BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	Case 189 No. 48825 MA-7725
SHEBOYGAN COUNTY SUPPORT SERVICES, LOCAL 110, AFSCME, AFL-CIO	
and	Case 190 No. 48826 MA-7726
SHEBOYGAN COUNTY	

Appearances:

Ms. Louella Conway, Personnel Director, Sheboygan County, appearing on behalf of the County.

Ms. Helen Isferding, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.

ARBITRATION AWARD

On February 19, 1993, Sheboygan County Support Services, Local 110, AFSCME, AFL-CIO, hereinafter Union, requested the Wisconsin Employment Relations Commission to appoint a member of its staff to act as arbitrator in a dispute concerning the suspension and ultimate discharge of one of its members. A hearing in the matter was held on April 28, 1993, at which time the parties were afforded an opportunity to present documentary evidence and testimony relevant to the dispute. A stenographic transcript of the proceedings was not taken, and the parties filed initial post-hearing briefs with the undersigned by June 2, 1993. Subsequent to receipt of those briefs, but prior to issuance of the Award, the Union, on November 24, 1993, moved to reopen the record for the purpose of introducing a new arbitration award involving a prior suspension of the grievant for alleged similar misconduct. The County opposed the motion, but the undersigned granted the motion on January 7, 1994. The parties were afforded the opportunity to file additional argument regarding what, if any, impact that award should have on this case. Those briefs were received by February 7, 1994.

ISSUE:

At hearing, the parties stipulated to the following statement of the issue:

> Did the Employer violate the collective bargaining agreement when it suspended and discharged the grievant, DMS? If so, what is the appropriate remedy?

The parties also stipulated that there were no procedural arbitrability issues before the Arbitrator to resolve.

PERTINENT CONTRACT LANGUAGE:

ARTICLE 5

MANAGEMENT RIGHTS

> Except as otherwise provided in this Agreement, the Employer shall have the right to:
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> . . .
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> 2. To hire, promote, transfer, demote, discipline, suspend or discharge for just cause its employees.
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> . . .

BACKGROUND:

The grievant, DMS, was a cook in the County's jail who functioned as a lead worker of trustees assigned to the kitchen to assist with meal preparation and clean-up. On August 12, 1992, DMS's supervisor overheard two trustees talking about being inappropriately touched and rubbed against by the grievant while they were working in the kitchen. The conversation was reported to another supervisor who in turn reported it to the Sheriff who ordered an investigation.

A lieutenant in the criminal investigation section was assigned to investigate. He interviewed the trustees who were overheard talking of the incidents of sexual touching by the grievant and videotaped those interviews. The lieutenant then spoke with grievant, in the presence of the Union steward, and although she denied the allegations the lieutenant advised her she was suspended with pay pending the conclusion of the investigation. After being advised by the lieutenant of his findings, the Sheriff met with the grievant on August 17, 1992, at which time he discharged her.

The Union argues that because it was the Employer who terminated DMS for "acts of sexual misconduct and untruthfulness," it has the burden of proof, but has not sustained that burden in this case. The testimony of the County's own witnesses do not support a finding of sexual misconduct by the grievant. Indeed, the Union's witnesses' testimony supports a finding that sexual misconduct did not occur and the Employer was and has been "out to get D----." The Union believes that in order for the Arbitrator to render the correct decision he must understand the credibility, craziness and milieu of what was going on in the Sheriff's Department at the time of DMS's discharge. She was not the only victim of "supposed sexual misconduct" accusations. At about the time of DMS's problems, her supervisor P, accused the Jail Administrator J of purposely touching her on the breast when passing through a door while she was carrying a tray. This was DMS's supervisor accusing another 17-year County Sheriff's Department employe of sexually touching her. That employe denied and

protested the accusation as well as threatened to obtain legal counsel. It was upon the threat of obtaining legal counsel that the accusations and charges were dropped. Furthermore, prior to DMS's discharge, she was the only employe under P's supervision who was being evaluated on a monthly basis. These evaluations followed a string of Employer attempts to discipline DMS for approximately two years after she filed an EEOC complaint.

The Union also asserts that because of the seriousness of accusations relative to sexual misconduct, the County should be required to prove "beyond a reasonable doubt" such acts occurred. The Union believes that there is arbitral authority for the proposition that the quantum of proof in discharge cases involving misconduct of moral turpitude is higher than that for other types of misconduct. Also, the grievant should not be placed in a position where she is required to prove a "universal negative."

The Union believes that the testimony of Trustees KA and MM was credible and establishes that the grievant did not touch any trustees sexually. Further, Trustee KA testified that there were abundant rumors in the jail that you could obtain an early release if you "told on D-----." He also testified that he did not observe the grievant touching or being sexually involved with any of the inmates during his first four-month period of incarceration, and he also commented that he believed her workload was significantly more than that of other cooks. Because he had nothing to gain by coming forward voluntarily, his testimony should be given great weight. Further, Trustee MM testified that he did not see any touching of a sexual nature and also agreed that the grievant's workload was heavier than that of the other cooks.

The Union also contends that the Employer's own witnesses did not support the allegation that DMS is guilty of sexual misconduct. Trustee T, who was allegedly touched by the grievant, testified that she is a "caring person, she's not sexual." He also used phrases such as "D----- was not the type" and that other trustees were not complaining about D, and that he knew of no other incidents that might be construed as sexual touching by D.

The Union believes that what happened in this case was that DMS's supervisor overheard a conversation between two trustees teasing each other and blew it out of proportion in an attempt to get DMS. The Union notes that there are several inconsistencies and contradictions in the testimony of Employer witnesses which support the Union's theory that DMS's supervisor was out to get her and that no just cause existed to discipline or discharge the grievant. Furthermore, the Union believes that the Sheriff could not have taken the grievant's work record into consideration inasmuch as he did not know that a previous disciplinary action was being challenged in arbitration. Also, a review of the disciplinary actions taken against the grievant show them not to be corrective discipline, but rather punitive with the obvious intent to terminate the grievant.

Additionally, the Union believes that DMS's testimony was credible. She acknowledged making mistakes in the past. However, these matters are stale and

should not be a factor in this case. The Union believes that it is clear from the record that she had filed an EEOC action, and in less than four months of that filing, the Employer was out to get her.

The Union concludes that the record in this case does not support a finding that the grievant was guilty of sexual misconduct. The Employer's witnesses were uncertain of their facts. Their statements were inconsistent and contradictory and in some instances obtained after the decision to terminate. The facts are that the grievant and trustees were working in a kitchen area which was cramped with little room for movement without bumping into one another and the storage room where some of the inappropriate touching was alleged to have occurred was small and crowded. Thus, the Employer has failed to provide sufficient evidence to prove that just cause existed to suspend and terminate the grievant on August 17, 1992.

In its supplemental brief the Union, while continuing to refute the allegations of inappropriate touching of trustees by the grievant, contends that because the Gratz award overturned a prior 10-day suspension imposed upon the grievant for similar conduct, discharge was not the appropriate penalty even if the grievant committed the acts alleged. The Union notes the County argued progressive discipline left it with termination as the only alternative in dealing with the grievant. However, because the prior 10-day suspension was deemed proper discipline by the County for a "similar incident" it cannot now be a step that is skipped in favor of discharge. Therefore, the Union requests the Arbitrator to sustain the grievance, reinstate the grievant and make her whole.

The County contends that it has the legal responsibility to investigate any allegation brought by a trustee of the jail against jail employes. In the case at hand, the grievant's supervisor overheard a discussion between two Trustees, T and G, in which a statement was made "you'll probably get grabbed in the ass too." This statement bothered the supervisor, and as a consequence she reported it to her supervisor, Inspector H, who in turn spoke with the Sheriff. The Sheriff directed that a lieutenant in the Criminal Investigation Unit conduct an investigation into the allegations. The investigator interviewed the trustees involved regarding their remarks, as well as the grievant.

As a consequence of this investigation, the County found itself in a position of having to take action based upon their belief that the trustees had been sexually harassed by the grievant. The County cites the fact that Trustee G was bothered by the comments and conduct of the grievant. The County believed the grievant had created a "sexually hostile work environment in the kitchen because of the unnecessary touching and the trustees' feeling (sic) concerning that conduct of the grievant." Furthermore, during the investigation both Trustees T and G stated that they feared retaliation if they made a statement which "got D----- in trouble." Also, the County's Law Enforcement Department has a sexual harassment policy which had been disseminated to all employes in 1984, including the grievant. Once having concluded that the grievant had created a sexually hostile work environment and had sexually harassed the grievants, the County was obligated to take appropriate action.

To the County, appropriate action in this case meant that based upon the prior disciplinary record of the grievant dating back to 1988, and the progressive discipline policy followed by the County, discharge was the only alternative. The Sheriff, after reviewing the statements of the trustees, the grievant's statement, as well as the grievant's prior disciplinary record dating back to 1988 concluded that while she had been given ample opportunity to correct her behavior, she had not done so, and therefore, the only

alternative was termination.

In its supplemental brief the County argues that the Gratz award removing the 10-day suspension from the grievant's record has very little to do with the decision to terminate the grievant. The grievant's record without that suspension still contains other incidents of misconduct, and in this case, unlike that included in the Gratz award, there is no doubt that the incidents occurred. Further, the County argues that even "one incident of physical touching that is of a sexual nature is so serious that the only appropriate disciplinary response is termination." In this instance where a supervisor of trustees engages in such behavior it is so repugnant that discharging the employe is clearly appropriate, and the only remedy that will ensure such incidents don't occur again. Finally, the County is responsible to insure the trustees' civil rights are not violated while in its custody, and it would have been remiss in fulfilling this responsibility if it allowed the grievant's behavior to continue unchecked.

Therefore, the County believes that because its thorough investigation established the incident did occur, the grievant's misconduct was serious and the termination was the appropriate penalty, the Arbitrator should find that the County did not violate the contract and the grievance should be denied.

DISCUSSION:

The testimony of Trustees T and G has clearly convinced me that the grievant did intentionally sexually touch them while they were working with her in the jail kitchen. The Union would have the undersigned set the quantum of proof in this case as being beyond a reasonable doubt. I do not agree. Inasmuch as this is not a criminal proceeding I do not believe the County is to be held to that standard. Rather, the appropriate standard in a case of this nature more appropriately requires the County to establish by clear and convincing evidence that the alleged misconduct did occur. In this case the County has met its burden of proof.

At the hearing both sequestered trustees testified under oath, and their videotaped investigatory interviews corroborated, that the grievant had touched T in a sexual manner. She had on more than one occasion grabbed him in the buttocks and brushed against him with her breasts. Both trustees said that while she tried not to be obvious about it, the acts were not accidental. T testified that she inappropriately touched or rubbed against him many times and he was not mistaken about these actions being intentional. 1/ The undersigned can find no reason to question the credibility of these witnesses. They did not volunteer the information; rather, the County sought them out. Further, they were worried about talking with the investigator, and said they did not want to get the grievant fired. Contrariwise, the grievant had the ultimate reason to be less than forthright about the events--saving her job. Consequently, the undersigned credits the trustees' testimony and not the grievant's.

1/ Initially, each trustee testified from their then present recollection of the past events and were then cross examined. Thereafter, a video tape of the investigatory interview was played and each trustee was examined again by the parties. These interviews occurred on August 12, 1992. The trustees in their testimony at hearing did not recant anything they had said in the taped investigatory interview nor did they testify that the video tapes were incomplete or otherwise inaccurate.

The undersigned has also considered the testimony of two trustees that were called as witnesses by the Union in support of the grievant. However, nothing in their testimony refutes the direct testimony of T and G. Merely because they never observed the grievant touch any trustee inappropriately does not mean she didn't inappropriately touch T as alleged. Their testimony was that KA did not recall ever working with Trustees T and G and MM said he never worked with T or G. Consequently, their testimony merely shows that if the events did take place as testified to by T and G, Trustees KA and MM did not observe them.

There was also testimony adduced on the grievant's behalf that she had a significantly higher workload than other cooks, that she was the only cook being evaluated on a monthly basis following her filing of an EEOC complaint against the County. Even if all of this is true, it does not in any way diminish or taint the persuasive statements of Trustees T and G concerning the incidents which led to the Sheriff's investigation that culminated with D's discharge.

The remaining question is whether discharge 2/ is too harsh a penalty, whereas the appropriate penalty should have been a suspension as argued by the Union. The Union believes the Gratz award overturning a prior 10-day suspension for alleged similar misconduct mandates that the discharge penalty in this case be overturned. The undersigned disagrees. Under progressive discipline schemes, discharge for the first incident of misconduct can be appropriate if the misconduct is egregious enough to warrant that penalty and there are not factors present that militate against a decision to discharge, e.g. a long service, highly regarded employe without a prior disciplinary record. Here, the County employe discipline policy explicitly acknowledges this can occur. It enumerates examples of employe misconduct that because of the seriousness of the offense warrants immediate discharge and not corrective discipline.

. . .

(a) Consumption of alcoholic beverages during scheduled work period.

(b) Use, possession, or sale of illegal drugs on County premises or during working hours.

(c) Theft of County property.

(d) Carrying a weapon on County premises, except law enforcement personnel.

. . .

2/ The statement of the issues talks about suspension and discharge, but the suspension was with pay after her meeting with the investigating lieutenant pending conclusion of the investigation into the grievant's alleged misconduct including discussion with the Sheriff. As such, it was not a separate disciplinary action and, therefore, is subsumed in the discharge.

(z) Patient abuse.

. . .

So, was the penalty of discharge that was imposed in this case too severe or otherwise inappropriate such that the undersigned should order its modification? The answer is unequivocally no.

The offense of inappropriate sexual touching of a jail trustee is an egregious offense and not unlike patient abuse. As with nursing home patients, trustees are in the custodial care of the County and its employes. The fact that the trustees are incarcerated because they have themselves committed criminal acts does not diminish their right to be free from harassment and intimidation by those who have custody of them. Clearly, in situations like the instant one they are vulnerable to being disadvantaged by their custodians and that is why the County, as the responsible custodian, must be vigilant in insuring that incidents such as this do not occur. Because of the importance of the rights being protected and the vulnerability of the trustees, not unlike nursing home patients, the undersigned is satisfied that the County was not obliged to follow corrective discipline in this case, but had the discretion to terminate the grievant. The undersigned is satisfied that under the circumstances present in this case the County acted reasonably and not discriminatorily or in bad faith in deciding to discharge the grievant.

Based upon the foregoing and the record as a whole, the undersigned enters the following

AWARD

The Employer did not violate the collective bargaining agreement when it suspended and discharged the grievant, DMS. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 25th day of March, 1994.

By Thomas L. Yaeger /s/
Thomas L. Yaeger, Arbitrator