BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
A.F. of L. - C.I.O., LOCAL UNION #2304

and

MADISON GAS AND ELECTRIC COMPANY

Case 71
No. 62363
A-6071

Appearances:

Kurt C. Kobelt, Lawton & Cates, S.C., Attorneys at Law, 10 East Doty Street, Suite 400, Madison, Wisconsin 53703-2694, appearing on behalf of International Brotherhood of Electrical Workers, A.F. of L. - C.I.O, Local Union #2304, which is referred to below as the Union.

Meg Vergeront, Stafford Rosenbaum, LLP, Attorneys at Law, 3 South Pinckney Street, Suite 1000, P.O. Box 1784, Madison, Wisconsin 53701-1784, appearing on behalf of Madison Gas & Electric Company, which is referred to below as the Employer.

ARBITRATION AWARD

The Union and the Employer are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The Union requested, and the Employer agreed, that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a grievance filed on behalf of Lawrence J. Heuvelmans, who is referred to below as the Grievant. The Commission appointed Richard B. McLaughlin. Hearing on the matter was conducted on July 15, 2003, in Madison, Wisconsin. No transcript was made of the hearing. The parties filed briefs and reply briefs by September 11, 2003.

ISSUES

The parties did not stipulate the issues for decision. The Union proposes the following:

Did the Employer have just cause to terminate the Grievant?

If not, what is the appropriate remedy?

The Employer proposes the following:

Did MGE violate the collective bargaining agreement (CBA) when it terminated Lawrence Heuvelmans' employment?

If so, what is the appropriate remedy?

I adopt the Union's statement of the issues as that appropriate to the record.

RELEVANT CONTRACT PROVISIONS

ARTICLE I

. . .

Section 3

A. . . . Probationary Period, Rights During Year. . .. Any time within a period of nine months after date of employment, if such new employees are found unsuited for their work, of which the Employer shall be the judge, the Employer shall have the right to discharge them, notwithstanding any other provisions of this Agreement.

Section 4

A. Promotion and Demotion. . . . Subject to Article IV, Section 2, the right to employ, promote, discipline and discharge employees is reserved by and shall be vested exclusively in the Employer. . . .

F. Leaves of Absence. . . . If employees remain away for more than six months, or if they accept employment elsewhere during their scheduled work hours without sanction of the Employer, such action shall be cause for dismissal. . . .

ARTICLE III
Section 1

A. Sick Leave Benefits Provided.

. . .

(g) Resignation or Dismissal Cancels Sick Leave Credits. In case an employee resigns or is dismissed for cause, any accumulated sick leave credits will be canceled. . . .

ARTICLE IV
. . .

Section 2

A. Grievance Procedure. The Employer agrees, unless otherwise provided for by this Agreement, should any employee covered by this Agreement believe that employee has been unjustly dealt with . . . then the said party may take the matter up with the Employer . . .

Section 3

A. Safety. The Union and the Employer acknowledge that safety and the maintaining of safe conditions in relation to employees, customers, and the public are of the utmost importance and are a direct responsibility of the Employer and all of its employees. The Employer will provide and maintain its buildings, facilities, equipment and machinery in a manner consistent with applicable laws . . . All employees shall be furnished with a copy of the *Safety Manual* . . .

B. Safety First. . . . Each employee will be provided with a *Safety Manual* and training. Employees are expected to perform their job in a safe manner following all prescribed rules and regulations.

BACKGROUND

The grievance, filed on February 24, 2003, asserts the Grievant "was unjustly terminated by the Employer" in violation of "Article IV, Section 2, A. . . . And Other Applicable Provisions." The Grievant received a letter of termination dated February 13, 2003, which states:

> The position of Line Technician, Electric Transmission and Distribution, is covered under the Department of Transportation's Federal Highway Administration Federal Motor Carrier Safety Regulations on controlled substances and alcohol use. The regulations are incorporated in the Company's Anti-Drug and Controlled Substances Abuse and Alcohol Use Program (Program).
>
> On October 16, 2001, you tested positive for drugs, and the Medical Review Officer recommended you enter a rehabilitation program. Following your completion of the rehabilitation program in November 2001, you tested positive on December 19, 2001, for alcohol with a concentration level of .075. The Medical Review Officer again recommended you enter a rehabilitation program which you completed in 2002.
>
> You were tested for alcohol on February 7, 2003, one hour after you reported for work and had a concentration level of .08. As required by the Program, your results were referred to the Medical Review Officer on Monday, February 10, 2003, with his recommendation that you enter another rehabilitation program. The Company is bound by federal statute to safeguard the workplace including property and personnel employed by the Company. The Company's Program allows for only one rehabilitation for alcohol. Therefore, your employment with the Company is terminated effective with the date of this letter.
>
> We regret the Company is compelled to take this action. However, your actions over the past 16 months involving testing positive for drugs and testing positive twice for alcohol, including reporting to work legally intoxicated on both occasions, can no longer be tolerated . . .

The parties negotiated the Program, which is entitled "Antidrug and Controlled Substances Abuse and Alcohol Use Program."

The Program, Related Policies, and Evidence of Bargaining History

The "only one . . . rehabilitation" reference to the Program in the termination letter is to the following provision:

> **V. Employee Assistance, Education, and Training**
>
> A. Rehabilitation
>
> The Company will provide drug and/or alcohol rehabilitation as follows:

. . .

3. . . . An employee refusing to submit to rehabilitation or failing to complete a rehabilitation program will be subject to termination. Employees attending rehabilitation following a positive drug and/or alcohol test will be on leave of absence but may be able to apply assigned vacation during this period. Upon satisfactory completion of a rehabilitation program following a positive drug and/or alcohol test, the employee will be returned to work subject to approval of the MRO and subject to retest during the following 60 months with a minimum of six within the first 12 months. Costs of rehabilitation treatment may be submitted to the employee's medical/health plan. Only one drug rehabilitation as a result of a positive test and only one alcohol rehabilitation with an alcohol concentration of 0.04 or higher will be granted during an employee's work history with the Company.

The Program also contains the following provision:

VII. Evidential Breath Testing (EBT) Procedures

. . .

J. Disciplinary Actions

. . .

6. Multiple Tests of 0.04 or Greater

   In all cases of an employee having an alcohol in a concentration of 0.04 or greater, and who has tested a second time within a 24-month period at an alcohol concentration of 0.04 or greater, will be removed from duty for two weeks without pay. If the employee should test 0.04 or greater a third time during the same 24-month period, the employee will be terminated.

Federal legislation and rules prompted the Program. The parties discussed its implementation in two phases. The first addressed the natural gas distribution system and covered controlled substances abuse. The second came some years later, addressing the operation of heavy equipment on highways and covering alcohol abuse.

John McGuire has served as the Employer's Director of Employee Relations since 1997, and served as the Manager of Employee Relations for ten years prior to that. He testified that the "only one . . . rehabilitation" reference of Section VA3 of the Program came into effect when the Program was created to cover controlled substance abuse, probably in 1990. Some years later, the parties adapted it to alcohol when that portion of the Program was negotiated in 1994 or 1995. McGuire noted that the Employer is self-insured and that the insurance plan permits reimbursement for the expenses of rehabilitation. He added that the parties did not specifically discuss how the "only one . . . rehabilitation" reference related to employee claims on the insurance program for reimbursement of rehabilitation expenses.

David Poklinkoski is employed by the Employer as a Storekeeper, and has served in a variety of Union positions, including President and Steward. He has served as Chair of the Union's negotiating committee since 1987. He noted that the negotiation of the Program occurred separately from negotiations for a labor agreement. The Employer's drug testing program dates from the early 1990's. To Poklinkoski's recall, the creation of Section VA3 concerned Employer payment for rehabilitation. The federal legislation prompting the drug-testing program provided for rehabilitation, but did not address how it would be paid. The parties agreed to make one rehabilitation employer-paid. These discussions preceded the extension of the drug-testing program to alcohol.

What ultimately became Section VIIJ6 of the Program initially appeared in a working document being negotiated by McGuire and Poklinkoski. The Employer initially made the following proposal:

> 3. Repeat Usage.
> In all cases of an employee having an alcohol concentration of 0.04 or greater, and who has tested a second time within a 24-month period, at an alcohol concentration of 0.04 or greater, will be terminated.

Poklinkoski objected to a series of Employer proposals that he viewed to establish a "two positives and you're out" proposal, and counter-proposed a "three positives and you're out" series of proposals. The parties ultimately agreed on the language that became Section VIIJ6. Poklinkoski did not believe the discussions addressed the relationship of rehabilitation with discipline under Sections VA3 and VIIJ6. The absence of such discussions, in his view, left the number of rehabilitations available to an employee open-ended. McGuire testified the "only one . . . rehabilitation" reference could not be meaningfully related to Employer payment, and could not be considered open-ended.

The Employer has maintained Administration Procedure 622 (the Procedure) concerning drug and alcohol abuse since at least 1988. The Employer distributed the Procedure to all employees, including the Grievant. The version issued in June of 2000 states the following:

> **OFF-THE-JOB USE**
> Off-the-job illegal drug and alcohol use which could adversely affect an employee's job performance or which could jeopardize the safety of other employees, the public, or Company equipment will be cause for disciplinary action up to and including termination of employment.
>
> . . .
>
> **REPORTING FOR DUTY**
> . . . no employee shall report for duty or remain on duty while under the influence of . . . alcohol or controlled substances . . .

The Employer's Safety Manual states the following:

> **2.3 Employee Responsibility:** It is the responsibility of the employee to:
>
> . . .
>
> g. Report for duty sober. . . .
> h. Any employee violating safety rules or who unnecessarily endangers their own or another's personal safety shall be subject to disciplinary action. This may include reprimand, reassignment, suspension, or dismissal, depending upon the circumstances of each case.

The Grievant received a copy of the Safety Manual and its updates.

<u>The Circumstances Prompting The Termination</u>

The Employer hired the Grievant in 1986 as an Apprentice Lineman. He became a Line Technician Class A in 1991 or 1992, and held that position for twelve years before becoming a Crew Leader. He received no formal discipline prior to the events prompting the termination, and his work record was satisfactory or better. In fact, his "April, 2002 Review" includes the following:

> Seems to have everything under control. Doing an excellent job on the trouble truck using good judgment.

His work involves the construction and maintenance of above and below ground electric lines. It is dangerous work, and subject to the Program. It is undisputed that prior to his first failure of an Employer drug test, the Grievant had two convictions for operating a motor vehicle under the influence of alcohol. He testified that this meant his legal limit was 0.08 at the time of the drug tests that prompted his discharge.

The Grievant submitted a urine sample to the Employer's testing contractor on October 15, 2001. On October 18, 2001, a Medical Review Officer (MRO) advised the Employer that the sample was positive for THC. McGuire issued the Grievant a letter dated October 22, 2001, which is headed "Disciplinary Leave of Absence" and which states:

> Jim Miller and I spoke with you on October 18, and you confirmed you had used a controlled substance. You were advised you were on disciplinary leave of absence and were covered under the . . . Program. The program in part states:
>
> . . .
>
> " . . . Only **one** drug rehabilitation as a result of a positive test will be granted during an employee's work history with the Company."
>
> . . .

The Grievant agreed to enter a rehabilitation program, completed it, and was reinstated to work the following November 19.

In a follow-up intoxilyzer test administered on December 19, 2001, the Grievant tested at a Blood Alcohol Content (BAC) of 0.80. His first sample was taken at 8:05 a.m. A second sample taken at 8:23 a.m. yielded a BAC of .075.

McGuire summarized the matter in a letter, dated December 28, 2001, to the Grievant headed "Disciplinary Leave of Absence" which states:

> You took your first required test on the morning of Wednesday, December 19. You reported for work at 7 a.m. and drove a Company vehicle to General medical Laboratory. . . . Following the test, you called a crew member to pick you up and take you to your car. You then vacated Company property without notifying departmental supervision.

After citing the Program, the letter refers to the Procedure concerning off-the-job drug and alcohol use cited above, and concludes thus:

> Your actions of December 19 were in direct violation of this policy. By driving a Company vehicle with an alcohol content as high as yours, it put you, your coworkers, and the public in harm's way. This type of action cannot be tolerated, and for all future tests, you are forbidden to drive a Company vehicle on the day of the test and up until test results are received by the Company. If you do drive a Company vehicle on these days, you will be subject to immediate termination.

The Grievant again agreed to submit to a rehabilitation program. In February of 2002, a therapist recommended that the Grievant be returned to work during the course of his rehabilitation program. The Employer returned the Grievant to work and he ultimately completed the rehabilitation program.

On February 7, 2003, the Grievant, after reporting for work at 7:00 a.m., took an intoxilyzer test at 7:45 a.m. The test yielded a BAC of 0.087. A second test administered at 8:02 a.m. yielded a BAC of 0.080. McGuire wrote a memorandum to his immediate supervisor, Joseph Pellitteri, dated February 10, 2003, which reviewed the Grievant's circumstances, and concluded thus:

> There are a number of issues concerning (the Grievant's) continued employment with the Company:
>
> 1. He has tested positive for both drugs and alcohol in a 16 month period with a positive test for alcohol twice.
> 2. He has been granted two rehabilitations as granted under the Program, one for drugs and one for alcohol.
> 3. He has reported to work twice when he was legally intoxicated and once drove a Company vehicle to the testing site.
> 4. He has been told in writing that he will have only one rehabilitation for drugs and one for alcohol.
> 5. He has been told in writing that policy on off the job use of alcohol could impact the Company adversely could lead to termination.
>
> There are two courses of action the Company could take and both would lead to (the Grievant's) termination. The first would be to refer him to the Medical Review Officer who would determine what assistance would be needed as stated in the Program. He would undoubtably recommend another rehabilitation which is not allowed and (the Grievant) would be terminated by the action of vacating his position. The second course would be to not refer him to the Medical Review Officer and terminate him based on his actions being not only in direct violation of Company policy but public policy. If his employment was continued he would not only put the Company at serious risk of his future actions but would put the Company in an indefensible position when it came to public opinion. (The Grievant) with his actions not only while employed with the Company over the past 14 months but with his prior DWIs has put the Company in an untenable position when it comes to continuing his employment.
>
> It is my recommendation that the Company has no choice but to terminate (the Grievant's) employment effective immediately without referral to the Medical Review Officer.

After some discussion, Pelliteri made the termination decision and issued the termination letter set forth above. McGuire agreed with the decision, and testified that he understood the termination to be based on the terms of the Program, a pattern of failure on the Grievant's part to rid himself of alcohol and drug abuse, and on the safety risks posed to employees and the public.

Also on February 10, 2003, an MRO recommended the Grievant be placed in a rehabilitation program. McGuire discussed the point with the MRO, and understood the MRO to take the position that the Grievant had yet to learn his lesson regarding drug and alcohol abuse.

The Grievant testified that the positive test for THC traced to casual use. He met an old friend at a hunting shack and they smoked two joints. The test came during the workweek following this and picked up the traces of that usage. The positive alcohol tests traced to traumatic personal events. Prior to the first positive test, the Grievant had learned that X-rays of his lungs showed a spot that might be malignant. He responded by drinking heavily the night before the test of December 19, 2001. Prior to the positive test of February 2003, the Grievant learned that a friend had been diagnosed with cancer. He testified the news "scared me" and he again drank heavily the night before the test. He acknowledged he did not inform the Employer of the circumstances that prompted his alcohol abuse.

The Grievant responded to the second positive test and the resulting termination by submitting himself to rehabilitation. He started the effort with a personal check, and maintained his membership in the Employer's health insurance with his COBRA rights. He completed that effort in May of 2003, and the insurance administrator reimbursed at least some of the costs. He stated that he has been drug and alcohol free since the start of that rehabilitation effort. He testified that the difference between that rehabilitation and earlier efforts was his appreciation of the affect his drinking had on his family. He stated that since his rehabilitation, he has gotten much closer to his wife and sons and does not want to lose that. He testified he could personally guarantee that he would remain drug and alcohol free.

Further facts will be set forth in the **DISCUSSION** section below.

THE PARTIES' POSITIONS

The Employer's Brief

After a review of the evidence, the Employer concludes that its policies, the language of the labor agreement and public policy demanded the Grievant's termination and that "there is absolutely no basis for this grievance."

More specifically, the Employer notes that even if the agreement can be "read to impose a 'just cause' standard on disciplinary actions", then the discharge must upheld since the Employer

proved, by a preponderance of the evidence, that the Grievant engaged in conduct in which the Employer has a disciplinary interest and the discharge reasonably reflects this interest. This interest is codified in the labor agreement, Employer policy, and federal regulations.

Since the determination of the appropriate penalty for disciplinable conduct is "primarily the function of management" and since arbitral precedent establishes that an employer determination "should not be disturbed as long as the employer acts in good faith and evenhandedly", the evidence leaves no doubt that the termination decision should be affirmed. Section VA3 of the Program establishes specific support for this. The Employer has consistently interpreted the "only one . . . rehabilitation" reference to mean that "once an employee has been referred to rehabilitation after failing a test required under the Testing Policy, he will be terminated if he is referred to rehabilitation after failing a second required test." The provisions of the Safety Manual and the Procedure confirm this. The Grievant's three separate violations, including showing up for work on two occasions legally intoxicated, establish the factual basis demanding the application of these policies.

Article IV obligates the Employer "to ensure the safety of its employees and the public it serves." That the Grievant chose to report to work legally intoxicated on two occasions in addition to failing a drug test establishes that the Employer's safety concerns for other employees and for the public are well founded. The evidence affords no reliable basis to conclude the Employer had a responsible alternative to termination. Any other conclusion would violate public policy as set forth in Wisconsin Statutes concerning drunk driving, and in federal regulations.

Section VIIJ6 of the Program does not warrant any conclusion other than sustaining the discharge. This section "deals with the consequences of multiple failed alcohol tests in general." Section VA3 deals with the same point, and arbitral precedent demands that "they must be harmonized and both given effect if possible." Since Section VA3 is the more specific of the two, it should be given controlling effect. This does not read Section VIIJ6 out of existence, since it "will always control in cases where no rehabilitation is recommended after a failed alcohol test of .04 or greater BAC." Any other conclusion would render Section VA3 meaningless. The Union's failure to grieve the imposition of a nine-week disciplinary suspension for the first failed alcohol test constitutes a tacit acknowledgment of the persuasive force of the Employer's interpretation of these sections.

Nor can the Union persuasively contend that Section VA3 deals "only with who *pays* for the rehabilitation." Neither witness testimony nor past practice will support this. This contention demands implying terms into the text of the Program. Any doubt on this issue must be resolved against the Union in light of the strong public policy surrounding "the use of drug and alcohol and the operation of vehicles." The Employer concludes that "the grievance must be rejected and the discharge affirmed."

The Union's Brief

After a review of the evidence, the Union contends that the Employer lacked just cause to terminate the Grievant. The grievance calls for the interpretation of the relationship between VIIJ6 and VA3. Section VIIJ6 is "the only portion of the policy expressly devoted to discipline." Since the Grievant had tested twice within "a 24 month period for alcohol concentration greater than 0.04", it follows that the appropriate discipline was a two-week suspension, not discharge. The language of this section applies to "all" cases, and contains no exceptions.

Section VA3 does not undercut this conclusion. This section governs rehabilitation, not discipline, and it "makes little sense for the parties to negotiate a contradictory disciplinary procedure . . . without even labeling it as discipline." An examination of the terms of Section VA3 confirms this. The sentence preceding the sentence advanced by the Employer as permitting only one rehabilitation effort refers expressly to the "costs" of a rehabilitation effort. This demands the "plain inference . . . that the employee must pick up the tab for any additional drug or alcohol rehabilitations." The final sentence thus "actually envisions that there may be situations where three or more rehabilitations occur during an employee's work history." The number of rehabilitations depends on the facts of each case and "on where (an employee) is on the disciplinary progression established" by Section VIIJ. This view "is consistent with the accepted view that alcoholism is a disease" and that rehabilitation "is intended to be a cure." The Union's view, unlike the Employer's, does not confuse these concepts and harmonizes the two sections. The Employer's view would render the final sentence of Section VIIJ6 meaningless.

Beyond this, the Employer never put the Grievant on notice that Section VIIJ6 would not apply to him. The October, 2001 rehabilitation agreement did not say that a positive result from the test would compel his termination. The December 28, 2001 letter following the positive test contains no warning beyond a threat of termination if the Grievant drove an Employer vehicle prior to the Employer's receipt of the test results. The Unemployment Compensation Examiner's decision confirms this.

Evidence of bargaining history supports the Union's interpretation. The Employer proposed, during the 1995 negotiations, contract language that would mandate termination after two positive alcohol tests registering 0.04 or greater within a twenty-four month period. The Union did not accept this proposal and made a counter offer that established a "three strikes" policy. The Employer accepted this proposal. To adopt the Employer's interpretation would "be the classic case of giving (the Employer) something it lost at the bargaining table." The Employer's averred concern with public policy is little more that a fear of bad publicity. The basis of the Employer's concern is legitimate, but cannot support reading the bargaining history evidence out of existence.

Even though it is improper for an employee to report to work legally drunk, arbitral precedent demands the examination of "the employee's overall circumstances in determining whether the ultimate sanction of termination is appropriate to cases involving alcohol abuse." The evidence establishes that the Grievant "is considered a fine employee" who has a long-term record of solid service warranting his elevation to "the rank of crew leader." Specific examination of his alcohol abuse establishes that he drank in response to depression traceable to "tragic health news". This fails to mark the Grievant "as an incorrigible alcohol abuser." The Grievant testified credibly "regarding his intention to stop drinking entirely" and to his "strong desire" to maintain the dramatic improvement in his relationship with his children "since he stopped drinking." The Union concludes, "the grievance should be sustained and (the Grievant should) be reinstated with full back pay and other benefits."

The Company's Reply Brief

After a review of the Union's brief, the Employer argues that the Grievant knew, and should have known, that "coming to work drunk could result in termination." The December 28, 2001 letter plainly put him on notice that illegal drug or alcohol use could put his employment at risk. Beyond this, the letter put him on notice that Section VA3 permitted only one rehabilitation per career. Even if the letter had not been issued, "there are some rules that are simply so obvious that no employee can claim ignorance of them or their potential consequences." A "prohibition against showing up for work drunk is one of these rules." The opinion of an Unemployment Compensation examiner concerning appropriate notice can have no legal or persuasive bearing in this arbitration.

The evidence does not support the Union's view of bargaining history. The Employer's initial proposal would have demanded termination where a test yielded ".04 or greater for a second time *even if* that employee was not also referred to rehabilitation for a second time." The Union's rejection of this proposal set the stage for the creation of Section VIIJ6, which "made no mention of the consequences of referrals to rehabilitation." Simultaneous with this agreement came the creation of Section VA3, "which expressly addresses the consequences of referral to rehabilitation." This section, being more specific than Section VIIJ6 concerning the facts posed by the grievance, has controlling effect.

The Union's claim that Section VA3 addresses the cost of rehabilitation cannot be accepted. It fails to explain whether the Employer pays for rehabilitation "out of pocket" or by virtue of "the coverage provided for rehabilitation services under MGE's health plan." There is no evidence the Employer paid for the Grievant's rehabilitations out of pocket. Rather, the evidence is that the Grievant submitted these costs to the health plan, which "covered the costs in both instances." Accepting the Union's view ignores the plain language of Section VA3, past practice and the Union's failure to grieve the nine-week suspension. Beyond this, the evidence establishes that the Employer's health plan provides for

rehabilitation, thus making it unnecessary for the Employer to negotiate a provision demanding it to pay for only one rehabilitation. That the health plan covered two of the Grievant's rehabilitations underscores that the Union's view makes no sense. To adopt the Union's view would lead to the absurd result of having the Employer attempt to implement a restriction that would inevitably have to be rejected by the Employer's health plan administrator.

Nor can the evidence be read to suggest the discharge reflects anything other than the Employer's desire to enforce clear work rules that govern conduct implicating public policy. This cannot be reduced to a concern for "bad P.R.". The mitigating circumstances advanced by the Union are irrelevant. The Grievant never informed the Employer of these personal circumstances prior to his discipline. Even if the mitigating circumstances are considered relevant, they cannot support reinstatement. That the Grievant's sense of personal tragedy led him to drink to excess twice says nothing about whether it might lead him to do so again. The Employer is obligated to consider the safety of all employees and the public, not just the Grievant's personal circumstances. The Employer concludes that "the grievance must be rejected and the discharge affirmed."

The Union's Reply Brief

The Employer's implication that it is not bound to a just cause standard cannot be squared with prior arbitration awards. Its assertion that Section VA3 applies where an MRO recommends rehabilitation demands the conclusion that Section VIIJ6 applies where no such recommendation occurs. This would create the absurd result that an employee not referred to rehabilitation would receive a two-week suspension while a similarly situated employee referred to rehabilitation would be terminated. This means "the employee with the more serious drinking problem will continue to work."

Employer assertions of past practice involve the termination of non-unit members for drug usage. The assertion of a nine-week suspension for the Grievant's first rehabilitation ignores that the time off was for rehabilitation, not for discipline. There was thus nothing for the Union to grieve. Employer concerns with public policy implications of the Program cannot obscure that the parties addressed the matter in bargaining and that the function of the arbitrator is to interpret the labor agreement, not speculate on public policy. The Union concludes, "the grievance should be sustained and (the Grievant) be returned to work with full back pay and other benefits."

DISCUSSION

I have adopted the Union's statement of the issues. In a prior arbitration award involving the Employer, I concluded that its labor agreement with another union established a cause standard for discharge, see MADISON GAS & ELECTRIC COMPANY, A-5067,

(McLaughlin, 2/94) at 23-25. This decision was cited in an arbitration award involving the

Union and the Employer, see MADISON GAS AND ELECTRIC COMPANY, A-5476 (McGilligan, 1/97). The contractual provisions applicable in the earlier award are paralleled by those set forth above. Beyond this, the Procedure concerning off-the-job use of alcohol refers to "cause for disciplinary action." Section 2.3.h of the Safety Manual refers to discipline "depending on the circumstances of each case," which is the essence of a cause analysis. Thus, this record does not afford a basis to abandon the conclusion that the agreement establishes a cause standard. The prior award also noted, however, that "the Employer has reserved greater discretion over discharge than if the agreement was not silent on the point" (A-5067 at 23). This is not an entirely academic point on this record, for the focal point of the grievance is the Employer's exercise of discretion.

This conclusion highlights what is not determinative. Each party contends that rote application of the Program supports its view. The Employer cites the "only one . . . rehabilitation" reference of Section VA3, while the Union cites the suspension language of Section VIIJ6.

Neither provision is sufficiently clear on its face or through bargaining history to permit their rote application. The Union asserts that Section VA3 has no disciplinary effect, given its placement in a rehabilitation section; its express reference to the "costs of rehabilitation;" and the provisions of Section VIIJ6 regarding discipline. Section VA is entitled "Rehabilitation", but its provisions have disciplinary impact, as established by the first sentence of second paragraph of Section VA3, which states that an employee who refuses or fails to complete rehabilitation "will be subject to termination." The section refers to "costs" but the Employer's self-funded insurance program makes it difficult to understand how the "costs" reference can be meaningfully applied to the "only one . . . rehabilitation" reference. The Grievant's February, 2003 rehabilitation affirms the Employer's assertion that even if it denied rehabilitation costs, its administrator would pay them under the insurance plan. Nor does the Union's interpretation of Section VIIJ6 reconcile it with Section VA3. The Union's view affords no insight on how the Grievant's history of OWI violations or drug rehabilitation can be reconciled to its "three positives and you're out" reading of Section VIIJ6. This difficulty would be magnified by cases posing more egregious conduct or history than that posed here. The assertion that the sections establish an open-ended approach to rehabilitation lacks support in the language of Section VA3 and in bargaining history evidence.

Nor is the Employer's attempt to harmonize the sections flawless. If the appropriate point of reference is the Grievant's submission of two alcohol tests with a concentration of 0.04 or higher within a 24-month period, then Section VIIJ6 is more specific than Section VA3. It is less than apparent how the Employer's reading of Section VA3 can be reconciled to the final sentence of Section VIIJ6. If Section VIIJ6 demands a suspension when there is no rehabilitation referral after the second positive test, but permits termination when

there is a referral, then the provisions pose the odd result that an employee who is amenable to

rehabilitation is treated more onerously than one who is not. Beyond this, it is unclear how McGuire's memo to Pelliteri is reconcilable to the Employer's reading of Section VIIJ6, since the options discussed presume active Employer involvement in the disciplinary process without regard to an MRO's decision to recommend rehabilitation. In any event, it is clear that the memo treats the termination decision as a deliberate disciplinary action rather than a rote administration of the Program.

These sections may not reconcilable in all cases. However, there is no need to address them beyond the facts of this grievance. On the facts of this grievance, conflict only arises to the degree either party's view is read to preclude the case-by-case approach of a cause analysis. The provisions must each be given effect, and only a case-by-case application of cause for discipline can do so. With this as preface, it is necessary to apply the cause analysis.

In my view, unless the parties agree to the standards defining cause, two elements define it. The first is that the Employer must establish conduct by the Grievant in which it has a disciplinary interest. The second is that the Employer must establish that the discipline imposed reasonably reflects its interest.

The parties' dispute turns on the second element. It is undisputed that the Grievant twice reported for work legally intoxicated, in violation of the labor agreement, the Procedure, the Program, the Safety Manual and common sense. There is no dispute that the Employer has a disciplinary interest in this conduct, particularly in light of the Grievant's history.

The dispute on the second element thus specifically focuses on the reasonableness of the Employer's conclusion that the Grievant's conduct warranted discharge rather than suspension. Broadly speaking, the Employer rests its discretion on the nature of the Grievant's work and the acute nature of his conduct. The Grievant operates heavy equipment on public roads and works in a dangerous occupation. The danger is not limited to the Grievant, but includes co-workers and the public. He had, during the course of his employment, two incidents of OWI and three positive drug or alcohol tests. He reported for work on two occasions legally drunk. On one of those occasions, he drove a company vehicle to the testing facility and left work without notice, thus aggravating the flawed judgment shown in reporting for work at all. The Union attacks this exercise of discretion based on the Program and on the quality of the Grievant's work and rehabilitation effort. More specifically, the Union questions whether he had notice that his employment was at risk, and points to the quality of the effort that made the Grievant a Journeyman, a Crew Leader, and a well-regarded employee with no disciplinary history. The Union adds that his current rehabilitation effort is sincere and final.

Issues of notice play no effective role in the evaluation of the Employer's exercise of discretion. Even ignoring the provisions of the Article IV, Section 3, the Procedure, the

Program and the Safety Manual, there can be no persuasive claim that the Grievant, as an

individual who had been through two rehabilitation efforts, should not be expected to know that alcohol abuse put his position at risk.

The force of the Union's argument focuses on the strength of the Grievant's work record. The difficulty with the argument is that it highlights the strength of the Employer's assessment of the acute nature of his conduct. His reporting for work twice above the legal limit after a night of heavy drinking points to a problem that threatened to overpower the judgment that underlies his competence. His first positive alcohol test came on the heels of his rehabilitation for a positive drug test. The resulting alcohol rehabilitation proved unsuccessful. His driving record highlights that the problem had a long history.

This highlights the significance of the Union's assertion of the remaining mitigating factors. They focus on the Grievant's testimony concerning his most recent rehabilitation effort. That testimony did not, however, undercut the reasonableness of the Employer's assessment of the problem. The Union contends that the positive test for THC was traceable to a chance meeting with a friend, and that the two alcohol tests were traceable to personal trauma. This argues that the positive tests were episodic, and thus unlikely to be repeated.

The force of the Union's argument is, however, undercut by the underlying evidence. The long-term nature of the problem is evident. Beyond this, the Grievant's testimony does not point to episodic use. He noted that the current rehabilitation effort would be final, and had brought home to him how much strain his difficulty had brought upon his relationship to his wife and children. This testimony is not reconcilable to the argument that the alcohol tests related to isolated incidents of non-repeatable personal trauma. Rather, it tends to confirm the Employer's assessment of an ongoing problem that overcame two rehabilitation efforts.

Viewing the record as a whole, the Employer has demonstrated that discharge is a reasonable reflection of its disciplinary interest in the Grievant's conduct.

Prior to closing, it is appropriate to tie this conclusion more closely to the parties' arguments. Evidence of past practice affords no assistance. What evidence there is of practice concerns non-unit employees. The value of past practice is traceable to the agreement manifested by bargaining parties' conduct, and it is not evident that the Union knew of, or could affect the Employer's treatment of non-unit employees.

The Union's failure to grieve letters headed "Disciplinary Leave of Absence" has no bearing on the grievance. The Union viewed such leave as part of the rehabilitation effort, not discipline. This view has support in Section VA3, which refers to a "leave of absence" for rehabilitation and permits the use of vacation to cover missed work time.

The decision of a UC Examiner plays no role in this grievance. Ignoring potential

differences in the evidentiary records underlying the grievance and the statutory proceeding, the determination of entitlement for unemployment compensation turns on considerations distinguishable from the enforcement of a labor agreement. Contract provisions vary with the parties who bargain them, and the goal of contract interpretation is to give the bargaining parties the benefit of their agreement. The statutory provision for unemployment compensation is constant and functions without regard to the agreement of litigants.

As touched upon above, the closest interpretive issue is the relationship of Sections VA3 and VIIJ6. The sole conclusion necessary to resolution of the grievance is that neither section is sufficiently clear to be applied by rote. Thus, neither can be read to preclude the case-by-case analysis of cause. Since the Grievant received one drug rehabilitation and one alcohol rehabilitation after a test of 0.04 or higher, the requirements of Section VA3 were met. This is not to say that the section mandated discharge. Rather, it says that on the facts of this case, there is no evident conflict between Sections VA3 and VIIJ6. Strictly speaking, Section VIIJ6 refers to two positive alcohol tests yielding concentrations of 0.04 or higher within a 24-month period. It is silent on other factors, such as the Grievant's rehabilitation following a positive drug test, his OWI violations, or the quality of his work or rehabilitation efforts. Such considerations are relevant to a determination of cause.

This should not obscure that the Union's view of the Program has support in evidence of bargaining history. Its view of Section VIIJ6 is that an employee should receive three positive tests and two rehabilitation efforts prior to facing discharge, where the tests reflect alcohol concentration of 0.04 or higher within a 24-month period. In the absence of other factors, this view is persuasive. The difficulty is that this view attempts to apply Section VIIJ6 to defeat a case-by-case analysis. The evidence establishes that the Grievant had three positive tests and two rehabilitations. The Union's view rejects the Employer's action because one of the rehabilitation efforts traced to a positive test for THC rather than to an alcohol content of 0.04 or higher. This view reads evidence other than the Grievant's two tests of 0.04 or higher out of existence. Section VIIJ6 does not demand this conclusion, and Section VA3 stands against it. More to the point, this view, like the Employer's reading of Section VA3, attempts to preclude a case-by-case cause analysis. That analysis is, however, necessary to avoid conflict between the sections

In sum, reconciliation of Sections VA3 and VIIJ6 demands consideration of the circumstances of the affected employee. If the Grievant had not had a drug rehabilitation, the Union's application of VIIJ6 would carry more persuasive force. To apply it to this grievance, however, reads Section VA3 out of existence. This underscores the need for a cause analysis.

The Union's arguments with the Employer's avowed concern for public safety are forcefully stated. A legitimate concern for public safety must be more than a fear of "bad

P.R.". This cannot obscure that the Grievant filled a sensitive position or that the Employer

can legitimately concern itself with liability issues and the perception of its customers regarding safety. If the evidence indicated that the Employer sacrificed a contractually required rehabilitation effort for public relations, the conclusion stated above could not stand. The evidence does not, however, support this.

In this case, the agreement reserves the decision to discipline to the Employer, and the absence of an express cause standard governing discipline highlights the degree of the Employer's discretion. In this case, the Employer's conclusion that the Grievant's conduct warranted discharge has a solid basis in the evidence, and cannot be dismissed as unreasonable. This means the Employer has proven each element of the cause analysis and thus that the discharge did not violate the labor agreement. This cannot obscure the quality of the Grievant's work performance and, potentially, of his most recent rehabilitation effort. This decision is a review of the Employer's exercise of discretion, not of the Grievant's individual worth. This cannot lessen the weight of the discharge, but the contractual, rather than the personal dimensions of this action should be emphasized.

AWARD

The Employer did have just cause to terminate the Grievant.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 26th day of November, 2003.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

RBM/gjc
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