BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

KENOSHA COUNTY (Wisconsin)

and

KENOSHA COUNTY LOCAL 990 (JAIL STAFF), AFSCME, AFL-CIO

Case 178
No. 56229
MA-10213

(Grievance concerning the discharge of V_ P_)

Appearances:

Mr. Frank Volpintesta, Corporation Counsel, with Davis & Kuelthau, S.C. by **Mr. Mark L. Olson** and **Mr. Gregory B. Ladewski** on the brief, on behalf of the County.

Mr. John Maglio, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of the Union.

ARBITRATION AWARD

At the joint request of the Union and County noted above, the Wisconsin Employment Relations Commission designated the undersigned Marshall L. Gratz as Arbitrator to hear and decide a dispute concerning the discharge of the Grievant, which dispute arose under the parties' 1998-99 Agreement (Agreement).

At a pre-hearing settlement conference in this matter held on May 4, 1998, the County advised the Union and Arbitrator that it refused to proceed to arbitration in the matter. The County ultimately agreed to proceed at the conclusion of a resultant WERC complaint hearing regarding that refusal. Thereafter, pursuant to notice, the grievance dispute noted above was heard by the Arbitrator at the County Personnel Department office on October 27, 1998. The proceedings were not transcribed, however, the parties agreed that the Arbitrator could maintain a cassette tape recording of the testimony and arguments for the Arbitrator's exclusive use in award preparation.

By agreement of the parties, the County initially summed up orally at the hearing, the Union then submitted a brief, and the County submitted a reply which was exchanged on December 28, 1998, marking the close of the hearing.

STIPULATED ISSUES

At the hearing, the parties authorized the Arbitrator to decide the following issues:

1. Did the County have just cause to terminate V__ P__?

2. If not, what is the appropriate remedy?

PORTIONS OF THE AGREEMENT

ARTICLE I - RECOGNITION

. . .

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 . . . suspend or otherwise discharge or discipline for proper cause; . . . .

. . .

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 [grievance and arbitration] procedure shall govern any claim by an employee that he/she 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 or modified in any manner not inconsistent with the terms of this Agreement.

. . .

BACKGROUND

The Union represents certain jail staff personnel employed in the County's Jail facilities. The County and Union have been parties to a series of collective bargaining agreements covering that unit, including the Agreement.

Prior to his discharge effective January 19, 1998, the Grievant was employed as a Relief Cook in the County Jail. It is undisputed that, when discharged, Grievant was a "long term" employe, whose County employment dated from sometime before 1984.

The grievance giving rise to this proceeding was dated January 19, 1998. That grievance asserts the following:

> P__ was terminated by Kenosha County for reasons other than proper or just cause [in violation of] Article I Sec. 1.2 and Article III Sec. 3.5 and any and all articles that may apply. [Such] that V__ P__ [should] be reinstated immediately and made whole for any lost wages or benefits and furthermore, that his work record be expunged of this matter.

The above-noted grievance was then filed and processed to arbitration as noted above. At the hearing the County presented testimony by Sheriff's Department Chief Deputy Charles Smith and County Personnel Director Brooke Koons. The Union cross-examined the County's witnesses and rested its case.

It is undisputed that, in January of 1991, after having experienced alcohol-related problems on and off the job, and after having undergone alcohol abuse counseling, the Grievant and Union representatives met with County representatives regarding a recommended six-month disciplinary suspension of Grievant that resulted from Grievant being arrested for driving under the influence of alcohol earlier that month. It is also undisputed that on January 15, 1991, an agreement was ultimately entered into and signed "FOR THE UNION" by Grievant, Union 1st Chair Karen L. Shepard and Union Steward Oscar D. Salas, County and "FOR THE COUNTY" by Koons and then-Sheriff Allan K. Kehl, which read, as follows:

> It is hereby agreed by and between the parties, Kenosha County, Kenosha County Sheriff's Department, Local 990-Jail Staff, and V__ P__, that the issue involving Kenosha County Sheriff's Department employee V__ P__ shall be resolved as follows:
>
> 1. In lieu of a 6 month suspension for V__ P__, the parties agree that a 4 work day suspension will be imposed. The dates of the suspension to be January 14, 15, 16th and 17th, 1991.

2. V__ P__ shall be on probationary status for a 1 year period ending January 14th 1992. During this period the County and the Sheriff's Department [shall have] the right of termination as applied to any other employee in that status.

3. V__ P__ shall during the period of probation submit to random testing for drugs and alcohol.

4. V__ P__ shall have must [sic] perfect attendance and punctuality with exception of legitimate illness during the period of probation.

5. V__ P__ shall be terminated from employment with Kenosha County and the Kenosha Sheriff's Department where the use of alcohol or drugs causes him not to report to work, or to report to work late, or report to work under the influence of an intoxicant or drugs; or causes him to be arrested; or brings discredit upon the reputation of County and the Sheriff's Department in the community, during the life of his employment with Kenosha County.

6. It is not required but recommended that V__ P__ seek treatment for his problem with alcohol. The County will not monitor his treatment as in the past, only his conduct as related to any incidents that may affect the operations of the Sheriff's department and its reputation in the community.

7. By this agreement, Local 990-Jail Staff does not acknowledge the ability of the County to conduct drug and/or alcohol tests of County employees.

8. This agreement is non-precedential and shall have no effect in any future grievance which may arise between the County, the Sheriff's Department and Local 990-Jail Staff.

Dated this 15th day of January, 1991

It is also undisputed that on January 5, 1998, Grievant was involved in a one-car property damage accident occurring at approximately 5:30 p.m. that day. After being apprehended by the Kenosha City Police in the process of walking from the scene toward his home, Grievant was arrested and cited for operating a motor vehicle while intoxicated, for doing so with a blood alcohol content of .23, for operating his vehicle left of the center line, and for leaving the scene of an accident. Grievant was transported to the County Jail and booked in before being released later that evening.

In response to those developments, the Sheriff's Department placed Grievant on administrative leave with pay until an investigation by the Department was made and completed. Following the Department's investigation, the Department recommended that Grievant be terminated. Following a January 13, 1998, pre-disciplinary hearing at which Grievant was present and represented by the Union, Smith issued a January 16, 1998, memorandum concluding as follows:

> I find that Mr. P__ has been given every opportunity by the County to preserve his job and find help for his alcohol problem. His irresponsible actions in his second arrest for driving under the influence and [his] leaving the scene of an accident has indeed violated the Last Chance Agreement and damages the reputation of the Kenosha County Sheriff's Department, a law enforcement agency, with the community.
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> It is also disheartening to realize that the Union, who bargained for the Last Chance Agreement in 1991 and signed off fully recognizing and agreeing to its demands, now doesn't recognize it and wants to renege on their agreement.
>
> I, therefore find no recourse but to accept the recommendation of the Department of termination as it relates to V__ P__.
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> Mr. P__'s last day of employment with Kenosha County will cease at 4:00 p.m. on Monday January 19, 1998.

Additional background information is set forth in the summaries of the parties' positions and in the discussion, below.

POSITION OF THE EMPLOYER

Even in the absence of any last chance agreement, the facts of this case would constitute just cause for Grievant's termination. The Grievant, a County Sheriff's Department employe, damaged property and endangered the safety of the citizens his Department is responsible for protecting. He then illegally left the scene of the accident, abandoning his vehicle in the road, causing the County to expend time and resources investigating the scene, obtaining statements and tracking him down. Ultimately, he was arrested and later booked and incarcerated by his co-workers in the Jail where he was employed.

Given the terms of the 1991 agreement, there is no reason to compare the gravity of the 1991 and 1998 incidents as the Union has done. However, if such a comparison is made, the Grievant's 1998 behavior was more serious than his 1991 actions and merits more serious

consequences. In 1991, Grievant received a single citation for driving while intoxicated after being observed by the arresting officer driving through a red light after stopping for it. In 1998 Grievant was cited for four violations: operating a motor vehicle while intoxicated; having a blood alcohol content in excess of the legal limit; operating left of center; and hit and run adjacent to a highway. In 1998 Grievant's van struck and damaged a bridge barrier support, a fire hydrant and a stop sign; and he endangered the safety of numerous citizens by careening down the street at speeds over 50 miles per hour, crossing the center line numerous times, and causing numerous cars to swerve to avoid colliding with his vehicle; and then he left the scene of the accident altogether. Given the increased public concern about the dangers of drunk driving, Grievant's 1998 behavior can also be presumed to have done greater harm to the reputation and integrity of the Sheriff's Department and the County generally than was the case in 1991.

In any event, the Grievant's termination was the proper and direct result of his violation of the terms of the 1991 last chance agreement. The County has lived up to the obligations imposed on it in the 1991 agreement. In 1998, the Grievant violated those terms. There is no basis in this case for the Arbitrator not to hold Grievant and the Union to their end of that bargain.

The last chance agreement was fully in force in 1998 and is unambiguous in its meaning and effect. The 1991 agreement was bargained for and freely signed by the Grievant and by his Union representatives. It clearly states that if Grievant were ever again involved in an alcohol-related arrest, he "shall" be terminated. Grievant and the Union could have challenged the severe discipline Grievant was facing in 1991 through the grievance procedure and argued that Grievant's off-duty drinking-related conduct was not susceptible to discipline by the County. By choosing, instead, to enter the 1991 agreement, they waived their right to advance any such arguments in this case. While the one year probationary period referenced in paragraphs 2-4 has expired, the terms of paragraph 5 regarding alcohol-related arrests have not expired. Those latter terms expressly provide that "during the life of his employment with Kenosha County" if Grievant is arrested due to the use of alcohol he "shall be terminated from employment with Kenosha County and the Kenosha County Sheriff's Department." If the Union or Grievant felt those terms were too harsh or unreasonable they could have taken their chances grieving the proposed 1991 discipline. Having entered into the 1991 agreement, they are now bound by it.

Arbitral authority, including that cited by the Union, strongly supports the enforceability of that agreement. Citing, TECUMSEH PRODUCTS, 82 LA 420 (MURPHY, 1984) (enforcing last chance agreement requiring no further alcohol abuse). In the EXXON case cited by the Union, the arbitrator stated that the last chance agreement "is a part of the agreement by which the grievant was employed and which is enforceable by the Company by proper discipline." The discharge in that case was reduced to a reinstatement without back pay

because the grievant had committed only technical, minor and even ambiguous violations of the last chance agreement. In the OHIO case cited by the Union, despite his expressed concerns that two years is too long to maintain a last chance agreement, the arbitrator wound up sustaining the discharge and enforcing the agreement, which, unlike the one in the instant case, contained no language regarding its duration.

For those reasons, the Arbitrator should conclude that the discharge was for just cause and should deny the grievance in all respects.

POSITION OF THE UNION

The Grievant's January 5, 1998, arrest for driving under the influence of alcohol did not violate the 1991 agreement. The 1991 agreement followed various job related problems associated with Grievant's bouts with alcohol. Those problems included inability to fulfill his work duties causing the County to replace him with other employes working at overtime premium rates. In contrast, Grievant's 1998 arrest did not cost the County money and did not interfere with the County's operations in any way. Grievant was not in uniform when he was arrested. He did not try to influence anyone involved in his arrest based on his County employe status. Moreover, Grievant did not report to work under the influence of alcohol in 1998 or at any time since the 1991 agreement was entered into.

While Grievant's problems with alcohol recurred in 1998, the County has failed to demonstrate a nexus or direct relationship between Grievant's alcohol abuse and Grievant's job performance. His 1998 arrest was not so egregious as to put his job in jeopardy. Citing, EXXON USA, 101 LA 997 (SERGENT, 1993). Without a showing of adverse effect of the Grievant's off-duty conduct on the Employer's business, just cause for discharge has not been established. Citing additional published arbitration awards.

In any event, after the passage of seven years, the 1991 agreement was no longer valid in 1998. In its numbered paragraph 2, it places Grievant on probationary status for a one year period ending January 14, 1992," such that "During this period the County and the Sheriff's Department has [sic] the right of termination as applied to any other employee in that status." That was double the six month probationary period made applicable to newly hired employes in Agreement Sec. 6.1. To hold Grievant to that much higher standard goes well beyond the terms of the labor agreement.

In addition, it is manifestly unreasonable, and inherently violative of the Agreement just cause standard for discharge for the 1991 agreement to expose the Grievant to summary discharge forever without the full protection of the just cause standard applicable to new hires after completion of their six month probationary period. Citing, OHIO DEPARTMENT OF HIGHWAY SAFETY, 96 LA 71, 77 (J. DWORKIN, 1990) ("In order to be regarded as reasonable,

last chance compromises must terminate within sensible times; to withhold full just-cause treatment from an employee for five, ten, twenty or thirty years is a model of unreasonableness, so contrary to just cause as to constitute an irrefutable contractual violation. . . . Two years seem extraordinarily long for an employee to be kept 'under the gun,' too long to weather a critical evaluation of reasonableness.")

Even the State of Wisconsin Motor Vehicle Code has more reasonable standards regarding convictions for driving while intoxicated. Thus, by 1998, Grievant's 1991 conviction for that offense had been expunged from his permanent record based on the passage of time, such that the State has treated his 1998 conviction as his first such offense. To be consistent with the Agreement's just cause standard, the County and the Arbitrator must do the same.

It is ridiculously harsh and unreasonable to deprive the Grievant of the full protections of the just cause standard for seven years. Especially so where those protections are made available to new hires after six months; where Grievant avoided a recurrence of his driving under the influence for more than the forgiveness period for such convictions under Wisconsin law; and where the 1998 conviction did not cost the County any money.

For those reasons, the Arbitrator should conclude that the discharge was without just cause and should order the County to reinstate Grievant with full back pay and expunge the discharge from his record.

DISCUSSION

Agreement Article III Step 5 expressly limits "the authority of the arbitrator . . . to the construction and application of the terms of this Agreement and limited to the grievance referred to him/her for arbitration. . . ." For that reason, and given the STIPULATED ISSUES submitted by the parties, the Arbitrator has limited his analysis in this case to the question of whether the County's discharge of the Grievant violated the "proper cause" and equivalent "just cause" standards contained in Agreement Secs. 1.2 and 3.5, to which the Arbitrator understands the parties to refer by their reference to "just cause" in STIPULATED ISSUE 1. Thus, the Arbitrator does not address the question of whether the discharge violated any laws; only whether the discharge violated the proper cause/just cause standard of the 1998-99 Agreement between the Union and the County.

At the center of this arbitrator are the parties disputes about whether the 1991 agreement remains in effect and if so whether it applies to this case.

It is a well established arbitral principle that "an arbitrator must abide by the terms of a last-chance agreement fairly negotiated between an employer, an employee and (where applicable) the union representing the employee." St. Antoine, et al., The Common Law of

the Workplace -- The Views of Arbitrators (BNA, 1998) at 161. That treatise elaborates with the following "Comment:"

> a. Occasionally parties may settle a disciplinary grievance with a "last-chance" agreement. These agreements vary in terms but usually grant the employer discretion to discharge the employe for any subsequent offense (sometimes for a subsequent similar offense) and commonly state or imply that the usual procedural protections will not apply. One of the most common occasions for last-chance agreements is the reinstatement of an employee discharged for problems related to substance abuse. [citations omitted]
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> b. Preclusive Effect. Depending on its exact phrasing, the last-chance agreement may definitively resolve the question of whether a given offense provides a legitimate basis for discharge. Such an agreement may bar an arbitrator from imposing a further requirement of proportionality or progressivity, but it normally would not bar inquiry into the question of whether the employee committed the final offense charged by the employer.
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> . . .
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> c. Relationship to the "Just Cause" Requirement. Depending on its wording, the agreement may or may not replace the just cause requirement. Because the just cause requirement is so fundamental, an arbitrator should not, without express language, presume the parties intended to abandon it. If the agreement does replace the just cause requirement, the arbitrator's authority may be limited to interpreting the last-chance agreement itself and determining whether the employee actually violated that agreement.
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> d. Necessary Parties. In a unionized workplace, no employee may enter into an agreement that conflicts with the collective bargaining agreement. The union, however, is generally free to modify the collective agreement, even in the context of a last chance agreement affecting a single employee. If the last-chance agreement conflicts with the collective agreement, the union must be a party to it before it will be binding.
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> . . .
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> e. Duration. A well-drafted last-chance agreement will specify an expiration date, after which the employee will be subject to the same disciplinary rules and procedures applicable to other employees. If the agreement does not state how long it lasts, an arbitrator should find that the parties intended it to last a "reasonable" time, depending on the nature of the offense, the parties' practices, and other relevant factors."

ID. at 161-163.

The Arbitrator finds that the foregoing principle and comments provide appropriate sources of guidance as regards the effect, if any, that the 1991 agreement should have in this case. The Arbitrator so concludes for the reasons outlined by arbitrator Dworkin at the outset of his discussion in the OHIO award, as follows:

> Last-chance agreements are effective tools for promoting employment security. They benefit both parties; they aid the Union to salvage jobs and the [Employer] to salvage employees. They are side agreements, fully as enforceable as any memorandums of understanding interpreting contractual terms and establishing standards of compliance. If they were not, neither party would have reason to review its stand on a discharge. Unenforceable last-chance agreements would be futilities. The Union would be deprived of an important resource for protecting employes; the [Employer] would lose the wherewithal to give an employe the "one last chance" the Union so often pleads for at preliminary grievance levels.

96 LA 71 at 76.

Here, a 1991 dispute concerning a proposed six-month suspension of the Grievant for alcohol-abuse-related conduct was resolved by resort to a last chance agreement among the Grievant the Union and the County. Because all of the parties to that agreement signed it and have acted in reliance on it since it was entered into, and because there has been no showing that it was not fairly negotiated, the Arbitrator concludes that the 1991 agreement was fairly negotiated.

The provisions contained in paragraphs 2-4 of that agreement expired by their express terms on January 14, 1992. In contrast, however, the agreement specifically and expressly provides that the terms of paragraph 5 of that agreement are applicable "during the life of [the Grievant's] employment with Kenosha County." Accordingly, unlike the OHIO case cited by both parties, this is not a case in which the last chance agreement does not state how long it lasts. It is therefore also not a case in which the Arbitrator is in a position to impose his own judgement -- based on the Motor Vehicle Code timelines or any other considerations -- regarding what a reasonable duration would be for the provisions of paragraph 5. The parties unambiguously determined that for themselves in paragraph 5 by specifically making that paragraph applicable throughout the life of the Grievant's employment with the County. The Grievant and Union accepted that provision and the others as part of an agreement that provided Grievant a significant benefit relative to taking his chances with a grievance procedure challenge of the pending six month suspension. Since that time, both the Grievant and the County have apparently benefited from the Grievant's successful avoidance of alcohol-abuse-related-conduct violative of the terms of the 1991 agreement. Notwithstanding that lengthy success period, under the clear and unambiguous language of the 1991 agreement, the County remains entitled to enforcement of the remaining provisions of that Agreement if they are applicable in this case.

The language of paragraph 5 also definitively resolves the question of whether a given offense provides a legitimate basis for discharge. It specifically and expressly provides that Grievant "shall be terminated from employment with Kenosha County and the Kenosha Sheriff's Department where the use of alcohol . . . causes him to be arrested . . . ." The 1991 agreement therefore bars the Arbitrator from imposing a further requirement of proportionality or progressivity. It also bars the Arbitrator from requiring the County to show that there is a sufficient nexus between the alcohol-caused arrest of Grievant and interests that the County has an Agreement right to protect by means of employe discipline. In those respects, the 1991 Agreement redefined the meaning of "proper cause" and "just cause" as regards instances of conduct on Grievant's part that fall within the categories of misconduct described in paragraph 5.

However, paragraph 5 of the 1991 agreement does not bar inquiry into the question of whether the Grievant committed the violation of the 1991 agreement as charged by the County.

When that inquiry is undertaken, the record evidence clearly establishes that Grievant's use of alcohol caused him to be arrested on January 5, 1998. When he was apprehended shortly after the accident, Grievant took and failed both field sobriety tests and an Intoxilyzer Alcohol Analyzer, registering an unlawfully high Blood Alcohol Content of .23 on the latter test. He was arrested and charged with, among other offenses, operating a vehicle while intoxicated.

Accordingly, the County was within its rights under the Agreement, as properly interpreted in accordance with the provisions of the 1991 agreement, to impose the instant discharge.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole, it is the decision and award of the Arbitrator on the STIPULATED ISSUES noted above that

1. Yes. The County did have just cause to discharge the Grievant.

2. Accordingly, the grievance giving rise to this arbitration is denied, and no consideration of a remedy is necessary or appropriate.

Dated at Shorewood, Wisconsin this 17th day of May, 1999.

Marshall L. Gratz /s/
Marshall L. Gratz, Arbitrator

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