BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
MARATHON COUNTY OFFICE AND TECHNICAL EMPLOYEES UNION, AFSCME LOCAL 2492-E	Case 237 No. 53335 MA-9314
and	
MARATHON COUNTY	

Appearances:

Mr. Phil Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

Ruder, Ware & Michler, S.C., Attorneys at Law, by Mr. Jeffrey T. Jones, appearing on behalf of the County.

ARBITRATION AWARD

Marathon County Office and Technical Employees Union, AFSCME Local 2492-E, hereinafter referred to as the Union, and Marathon County, hereinafter referred to as the County, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the County, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over a termination. The undersigned was so designated. Hearing was held in Wausau, Wisconsin, on May 14, 1996. The hearing was transcribed and the parties filed post-hearing briefs. The parties reserved the right to file reply briefs. The Union chose not to file a reply brief and the County filed its reply brief on August 8, 1996, and the record was then closed.

BACKGROUND:

The grievant was employed by the County for 11 1/2 years. The first three years he worked as a Corrections Officer and the last 8 1/2 he worked as a Public Safety Telecommunicator, a Dispatcher. The grievant's performance evaluations have been satisfactory

but the grievant has had problems with alcohol abuse for many years. In 1993, after failing to report to work as scheduled, the grievant was given a medical leave for approximately one month for treatment at St. Joseph's Hospital in Marshfield, Wisconsin. Upon his return to work, the grievant agreed to remain alcohol free, attend regular outpatient counseling and make himself available for random chemical screening. This agreement expired on April 1, 1994, apparently without any further alcohol-related problems. On July 11, 1995, the grievant was involved in an off-duty incident. The grievant admitted that prior to this incident, he had consumed a few beers at a golf outing. On July 21, 1995, the grievant met with the Chief Deputy, the County's Personnel Director, as well as a Union steward and the July 11, 1995 incident was discussed. As a result of these and other discussions, the parties entered into the following:

MEMORANDUM OF AGREEMENT

IT IS HEREBY AGREED by and between Marathon County, AFSCME Local 2492-E, and Kristian Evenson that the following shall constitute the terms and conditions in which Mr. Evenson continues his employment as a Police Communications Specialist with the Marathon County Sheriff's Department:

A. Mr. Evenson shall cooperate with an alcohol assessment conducted by Mr. Milo Gordon and shall comply with all recommendations for alcohol treatment/counseling made by Mr. Gordon. Mr. Evenson shall execute any release(s) of information needed to permit the County to receive a copy of the assessment findings and to confirm participation in any subsequent treatment/counseling.

B. Mr. Evenson shall remain alcohol and drug free during the term of this Agreement.

C. Mr. Evenson shall submit to a random drug and alcohol tests (sic) to be conducted during work hours. A positive result to the alcohol screen shall be defined as .01 and above.

D. If Mr. Evenson fails to comply fully with the terms described in this document he shall be terminated from his employment with Marathon County.

E. This Agreement shall become effective upon signature and shall expire on December 31, 1996.

Dated this 25th day of July, 1995.

ON BEHALF OF MARATHON COUNTY	ON BEHALF OF THE UNION
Gary Marten /s/	Joanne P. Mosier /s/
Sheriff Gary Marten	~~Richard Niemi~~
	President V.P.

	ON BEHALF OF
Brad Karger	MR. EVENSON
Personnel Director	
	Kristian P. Evenson /s/
	Kristian Evenson

The grievant reported to work at 6:00 a.m. on August 14, 1995, and was asked to submit to an alcohol breathalyzer test pursuant to the Memorandum of Agreement. The test was administered between 7:00 a.m. and 7:30 a.m. by a contracted Breath Alcohol Technician. The grievant tested .014. A second test is required 15 minutes after the first test as part of Federal regulations related to testing in the transportation industry. The grievant elected not to take the second test stating that there was no reason to do it as the result would be the same. The grievant admitted to the person conducting the test that he had consumed eight cans of beer the night before. The Chief Deputy was informed that the grievant would not take the second test and the Chief Deputy told the grievant that he should rethink his refusal but the grievant said he wasn't going to take a second test. The Chief Deputy told the grievant that he would be sending him home and would schedule a predetermination hearing for the next day. The Chief Deputy went to check his calendar and the availability of the Sheriff. Upon his return, the grievant stated he wanted to resign. The Chief Deputy told the grievant he should really think about that but the grievant didn't change his mind. The Chief Deputy and the grievant then went to the Sheriff's office and the Sheriff asked the grievant if he was sure he wanted to resign and the grievant said he did. The Sheriff asked for it in writing and the grievant asked to go home and type it up. The Sheriff agreed and a couple of hours later the grievant returned and submitted the following:

> THIS IS A LETTER TO INFORM YOU THAT I HEARBY (sic) RESIGN MY COMMISSION AS A POLICE COMMUNICATIONS SPECIALIST WITH THE MARATHON COUNTY SHERIFF'S DEPT. EFFECTIVE AUGUST 14, 1995 AT 8:00 A.M. I WOULD LIKE TO HAVE MY REMAINING VACATION TIME AND COMP. TIME PAYED (sic) OUT. ALSO AS STATED IN MY PRIOR LETTER I WILL BE IN CONTACT WITH THE UNION REP. PHIL SALAMONE. AS I DON'T FEEL THAT MY PERSONAL LIFE HAS INTERFERED WITH MY WORK DUTIES. THANK YOU FOR YOUR UNDERSTANDING IN THIS MATTER.
>
> SINCERLY, (sic)
>
> KRISTIAN P. EVENSON
>
> Kristian P. Evenson /s/
>
> CC. PHIL SALAMONE

Neither the Sheriff nor Chief Deputy saw the grievant again until the first day scheduled for hearing in this matter.

On August 16, 1995, the grievant filed a grievance alleging he was constructively discharged and forced to resign. He asked to be reinstated. The grievance was denied and appealed to the instant arbitration.

ISSUE:

The parties were unable to agree on a statement of the issues.

The Union stated the issue as follows:

> Did the Employer violate the collective bargaining

agreement by constructively discharging the grievant, Kristian Evenson? And if so, what is the appropriate remedy?

The County stated the issue as follows:

> The first issue is whether the termination of the grievant's employment violated the terms of the collective bargaining agreement. If so, what is the appropriate remedy? The second issue is whether the grievance is subject to arbitration. If not, what is the appropriate remedy?

The undersigned frames the issues as follows:

1. Did the grievant voluntarily resign his employment from the County?

2. If not, was the grievant discharged without just cause?

3. If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS:

Article 2 - Management Rights

> The County possesses the sole right to operate the departments of the county and all management rights repose in it, but such rights must be exercised consistently with the other provisions of the contract. These rights include, but are not limited to, the following:
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> . . .
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> D. To suspend, demote, discharge, and take other disciplinary action against employees for just cause;
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> . . .

COUNTY'S POSITION:

The County contends that the grievant's resignation did not constitute a constructive discharge. It submits that a resignation is treated as a discharge only when there is not adequate evidence of the intent to resign or the employer has coerced the employe into resigning. The County cites a number of arbitration decisions which held that where an employe's resignation was voluntary, the employer's failure to accept a retraction of the resignation did not constitute a constructive discharge. 1/ It argues that the evidence unequivocally demonstrates that the grievant intended to resign and was not coerced into doing so and no constructive discharge occurred. It also asserts that while there is no requirement that the resignation be accepted, it was accepted in the instant case.

The County insists that pursuant to Article 6 (D) 1, the grievant voluntarily terminated his employment when he submitted his resignation. It asserts that the grievant was not coerced into resigning as the Chief Deputy advised the grievant about not submitting to the second test and after the grievant verbally stated he wished to resign the Chief Deputy advised him to seriously consider the decision. It notes that the Sheriff then asked the grievant if he was sure he wanted to resign and the grievant told him "yes" and the grievant went home for 2 - 3 hours and returned with his written resignation. It insists that the grievant was not coerced, advised, implied or influenced to resign but on the contrary, both the Chief Deputy and the Sheriff advised him to reconsider his decision. The County points out that the grievant never attempted to retract his resignation. The County repeats its argument that nothing in the contract requires it to formally accept a resignation before it becomes effective but the Sheriff did, in fact, accept the resignation, and thus, Article 6 (D) 1 must be given effect.

The County maintains that the Union's assertion that the grievant was coerced into signing the Memorandum of Agreement is totally without merit. The County anticipates that the Union will assert that the grievant was coerced into signing the Memorandum of Agreement because if he didn't, he'd be discharged, and his later violation of the coerced Memorandum of Agreement prompted his resignation. The County takes the position that the Memorandum of Agreement was a "Last Chance Agreement" which was valid and enforceable. The County cites a number of authorities 2/ that hold that "Last Chance Agreements" must be strictly interpreted and given effect

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1/ Texas Utilities, 82 LA 6 (Edes, 1983); Mosinee School District, No. A/P M 9092 (Chatman, 1990); H. H. Robertson Co., 50 LA 637 (Kabaker, 1968); ITT Cannon Electric, 47 LA 454 (Roberts, 1966); Transcon Lines, 40 LA 469 (Marshall, 1963); Addressograph-Multigraph Corp., 29 LA 700 (Dworkin, 1957); Safeway Stores, Inc., 79 LA 176 (Winograd, 1982); Borden Co., 38 LA 425 (Morvant, 1962).

2/ Abtco Inc., 104 LA 551 (Kanner, 1995); Porcelain Metals Corp., 73 LA 1133 (Roberts, 1979); Story Chemical Corp., 65 LA 1257, 76-1 ARB para. 8141 (Daniel, 1976); Bakers Union Factory No. 326 v. ITT Continental Baking Company, Inc., 117 LRRM 3145 (6th

because all the parties agreed to it as a modification of the collective bargaining agreement.

The County argues that the Memorandum of Agreement was reasonable and the grievant was not coerced into signing it. It notes that there were two different meetings between the County and the Union and the grievant was not coerced into signing it and never grieved it. It submits that the grievant was never told to sign it or he'd be fired. It insists that the Memorandum of Agreement was clearly enforceable and the grievant's resignation based on his violation of the Memorandum of Agreement cannot be considered a constructive discharge.

The County claims that inasmuch as the grievant is a Dispatcher, requiring him to comply with the terms of the Memorandum of Agreement was appropriate. It points out that the grievant's duties include emergency services that require complete sobriety and requiring him to be alcohol free is reasonable and appropriate.

The County contends that the grievance is not subject to arbitration and should be summarily dismissed. According to the County, the grievant, by signing the Memorandum of Agreement, waived the "just cause" provision as well as the grievance procedure with respect to his termination. It submits he violated the terms of the Memorandum of Agreement and his employment was terminated in accord with its terms, and therefore, the grievance should be dismissed as being not subject to arbitration.

UNION'S POSITION:

The Union points out that Article 2 (D) provides that the County must have just cause to discharge an employe. The Union claims there are two questions, i.e. was there a discharge and was there just cause for it. The Union argues that there was a constructive discharge in this case. It submits that the evidence establishes that if the grievant did not sign the Memorandum of Agreement, he would have surely been discharged and if he had not resigned, again he would have been discharged. It defines a constructive discharge as action by an employer to get rid of an employe by making conditions so unbearable that the employe is forced to quit. It submits that the grievant was "forced" into the actions he took because he would have been terminated.

The Union takes the position that there was not a resignation but rather a discharge. It claims that the incident leading to the Memorandum of Agreement was off-duty conduct not reasonably related to his employment and there was not a sufficient "nexus" between his employment and off-duty conduct to subject him to discharge. It acknowledges that the grievant

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Cir. 1984); Tootsie Roll Industries v. Local 1, 126 LRRM 2700 (7th Cir. 1987); Bethlehem Steel Corporation, 102 LA 1211 (Doepken, 1994); National Steel Corp., 88 LA 457 (Wolff, 1986); City of Wausau, Dec. No. 39510 (Buffett, 1988).

has had past problems with alcohol but it did not affect his job performance as demonstrated by his performance evaluations. The Union states that it understands the County's wish not to have an employe with a potential alcohol problem in a sensitive position as an emergency 911 operator. It suggests that the discharge be converted to a demotion to Corrections Officer, so the grievant would not go "scott free" but would have a job while he worked on his personal problems. The Union believes the facts and circumstances of this case require re-examination and the punishment should more nearly fit the crime.

COUNTY'S REPLY:

The County contends that the Union's claim that the grievant would have been discharged had he not signed the Memorandum of Agreement is, at best, a half truth. It admits that termination was only an option. It asserts that the grievant admitted that no one advised him that he would be terminated if he didn't sign the Memorandum of Agreement. With respect to his resignation, the County observes that the grievant's possible termination was never discussed and in either case, the grievant had the option to challenge any discharge through the grievance procedure.

The County insists that the July 11, 1995 incident was related to his employment even though it occurred off duty because the grievant identified himself as a member of the Sheriff's Department. It also notes that the grievant never filed a grievance over the July 11, 1995 incident and the time for doing so has long since passed.

The County objects to the Union's requested relief of a demotion to Corrections Officer as suggested by the Union as it would be inappropriate as such conflicts with the Sheriff's constitutional authority and would require the layoff of a totally innocent party. The County asks that the grievance be denied and the County be awarded attorney's fees and costs.

DISCUSSION:

This is a classic case of an individual who is an alcoholic and refuses to admit it or to stop drinking even if it means the loss of employment. The grievant must be ready and willing to seek and accept help to solve his problem. The County has recognized the problem and has attempted to assist the grievant in rehabilitation to salvage his employment. The grievant was given a leave of absence in 1993 to seek a solution to his problem. In 1995, the grievant was given another opportunity to solve his problems with alcohol but failed. An employer is not obligated to assist an employe forever. Where an employe will not help himself and rejects the hand offered to him, he must accept the consequences.

The Union has argued that the grievant did not resign but was constructively discharged.

Constructive discharge is a well-recognized concept in arbitration. Usually, employers present employes with the option to resign or be discharged with the result of forcing a resignation to avoid the just cause requirements of the contract. Another example of a constructive discharge involves a situation where, in the heat of a controversy, an employe quits in a fit of emotion and when he/she has calmed down, retracts the quit.

The facts presented in this case do not support a finding of a constructive discharge. First, with respect to the Memorandum of Agreement signed by the grievant on or about July 25, 1996, there is no evidence that the grievant was told to sign it or be terminated. The Memorandum of Agreement was a "Last Chance Agreement" and was similar to the September 30, 1993 Memorandum. 3/ The grievant had the option to see what discipline the County was going to mete out and challenge it through the grievance procedure. The grievant was represented by his Union stewards and there was no evidence anyone forced him to sign the Memorandum of Agreement. The County gave up its right to discharge the grievant and take its chances in arbitration if the grievant in fact pursued it and the grievant gave up just cause for his termination if he committed a violation of the Memorandum of Agreement in order to keep his job. The grievant chose a result that he felt was best for him and the fact that he failed to live up to his side of the bargain does not make the Memorandum coerced. The evidence failed to show that there was any coercion, threats or undue pressure by the County on the grievant to sign it. Thus, the Memorandum of Agreement was proper. An employer who enters into a last chance agreement is entitled to strict enforcement otherwise there would be no motivation for entering into such an agreement with other employes.

Second, with respect to the grievant's resignation, the evidence establishes that he voluntarily and knowingly resigned from his job. The evidence established that he was not told to resign or he would be fired. He brought up the resignation and neither the Chief Deputy nor Sheriff suggested it. On the contrary, the grievant was advised to think about what he was doing and questioned whether he was sure he wanted to resign. There was absolutely no coercion. Additionally, the grievant went home to type it up and came back some hours later and submitted it. He never retracted it. The resignation was thus voluntarily made and never rescinded, thus there was no constructive discharge. It is concluded that the grievant voluntarily resigned his employment and was not discharged and thus, the County did not violate the terms of the parties' agreement.

The County has asked for attorney's fees and costs; however, no provision of the agreement provides for the award of costs and attorney's fees to the losing party. If the parties intended such a result, they could have easily specified so with express language. They did not. Therefore, the undersigned will not award attorney's fees and costs.

Based on the above and foregoing, the record as a whole and the arguments of the parties, the undersigned issues the following

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3/ Ex. 30.

AWARD

The grievant voluntarily resigned his employment from the County, and therefore, the grievance is denied in all respects.

Dated at Madison, Wisconsin, this 8th day of November, 1996.

By Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator