she had known the grievant for the approximately two and one-half years he had been a customer at the Tipo Bar and that she knew from that experience when he was intoxicated; that S. Gall testified she had observed the grievant in what she believed to be an intoxicated state on a Friday night in October, 1981, when he lost his balance, fell, and spilled a red-colored drink on a wall; and, that S. Gall had not seen the grievant consume any intoxicants on said occasion.

11. That on November 24, 1981, Boeckman advised the grievant that he would be terminated; and, that on November 25, 1981, the grievant received a letter from Boeckmann which stated: "This letter is to advise you that the portion of the Mediation Agreement dealing with sobriety on your part for 60 days has not been met and you hereby are again terminated.".

12. That the grievant failed to meet the requirement in Kerkman's Award that he demonstrate sobriety during the sixty-day period commencing on September 25, 1981.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes and enters the following

CONCLUSION OF LAW

That Respondent, Sheboygan County, by refusing to reinstate the grievant to employment in its Sheriff's Department and by discharging the grievant for failing to comply with the conditions for reinstatement as set down by Arbitrator Jos. B. Kerkman, did not commit a prohibited practice within the meaning of Section 111.70(3)(a)5, or, any other provision of the Municipal Employment Relations Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes and issues the following

ORDER 1/

IT IS ORDERED that the complaint filed herein be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 8th day of July, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Douglas V. Knudson
Douglas V. Knudson, Examiner

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

One of the conditions established by Arbitrator Kerkman for the grievant's reinstatement was that he demonstrate sobriety for a sixty-day period commencing on September 25, 1981, the date of the Arbitration Award. The County maintains that the grievant failed to meet said condition as evidenced by occasions within the sixty-day period when he was observed in an inebriated site and when he was observed consuming alcoholic beverages. The Union argues that maintaining sobriety does not require abstinence, and, since the grievant consumed at most only a moderate amount of alcohol on any single occasion during the sixty-day period, there is insufficient evidence to show that he breached the "demonstrates sobriety" requirement. The Union further points out that since the award was issued, the grievant regularly has attended counseling sessions and had participated in an Antabuse program.

The Commission functions here in a similar fashion as a "Section 301 Court". It is well settled that courts ought not delve into the merits of a previous arbitration award, 2/ nor is it necessary to do so in the instant dispute. The Commission here need simply consider whether the grievant complied with a particular condition precedent for his reinstatement, i.e., whether he demonstrated sobriety during the sixty days commencing on September 25, 1981, which condition was set forth in the Arbitration Award.

Though it is commendable that the grievant participated in both counseling and an Antabuse program in an effort to straighten out certain difficulties in his life, including an alcoholism problem, such efforts do not demonstrate sobriety. Thus, if the County can show that on at least one occasion during the sixty-day period the grievant failed to maintain sobriety, then the County does not have to reinstate him.

Clearly the grievant understood that he was an alcoholic and that alcoholics should abstain totally from drinking. With that knowledge and knowing that his job was on the line, the grievant should have avoided placing himself in any situation which might give the appearance that he was not sober. Instead, the grievant continued to visit taverns and to drink alcoholic beverages, based on his belief that he could control his drinking. Obviously, that opinion was not shared by the psychiatrist who placed the grievant on an Antabuse program on November 10, 1981. Similarly, Bronson's reports indicate that he was seeking a goal of abstinence for the grievant, as evidenced by his note concerning their counseling session on October 21, 1981 and by the statement in his letter of November 12, 1981. Such periods of abstinence were relatively brief since the grievant admitted to drinking on November 7, 1981. Moreover, the grievant was taking certain other medications which, in his opinion, resulted in intoxication occurring from fewer drinks than when he wasn't taking such medications. Accordingly, the grievant's opinion that he could, and did, control his drinking during the sixty day period is of a very tenuous nature.

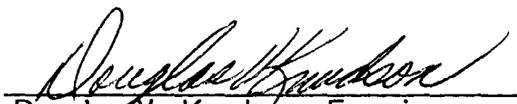
Both Jerry Gall and Shirley Gall had observed the grievant on previous occasions in their tavern when, in their opinions, he was not sober. Based on those past observations, each of the Galls, on separate occasions during the sixty-day period relevant herein, believed the grievant to be intoxicated. It is true that such opinions are subjective. However, those opinions must be given more weight than the grievant's self-serving and subjective opinion that he demonstrated sobriety during the sixty-day period. The grievant admitted to having a couple of alcoholic drinks on the date to which Jerry Gall testified, as well as to drinking on occasion during the sixty days. Yet he was unable to specify a number when asked to state the most drinks he had consumed on a single occasion during the sixty-day period. Thus, his estimate of a couple of drinks on November 7, 1981 is suspect.

2/ Steelworkers v. Enterprise Wheel and Car Corp., 363 U.S. 574 (1960).

Though neither Jerry or Shirley Gall knew if the grievant was actually drinking alcoholic beverages on the occasions to which they testified, such knowledge is not a necessary element to prove one is intoxicated. Proof can be established through opinions, formed solely from observing exhibited behavior. Indeed, that is often the method used in courts of law to prove intoxication when it is at issue. 3/ Upon consideration of the Galls' previous observations of the grievant, the grievant's testimony concerning both his drinking and his ability to control his drinking, and, the evidence relating to the Antabuse and counseling programs, the Examiner is satisfied that on the two occasions testified to by the Galls the grievant did not maintain sobriety. 4/ Consequently, the grievant did not fulfill the requirement that he demonstrate sobriety for the sixty days following Kerkman's Arbitration Award. Therefore, the County did not fail to comply with said Award when it terminated the grievant on November 25, 1981.

Dated at Madison, Wisconsin this 8th day of July, 1982.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Douglas V. Knudson, Examiner

3/ See, e.g., Kuroske v. Aetna Life Ins. Co. (1940), which states in relevant par as follows: "(A) lay witness who has the opportunity to observe the facts upon which he bases his opinion, may give his opinion whether a person at a particular time was or was not intoxicated."

4/ Because the Examiner has determined that on said two occasions the grievant was intoxicated, it is not necessary to discuss the incident on October 17, 1981, to which Hermann and Warbler testified.