BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
LOCAL 2484, WCCME, AFSCME, AFL-CIO	Case 143 No. 50486 MA-8269
and	
LA CROSSE COUNTY, WISCONSIN	

Appearances:

Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, Route 1, Sparta, Wisconsin 54656, with Mr. Bruce Ehlke, Lawton & Cates, Attorneys at Law, 214 West Mifflin Street, P. O. Box 2965, Madison, Wisconsin 53701-2965, on the brief, appearing on behalf of Local 2484, WCCME, AFSCME, AFL-CIO, referred to below as the Union.

Mr. Robert B. Taunt, Personnel Director, La Crosse County, La Crosse County Courthouse, Room B-04, 400 Fourth Street, North, La Crosse, Wisconsin 54601-3200, appearing on behalf of La Crosse County, Wisconsin, referred to below as the County or as the Employer.

ARBITRATION AWARD

The Union and the County 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 parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of Sue Conard, referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on May 10, 1994, in La Crosse, Wisconsin. The hearing was not transcribed, and the parties filed briefs and reply briefs by August 8, 1994.

ISSUES

The parties did not stipulate the issues for decision. I have determined the record poses the following issues:

> Did the County violate Section 2.01 by suspending the Grievant from work for three days and by reassigning her from the Jail Nurse position?
>
> If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE II

ADMINISTRATION

2.01 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 . . . transfer, demote or suspend or otherwise discharge or discipline for proper cause; the right to decide the work to be done and location of work . . . and the allocation and assignment of work or workers . . . and, to adopt and enforce reasonable rules and regulations.

BACKGROUND

The grievance, filed on April 14, 1993, 1/ lists the relevant facts thus: "Employee was suspended without pay for three (3) days (3-31, 4-1 & 4-2, 1993) because of inappropriate behavior and will not be able to continue her work as the Jail Nurse." The grievance seeks the following remedy:

> "Employee return to work as a Jail Nurse III. Receive reimbursement of the three (3) days pay while suspended. The employee be made whole and any and all documents and references related to this action be removed from any and all files."

The Grievant began work for the County in June of 1985. She was first employed as a Refugee Assistance Nurse, and moved into the position of Jail Nurse in January of 1990.

As Jail Nurse, the Grievant oversees the administration of medicine for inmates. She also oversees dietary needs of inmates to the extent those needs require medical oversight. Meals are prepared for inmates at the County's Hillview Nursing Home, and shipped to the Jail. The Grievant plays no direct role in the serving of meals, and is not typically working when the evening meal is served. The Grievant is an employe of the County's Health Department, and plays no role in the administrative chain of command for the Jail.

On March 17, Jeffrey Patterson was a Jail inmate. He has diabetes. He is viewed as a difficult prisoner. For the evening meal, Patterson and other inmates stood in line, waiting to pull their meal from a meal cart. Each meal was placed on a tray and onto a meal cart by Hillview employes or by a Jail Trustee. The Trustee that evening was James Butcher. Butcher was an inmate who, as Trustee, had been given administrative duties to perform in the kitchen area. The serving of the meal was overseen by Tom Stollenwerk, a Jailer, and by Gary Hanan, a Special Deputy. Stollenwerk was, at that time, serving a probationary period as Jailer. Hanan, as a Special Deputy, worked on an on-call basis, hired directly by the Sheriff. As Patterson picked up his tray, he

1/ References to dates are to 1993, unless otherwise noted.

noticed a Milk-Bone type dog biscuit in his mashed potatoes. He started screaming in protest. He was ultimately served a meal not including dog food, and moved to a different part of the Jail. He complained of the incident to Jail administration. Sheriff Karl Halverson ultimately assigned Sergeant John Schmidt to investigate the incident.

The only known source for the dog biscuit was the Grievant. She kept a supply of dog biscuits in her desk to feed to the seeing eye dog used by an AODA counselor who assisted inmates. After Schmidt's investigation, Halverson terminated Stollenwerk and Hanan, and banned the Grievant from the Jail. Doug Mormann, the Director of the County's Health Department, issued the Grievant a three day suspension. Mormann also reassigned the Grievant as a Community Health Nurse, thus honoring Halverson's determination to ban her from the Jail. The Grievant did not suffer any reduction in her hourly rate of pay, but did suffer a reduction in her gross earnings due to a reduction in the overtime and call-in opportunities available to her as a Community Health Nurse. She also lost the opportunity to obtain national certification as a Correctional Health Care Provider.

The background summarized to this point is undisputed. The balance of the background will be set forth as an overview of witness testimony.

John Schmidt

Schmidt first heard of the incident on March 17. Patterson was extremely agitated and unable to get along with others in his block. Patterson complained to Schmidt about the dog biscuit, and Schmidt logged the report in Jail records. On March 19, Halverson told Schmidt to investigate the incident. Schmidt interviewed Butcher, whose written statement reads thus:

> I worked in the jail kitchen on 3-17-93 during the evening meal. I was handed a Milk-Bone Biscuit by the nurse and it was placed on food tray of Patterson. When tray was returned, biscuit and potatoes were thrown away and more potatoes placed on tray.

Patterson's statement, dated March 17, reads thus:

> . . . I noticed a milk bone dog bisket (sic) pressed into my mashed potatoes. I asked what the hell was with the dog bone neither of the guards acked (sic) if they knew what was going on they said it must be a joke on another guard then the guard in the dark shirt (the one in the light shirt gave me the tray) took the spoon off the tray and scooped the bone off the potatoes and proceded (sic) to hand it back. I said hell no I want a new tray so I grabbed a coffee off the cart and went inside after every one had gotten there (sic) trays and started eating, about 5 min. later they returned with my tray but the same tray. All they did is smooth over the taters and give it back. I asked again What the hell? they said but we put more potatoes on there. I took the tray and hesitatly (sic) ate only the sandwhich (sic) . . .

Stollenwerk's statement, dated March 22, notes the following:

> . . . earlier that evening I heard (the Grievant) say that it would be funny to put a bone in an inmate's food. I heard the remark in passing and did not think it would happen . . .

Hanan's statement, dated March 22, notes the following:

> On March 17, at approx 1630, (the Grievant), jail nurse told me that a practical joke was going to be played on Jeff Paterson. (sic) I had forgotten what she had said by the time Hillview arrived to serve supper, around approx 1630-1640 . . . It was when I called . . . Paterson to be fed first then I noticed the biscuit in Paterson's plate. I laughed along with the rest briefly until I saw Jeff's anger. I then took back the plate & asked Jim Butcher, trustee, to remove the potatoes and given (sic) the plate a new order of potatoes . . .

Liz Zachowski served as a Special Deputy on March 17. Her written statement, dated March 22, reads thus:

> On 3/17/93 approximately 5:15 P.M. . . . I heard Inmate Jeff Patterson saying in a very loud voice What the fuck is that a dog biscuit in my mashed potatoes. I heard laughter and remarks being made as Jailer Tom Stollenwerk, Special Deputy Gary Hanan and trustee Jim Butcher were serving block 4 . . . (The Grievant) came out of her office and joined them talking and laughting (sic) . . . (The Grievant) said Patterson is

> a real asshole . . . Jailer Mark Yehle had no part in the incident . . . Later on that eveing (sic) I heard Jailer Stollenwerk and Sp Deputy Hanan making remarks about Inmate Patterson something like they should move the dumb fuck to block 8 because that would piss him off. They went down to block 4 several times and had words with inmate Patterson then would return to the office and watch him on the monitor and laugh and joke about him.

Yehle's statement, dated March 19, reads thus:

> . . . At approximately 5:20 pm (the Grievant) came into the control room where myself and Liz were working. Gary and Tom were serving the 5pm supper . . . (The Grievant) and Liz had begun talking in the control room. During this conversation (the Grievant) stated that Jeff Patterson had complained that he couldn't tell which diabetic meal was his, so she told the Jail Trustee to put a dog bone treat in his mash potatoes that she had given him. (The Grievant) then walked over to the window . . . and said something to the effect the (sic) if she was going to get in trouble for it she was going to enjoy it. (The Grievant) walked back to where she was standing and told us not to say anything, but that if someone were to get in trouble for it they could blame her. (The Grievant) said she had the dog treats for someone's dog that she knew . . .

The Grievant's statement, dated March 23, reads thus:

> Several days prior to 3/17/93, trustee Jim Butcher and I discussed, jokingly that some of the jailers seemed to have difficulty determining which tray was the diabetic tray even though the diabetic tray had a banana rather than pie for dessert. I gave Jim a dog biscuit which I kept in my desk for Don Lowell's seeing eye dog and suggested that might make the tray more obvious as a diabetic tray. On 3/17/93 I was in the office when Mr. Paterson was served his supper and he returned it to the jailers stating he had a dog biscuit in his potatoes. I did not see anyone place the biscuit in the potatoes nor did I see the biscuit in the potatoes.

Schmidt noted he had spoken with Stollenwerk and Hanan on March 17, but each denied any role in the incident. After obtaining Zachowski's statement, Schmidt

decided to interview the Grievant. That interview resulted in the statement noted above. His written summary of the events surrounding her written statement reads thus:

> . . . The first story she told me was that she had talked a while back . . . with kitchen trustee Butcher about Paterson (sic) not knowing which meal was his diabetic one, and maybe it should be marked with a dog biscuit. She stated she in fact had dog biscuits in her desk, in the unlocked portion. She did not know how the biscuit got into the kitchen as everyone had access to them. At this time I advised her I had written statements from several people who told the story and involved her. I further advised her that a proveable (sic) lie on her part would not be good. (The Grievant) at this time changed her story and stated she and Butcher had talked about the incident, and she in fact gave the dog biscuit to Butcher. She further stated, upon my asking, that the Jailers knew what was going on. She further stated "if anyone should be blamed, I should, as I planted the idea and gave him the bone" . . .

Schmidt reported the results of his investigation to Halverson. The statements he had obtained were also given to Doug Mormann, the Director of the County's Health Department.

Gary Hanan

Hanan acknowledged that he has a slight hearing problem, but noted that he overheard the Grievant tell other workers that some sort of joke was in the process of unfolding. Hanan noted there were two diabetics who received special dinners. He was unaware of the biscuit until Patterson discovered it and started yelling. Hanan noted he laughed at the incident, as did all the inmates and employes in the area. He did not know who put the tray on the cart, but assumed it was Butcher or another trustee. He acknowledged he initially lied to Schmidt about the incident.

Mark Yehle

Yehle affirmed the accuracy of his statement. He noted the Grievant entered the control room area before Patterson started to shout. He also stressed that the Grievant did not state she told Butcher to put the biscuit in the potatoes, but did state she had given the biscuit to Butcher.

Karl Halverson

Halverson stated that after a review of Schmidt's investigation, he offered Hanan and Stollenwerk the opportunity to resign or be discharged. He noted he played no role in the Grievant's suspension. Rather, believing he had no direct authority over her, he informed the County he would not permit her into the Jail. He shares a verbal and budgetary agreement with the County to use a County employe as the Jail Nurse. This informal agreement does not, in his estimation, bind him to use only County employes or to use any particular County employe as the Jail Nurse. He summarized his views on the Jail Nurse in an April 1 memo to Robert Taunt, which reads thus:

> Following the recent events related to the jail nurse, I wish to provide you my position in writing.
>
> The Sheriff has total custody of the County Jail, Wis.ss 59.23. The Sheriff has total responsibility for the provision of medical care for the prisoners which are under the care and custody of the Sheriff, Wis.ss 302.38.
>
> Ill-treatment or abuse of jail prisoners by any person employed in a place of confinement is a Class E Felony, Wis.ss 940.29 which is subject to the penalties described in Wis.ss 939.50.
>
> Ill-treatment or abuse of a prisoner by a registered nurse, responsible for the medical care of the prisoner, is a violation of Wis.ss 441.07 and is subject to the regulatory authority of Wis.ss 440.03.
>
> Ill-treatment or abuse as described in 940.29 may be a basis for suit by the prisoner as a violation of Article VIII of the amendment to the United States Constitution, the right to be free of cruel and unusual punishment.
>
> The determination of who will provide medical care for prisoners and who will be allowed to enter the jail for the purpose of providing the medical care for prisoners is exclusively the decision of the Sheriff.
>
> Based on facts developed through an internal investigation, I will not allow (the Grievant) to enter the jail for the purpose of providing medical care for prisoners.
>
> Please feel free to share this letter with the Union representatives who may be involved in this issue.

Halverson acknowledged he did not know who placed the biscuit into Patterson's meal, but stated he assumed Butcher did. Butcher continued to serve as Trustee after this incident.

Doug Mormann

Mormann learned of the incident through the Personnel Department, and called the Grievant in to discuss the incident on March 26. He stated she acknowledged supplying the biscuit to Butcher, but disavowed any role in the process by which the biscuit ended up on Patterson's tray. Mormann reviewed this interview and the statements supplied by the Sheriff's Department, and met again with the Grievant on March 30. He issued the Grievant a memo, dated March 30, which suspended her from work for three days. That memo reads thus:

> The following is the result of my investigation of your involvement in putting a dog biscuit into the food of the jail inmate, Mr. Patterson:
>
> . . .
>
> - According to your statement, you and two jailers developed a plan to place a dog biscuit into the food of Mr. Patterson.
>
> - According to a statement by Mr. Butcher, you gave Mr. Butcher the dog biscuit to be put it (sic) into the potatoes.
>
> . . .
>
> Your conduct in this matter is a serious breach of your professional duties . . .
>
> Your conduct in at first trying to hide your responsibility for this incident and then telling the truth after having to be reminded of penalties is not acceptable.
>
> Your referring to an inmate under your care as a "real asshole" while working as a nurse representing the Health Department is not acceptable.
>
> Your actions could be construed as a Class E felony under State Statute 940.29 . . .
>
> Your actions put La Crosse County in significant legal and financial jeopardy by ill treating an inmate.

> Your actions could be construed as a violation of the Nurse Practice Act . . .
>
> Your conduct lays open the entire Health Department for public criticism and ridicule. An expose' on Health Department staff feeding prisoners dog food would not be well received by our community.
>
> In addition to the poor performance exemplified above, it is appropriate to review concerns that have been documented regarding your performance in the past as follows . . .
>
> Your serious errors in judgment and poor work performance have caused a serious erosion of confidence in your ability to perform. This has lead me to determine that your employment with La Crosse County should be suspended without pay for three days . . .
>
> I am responding to Sheriff Halverson's request that you not be assigned work in the jail in the future. Upon your return to work on April 5, you will be assigned duties that will not include working in the jail or the JDC.
>
> In the past you have shown yourself to be a competent community health nurse. I expect your performance to improve. Further failure on your part to meet basic expectations in the performance of your duties could result in disciplinary action, including termination as an employee of the County . . .

Mormann testified that the actual placement of the biscuit in the potatoes was not, in his view, the crucial point. Rather, the crucial point was that she played a role in getting the biscuit onto the tray at all. He noted his belief that she planned the joke and gave Butcher the biscuit.

The Grievant

The Grievant noted that Butcher came into her office on March 16, and noted that Jailers needed more training because they were confused on which plates were for diabetic inmates. She responded that perhaps the plates could be marked with a big red "D." Butcher replied that the "D" would wash off. She responded by pulling a biscuit from her desk and commenting that perhaps the Jailers could associate the "D" for diabetic with the "D" for "d"og biscuit. Butcher took the dog biscuit at that time. The conversation was, she noted, done in jest.

On March 17, she was required to stay later than she typically would. She did so because a new inmate required a prescription to be filled and dispensed. While in her office, she heard Patterson shouting, and she went into the control room area. There she noted, aloud, "Oh great, the shit's going to hit the fan." She then noted she would probably get into trouble because she was in part responsible. Her remarks, she noted, reflected that Patterson typically blamed her for all of his problems, and that at least in this instance he would be partially right. She denied she ever told any employe to keep quiet about the incident. She also denied ever labelling Patterson an asshole. She acknowledged she may have said he treated her like an asshole. She denied she ever planned to play a joke on Patterson, and stated she assumed Butcher wanted the biscuit to feed to Lowell's dog.

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

THE PARTIES' POSITIONS

The County's Initial Brief

The County phrases the issues posed thus:

A. Was there just cause to suspend (the Grievant) three (3) days without pay?

B. If issue A is answered in the negative:

1. What discipline, if any, is appropriate?
2. Does the arbitrator have jurisdiction to reverse the action of Sheriff Halverson to grant the grievant's request for relief?

After a review of the factual background, the County notes that the contract, read in light of arbitral precedent, places a burden on it to establish that the Grievant committed misconduct warranting a three day suspension. That she is guilty of misconduct is, according to the County, established by her own testimony. The County acknowledges she denies formulating the plan to put the dog biscuit in his food, but notes she acknowledges discussing the point with Butcher and giving him the dog biscuit. The hearsay nature of some of the evidence indicating she is more culpable than she acknowledges is, according to the County, irrelevant. The County contends that the hearsay parallels non-hearsay testimony, and was related by witnesses with no "vendetta or reason to lie about what (the Grievant) told them." The testimony, viewed as a whole, establishes, the County argues, that "it has met its burden of proof in establishing that an incident occurred which warranted discipline."

The County's next major line of argument is that the discipline imposed was appropriate to the offense. Citing Secs. 940.29 and 946.12, Stats., and portions of the Wisconsin Administrative Code establishing rules of conduct for nurses, the County contends that the severity of the underlying offense cannot be doubted. Noting that the Grievant has maintained an office outside of the dining area, the County asserts that the Grievant was well aware of the security risks posed by her practical joke. That she is experienced both as a Nurse and as a Jail Nurse, the County argues that she could "have reasonably expected the results which resulted." She was, the County notes, the most experienced employe in the area.

The County summarizes its view of the propriety of the three-day

suspension thus:

> The potential for inciting an inmate to disorderly conduct, civil rights law suits, privacy violation law suits as well as the potential for physical injury through contamination of food or mental injury through the imposition of mental anguish (manifested by the fear of the inmate to eat anything after his tray was cleaned up) warrants the imposition of a three (3) day suspension. But just . . . looking at the actual results of the prank, also gives . . . proper cause for the imposition of a three (3) day suspension.

Beyond this, the County notes that the Grievant cannot claim any disparate treatment, having received the lightest discipline of anyone associated with the prank. Her long experience and prior work record warrant the leniency, but the County concludes her conduct defies any justification.

Even if a violation could be found, the County contends the remedy sought by the Union is beyond an arbitrator's authority. Citing precedent interpreting the Sheriff's statutory and constitutional authority, the County concludes the Sheriff had the authority to ban the Grievant from the jail. That the Grievant is a member of a bargaining unit of Health Department employes and that the Sheriff is not a party to the collective bargaining agreement covering the Grievant underscores the impact of well-established precedent on the Sheriff's conduct here, according to the County. It follows, the County contends, that "an arbitrator may reverse the three (3) day suspension in this case" but cannot mandate that the Grievant be granted access to the jail.

Once the Sheriff notified the County that the Grievant had been barred from the jail, the County "reassigned her to Community Health Nurse status with no change in hourly rate." The reasons for this reassignment are, the County argues, traceable to the Grievant's misconduct and well-founded in the contract. The County concludes that the "grievance should be denied."

The Union's Initial Briefs

The Union phrases the issues posed thus:

> Did the County have proper cause to suspend the Grievant for three (3) days, without pay, and remove her from her jail position for the incidents that occurred on March 17, 1993? If not, what is the appropriate remedy?

After a review of the factual background, the Union notes that much of the County's case rests on hearsay, which should be accorded no weight. The discipline presumes, the Union notes, that the Grievant "should be held to a higher standard of conduct because of being a professional employee responsible for the health and welfare of the inmates" and because she is responsible "for the serving of the food." These presumptions are inappropriate, the Union argues, since the Grievant is not scheduled to be present during the serving of meals and since she "has nothing to do with the actual serving of the meals."

Nor has the County demonstrated the Grievant engineered a practical joke. She has no advance knowledge of the meals being served, and could have had no way of controlling the dog biscuit once she gave it to Butcher. Hanan's and Stollenwerk's statements are inherently unreliable, according to the Union, since each individual lied when first confronted about the incident. That each lost his job afforded each, the Union concludes, "motive to implicate (the Grievant)." Yehle's testimony is inconsistent with his own and Zachowski's written statements. Viewed as a whole, this record manifests, according to the Union, an insufficient evidentiary base for the discipline. The Union concludes that the record, apart from legal issues surrounding the Sheriff's authority, warrants "that the arbitrator sustain the instant grievance and award a make whole remedy, return (the Grievant) to her Jail Nurse position and purge her personnel file(s) of any and all references to this incident."

Turning to the issue of the Sheriff's authority, the Union contends that "the arbitrator (can) apply the terms of the collective bargaining agreement to . . . restore (the Grievant) to her position as Jail Nurse III."

More specifically, the Union argues that the Sheriff's statutory powers over the jail under Sec. 59.15, Stats., are not exclusive and that they do not read the powers of the County Board out of existence. The County's power to contract under Sec. 59.15(2)(d), Stats., prevails over conflicting statutes, as noted in Sec. 59.15(4), Stats. Since the Sheriff and the Board exercise control over the jail; since the statute stating the Sheriff's authority is "rather vague"; and since Sec. 59.15(4), Stats., mandates the County's authority to supercede the Sheriff's in cases of conflict, it follows, the Union contends, that the labor agreement, which embodies the County's authority to contract, prevails over the Sheriff's statutory authority.

Nor can the Sheriff claim constitutional authority superceding the labor agreement, according to the Union. Manitowoc County 2/ "arguably may have marked an increase in the prerogatives accorded a sheriff as a constitutional officer," the Union acknowledges, but that decision does not protect "mundane and commonplace" duties or "administrative and executive duties." Contending that the "feeding of prisoners is about as mundane and commonplace a duty as a sheriff has to perform," the Union concludes that Manitowoc County does not put the remedy requested here beyond an arbitrator's authority.

The Union then asserts that a review of related judicial precedent establishes a delineation of "the limited scope of a sheriff's constitutional

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2/ Manitowoc County v. Local 986B, 168 Wis.2d 819 (1992).

prerogatives." That delineation, the Union urges, should not be broadened by accepting the County's contention on the limited scope of arbitral authority over this grievance.

The County's Reply Brief

The County notes that even under the Union's arguments the Grievant was aware that Patterson received the only diabetic meal, was present when that meal was served and made the dog biscuit available for placement in Patterson's meal. Whether the Grievant formulated the joke with Butcher alone, or with other jail personnel is, the County argues, irrelevant. Essentially unrebutted testimony establishes, the County concludes, that the Grievant is culpable: "As a professional nurse she should not have started the joke nor provided the means of completing it."

The County then notes that the Union has made conflicting arguments attempting to discredit Hanan's and Stollenwerk's statements. The Union cannot, the County argues, use Zachowski's statement to discredit Hanan's, while attacking Zachowski's as hearsay. Nor can Hanan's and Stollenwerk's statements be dismissed because each had, as the Union contends, a motive to implicate the Grievant. This follows, the County contends, because Yehle's and Zachowski's statements corroborate them, and neither Yehle nor Zachowski had the motive the Union attributes to Hanan and Stollenwerk.

A review of the testimony establishes, according to the County, that the Grievant's "statements at the hearing are inherently suspect." That there may be conflicts between Jail and Health Department rules is, to the County, irrelevant: "Neither Health Department nor Jail policy would permit or allow the passing of a dog bone to an inmate as a joke."

The County then contends that the bulk of the Union's arguments regarding the Sheriff's legal authority is misplaced. The scope of arbitral review of the suspension is, the County notes, undisputed. That the County Board may limit the authority of the Sheriff under Chapter 59 Stats. is, the County contends, irrelevant here since the collective bargaining agreement covering the Grievant is not applicable to the Sheriff. Because the Sheriff owes no contractual duty to the Grievant it follows, according to the County, that "there is no legal barrier to the Sheriff's exclusion of her under his clear and statutory right to maintain a Jail and the inmates therein."

Nor can the grant of authority to the Sheriff over the jail in Sec. 59.23, Stats., be considered vague, according to the County. Even if it could be, the County notes that the facts of this case do not seriously question that authority. The County explains this argument by analogizing that just as a client of the County's Community Health program could refuse the entrance of a County nurse to their home, the Sheriff can refuse entrance to nurses he lacks confidence in.

The County argues that the Union's arguments on the scope of the Sheriff's authority fundamentally miss the point that the Sheriff has not contracted with the County as the sole provider of nursing services. He could obtain such services from a variety of sources other than the County. From this, the County concludes that the legal authority which recognizes the Sheriff's Constitutional authority over a deputy sheriff covered by a labor agreement has controlling significance in this grievance where the affected employe has no contractual relationship to the Sheriff. The County concludes by repeating its request that "the grievance should be denied."

The Union's Reply Briefs

The Union challenges the County's assertion that the Grievant's testimony varies from her initial written statement. The key point, according to the Union, is that she has consistently and persuasively denied knowing how the biscuit ended up in Patterson's potatoes. That she laughed when she learned of the incident is, the Union contends, irrelevant to any disciplinary interest of the County. That Hanan and Stollenwerk lied about the incident when first questioned, then lost their jobs, affords them, the Union repeats, a reason to implicate the Grievant.

The County's citation of felony statutes and administrative rules governing the conduct of nurses is irrelevant here, the Union contends, since no complaints or charges have been filed and the Grievant "cannot be found guilty by inference."

The Union then contends that the Grievant plays no effective role in the chain of command at the Jail, and cannot reasonably be held responsible for Butcher's, Hanan's or Stollenwerk's conduct. Noting that the Grievant testified that she "had no intention that the tray should be served with the dog biscuit", the Union questions: "What responsibility does (the Grievant) have for the actions of others on the day after her conversation with Mr. Butcher?"

Noting the Grievant's long history of competent service to the County, the Union concludes that the grievance should be sustained and that an appropriate make whole remedy be ordered.

Turning to the legal issue regarding the relationship of arbitral remedial authority to the Sheriff's Constitutional and Statutory powers, the Union argues that "(i)f the County is to bar (the Grievant) from the Jail, it must do so in a manner consistent with the Collective Bargaining Agreement . . . " The Union supports this argument by contending that Sec. 59.15(2)(d), Stats., supercedes the Sheriff's authority under Sec. 59.23, Stats. The provisions, read together, establish, according to the Union, that "(t)he sheriff is certainly in charge of the jail, but . . . still must abide by other Wisconsin laws."

The Union next contends that the Sheriff's constitutional powers are not posed here. Manitowoc recognizes, according to the Union, constitutional powers only related to "duties of the sheriff that give 'character and distinction' to his office." The "feeding of prisoners" does not, the Union contends, "give character and distinction to the office of sheriff." Nor does the absence of a contractual relationship between the Grievant and the Sheriff implicate the Sheriff's constitutional authority, according to the Union:

> If an employee is so far removed from these central duties as not even to be employed by the sheriff's department, it is certain that the sheriff has no special constitutional power to discipline that employee without adhering to the Collective Bargaining Agreement.

Nor does any other legal precedent support the County's position, according to the Union.

The Union then argues that the fact that the Sheriff is not a party to the labor agreement covering the Grievant is irrelevant. As the Union puts it: "In this case, the Agreement is between the County and the AFSCME Local 2484, and both Sheriff Halverson and (the Grievant) are subject to its terms." The statutory and constitutional powers the County asserts are, according to the Union, "imaginary" and pose no barrier to the remedy the Union seeks.

DISCUSSION

The issues adopted above draw from, but do not adopt, the issues as formulated by either party. The reasons for this reflect the difficulty in characterizing the action taken against the Grievant. As is discussed below, this action implicates the County's authority to discipline as well as its authority to assign and regulate the work force. Each of these rights are stated at Section 2.01 of the contract, so the issue adopted above points to that section.

At a minimum, it is apparent the County has disciplined the Grievant, and that this discipline, under Section 2.01, is governed by a "proper cause" standard. As the County acknowledges, there is no difference between a "just" and a "proper" cause analysis. 3/ Where the agreement does not specify the standards governing discharge and where the parties have not otherwise stipulated to them, a cause analysis must address two elements. First, the Employer must establish the existence of conduct by the Grievant in which it has a disciplinary interest. Second, the Employer must establish that the discipline imposed for the conduct reasonably reflects that interest.

That the County has demonstrated a disciplinary interest in the Grievant's conduct is not significantly in doubt. Undisputed testimony establishes that the Grievant gave Butcher the dog biscuit, and did so at a point in a lighthearted conversation in which the marking of diabetic meals with a dog biscuit was the point of the discussion. According to the Grievant's testimony, Patterson was the only diabetic to be served. No one

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3/ See Management Rights, Hill & Sinicropi, (BNA, 1985) at 99: "The term 'just cause is generally held to be synonymous with 'cause,' 'proper cause' or 'reasonable cause.'"

disputes that Patterson was, at best, an unpopular inmate. How Butcher could take the proffered dog biscuit as anything other than a marker for Patterson's plate is not apparent. The Grievant testified she assumed Butcher would feed the biscuit to Lowell's seeing eye dog, but this assumption has no basis in her own, or any other account of the events preceding the March 17 supper. Nothing in the Grievant's testimony indicates she and Butcher ever discussed the dog or its owner. Her March 23 written statement links her giving Butcher the biscuit with her suggestion "that might make the tray more obvious as a diabetic tray." Against this background, the Grievant's conduct manifests, at the least, a lapse in professional judgement. The suggestion conveyed to Butcher that the dog biscuit could serve as a marker for Patterson's food is apparent. As Mormann testified, this is objectionable conduct from a nurse.

The parties more closely dispute whether the Grievant plotted to embarrass Patterson, using Butcher to carry out the joke. The Union contests much of the testimony supporting the assertion. That testimony, as the Union points out, forms something less than a seamless weave. Yehle's testimony puts himself and Zachowski in the Control Room, working together as the incident unfolded. Zachowski's statement places her serving female inmates as the incident unfolded. Hanan and Stollenwerk initially denied any role in the incident, only to later recant.

These difficulties do not, however, establish that the Grievant played less than a causal role in the incident. Initially, it must be noted that testimony rarely forms a seamless weave. The Grievant's testimony was less than fully consistent. At one point in her testimony, she denied that putting the biscuit in the potatoes could be considered funny. At another point, she smiled, acknowledging she found the incident humorous. Testimony rarely forms a seamless weave. When it does, it may as easily be attributed to being well rehearsed as to being truthful.

The difficulty in reconciling the testimony and statements makes it difficult to conclude that the Grievant devised and directed a plan to put the biscuit into Patterson's potatoes. The compelling and underlying thread of the testimony is, however, that the Grievant gave the biscuit to Butcher knowing it would somehow end up on Butcher's plate. As noted above, the Grievant's testimony indicates, at a minimum, that the Grievant gave Butcher the biscuit at a point in their conversation indicating it could serve as a marker for a diabetic's meal. She testified he was the only diabetic to be served. Her March 23 written statement linked her giving the biscuit to him with the suggestion that it "might make the tray more obvious as a diabetic tray." Butcher's March 19 statement confirms this: "I was handed a Milk-Bone biscuit by the nurse and it was placed on food tray of Patterson." Butcher's statement tersely confirms that the Grievant suggested, and Butcher agreed, that the biscuit could serve well to mark Patterson's meal.

While the remaining statements vary on the details, each statement points to some foreknowledge on the Grievant's part that Patterson was in for a surprise. Hanan's and Stollenwerk's testimony each point to the Grievant making statements about the incident before it occurred. Yehle's statement and testimony also point to some foreknowledge of the incident by the Grievant. Viewed as a whole, the evidence establishes the Grievant should have known, and did know, that the biscuit she gave Butcher would find its way to Patterson, not to a seeing eye dog.

The next element of the cause analysis is whether the discipline imposed reasonably reflected the County's disciplinary interest in the conduct noted above. This point is complicated by the Sheriff's banning the Grievant from the Jail. The Union contends this and the suspension must be considered disciplinary, while the County contends the Sheriff's actions prompted not its

exercise of the right to discipline, but of the right to assign.

On these facts, these contentions are impossible to separate. The County's view of its right to assign is persuasive, but ignores that the Grievant's reassignment was performance-based and cost the Grievant money. How this could be distinguished from a "demotion" under Section 2.01 is not apparent.

The Union's view that the reassignment is a disciplinary action is persuasive, but ignores that the County's right to assign and regulate employes is implicated. The Union does not dispute that the Sheriff, whatever the ultimate scope of his authority over the Jail may be, can obtain nursing services from sources other than the County Health Department. The County's contention that any client of its Community Health Nurses can ban a particular nurse from their home stands unrebutted. Characterizing the Grievant's exclusion from the Jail as a purely disciplinary action thus denies the County its right to assign and regulate the work force.

The "proper cause" provision advanced by the Union, and the management rights advanced by the County are rooted in Section 2.01. That provision must be construed as a whole, with each of these provisions given meaning. Section 2.01 requires "regulations" of the work force to be "reasonable." As already noted, the "proper cause" analysis requires a determination of whether the discipline imposed reasonably reflects the County's disciplinary interest. Thus, the provisions advanced by the party must be subjected to a reasonableness test to be reconciled.

The issue, then, is whether the County had a reasonable basis to reassign the Grievant from the Jail, and whether it also had a reasonable basis to suspend the Grievant for three days. The parties dispute both the statutory and the constitutional scope of the Sheriff's authority to manage the Jail. This legal dispute need not, however, be resolved to address the reassignment rights posed here.

As preface to the issue of the Grievant's reassignment, it is necessary to touch on the parties' concern with the Sheriff's authority. Halverson's April 1 letter makes it apparent he recognizes no limit on his authority to manage the jail. The Union counters that the County possesses broader authority under Chapter 59, Stats., than the Sheriff, and that Manitowoc grants the Sheriff limited Constitutional discretion. It is not necessary to adopt either of these extreme views to set the background to the reassignment rights at issue. Manitowoc cannot be persuasively read to restrict the Sheriff's authority as much as the Union contends. The Manitowoc majority looked to State ex rel. Kennedy vs. Brunst, 26 Wis. 412 (1870) to support much of its reasoning. The Brunst Court noted that among the duties then generally recognized as belonging to the office of Sheriff "one of the most characteristic and well acknowledged was the custody of the common jail and of the prisoners therein." 4/ The Attorney General has affirmed a sheriff enjoys wide latitude in supervising a jail. 5/ This does not necessarily confirm the Sheriff's expansive view of his own authority, but does underscore that the County can reasonably view the Sheriff as holding considerable legal authority in the management of the Jail.

4/ 26 Wis. at 414.

5/ See, for example, 77 Op. Atty. Gen. 94 (1988), and 40 Op. Atty. Gen. 140 (1951).

As noted above, the Union has not disputed that the Sheriff can obtain nursing services from sources other than the County Health Department. As of the Sheriff's April 1 letter, then, the County had determined that the Grievant was guilty of a disciplinable offense, and that the offense was so significant to the Sheriff that he would not admit the Grievant to the Jail. The County concluded that assigning the Grievant to the Jail posed the issue of whether the Sheriff would continue to use the County Health Department as his source for nursing services. By reassigning the Grievant, the County effectively preserved the work for the County and necessarily for the bargaining unit. This conclusion cannot be dismissed as unreasonable. Even if the County possesses the authority the Union urges, the County could reasonably have concluded the attempt to test that authority might have resulted in the loss of work for its Health Department.

The remaining issue is whether the County had cause to suspend the Grievant for three days. The final paragraph of Mormann's suspension letter states the County's view of the suspension. The suspension reflected, to Mormann, a balancing of her past performance with the severity of the incident. Future incidents could, in Mormann's eyes, result in another suspension or discharge. The discipline thus stands as an attempt to modify the Grievant's behavior. This is, ultimately, the purpose of progressive discipline.

The final paragraph of Mormann's letter does not, however, take into account any of the impact of the Grievant's reassignment from the Jail. This impact is essential to an assessment of the reasonableness of the suspension. As preface to this, it is necessary to note that on the face of the paragraph any suspension could have communicated Mormann's disciplinary interest as effectively as a three day suspension. That future incidents could result in either additional suspension or discharge underscores this conclusion. Thus, the use of a three day suspension is severe.

In this case, the suspension is more than severe, it is punitive. The purpose of a suspension is to deny an employe pay and provide time off to assess the impact of the discipline. In this case, however, that impact was fully communicated by the County's decision to reassign the Grievant based on her misconduct. The monetary impact of the suspension pales in comparison to the overtime and call-in lost by the Grievant with the loss of her Jail Nurse position. That she no longer serves as a Jail Nurse is a daily reminder of the impact of her conduct. Separation from the position is, unlike a suspension, permanent. Against this background, the three day suspension is punitive. The County's disciplinary interest in the Grievant's behavior was fully reflected in her reassignment.

Before closing, it is appropriate to touch on certain points raised by the parties. The Union has forcefully contended that none of the written statements should be given weight due to their hearsay nature. While several of the statements are noted above, only one plays any role here. Butcher's statement essentially confirms the Grievant's testimony and written statement. It plays, then, only a corroborative role. As noted at hearing, Butcher's statement was admitted because no one knows where he went after he left jail, and he is not reachable by subpoena. Whether this statement strictly qualifies as an exception to the hearsay rule is, against this background, not determinative. Arbitration is meant to be an expeditious and inexpensive alternative to formal litigation. To require the presence of a witness such as Butcher would unacceptably elevate the costs and the formality of the process. To exclude his written statement due to his unavailability would elevate form over substance, since there is no independent basis to doubt the signed, written statement reflects anything other than a voluntary statement.

Statements other than Butcher's and those of testifying witnesses have been noted above only to flesh out the parties' arguments, and to assess the parties' arguments on witness credibility. None of the statements of non-testifying witnesses is necessary to the finding of cause for the discipline.

The Union questions whether Hanan and Stollenwerk had a motive to implicate the Grievant. Hanan testified. Thus, his testimony and statement are the only items relevant here. Even if Hanan had not testified, the conclusions stated above would stand. His affirmance of his written statement is, however, reliable. If the Union contends he supplied the written statement to save his own job, it is not clear why he would stand by it once the job was lost. If he was motivated to hurt the Grievant, it is neither clear why he would do so nor why he would testify as he did. He freely admitted he had a hearing problem, and acknowledged he could not recall exactly what he overheard the Grievant say regarding the joke. If he was inclined to hurt the Grievant, this reticence to specifically implicate her is unexplainable. It is explainable if his testimony is credited. More significantly, whatever his motives, his testimony reflects the same themes underlying all the testimony.

The issue of remedy does not require extensive discussion. The Award entered below notes proper cause does not exist to both remove the Grievant from the Jail and suspend her for three days. As noted above, this punishes her twice for the same conduct. The Award is stated in terms of "proper cause", but as noted above, the issues posed inextricably link the County's authority to discipline and to reassign. The expungement of the Grievant's records regarding the suspension is restricted to any mention of the suspension itself. That the Grievant was reassigned, and that the reassignment was rooted in her misconduct in providing Butcher with the dog biscuit which found its way to Patterson's plate is not subject to this expungement.

AWARD

The County did violate Section 2.01 by suspending the Grievant from work

for three days and by reassigning her from the Jail Nurse position. The County had the authority to reassign her from the Jail Nurse position, but having done so lacked proper cause to suspend her for three days.

As the remedy appropriate to the County's violation of Section 2.01, the County shall make the Grievant whole for the suspension by compensating her for the wages and benefits she would have earned but for her three day suspension. The County shall expunge any specific reference to the three day suspension from her personnel file(s).

Dated at Madison, Wisconsin, this 30th day of September, 1994.

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

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