

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :  
of a Dispute Between :  
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SHEBOYGAN COUNTY LAW ENFORCEMENT : Case 142  
EMPLOYEES, LOCAL 2481, AFSCME, AFL-CIO : No. 45956  
 : MA-6819  
and :  
 :  
SHEBOYGAN COUNTY (SHERIFF'S DEPARTMENT) :  
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Appearances:

Ms. Helen Isferding, District Representative, Wisconsin Council 40,  
AFSCME, AFL-CIO, appearing on behalf of the Union.  
Ms. Louella Conway, Personnel Director, appearing on behalf of the  
County.

ARBITRATION AWARD

Sheboygan County Law Enforcement Employees, Local 2481, AFSCME, AFL-CIO, hereinafter referred to as the Union, and Sheboygan 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 suspension. The undersigned was so designated. Hearing was held in Sheboygan, Wisconsin on September 23, 1991. The hearing was not transcribed and the parties filed post-hearing briefs which were exchanged on October 18, 1991.

BACKGROUND

The grievant has been employed by the County since 1984 as a correctional officer in the County's jail. For approximately the last two years, the grievant has worked the second shift from 3:00 p.m. to 11:00 p.m.. On December 7, 1990, the grievant worked fifteen minutes past the normal 11:00 p.m. shift ending time and the grievant also worked on December 8, 1990 on the second shift. Around 6:50 p.m., an inmate had an apparent heart attack which required his transport to the hospital and the inmate was accompanied by a correctional officer to guard him. The grievant was offered the opportunity to guard the inmate but declined and another correctional officer was assigned that duty. Medications required by inmates are routinely distributed to them at 10:00 p.m. by a correctional officer. This is generally done by a female correctional officer because Huber prisoners are returning to the jail and must be strip searched by the male correctional officers, so the grievant distributed medications to inmates infrequently. Due to the absence of the correctional officer who was at the hospital, the grievant's supervisor informed him that he would be responsible for passing medications that evening.

This assignment was given to the grievant sometime between 9:15 p.m. and 9:40 p.m.. The supervisor informed the grievant of this duty as well as the location of the medication keys and the non-prescription list. Sometime after 9:00 p.m., an inmate was booked in by the grievant to begin serving a sentence and the booking process was completed by 10:00 p.m.. The normal amount of time to pass medications is about one hour. At 10:00 p.m. the grievant informed his supervisor that he was going for "a quick smoke" and then would do the medications. At about 10:15 p.m. the grievant asked his supervisor if he could cut out the dispensing of vaseline and hand creams because of the time involved and he was given permission to delete these items.

Correctional Officer Brinkman was called in early to work due to the absence of the one correctional officer at the hospital. At approximately 10:45 p.m., the grievant asked Officer Brinkman if he would complete the distribution of the meds to inmates. The grievant informed Brinkman what medications he had prepared along with the paperwork and what work Brinkman would have to complete. The grievant then left at 10:45 pm. because he had worked the 15 minutes beyond his shift the previous evening and told Brinkman that if there were any problems, he would be at Futzies, a local tavern. Brinkman reviewed the meds prepared by the grievant and noted that the liquid medications were in paper containers and had varying amounts, i.e., they differed in quantity by one or two cc's. Brinkman and another officer remeasured the liquids and put them in plastic containers and distributed them. Brinkman also discovered that the grievant had not counted and logged the quantity remaining of a controlled substance that was dispensed to an inmate, and additionally, the paperwork was not completed for the liquid medications. Brinkman reported this to his supervisor.

Subsequently, the Jail Administrator suspended the grievant with pay pending an investigation of the incident. On December 14, 1990, the grievant was suspended for a period of thirty (30) working days for his actions on December 8, 1990 for violating the following Department Policies:

- 1-8-2 Proper Conduct
- 1-8-3 Obedience to Laws
- 1-8-5 Dangerous Duties
- 1-8-7 Compliance with Orders and Directives
- 1-8-33 Negligent Conduct
- 1-8-42 Violation of Rules

The suspension was grieved on December 19, 1990 and processed through the grievance procedure to the instant arbitration.

#### ISSUE

The parties stipulated to the following:

Did the Employer suspend the grievant for just cause when it gave him a thirty (30) day suspension?

If not, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

ARTICLE 5

MANAGEMENT RIGHTS

Except as otherwise provided in this Agreement,  
the Employer shall have the right to:

. . . .

2. To hire, promote, transfer, demote, discipline,  
suspend or discharge for just cause its  
employees.

COUNTY'S POSITION

The County points out that it has a statutory obligation to provide appropriate care and treatment of inmates. It contends that in this regard the Sheriff's Department has a Policy and Procedure Manual, Section 8-3-2 of which sets out the general policy with respect to medical records. Additionally, the County has established Standards for Jail Health Services which provides that the correctional officers will administer medications and record health care information. The County notes that correctional officers are trained and have written guidelines for the administration of medications which spell out exactly how liquids are to be measured and dispensed. The County asserts that the procedure accepted by everyone is that the correctional officer who starts the administration of meds is the one who finishes this task. The County submits that the grievant failed to follow the guidelines and did not complete the administration of the meds, thereby failing to comply with the Jail Policy.

The County argues that it had just cause to suspend the grievant as it had adequate reasons for its action. The County refers to the grievant's past disciplinary record which included a five-day suspension on May 18, 1989, a fifteen-day suspension on August 29, 1989 and a written warning on March 19, 1990 and insists that this very poor performance record would justify a discharge so that its thirty-day suspension was proper.

The County maintains that the grievant failed to follow orders, did not advise his supervisor of any difficulties and failed to perform the dispensing of meds in accordance with the County's policy. The County asserts that the arbitrator should not substitute his judgment as to the penalty imposed unless the penalty is found excessive, unreasonable or an abuse of discretion. The County concludes that it had just cause for the suspension and acted properly and in compliance with the provisions of the parties' labor agreement.

UNION'S POSITION

The Union contends that the County did not have just cause to suspend the grievant. It submits that the County has the burden of proof and it has failed to prove that the grievant did anything wrong on December 8, 1990. The Union claims that it has a difficult time in trying to decipher what the County asserts the grievant did wrong. It submits that the supervisor's reports and the grievant's testimony plus the County's own guidelines for passing medications support the conclusion that the grievant did what he was told to do and did not violate any rules.

The Union notes that the record indicates that December 8, 1990 was a very busy night compounded by the "heart attack" of an inmate. It submits that

everyone was put behind schedule and while there is some disagreement in times, the grievant was given permission to take a smoke at 10:00 p.m. and then proceeded to do the meds. The grievant's supervisor knew the grievant was leaving early and because it takes at least one hour to pass the meds, the supervisor knew the medications could not be done in time. The Union notes that there was no testimony that the grievant refused to pass the meds and although he normally doesn't do this duty, there was no showing of any wrongdoing by the grievant.

The Union points to the testimony of correctional officer Brinkman who agreed to continue where the grievant left off in dispensing the meds and thus it became Brinkman's responsibility to tabulate and log the medication as per the guidelines and this was not the grievant's ultimate responsibility as he never passed the medication, and Brinkman never told the grievant to stay and do it and in fact Brinkman did it. It notes that Brinkman knew where the grievant was going and that he was leaving on compensatory time and the grievant's comment does not indicate that he was unwilling to help, if needed, nor could this be a refusal to stay overtime.

The Union notes that while the Guidelines state that timeliness is important in dispensing medications, the grievant's supervisor assigned this duty knowing there wasn't enough time to do it and the grievant should not be punished for this management decision.

The Union points out that an assertion was made that the grievant should have used plastic cups to measure and dispense the liquid medications; however, the Guidelines state that both plastic and paper cups may be used.

The Union insists that the just cause standard was not followed by the County as this was the first time the grievant was in trouble for passing medications, so thirty days off was not warranted. It maintains that there was never an incident of the grievant's refusing to pass medications and the use of paper cups was justified by the Guidelines. It asserts that the grievant broke no rules and the rules quoted in the letter of suspension are not reasonably related to the grievant's actions. The Union submits that the grievant wasn't even asked for his version of what happened and the punishment does not fit the crime. The Union maintains that the County failed in its burden of proof and asks that the grievance be sustained and the grievant be made whole.

## DISCUSSION

Article 5 of the parties' agreement provides that the County has the right to suspend its employees for just cause. 1/ The County has adopted a progressive discipline procedure which provides that any discipline must be both fair and just and lists the following questions which must be asked to justify the discipline imposed:

1. Did the employee actually participate in improper conduct?
2. Does the employee's act or misconduct warrant corrective action?
3. Is the contemplated corrective action appropriate to the circumstances? 2/

Following this procedure, the first question is whether the grievant actually participated in improper conduct. The County contends that the grievant violated a number of work rules. 3/ The Union contends the grievant did not violate any work rules and consequently no discipline is justified. A review of the evidence is necessary to determine if the County has shown that the grievant engaged in any misconduct.

It is undisputed that medications are normally given to inmates at the jail at 10:00 p.m.. The grievant was directed by his supervisor to pass the meds on the evening of December 8, 1990. The exact time that the grievant was informed that he was responsible for passing meds is in dispute but it occurred sometime between 9:00 and 9:40 p.m. that evening. The grievant had to book in a prisoner about this time and he completed that duty about 10:00 p.m.. At 10:00 p.m. the grievant told his supervisor that he was going for a quick smoke and at 10:15 p.m., he asked his supervisor if he could cut out the non-essential meds such as vaseline and hand creams and was given permission to do so. The evidence indicated that the grievant thereafter did not contact his supervisor about any problems in dispensing the medications or about anything else and left at 10:45 p.m.. The record also established that the grievant did not pass the meds to the inmates but instead asked Officer Brinkman if he would do it. Officer Brinkman agreed to do so but later noticed that the liquid medications were not in uniform quantities and were in paper rather than plastic cups. Officer Brinkman remeasured and distributed the medications.

A review of the evidence fails to establish that the grievant engaged in any wrongdoing by using paper cups. The Guidelines for the administration of medications states that paper cups may be used. 4/ Additionally, the grievant's leaving at 10:45 p.m. because he had worked overtime on December 7, 1990 does not constitute wrongdoing on the part of the grievant as it appears that he had permission to use compensatory time for the last fifteen minutes on December 8, 1990. The failure to record the actual administration of the medications also was not per se improper conduct by the grievant as the person

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1/ Ex-1.

2/ Ex-11.

3/ Ex-3.

4/ Ex-10.

who actually dispensed the medication must initial the log sheet. 5/ The evidence is insufficient to demonstrate that the grievant refused the supervisor's directive to dispense the medications such that a charge of insubordination or deliberate refusal to comply with a supervisor's directive was established.

On the other hand, the evidence does establish that the grievant used very poor judgment and failed to perform an assigned duty properly. The record established that the grievant was negligent in measuring the liquid medications and in his failure to tabulate and log a controlled substance. The grievant did not pass the medications as directed by his supervisor. The grievant used poor judgment when he failed to inform his supervisor that he did not have sufficient time to complete this duty. It is not an excuse that the supervisor should have known that the grievant did not have sufficient time to dispense the medications. The grievant was responsible for this duty and if he didn't have sufficient time, he should have informed his supervisor. Instead of asking Officer Brinkman to complete the job, the grievant should have contacted his supervisor just as he did when he went on a "smoke break" and when he asked to cut out the vaseline and hand creams. The evidence established that the generally known and accepted practice was that one person prepared and dispensed the medications. Given the grievant's seniority and experience, it is concluded that he was well aware of this practice. The grievant should have followed the practice or reported any problems or inability to follow the practice to his supervisor but the grievant failed to do so. Thus, the grievant did engage in improper conduct in failing to exercise good judgment with respect to the passing of medications on December 8, 1990 and was negligent in the work he did with the medications. Therefore, the first question set out above must be answered "yes."

The second question is does the misconduct warrant corrective action and it too must be answered "yes." While the County cited a number of work rules allegedly violated by the grievant, the grievant's conduct essentially was a failure to properly carry out his duties. The failure to properly perform one's duties certainly warrants corrective action so that in the future the employee will perform his duties properly or suffer the ultimate consequence of termination.

The third question is whether the punishment here fits the crime. The undersigned is mindful that normally the discipline imposed by the County will not be set aside unless the County has abused its discretion by imposing an unreasonable or excessive penalty. Additionally, the grievant's past disciplinary record must be considered in determining the appropriate discipline such that the principle of progressive discipline is followed.

The grievant's past disciplinary record includes a five (5) day suspension on May 18, 1989 6/ and a fifteen (15) day suspension on August 29, 1989 7/ and a written warning on March 19, 1990. 8/ No explanation was given as to why the written warning was given following the two suspensions. It is

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5/ Ex-10.

6/ Ex-12.

7/ Ex-13.

8/ Ex-14.

possible that after the expiration of a period of time after discipline has been imposed that the County gives it less weight. The written warning of March 19, 1990 states that such behavior within one year could result in a suspension. 9/ Also, in another disciplinary action involving negligence with respect to medications, the discipline report indicated that it would remain in the file for one (1) year and then be removed if no similar instances occurred during that period. 10/

The issue then is whether the thirty (30) day suspension is warranted for the grievant's misconduct in light of his past disciplinary record. The undersigned concludes that thirty (30) days is excessive and unreasonable as being too severe. The discipline imposed must fit the crime and be corrective.

The grievant had been given a written reprimand with notice that the next infraction could result in a suspension. 11/ A review of the County's procedures indicates that the level of discipline to be imposed in the usual case after a written warning, is a one (1) day suspension, which is then followed by a five-day suspension and then discharge. 12/ In the instant case, a thirty (30) day suspension would be a last chance type of discipline where perhaps discharge would be warranted but the County gives the employee one last chance. Such is not the case here. The grievant's misconduct was poor performance and failure to follow the normal practice and the failure to inform his supervisor of problems causing the failure to follow the normal practice. Therefore, this is not a usual case but one with more than a single offense so the one-day suspension need not be imposed and the undersigned concludes that a five (5) day suspension would be appropriate and consistent with level of discipline set out in the County's procedures. 13/

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

#### AWARD

The County did not have just cause to suspend the grievant for thirty (30) days. The grievant's thirty (30) day suspension is reduced to a five (5) day suspension. The County shall pay the grievant backpay and benefits less any interim earnings for the twenty-five (25) days of suspension found not warranted.

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9/ Id.

10/ Ex-16.

11/ Ex-14.

12/ Ex-11.

13/ Ex-11.

Dated at Madison, Wisconsin this 17th day of December, 1991.

By \_\_\_\_\_  
Lionel L. Crowley, Arbitrator