BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

KENOSHA COUNTY

and

LOCAL 70, AFSCME, AFL-CIO

Case 112
No. 45250
MA-6538

Appearances:

Mr. Frank Volpintesta, Corporation Counsel, Courthouse, 912-56th Street, Kenosha, Wisconsin 53140, appearing on behalf of Kenosha County.

Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 624, Racine, Wisconsin 53401, by Mr. John P. Maglio, Staff Representative, appearing on behalf of Local 70.

ARBITRATION AWARD

Local 70, AFSCME, AFL-CIO (hereinafter referred to as the Union) and Kenosha County (hereinafter referred to as the County) jointly requested the appointment of Daniel Nielsen as arbitrator of a dispute concerning the discharge of Louis Vite. The undersigned was so designated. A hearing was held in Kenosha, Wisconsin on March 25, 1991, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant. A stenographic record was made of the proceeding and a transcript was received by the undersigned on March 29, 1991. The parties submitted post-hearing briefs, which were received by the undersigned on April 29, 1991, whereupon the record was closed.

Now, having considered the evidence, the arguments of the parties and the record as a whole, the undersigned makes the following arbitration award.

ISSUE

The parties stipulated that the following issue is to be determined herein:

> "Did the County have just cause to terminate the grievant? If not, what is the appropriate remedy?"

PERTINENT CONTRACT PROVISIONS

ARTICLE I - RECOGNITIONS

> Section 1.2. Management Rights. Except as otherwise provided in this agreement, the County retains all the normal rights and functions of management and those that it has by law. Without limiting the generality of the foregoing, this includes the right to hire, promote, transfer, demote or suspend or otherwise discharge or discipline for proper cause; the right to decide the work to be done and location of work; to contract for work, services or materials; to schedule overtime work, to establish or abolish a job classification; to establish qualifications for the various job classifications; however, whenever a new position is created or an existing position changed, the County shall establish the job duties and wage level for such new or revised position in

a fair and equitable manner subject to the grievance and arbitration procedure of this agreement. The County shall have the right to adopt reasonable rules and regulations. Such authority will not be applied in a discriminatory manner. The County will not contract out for work or services where such contracting out will result in the layoff of employees or the reduction of regular hours worked by bargaining unit employees.

. . .

ARTICLE III - GRIEVANCE PROCEDURE

Section 3.5 Work Rules and Discipline. Employees shall comply with all provisions of this Agreement and all reasonable work rules. Employees may be disciplined for violation thereof under the terms of this Agreement, but only for just cause and in a fair and impartial manner. When any employee is being disciplined or discharged, there shall be a Union representative present and a copy of the reprimand sent to the Union.

The foregoing procedure shall govern any claim by an employee that he has been disciplined or discharged without just cause. Should any action on the part of the County become the subject of arbitration, such described action may be affirmed, revoked, modified in any manner not inconsistent with the terms of this Agreement.

. . .

BACKGROUND FACTS

The County provides general municipal services to the people of Kenosha County in Southeastern Wisconsin. Among the services provided is the operation of a highway department. The Union is the exclusive bargaining representative for non-supervisory employees of the highway department. For 11 years, until his discharge on December 12, 1990, the grievant was employed as a truck driver/laborer in the highway department unit.

On November 14, 1990, the Kenosha County Highway Department Truck No. 172 was observed stopped at the intersection of Highway 158 in Green Bay Road in Kenosha County. Lawrence Green, a motorist stopped behind the truck, saw the truck make a left turn through the intersection while the stop-light was red. When the light changed, Green turned left and observed the truck pulled over on the side of the road in front of a convenience store. The driver had exited the truck and gone into the store. Green told his son to note the number of the truck.

Green contacted the Highway Department to complain about the truck driver's actions. Gene Scharfenorth, the Highway Commissioner, referred the complaint to Patrol Superintendent Dennis Wolf for investigation. Wolf determined that the truck in question was being driven by the grievant on November 14, and secured Green's commitment to participate in any disciplinary proceeding. He reported this back to Scharfenorth.

Scharfenorth reviewed the grievant's disciplinary record:

RECORD OF DISCIPLINE
LOUIS VITE

DATE	REASON	TYPE
Oct. 15, 1979	Started	
Nov. 10, 1980	Excess AWOP	Verbal

Feb. 25, 1981	Leaving early	Written warning
Mar. 5, 1981	Unauthorized absence	3 day susp.
Oct. 9, 1991	Disobeying safety rules	Written
Dec. 29, 1981	Unauth. absence-told to get Dr. rep.	Written
Apr. 23, 1982	Unauthorized absence	3 days susp.
Oct. 22, 1985	Excess absence-told to get Dr. rep.	Verbal
Aug. 13, 1986	Unauthorized absence	Verbal
Oct. 28, 1986	Unauthor. absence-told to get Dr. rep.	Verbal
Dec. 8, 1986	Unauthor. absence-told to get Dr. rep.	Written
July 28, 1987	Unauthor. absence-told to get Dr. rep.	Written
Apr. 17, 1989	Unauthor. absence-told to get Dr. rep.	Written
June 29, 1989	low work product.	Written
Aug. 18, 1989	Hitting truck fender	Written
Apr. 4, 1990	Agreement for work availability	Written
Oct. 29, 1990	Sleeping on duty	6 da. susp.

Based upon Green's report, and the review of the grievant's disciplinary record, Scharfenorth sent the grievant and George Serpe, the Union's President, a Notice of a Predisciplinary Meeting:

> You, Louis Vite, are hereby advised that on Dec. 6, 1990 at 2:00 p.m. in the Highway Conference Room there will be a pre-disciplinary meeting to discuss the charge of:
>
> 1. Failure to obey work rules
>
> A. Kenosha County Unified work Rules
>
> - Attendance
>
> No. 1. Every employee must be ready to work at the scheduled starting time and shall continue to work, except for authorized break and lunch periods, until the scheduled quitting time.
>
> No. 4. Employees shall not over-extend authorized breaks or lunch periods.
>
> - Work Habits
>
> No. 1. Employees shall not demonstrate incompetency or inefficiency in the performance of job duties.
>
> No. 5. Employees shall not restrict the amount of work they can perform, interfere with others in the performance of their jobs, or participate in any interruption of work.
>
> No. 7. An employee must obey all safety rules, wear protective equipment provided and shall not engage in any conduct which tends to create a safety hazard.

No. 18. Employees must comply with all federal or state codes and regulations that govern their respective departments.

2. Failure to obey work rules
   A. Kenosha County Highway Department Safety Program

   - General Rules

   No. 1.1 Highway employees shall obey the rules of the road. Highway Department employees operating county equipment shall obey all laws, rules of the road, and departmental regulations. The fact that they are operating county equipment does not allow them to disobey the law.

   No. 1.2. Every precaution shall be taken to prevent accidents. Employees shall do their work and drive equipment with all possible regard for their own safety and for the rights and safety of others. Highway work, especially on the roadway, is a dangerous occupation, and employees must exercise unusual care to avoid accidents.

   - Equipment Operation Safety Rules

   No. 2.3 Obey all rules and traffic laws.

   You may have present at this meeting a union representative or any other Representative of your choosing.

   As a result of the above infractions of the rules of the County of Kenosha, I am considering taking the following disciplinary action:

   1. Termination of employment.

   You are hereby advised that you have the right to a pre-disciplinary meeting upon the charges in this notice. You may waive your right to the meeting and admit that the charges are true. If you waive your right to the meeting, the penalty of termination may be imposed without further actions.

   I hereby waive my right to a pre-disciplinary meeting upon the charges enumerated above and state that they are true in substance and fact.

_____ _____

Employee Date Witness Date

cc: Personnel File
Due Cause Officer

At the pre-disciplinary conference Scharfenorth and Brooke Koons, the County's Personnel Director, presented the grievant and his Union representatives with a copy of Green's statement.

Scharfenorth indicated that another employee might well receive a reprimand for running a red light, but that the County was intending to terminate the grievant on the basis of his over-all poor work record. The grievant neither admitted nor denied running the red light. Instead, he told the County that he suffered from alcoholism and chemical dependency and that these were the root causes of his problems at work. Later that day, the decision was made to terminate the grievant.

Two days after his discharge, the grievant checked himself into St. Catherine's Hospital detox center. He spent the night in the detox center and the next day was sent to the Benet Lake Treatment Center. He successfully completed the program at Benet Lake, and was released on January 11, 1991. Doctor Herbert Roehrich, Director of Benet Lake, provided the grievant with the following letter:

> "To whom it may concern,
>
> This letter is to verify that Mr. Lewis Vite has been my patient at St. Katherine's Hospital. I have been treating him for primary alcohol dependency and other associated drug dependencies. Mr. Vite has, by history, had an alcohol abuse or dependency problem since age 16. I therefore believe it is reasonable to assume that his alcohol and dependencies have been the major cause of his job problems. Correspondingly I presume that he maintains his current sobriety he will no longer have substantive job problems.
>
> Sincerely,
>
> Herb Roehrich, M.D."

Roehrich also provided the grievant with a letter medically clearing him to return to work effective January 14, 1991.

On January 16, the County's Administration Committee met to consider the instant grievance. The committee was provided with information regarding the grievant's work history and was also informed of his alcohol and chemical dependency problems. The Administration Committee upheld the discharge and the matter was thereafter referred to arbitration for resolution. Additional facts as necessary will be presented below.

THE POSITIONS OF THE PARTIES

The Position of the County

The County takes the position that the grievant was discharged for just cause. In its brief, the County poses and answers the seven questions posed by Arbitrator Carroll Daugherty in his Enterprise Wire Company award: 1/

> 1. Did the County give to the employee forewarning or knowledge of the possible or probable disciplinary consequences of the employee's conduct?

The grievant was well aware of County work rules regarding work safety, job performance and attendance. He had signed receipts and in-service attendance sheets reflecting full knowledge of his obligations under these rules. Furthermore, the grievant had only just returned from a six working day suspension when this infraction occurred. His notice of suspension advised him that further infractions might result in further disciplinary actions up to and including dismissal.

1/ 46 LA 359, 363-64 (1966).

2. Was the County rule or managerial order reasonably related to the orderly, efficient and safe operation of the County's business and the performance that the County might properly expect of the employee?

County highway department safety rules require compliance with the law and the rules of the road. This is reasonably related to the orderly, efficient and safe operation of the County Highway Department.

3. Did the County, before administering discipline to the employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

Prior to disciplining the grievant, the County secured a written statement from an eyewitness. The witness, Lawrence Green, was a disinterested private citizen with no reason to mislead the County or unjustly accuse the grievant. Furthermore, the grievant was afforded Union representation at every step of the disciplinary process, and did not deny running the red light in his pre-disciplinary meeting with Scharfenorth and Koons.

4. Was the County's investigation conducted fairly and objectively?

Again, the grievant was represented by his Union throughout these proceedings, which were initiated after a complaint by a disinterested citizen. The initial investigation was conducted by the Highway Patrol Superintendent, Dennis Wolf, who had no apparent motive to slant the facts or treat the grievant unfairly.

5. At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

The grievant was not terminated for alcoholism or drug abuse. Rather, he was discharged for running a red light in a County vehicle after having been extensively disciplined for prior infractions. As previously noted, the County proceeded on the basis of eyewitness testimony by a disinterested citizen. There is a substantial and persuasive basis for the conclusion that the grievant was guilty of running a red light, as well as having been a poor employee for years before this offense.

6. Has the County applied its rules, orders and penalties evenhandedly and without discrimination to all employees?

While it is true that in one other instance an employee was given an opportunity to "dry himself out" and was thereafter reinstated, that case is distinguishable from the instant grievance. In the prior case, the County had knowledge of the employee's alcoholism for a period of two months prior to the discharge, and was able to respond in a more measurable manner. Furthermore, there is no evidence that that employee had the disciplinary record in any way comparable to the grievant's own long history of poor work performance.

7. Was the degree of discipline administered by the County in this case reasonably related to the seriousness of the employee's proven offense and the record of the employee in his service with the County?

The grievant has a long history of poor work performance and progressive discipline. His poor work history is capped by the serious breach of the County's safety program evidenced in this case. With respect to the defense of alcoholism or drug abuse, the County maintains that two relevant points must be considered. First, whether the behavior of the alcoholic, while intoxicated, is bizarre, aberrant, or otherwise disruptive. Secondly, the Arbitrator must consider whether or not the alcoholic's condition has an adverse effect on his or her work performance

and/or attendance. Both the expert testimony at the hearing and the grievant's own work record suggests that his alcohol and drug abuse have adversely affected his work performance and attendance. His own doctor labeled his prognosis as "guarded". The grievant's long history of chemical dependency, his poor work record, and the last minute nature of his admission to alcoholism and drug abuse, all suggests an insincerity in his promise to address the problem over the long haul.

For all of the foregoing reasons, the County asks that the discharge be upheld.

B. THE POSITION OF THE UNION

The Union takes the position that the County has utterly failed to prove that the grievant committed the offense alleged - to wit, running a red light on November 14, 1990. The grievant asserts that he does not recall any such incident, and denies that he would have forgotten it. No police report was ever filed in the matter, and only one witness came forward to complain about the alleged violation of traffic laws. Where the penalty of discharge is imposed, the Union asserts that the County must shoulder a substantial burden of proof. Here it comes down to essentially one person's word against another. All doubts must be resolved in favor of the grievant, and the Union argues that the underlying accusation cannot therefore be sustained.

The Union also acknowledges Arbitrator Daugherty's seven questions of just cause, and contends that the discipline must fail under this analysis:

> TEST 3. INVESTIGATION:
>
> "Did the Employer, before administering the discipline to the employee, make an effort to discover whether the employee did in fact violate or disobey a rule of management?"

As noted, the County conducted no real investigation. The police were not called to the scene, no police report was filed, and the County made no effort to seek out other eyewitnesses to the alleged incident.

> TEST 4. FAIR INVESTIGATION:
>
> "Was the Employer's investigation conducted fairly and objectively?"

Obviously, given the limitation of the investigation actually conducted, it can hardly have been a fair investigation.

> TEST 5. PROOF:
>
> "At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

Again, no corroborating witnesses, no police report, and no citation for a violation of traffic laws were available as evidence of the grievant's guilt. There is, the Union asserts, no substantial evidence of the grievant's guilt.

> TEST 6. EQUAL TREATMENT:
>
> "Has the Employer applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?"

It was established at the hearing that other individuals with drug and alcohol related dependencies did not suffer the loss of their jobs or seniority as a result of such dependencies. The grievant was discharged as the final disciplinary act by a retiring highway commissioner who

admitted during the hearing that he found the grievant to be an "irritant." No credible reason was proffered by the County for treating the grievant differently than other alcohol dependent employees had been treated in the past.

> TEST 7. PENALTY:
>
> "Was the degree of discipline administered by the Employer reasonably related to the seriousness of the employee's proven offense . . ."

Given the County's failure to prove anything, the discipline imposed cannot be reasonably related to the seriousness of the offense.

Even assuming for the sake of argument that the County has met its burden of proof in this case, the Union asserts that discharge is not the proper response in a case of long term alcohol dependency. The grievant's alcohol and drug abuse were substantially related to his disciplinary record. As an example, the Union notes that 11 of his 17 disciplines have been for absenteeism and attendance related problems. The grievant's attending psychiatrist, Dr. Joseph Ziccarelli, testified that work related problems such as absenteeism are a frequent symptom of alcoholism.

The evidence shows that, while the grievant had some difficulty facing up to his dependency prior to his termination, he has since voluntarily undergone a month of inpatient treatment and enrolled in continuing and intensive outpatient programs to control his addiction. His successful completion of the inpatient portion of the treatment program lead Dr. Roehrich, Director of Benet Lake, to conclude "if he maintains his current sobriety he will no longer have substantive job problems." Since the completion of his inpatient and intensive outpatient programs, the grievant has participated fully in the rehabilitation and therapeutic programs set forth by his counselors. As of the time of the hearing in this matter, he had been sober and drug free for three and half months.

The Union argues that the County erred in refusing to consider the grievant's alcohol and chemical dependency, as well as his admission of this problem and his willingness to seek help, when it decided to terminate him in December of 1990. The County should have given the grievant an opportunity to demonstrate that he could overcome his alcoholism and return to the County's workforce as a productive employee.

For all of the foregoing reasons, the Union asks that the grievant be reinstated and made whole for all of his losses.

DISCUSSION

At issue in this case is whether the grievant engaged in the misconduct alleged (running a red light), whether that misconduct constitutes grounds for discharge, and whether the grievant's history of substance abuse should mitigate his disciplinary record.

Proof

The weight of the evidence in the record persuades the undersigned that the grievant did indeed run a red light in November 14, 1991. There is no basis for doubting the accuracy of Green's eyewitness testimony. Green does not work for the County, is not acquainted with anyone involved in this case, and has nothing to gain by bearing false witness against the grievant. The Union's objections that additional witnesses are not secured and that no police report was filed are not persuasive. Common experience would suggest that relatively few motorists come forward to describe the moving violations they witness on a daily basis. As to the lack of a police report, the County as an employing entity would have no motive for attempting to have its employees cited by the police. In this regard, the undersigned would note that no responsible official of the County government actually witnessed the violation. Green presumably could have contacted the Sheriff's Department had he wished, but the fact that he did not does not in any way

diminish the reliability of his testimony.

Balanced against Green's testimony is the fact that the grievant never directly denied having run the red light. At his pre-disciplinary hearing, and at the arbitration hearing, the grievant couched his answers in terms of "not recalling" any such incident, at one point strengthening his statement to say that he didn't believe the incident could have happened. Even if one treats this final statement as a flat denial, it cannot overcome the weight of Green's testimony. The great weight of the evidence supports the conclusion that the grievant did indeed run a red light in his County truck on November 14, 1991.

Just Cause

There is little question that the failure to observe traffic signals is a violation of several county work rules. The safety rules for Kenosha County Highway Department employees listed in the County's Safety Program include under general rules:

> "1.1 Highway employees shall obey the rules of the road. Highway Department Employees operating County equipment shall obey all laws, rules of the road, and departmental regulations. The fact that they are operating County equipment does not allow them to disobey the law."

The specific work rules of the County Highway Department also address the employee's duty to abide by state and local traffic regulations:

> "14. Employees must comply with all state and local laws including those that pertain to traffic regulations, hazardous materials, and handling of chemicals."

Beyond these rules, there is a simple matter of common sense. A person employed as a truck driver can be presumed to understand his obligation to obey traffic laws, since it is a fundamental element of the safe discharge of his duties.

The County has proven that the grievant ran a red light while driving a County owned vehicle, and his conduct violates County work rules, as well as the generally accepted norms of behavior for persons employed as truck drivers. The degree of offense, however, is not such that it would, standing alone, usually lead to discharge. The discharge in this case was expressly premised upon the totality of the grievant's work record, with the incident on November 14th being the proverbial "last straw". The grievant has been repeatedly disciplined for violation of County work rules, and had just returned to work the previous day after serving a six day suspension for sleeping on the job in violation of those rules. The suspension notice warned him that "any further infractions of this same nature may result in further disciplinary actions up to and including dismissal."

The traditional requirement of progressive discipline is amply satisfied by the County's conduct in this case. The grievant had previously received four verbal warnings, nine written warnings and three suspensions in his 11 years of employment. It cannot be seriously argued that the grievant had no reason to suspect that he was on thin ice as regards his job. Granting that the infraction on November 14th was relatively minor, an employee who has trafficked in work rule violations as extensively as the grievant is rightly exposed to more serious consequences for his actions than another employee with a clean record. It is the essence of progressive discipline that employees may be expected to modify their behavior as the disciplinary steps become ever more severe. An employee who shows no such improvement may justifiably be discharged. Viewed in isolation from the issue of alcohol dependency, the grievant's violation of a fundamental work and safety rule on the day after he returned from suspension entitled the County to impose further discipline up to, and including, discharge.

Mitigation

Having concluded that the grievant's conduct justified discharge in the abstract, there remains the question of the extent to which his work record is mitigated by his alcoholism. This goes to the extent of personal responsibility the employee bears for his conduct. More importantly, the issue of substance abuse goes to whether there might be some basis for believing that the grievant could, in the future, modify his behavior so as to be a productive employee. Even if one concludes that the grievant has in the past been unable to control his behavior, without the prospect of improvement his employer has little to gain and much to lose from excusing that behavior and returning the grievant to the work force.

The grievant is an alcoholic, and has also used cocaine. His use of alcohol has been on a daily basis since his teens, while his cocaine use has been more sporadic. His use of both alcohol and cocaine was apparently exacerbated five years ago, when his brother was murdered by a foster child. While he denies ever having used alcohol or drugs on the job, his testimony and the expert testimony of his psychiatrist leave little doubt that his substance abuse played a significant role in his work related problems, particularly his 11 disciplines related to attendance and unavailability for overtime, with alcohol having the major part in these. Indeed, the grievant's disciplinary record consists almost entirely of offenses commonly connected with the alcoholic employee -- attendance problems, poor work product, and sleeping on duty. 2/

The majority view among arbitrators is that alcoholism is a disease, and that this must be weighed in determining whether a terminated employee should be afforded another chance. As expressed by the Denenbergs in their book on alcoholism and drug abuse in the work place:

> "For now, there seems to be an emerging consensus among arbitrators, advocates and treatment specialists that the normal progression of corrective discipline should not be suspended for the alcoholic employee. On the contrary, the alcoholic should be held accountable for his conduct, but, to be truly "corrective", disciplinary penalties should be coupled with opportunities to recover. . . ." 3/

At issue then is whether the grievant should be given some opportunity to recover and prove his ability to function as a productive employee without using intoxicants. The County concedes that it successfully extended this opportunity to another employee who suffered from alcoholism. It distinguishes that case from this, however, because it had two months' advance notice of that employee's chemical dependency, and thus a greater confidence in his sincere desire to address the problem. The grievant here only admitted his problem at the last instant before discharge.

Notwithstanding the County's skepticism, it is not surprising that the grievant's admission came at the last moment. It is frequently the case that alcoholism is not revealed until the employee is faced with discharge. One common feature of alcoholism is denial 4/ and many employes fear the effect that admitting their disease might have on their jobs. Only when the crisis is realized and the full implications of their behavior are brought home to them will many employees admit to dependency. Contrary to the County's view that the grievant showed a lack of sincerity in his late admission, the grievant's conduct is fairly typical of alcoholics. 5/

2/ Transcript, page 45, folios 3-25.

3/ Denenberg & Denenberg, Alcohol and Drugs: Issues in the Workplace, (BNA 1983) at page 143; See also Trice & Roman, Spirits and Demons at Work: Alcohol and Other Drugs on the Job, (ILR, Cornell University 2nd Ed. 1978) at page 209.

4/ Trice & Roman, at pages 170-175; Denenberg, at page 40.

5/ ". . . admission of alcoholism by an employee often comes after the highly traumatic experience of actual or threatened discharge from employment." N.Y. Telephone Company and Communications Workers (I. Markowitz, 1/14/80) cited in

Any question about the grievant's sincere desire to overcome his addiction may be answered by his conduct after he was discharged. Although post-discharge conduct is not usually considered in discipline cases, an exception is made for evidence concerning efforts at rehabilitation by alcoholic employees. 6/ This is because of the tension between society's recognition that the employee may not be fully culpable for his misconduct and may be salvageable with treatment, and the employer's legitimate concern about having an employee reinstated solely on the basis of an arbitrator's or doctor's optimism. It is, after all, the employer who shares the cost of a relapse with the employee. Evidence of successful efforts to become and remain sober after the discharge can serve to offer some reassurance to the employer that the worker, if reinstated, will change his behaviors to conform to the requirements of the workplace. The grievant here voluntarily checked into treatment on the day after his discharge and, as of the time of the hearing, and successfully completed each phase of the treatment program. While the grievant's psychiatrist characterized his prognosis as "guarded" because of his long history of alcohol abuse, he also expressed his professional opinion that continuation in the therapy program would speak against a relapse, and that return to work would itself be therapeutic.

Alcoholism is not and should not be available as a shield against realizing the consequence of poor job performance. The mere fact that an employee blurts out "I'm an alcoholic" on his way out the door cannot entitle him to wipe away a history of rule violations. Each case is unique, and in the absence of uniform employer policy for dealing with alcohol and drug abusers must be considered on its individual merits. In this case, the undersigned is persuaded that the vast majority of the grievant's rule violations were the direct result of his alcohol dependency, and there is a substantial basis in the record for concluding that control of his dependency will make him an acceptable employee. Given this, and in light of his 11 years of seniority, the undersigned concludes that chemical dependency may be treated as a mitigating factor in this case and that the grievant should be allowed to prove himself to the employer.

The decision to reinstate the grievant is expressly premised upon the belief that he can function well as an employee if he abstains from alcohol and drug use. The County has raised a reasonable concern about his fitness to function as a truck driver, although there is little question that he can perform the job safely so long as he is clean and sober. The reinstatement is therefore made subject to the following conditions:

> 1. The grievant will be reinstated without back pay, benefits or seniority for the period between the date of his discharge and the date of his reinstatement, assuming that he is otherwise qualified for reinstatement; 7/
>
> 2. The grievant must provide the County with a statement from his treating physician that he is fit for work as a truck driver prior to reinstatement;
>
> 3. The grievant must provide the County with a copy of his treatment program, as well as a statement from his treating physician that he is successfully following the treatment program, and thereafter provide statements every two weeks for a period of

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Denenberg at page 39.

6/ Indianapolis Rubber Company, 79 LA 529 (Gibson, 1982); Hiram Walker & Sons, Inc., 75 LA 899 (Belshaw, 1980); National Gypsum Co., 73 LA 228 (Jacobs, 1979); Standard Packing Corp., 71 LA 447 (Fogelberg, 1978).

7/ There was some question at the hearing about the grievant's possession of a commercial driver's license. The order of reinstatement is not intended to interfere with the application of uniform rules regarding qualifications.

one year from the date of reinstatement from his attending physician, counselor or therapist stating that he is continuing to successfully participate in a treatment program;

4. The grievant must provide the County with a release for all of his treating physicians, therapists and counselors, allowing the County to verify his continuing successful participation in treatment for a period of one year following the date of reinstatement;

5. The grievant must completely abstain from the use of alcohol and drugs, other than as may be prescribed by his physician. In the case of prescription drugs, the grievant shall inform the County of any prescriptions he may receive, and shall strictly conform to the prescribing doctor's directions for usage;

6. The County shall have the right to demand medical tests on a random basis for the period of one year following the date of reinstatement to determine whether the grievant has used or is using alcohol or non-prescription drugs, or is abusing any prescription drug.

7. This reinstatement order and the attendant conditions shall be treated as a last chance agreement, and the grievant shall be on final probation for a period of one year following the date of reinstatement.

The conditions for reinstatement set forth above are burdensome, and the grievant bears sole responsibility for complying with them. The requirements that he provide medical releases and submit to random drug and alcohol testing raise some questions concerning privacy rights, particularly since the case involves a governmental employer and a public employee. In order to ensure that the grievant understands that he bears responsibility for compliance, and in order to avoid clouding the issue with privacy questions, the last change agreement described above will be optional. The grievant may either voluntarily agree to its terms in writing -- thus waiving any privacy based objections -- or he may choose to let his discharge stand.

On the basis of the foregoing, and the record as a whole, the undersigned makes the following

AWARD

The County had just cause to discipline the grievant. However, the grievant's alcohol and chemical dependency mitigates his offense and makes discharge an inappropriate penalty, assuming that the grievant voluntarily executes a last chance agreement subject to the following conditions:

1. The grievant will be reinstated without back pay, benefits or seniority for the period between the date of his discharge and the date of his reinstatement, assuming that he is otherwise qualified for reinstatement;

2. The grievant must provide the County with a statement from his treating physician that he is fit for work as a truck driver prior to reinstatement;

3. The grievant must provide the County with a copy of his treatment program, as well as a statement from his treating physician that he is successfully following the treatment program, and thereafter provide statements every two weeks for a period of

one year from the date of reinstatement from his attending physician, counselor or therapist stating that he is continuing to successfully participate in a treatment program;

4. The grievant must provide the County with a release for all of his treating physicians, therapists and counselors, allowing the County to verify his continuing successful participation in treatment for a period of one year following the date of reinstatement;

5. The grievant must completely abstain from the use of alcohol and drugs, other than as may be prescribed by his physician. In the case of prescription drugs, the grievant shall inform the County of any prescriptions he may receive, and shall strictly conform to the prescribing doctor's directions for usage;

6. The County shall have the right to demand medical tests on a random basis for the period of one year following the date of reinstatement to determine whether the grievant has used or is using alcohol or non-prescription drugs, or is abusing any prescription drug.

7. This reinstatement order and the attendant conditions shall be treated as a last chance agreement, and the grievant shall be on final probation for a period of one year following the date of reinstatement.

8. The agreement shall include a statement to the effect that the grievant has consulted with his Union representatives prior to signing the agreement, that the grievant understands that the agreement may contain some provisions compromising legal rights to privacy that he might otherwise enjoy, and that he voluntarily waives those rights in return for reinstatement.

Should the grievant choose not to execute the last chance agreement, his alcohol and chemical dependency will not sufficiently mitigate his work rule violations, and the discharge will be upheld.

The undersigned will retain jurisdiction over this matter for the period of sixty (60) days following the date of this Award.

Signed and dated this 26th day of June, 1991 at Racine, Wisconsin.

By Daniel Nielsen /s/
Daniel Nielsen, Arbitrator