BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

WALWORTH COUNTY (CORRECTIONS)

and

WALWORTH COUNTY COURTHOUSE EMPLOYES, LOCAL 1925B, WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL EMPLOYES, AFSCME, AFL-CIO

Case 132
No. 53464
MA-9368

Appearances:
von Briesen, Purtell & Roper, S.C., Attorneys at Law, by Mr. James R. Korom, 411 East Wisco
Mr. Laurence S. Rodenstein, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CI

ARBITRATION AWARD

Walworth County (Corrections), hereinafter referred to as the County, and Walworth County Courthouse Employes, Local 1925B, Wisconsin Council of County and Municipal Employes, AFSCME, AFL-CIO, hereinafter referred to as the Union, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a Request for Grievance Arbitration the Wisconsin Employment Relations Commission appointed Edmond J. Bielarczyk, Jr., to arbitrate a dispute over the employment termination of an employe. Hearing on the matter was scheduled for February 21, 1996, and, was postponed and heard on May 2, May 3, and June 5, 1996, in Elkhorn, Wisconsin. A stenographic transcript of the proceedings was prepared and received by the Arbitrator by July 16, 1996. Post-hearing written arguments and reply briefs were received by the Arbitrator by September 16, 1996. Full consideration has been given to the testimony, evidence and arguments presented in rendering this Award.

ISSUE

During the course of the hearing the parties were unable to agree upon the framing of the issue. The Arbitrator frames the issue as follows:

"Did the County have just cause to terminate the Grievant's employment?"

"If not, what is the appropriate remedy?"

PERTINENT CONTRACTUAL PROVISIONS

III. PERTINENT CONTRACTUAL PROVISIONS

. . .

A. Article XXVI, Discharge and Discipline

. . .

26.01 Right of County. The County shall have the right to discipline or discharge any employee for just cause;

. . .

26.05 Discharge - Not for Just Cause. If after proper hearing the employe is found to be innocent of charges filed, said employee may choose to return to his/her former position or a similar position within the County at the same rate of pay, with no loss of seniority, pay or fringe benefits. This may be modified by an arbitration award, but in any event, the employee shall not receive more than his/her regular wages and benefits.

26.06 Work Rules - Discipline. Employees shall comply with all provisions of this Agreement and all reasonable work rules. Employees may be disciplined for violation thereof under the terms of this Agreement, but only for just cause and in a fair and impartial manner. When an employee is being disciplined or discharged, there shall be a Union representative present.

23.06 No Discrimination. The parties to this Agreement agree that they shall not discriminate against any person because of race, creed, color, sex, national origin, ancestry, age, handicap, arrest or conviction record, marital status, or sexual orientation, and that such persons shall receive the full protection of this Agreement.

. . .

BACKGROUND

Amongst its various governmental functions the County operates correctional facilities in Elkhorn, Wisconsin, whereat the County has employed Joseph Gibbs, hereinafter referred to as the grievant. The correctional facilities at the time pertaining to all matters herein consisted of a Huber facility, a jail and a jail annex. After the grievant's termination and prior to the hearing the County opened a new jail facility and all inmates are now housed in one facility. At the onset of the hearing in the instant matter the parties agreed to the following stipulation: The grievant was hired on April 7, 1994, he served a six month probationary period; on June 6, 1994, he completed the normal FTO; the probationary period for the grievant was extended by mutual agreement for ninety (90) days; and, the grievant's probationary period concluded on January 3, 1995. At the time the grievant was hired as a correctional officer, he was seventy (70) years old. He is also the father of a sitting Circuit Judge. During the grievant's probationary period it was discovered he had a hearing problem. This was thought to have caused some performance problems. He received a hearing aid, his probationary period was extended for ninety (90) days, and, at the conclusion of the extended probationary period, he passed his probation.

On April 27, 1995 the grievant was observed by Corporal Glenn Mauer to be performing his duties without wearing his hearing aide On May 3, 1995 Mauer again observed the grievant performing his duties without his hearing aid. On neither occasion was the grievant disciplined. On May 4, 1995 the grievant was observed by Corporal Michael McCaig performing work without his hearing aid. For this he received a verbal reprimand from Lt. Benjamin Harbach. He was also informed that this was progressive discipline and that if he failed to wear his hearing aid he would not be allowed to work.

On August 5, 1996 the grievant reported to work without his hearing aid. He was directed by Corporal Michael McCaig to go home and get his hearing aid.

On September 19, 1995 the grievant was discharged for the following written reasons: Insubordination, Use of profane or abusive language, Poor performance, Negligence, and Inability to perform job. The termination document also states:

> "The overall review of Mr. Gibbs' performance record shows that he is not competent to perform the job as a Correctional Officer. (See attached reports)"

The attached report was a document developed by Lt. Benjamin Harbach dated August 28, 1995 and is as follows:

> Date: August 28, 1995

To: Captain John Reiff
From: Lt. Benjamin R. Harbach
Subject: CO Joe Gibbs Work Performance

Employment date: April 7, 1994
Correctional Officer Field Training: April 7 -- June 6, 1994
Remedial Field Training: June 6 - July 12, 1994
Basic Jail Certification: Completed course on March 24, 1995

During the approximately 17 months of employment with Walworth County Corrections, Officer Gibbs has been involved in numerous work/job performance related incidents. These incidents can best be described as; 1. Poor work performance as it relates to safety/security concerns 2. Failure to comply with Conditions of Employment as it relates to the wearing of required hearing aid, and 3. Poor attitude/insubordination as it relates to interaction with his first line supervisors. Safety and security incidents can result in gravis injury to staff and inmate, as well as result in significant liability for Walworth County. Officer Gibbs failure or reluctance to wear his hearing aid impairs his ability to hear verbal communication, perform assigned tasks accurately and is a condition of his employment. Poor attitude/insubordination toward his supervisors, affects work productivity and is directly related to work performance and results in general disharmony in the work place.

The following is a chronological listing of incidents involving Correctional Officer Gibbs and will support the statements listed above as they relate to officer safety/security performance, condition of employment requirements, and attitude toward supervisors.

08/05/94 -- Lt. Graves and Sgt. Bjorge met with CO Gibbs to discuss his work performance as it related to safety/security concerns. Beyond, they discussed his computer deficiencies.
08/26/94 -- Lt. Graves and Sgt. Bjorge counselled CO Gibbs regarding officer safety/security issues and a variety of work performance issues. Beyond, he was advised by Graves that if he continued to violate officer safety issues, termination would be considered.
09/09/94 -- Lt. Graves has conversation with CO Gibbs and orders CO Gibbs to wear his hearing aid as soon as he receives it.
10/05/94 -- Lt. Graves extends probation period for an additional 90

days. The extension will allow Graves the opportunity to evaluate Officer Gibbs work performance now that he has his hearing aid. Gibbs work performance to date has been marginal.
10/24/94 -- Lt. Graves discussed an incident with Officer Gibbs regarding the failure to handcuff Inmate Gladney for transport and failure to secure jail door.
04/27/95 -- Cpl. Maurer noted that CO Gibbs was not wearing hearing aid.
05/03/95 -- Cpl. Maurer noted that CO Gibbs was not wearing hearing aid.
05/21/95 --Cpl. McCaig noted that CO Gibbs was not wearing hearing aid.
05/26/95 -- Lt. Harbach issued CO Gibbs verbal reprimand for failing to wear hearing aid and affirming that wearing his hearing aid is a condition of his employment.
06/05/95 -- Attempted escape from Annex Dorm K, CO Gibbs was assigned to this duty post.
06/06/95 -- Cpl. McCaig noted that CO Gibbs failed to dispense medications to Inmate Sugg in accordance with jail policy.
06/29/95 -- Cpl. McCaig noted that CO Gibbs failed to dispense medications to Inmate Sorenson in accordance with jail policy.
06/14/95 -- Cpl. Salimes noted that CO Gibbs expressed that he would sign an inmate fingerprint card in order to expedite the process.
07/10/95 -- CO Rugen noted that CO Gibbs was opening cell doors while she was performing a cell inspection.
07/10/95 -- Cpl. Rugen noted that CO Gibbs opened vestibule and outside doors, leaving the cell block unsecured.
07/12/95 -- Cpl. Maurer noted that CO Gibbs improperly opened the visitation door at the Annex, leaving visitation area unsecured.
07/14/95 -- CO Gibbs failed to inventory or store medications submitted for Inmate Cdebaca, in accordance with jail policy.
07/21/95 -- Cpl. McCaig noted that CO Gibbs did not secure an Annex door.
07/22/95 -- Cpl. McCaig noted that CO Gibbs did not secure an Annex door.
08/05/95 -- Cpl. McCaig noted that CO Gibbs reported for duty and failed to wear hearing aid in accordance with his Condition of Employment. He was relieved of duty until such time he could secure his hearing aid. Beyond, he was instructed that before leaving the building he was to turn in his radio and Annex keys. CO Gibbs failed to turn in his keys and in fact placed them in an

> unsecured locker at the entrance and left the building. The keys were retrieved by Cpls. McCaig and Ladwig from the unsecured locker. Later in his tour of duty, he was directed to write a report regarding his actions, he became disrespectful, used profane language and hung up the phone on Cpl. McCaig terminating their conversation.
> 08/11/95 -- Cpl. McCaig noted that CO Gibbs while on transport duty, failed to monitor inmate workers as they moved the food from the jail kitchen to the elevator. Further, the security gate into the jail was not secured by CO Gibbs upon entering the jail for the food transport.
> 08/12/95 -- Cpl. Schrack noted that CO Gibbs failed to follow proper monitoring procedures for returning inmates at the Huber Dorm.
>
> In summary the above listed incidents support the fact that Officer Gibbs has failed to meet his Condition of Employment requirement by failing to wear his hearing aid, has been insubordinate to supervisors and has failed to meet the security/safety standards required for correctional officers. As a result, and because of the nature, seriousness and frequency of the incidents, Officer Gibbs should not continue to be employed as a correctional officer.

Between May 4, 1995, the date the grievant received his verbal reprimand, and September 19, 1995, the date the grievant was discharged, there is no evidence the grievant had been disciplined for any of the actions cited in Harbach's August 28th document.

COUNTY'S POSITION

The County contends the proper inquiry under applicable case law is not one of traditional just cause standards, but rather of minimum competence to perform the essential duties of the job. The County argues the appropriate analysis of the facts herein is one of repeated demonstrated inability of an employe to perform the fundamental and core aspects of their job safely and efficiently. The County argues the grievant does not understand the fundamental risks associated with the corrections function and therefore should not be punished but removed from his position. Particularly when there are circumstances which suggest that corrective discipline will not rehabilitate the grievant into a satisfactory employe. The County also argues that when poor work performance is a result of genuine incompetence, progressive discipline cannot reasonably be expected to have any corrective effect. Herein, the County points out, the grievant's supervisor's immediately spoke to him about the drug dispensing policy, his failure to lock doors, and his otherwise inattentiveness to security concerns, and especially, his hearing aid. The fact that the grievant was told repeatedly by his supervisors of his failings, and the fact they continued over and

over again, justifies Harbach's conclusions. The County argues the fact we do not have suspensions on the grievant's record for each incident does not undercut the conclusion the grievant knew what was expected of him and was unable or unwilling to change or correct his behavior.

In support of its position the County points to Florsheim Shoe Company. 1/ Therein the grievant was discharged for inability to perform against reasonable work standards or incompetence. The Arbitrator held that the grievant could be disciplined although there was no fault or culpability when it became clear that the cause that impaired the employment relationship was chronic or longstanding and there was no reasonable prognosis that the cause could be removed. The County also points to Pratt and Whitney Aircraft Group. 2/ Therein the grievant was discharged for failure to pay sufficient attention to detail while performing his job when assembling aircraft parts. In so finding the arbitrator held that an employe could be discharged when an Employe concluded in a non-arbitrary or capricious basis that rehabilitation is an impossibility even though all disciplinary steps had not been taken. The County also points to Cosco Fire Protection. 3/ Therein the arbitrator upheld the termination of a journeyman sprinkler fitter for unsatisfactory work performance. The journeyman was hired in June 1987 and discharged on July 17, 1987. The arbitrator found that he exhibited serious deficiencies on several tasks and even when they were pointed out the journeyman failed to correct them. The County also points to West Chemical Products, Inc.. 4/ Therein a twenty-five (25) year employe was terminated for unsatisfactory performance. The arbitrator upheld the termination even though the reports from customers about the grievant's performance were subjective.

Turning to allegations made by the grievant that he had been discriminated against because of his age the County acknowledges that some employes questioned the grievant's ability to perform his duties because of his age. However, the County asserts this opinion was not universally held by his co-workers and further, that it was not an opinion held by any management official responsible for making decisions effecting the grievant. In support of its position that the grievant was not discriminated against the County points to Vermont State Colleges. 5/ The County argues that employes who may have had some predisposition concerning the grievant were confronted by management. Further, that employes who may have been predisposed were not involved in the decision to terminate his employment.

1/ Florsheim Shoe Company, 74 LA 705 (Roberts, 1980).

2/ Pratt and Whitney Aircraft Group, 91 LA 1014 (Chandler, 1988).

3/ Cosco Fire Protection, 91 LA 593 (Koven, 1988).

4/ West Chemical Products, Inc., 63 LA 611 (Dykstra, 1974).

5/ Vermont State Colleges, 91 LA 1347 (Toepfer, 1989).

The County also contends the facts in the instant matter demonstrate adequate justification for the conclusion that the grievant is not competent to perform his job. The County does acknowledge the grievant has several good attributes. However, the County argues the grievant has several failings which are fundamental to the effective operations of the Corrections Department. The County contends he has repeatedly failed to properly dispense medications to inmates in compliance with clear directives from his superiors. The County also contends he repeatedly failed to protect prisoner security and has allowed situations to exist where prisoners could smuggle in contraband into the institution.

The County also argues there is no reason to believe that punishment will serve to change the grievant's behavior. In support of this position the County points to County Exhibit Number 3, wherein Lt. Graves counseled the grievant on August 26, 1994 on interpersonal skills and officer safety, further, that if he did not improve he would be terminated. The County asserts the grievant was thus on notice he would be terminated if he did not act in a safe and secure manner. The County contends the grievant was trying to do his best but is incapable of performing the duties of a correctional officer. The County points out that the grievant was directed to wear his hearing aid. The County points out the grievant was unable to consistently wear his hearing aid and failed to do so even when he had it in his pocket upon arriving to work. The County argues the grievant did not just forget to wear it, he simply did not want to wear it. The County also asserts that when McCaig confronted the grievant about not wearing it he lied and became confrontational. Then on August 5, 1995 he again reported to work without his hearing aid, was sent home to get it, and had to be told two times to leave his keys before he left. The County concludes this is not the act of an individual who responds well to traditional methods of discipline.

The County also argues that the analysis of the traditional seven tests of just cause supports termination in this matter. The County asserts the grievant had adequate notice of the County's expectations, that the County's expectations are reasonably related to the effective operation the Correctional Facility, that an investigation was conducted, that the investigation was conducted fairly, that adequate evidence of wrongdoing exists, that the rules are enforced without discrimination towards the employe and that the penalty was appropriate.

The County would have the undersigned deny the grievance.

UNION'S POSITION

The Union contends the County violated the grievant's due process rights when it terminated him. The Union argues that any employe covered by a collective bargaining agreement which has a cause standard for disciplinary action has a valid expectation of fair treatment in the application of disciplinary actions. The Union asserts the grievant had no reason to expect the County to terminate him. The Union points out the grievant had only a oral reprimand for his

failure to wear his hearing aid. The Union argues he was never disciplined for the matters relied on by the County in his termination. Some of the offenses he was not even made aware of. The Union also argues the County waited an unreasonable amount of time, thirty-nine (39) days to terminate him, relying on incidents up to one year old. The Union also points out the grievant was terminated just nine (9) days after ten (10) new correctional officers were hired.

In support of its position the Union points to U.S. Postal Service. 6/ Therein the arbitrator held that foreknowledge of the consequences of an action is a fair condition precedent to the right of discharge. Further, that under a system of progressive discipline the question is whether the grievant has proven himself beyond rehabilitation.. Herein, the Union points out, Lt. Harbach testified he inserted the term progressive discipline at the June 15, 1995 disciplinary meeting principally regarding the hearing aid issue and general topics about job performance. 7/ The Union concludes that this placed the grievant on notice that work performance was subject to corrective, progressive discipline. The Union also points to Western Airlines. 8/ Therein the arbitrator held that past infractions of rules could not be used to support discharge where the employer failed to discipline the employe for the alleged infractions. Failure to discipline giving the strong inference that the employer accepted the employe's explanation or that the employer regarded the infraction as being insubstantial. 9/ The Union stresses the record herein is replete with testimony of supervisors and co-workers their incident reports concerning the grievant's alleged security lapses which were submitted to management in a timely manner and nothing was done by the County. The Union also points to Timex Corp., 54 LA 1185 (Seitz, 1970); Woodard's Spring Shop, Inc., 63 LA 367 (Pinkus, 1974); Caterpillar Truck Co., 67 LA 203 (Wolff, 1976); and the undersigned in City of Racine, Case 374, No. 45626, MA-6679 (2/5/92), in support of its position that progressive discipline has two interrelated remedial elements:

> (1) Unacceptable conduct must be made known to the employe in order to afford the opportunity to improve, and
>
> (2) Sanctions must be progressive in nature.

The Union stresses both elements are missing herein and further, the County's failure to investigate the matters at the time of their occurrence voids any disciplinary action.

The Union also contends the County was predisposed to the grievant regarding his age and

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6/ U.S. Postal Service, 62 LA 293 (Killian, 1974).

7/ Tr. June 5, 1994, pp. 20-21.

8/ Western Airlines, 37 LA 130 (Wyckoff, 1961).

9/ Ibid, p. 133.

family status and that this created an improper and unfair opinion about the grievant's job performance. The Union points out that several correctional officers and supervisors questioned the grievant's abilities prior to his commencement to work for the County. The Union asserts the County if responsible for the attitudes of the grievant's colleagues who prejudged him and continued to judge him disparately because of his age. The Union argues the County accepted each report on the grievant at face value even though it was aware of the widespread benign animus towards him. Here, the Union points out, on thirteen previous occasions the County had disciplined employes for various lapses of security, including failure to perform an assigned task which lead to a successful escape attempt. None of the employes were discharged, two of whom were subsequently promoted to supervisory positions. The Union asserts the County's failure to act promptly obviates the validity of the charges and demonstrates the disparate treatment afforded him.

The Union also contends the grievant is very competent and skilled correctional officer who is well suited to the new Correctional Facility.

The Union concludes that in many critical ways the grievant was denied basic due process considerations. His discipline was for events that were over a year old. The County improperly investigated any and all of the matters which formed the basis of the discipline. The grievant was not informed of many of the complaints lodged against him. There was no follow-up or corroboration of the complaints. The County let prejudice about the grievant's age operate unchecked. The County also relied on statements from individuals who had expressed unfair preconceptions about the grievant.

The Union would have the undersigned sustain the grievance and direct the County to make the grievant whole.

COUNTY'S REPLY BRIEF

The County argues in its reply brief that the instant matter is not one where the facts are in substantial dispute but one where the appropriate arbitral treatment of those facts is vigorously disagreed over. The County asserts there is no proof of discrimination in this matter. The County contends the Union has argued that the entire County was out to get the grievant because of his age or because of his relationship to a local judge. The County acknowledges that certain individuals had concerns about the grievant's ability to perform the job of a correctional officer prior to his first day of employment because of his age. The County stresses that these employes confirmed that they did not allow this concern to interfere with their judgement about the grievant. The County points out that Lt. Graves conducted a careful investigation into allegations of age discrimination and directed supervisors to ensure they did not judge the grievant based upon his age. The County points out that when the grievant had frequent lapses in security, medication policy violations, etc., but told his supervisors he would improve he was not punished. Only after a wide variety of allegations arose did the grievant's performance come under careful and lengthy

investigation into facts and events based upon written documentation. The County asserts it gave the grievant every opportunity to do the job and only when it was presented with overwhelming evidence was it forced to make the difficult decision to terminate his employment.

The County also asserts the Union's brief blurs the distinction between notice and progressive discipline. The County asserts the record is replete with evidence of efforts to direct the grievant to improve. The County also argues that in each instance the grievant knew he committed the act of misconduct at the time it occurred, and, that in most cases he informed his supervisor that act would not be repeated.

The County also asserts the application of progressive discipline allows termination in the instant matter. The County suggests the Union view of progressive discipline is that discipline would only progress if the grievant committed the same exact type of offense. The County asserts that punishing employes who are trying to improve is not a recipe for effective management. However, herein, there was sufficient progression to conclude the grievant was trying to adhere to the County's policies and procedures but was unable to do so.

The County also argues the safety issue cannot be ignored. The County argues employes who work with the grievant have expressed a legitimate concern for their safety. The County argues that they had a fear for their personal safety and for the integrity of the institution because of the grievant's inattentiveness to safety and security. The County argues that Lt. Harbach spent weeks investigating the matter before concluding the employes had valid concerns. The County contends that sitting down with the grievant, explaining this pattern to him, informing him this conduct was wrong and sending him back into the institution ignores the grievant was aware that the safety and security of the institution was important and violations could lead to termination and that he already was doing his best. The County argues the grievant has demonstrated he does not appreciate the seriousness of the risk to himself and other employes on a daily basis. That he is not cognizant of everything going on around him and does not have a healthy degree of skepticism for the may ways inmates can threaten the safety of the correctional officers.

REPLY BRIEF OF THE UNION

The Union asserts in its reply brief that the County does not have just cause to terminate the grievant's employment and must argue he is incompetent and that incompetence is exclusive of the just cause standard. The Union argues that incompetence may be excluded from progressive discipline when their is a good faith effort on the part of the employer. Herein, the Union asserts, there was no such effort. The Union points to the cases cited by the County to demonstrate the County never warned the grievant of his alleged deficient behavior and that none of them involved an instance of summary discharge. The Union argues the County took at face value uncorroborated and unsubstantiated allegations of the grievant's work deficiencies. Here the Union points out that if the County believed the grievant was incompetent why did it continue to assign him to work location where he worked entirely by himself on the first floor. The Union

reasserts that the issue of discrimination lies insidiously at the core of the instant matter.

DISCUSSION

The record demonstrates that when the County determined to terminate the grievant's employment it looked at the total history of the grievant's employment when making that determination. The total history demonstrates that the grievant had a difficult time getting through his probation, however, he successfully passed his probation. Thereafter, he was disciplined once, an oral reprimand. Lt. Harbach, who prepared the document used by Captain John Reiff in his discharge decision, cited twenty-two (22) instances of performance problems by the grievant. Five (5) occurred prior to completion of the probationary period. Four (4) involve the oral reprimand and the grievant's failure to wear the hearing aid. The remaining thirteen (13) occurred after the grievant received oral discipline for not wearing his hearing aid, ten (10) of which occurred prior to the grievant's failure to wear his hearing aid on August 5, 1995.

The record does not support the County contention that the grievant repeatedly failed to properly dispense medications. The record demonstrates two instances, both documented by Corporal McCaig. McCaig, who commenced work for the County on March 1, 1995, was asked during cross examination what did supervision tell him about the grievant. McCaig immediately responded, "He didn't want to be supervised." 10/. McCaig than stated that it was his own opinion, that no one in supervision had discussed the grievant with him and that he knew nothing about the grievant. 11/ McCaig wrote a written statement on June 6, 1996 that an inmate went to the grievant for medication because the grievant was an "easy mark". 12/ However, McCaig did not deny that the grievant informed McCaig the medication card was wrong because the inmate could not of received a 3:00 p.m. medication because the Huber inmate was at work at the time. 13/ What the undersigned finds incredulous is the fact McCaig in writing up the matter failed to determine whether a Huber inmate's card had been signed as the Huber inmate receiving medication when the Huber inmate had been at work as the grievant claimed. McCaig testified that the procedure for correcting a mistake claimed by an inmate should have been to contact the officer who dispersed the medication to see if a mistake was made. 14/ McCaig further testified that he did not know whether the grievant had done such a follow up but buttressed that by saying

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10/ Tr. May 2, 1996, p. 164.

11/ Ibid.

12/ Employer Exhibit 20

13/ Tr., May 2, 1996, p. 172.

14/ Tr., May 2, 1995, p. 173-174.

you just don't trust the word of the inmate. 15/ However, McCaig also testified Huber inmates are entrusted to take medication with them to a work site. 16/ Thus the record demonstrates McCaig concluded the grievant was violating the County's drug policy by giving the inmate a second dose without McCaig determining whether the Huber inmate was at work when the dosage was written down as given and without a determination of whether the grievant had contacted the officer who wrote down the dosage had been given. McCaig also testified the Huber inmate had approached him at 4:00 p.m. with a request for the medication and he had denied the request because the med card indicated he had already received the medication. 17/ Yet he never informed the grievant of this encounter until after he saw the grievant disperse the medication to the Huber inmate and clearly McCaig was aware it was the grievant's responsibility to disperse medications on his shift. The grievant was not disciplined at the time of this incidence. Had the grievant been disciplined the question of whether the grievant handled the matter properly would of been resolved.

On June 29, 1995 McCaig wrote a second memo concerning the grievant (Employer 21) and the County's drug policy concerning the grievant's failure to observe a Huber inmate taking his medication. McCaig noted the inmate had pocketed the medication and, after having patted the inmate down to retrieve the medication, was informed by the inmate that he planned to use the medication in the morning. McCaig fails to identify in the memo that the medication was Tylenol or aspirin. The grievant was not disciplined at the time of this incidence. He was sent on June 30, 1995 an E-mail to review the Department's drug policy. (Employer 22)

A third matter concerning drugs occurred on July 14, 1995, when the grievant allegedly failed to store an inmate's drugs. The grievant acknowledged he had placed the drugs in a closed drawer on July 20, 1995, which he believed to be a safe place. There is no record that the County disciplined him for this matter. There is not a written record that he was told that this was an incorrect handling of the matter. The undersigned notes that the three instances were distinguishable from one another, that the grievant gave rationale as to why he performed the acts, and that he was not disciplined at the time of the instance.

Further, there is no evidence that the grievant ever repeated the problems identified concerning the County's drug policy. Thus, the undersigned finds the County contention the grievant is repeatedly violating the drug policy is not supported by the record.

The County argument that the grievant's failure to adequately protect prisoner security and has allowed situations to exist which would allow prisoners to smuggle in contraband are also not supported by the record. Although questions were raised about unlocked doors, at no time did the

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15/ Ibid.

16/ Tr. May 2, 1995, p. 172.

17/ Tr., May 2, 1996, p. 126.

County ever discipline the grievant at the time any questions were raised. This may be because although the grievant was responsible for security on the floor he worked, many other correctional officers had keys to the door and could of walked through and failed to properly lock the door behind them. If the grievant was not disciplined at the time of the problem the grievant could conclude he was not deemed to be in the wrong, or, his response, that he was not the one at fault, was accepted by the employer.

The County is correct that the grievant's failure to wear his hearing aid places him and others unnecessarily at risk. The grievant was clearly on notice that he would be disciplined if he failed to wear his hearing aid. The fact the grievant was sent home to retrieve his hearing aid and that he did not grieve this action demonstrates the grievant was aware of the directive that he had to wear his hearing aid. However, there is no evidence the grievant was disciplined at the time of this incident.

On June 5, 1995 there was an attempted jail escape. An inmate gave the grievant a note informing the grievant there was to be an attempted jail escape. During this attempt several inmates had attempted to kick out a window. All inmates were secured and none escaped. The grievant was not disciplined at the time. There is no evidence the grievant did not have his hearing aid in, however, the County, in effect, alleged that the grievant's laxness in security were the reasons why his shift was selected for the attempted escape. The County was supposed to have investigated the matter at the time but the only evidence introduced at the hearing was the statements of other correctional officers who wrote up the incident afterwards. There is no indication the County interviewed the inmate who informed the grievant the escape was to take place and there was no indication the County interviewed the inmates who allegedly attempted to kick out the window as to how they could do it without someone hearing their attempt. What is clear is the escape was thwarted because the grievant called and got assistance from other correctional officers when he needed to. This was the proper procedure to follow yet the County finds that the grievant's actions somehow caused the escape attempt to occur with no evidence to support such a conclusion.

On July 22, 1995 McCaig wrote a memo to his superiors claiming the grievant had left the first floor door to the stairs unlocked. Although the grievant initially accepted responsibility for this unlocked door, he later claimed someone else may have left the door unlocked. The grievant was not disciplined at the time for this incident. What is clear is that when the grievant denied he had left the door open McCaig considered him at fault without trying to determine if some other correctional officer had left the door unlocked. However, when the grievant denied he had left the door unlocked and was not disciplined by the County at the time of the incident, the grievant could clearly conclude the County had accepted his response.

The County contention the grievant was unnecessarily inattentive to security concerns is thus not supported by the record herein. Two of the instances the County has relied on demonstrate a view the grievant is wrong in the County's view, yet, the County offered no

evidence which would support that what the grievant had done was wrong. The first is the attempted escape. Clearly the actions of the grievant when he became aware of the escape attempt was to contact his superiors to get support. The first two employes who arrived on the scene reported the inmates were anxious and the televisions were very loud. The County seems to imply that the grievant through some act allowed this to occur basing it on his "lax" view of security and "closeness" with the inmates. Clearly the grievant was aware and sought assistance. His actions in effect thwarted an escape attempt. But instead of being lauded for taking the proper action and getting assistance he was viewed as the problem. Had the grievant not sought assistance and attempted to resolve the matter himself the County could argue he handled the matter inappropriately. The second involves not securing his keys on August 5th. McCaig testified that the normal procedure was to receive keys and a radio at the beginning of a shift from the officer who was being relieved, and, at the end of your shift, turn the keys and the radio over to the officer who was relieving you. 18/ McCaig directed the grievant to go home and retrieve his hearing aid and return to work. This was not a situation where the grievant was being relieved by another employe. He was leaving his work site for a short duration and then returning. There is no evidence that the grievant had ever left the work site for a short duration and then returned. In the past, the grievant had left his work location to go to another County building, in which case he did not turn in his keys or radio. Further, if McCaig was concerned about security of the keys and the radio the matter could have been easily resolved by McCaig taking them himself from the grievant rather than expecting the grievant to guess on how to secure them.

The undersigned notes here that the County has not argued the grievant's use of the term "hell" when responding to McCaig on August 5, 1995, as so insidious a form of profanity as to warrant summary discharge. Thus, the undersigned has not addressed this matter.

The County's reliance on Florsheim Shoe Company, 74 LA 705 (Roberts, 1980), is not on point. Therein the grievant received a written, a one (1) day and a three (3) day suspension prior to her discharge. Herein the only evidence of discipline in the oral warning the grievant received in May, 1995. Also, in Florsheim the arbitrator noted an employer is obligated to warn an employe with appropriate steps and to attempt to work with the employe to remove matters which are destructive to the employer/employe relationship. Herein there is no evidence the County took appropriate steps to warn or that it worked with the grievant in an attempt to correct the grievant's performance. Having not taken steps to correct the employe's behavior, as in Florsheim where there was progressive discipline, the undersigned cannot conclude there was just cause to terminate the grievant's employment. Pratt and Whitney Aircraft Group, is also not on point. Therein there were five written reprimands, two memos pointing out problem areas, three decertification/certification actions, and several counseling sessions. Herein there is only one single disciplinary action, an oral reprimand. Cisco Fire Protection, is also distinguishable from the instant matter. Therein the arbitrator noted there was no issue that the journeyman received adequate notice nor was it claimed he was denied an opportunity to correct them. Herein there is

18/ Tr., May 2, 1996, p. 121.

no evidence, except for the hearing aid, that the grievant repeated a specific action that was pointed out to him as unacceptable. West Chemical Products, Inc., is also distinguishable from the instant matter. Therein the grievant was given six different written warnings that his performance was unacceptable, the Union and Company agreed to sixty (60) to seventy (70) day time frame to correct the deficiencies, and the work continued to be below standard. The County's reliance on Vermont State Colleges is also distinguishable from the instant matter. Therein the grievant was given a written performance evaluation which placed the grievant on notice of what her weaknesses were and what was expected of her in three distinct areas, all of which the grievant failed to improve in. Herein there was no such evaluation.

The undersigned thus finds the County's contention that punishment of the grievant would not change his performance is without merit. As noted in the cases cited by the County above, efforts were made to change performance in the form of discipline, counseling and evaluations and only when those efforts failed, did the employer take affirmative steps to cease the employe's employment. Herein the only blemish on the employe's record is an oral reprimand. This he received on May 26, 1995 after twice being counseled about not wearing his hearing aid (April 27, 1995, and May 5, 1995). All three incidents were within thirty (30) days. After formal discipline, the oral warning, over sixty (60) days went by before the grievant again failed to wear his hearing aid, August 5, 1995. From August 5, 1995 till his termination on September 19th, 1995, there is no evidence the grievant again failed to wear his hearing aid. This would indicate that contrary to the County's claim, the grievant was responding to progressive discipline and correcting the failure of wearing the hearing aid. There is no evidence that the grievant was ever disciplined for failure to follow safety or security procedures. Had he been at the time of the alleged incident disputes concerning whether he was at fault for leaving doors unlocked or failing to properly secure inmates would of been resolved through the grievance process. The undersigned again notes here that except for the failure to wear the hearing aid, there is no evidence the grievant repeated a safety or security concern raised by the County. Nor is there any evidence that after being advised about a specific procedure or policy, except the wearing of the hearing aid, that the grievant again violated that specific policy or procedure. Thus, contrary to the County's claims, there is no evidence to support a conclusion the grievant was not responding to traditional methods of correcting performance.

The County also asserts it conducted a fair investigation. However, several questions the County could of asked of individuals raising concerns about the grievant's performance were not raised. Both Butke and Kakuske wrote reports about the attempted jail break on June 5, 1995. Both noted the TVs were loud and Butke noted that the inmates were loud and anxious. The implication being that the grievant failed to take some action to prevent even the idea of an escape. Yet neither report identified any action taken by the grievant which should not have been taken or what additional acts he should have taken. There is no evidence the grievant should have acted on his own to thwart the matter, even turning down the volume of the TVs until he received assistance. The conclusion drawn by the County, though not expressly stated, was that the inmates planned their escape attempt to coincide with the grievant's tour of duty. Yet there is no evidence

to support such a conclusion except a predisposed opinion about the grievant's work performance. On the following day, June 6, 1995, McCaig writes a report indicating the grievant was approached for medication by an inmate because he is an "easy mark". Given the timing of McCaig's remark the undersigned has serious concerns that managers were predisposed as to how they viewed the grievant's performance, and, particularly in McCaig's handling of the grievant, that this predisposition tainted their supervision of the grievant. Again, the undersigned notes McCaig did not dispute the grievant's claim that the inmate's med card was wrong because the inmate was at work at the time the med was alleged to have been given, and, McCaig never investigated to see if such a claim was correct. The undersigned notes here that the County cited ten (10) different acts between the June 6, 1995 oral reprimand and the August 5, 1995 hearing aid incident. None of which the grievant was disciplined for at the time of the incident. Had discipline been used, the question of whether the grievant was at fault in any of them would have been resolved at the time the matters arose.

The County argues in its reply brief that the grievant was clearly aware he had committed a wrong doing at the time each incident occurred. The record herein does not establish that he was. For example, the grievant was never told at the time of the escape attempt that he had committed some wrong. On June 6 and June 29, 1995 when he allegedly failed to dispense medications properly he informed his supervisor why he did what he did. He was not disciplined at the time. At no time when he allegedly failed to secure an inmate or door was he disciplined.

The County also asserted the safety issue can not be ignored. The undersigned agrees the safety of other employes is a key element that the County has to be concerned with. However, it is the County's burden to demonstrate that the grievant is a safety risk. This must go beyond assumptions made by other employes and supervisors. Their view that he is a safety concern must have some basis in fact. There is no evidence an inmate was able to escape on his tour of duty. There is evidence he thwarted an escape attempt. While there is evidence he violated the County's drug policy when he failed to observe a Huber inmate take non-prescription drug when it was dispersed, this happened only once and there is no evidence that after he was told to correct this procedure that he failed to do so again. There is no evidence contraband was smuggled into the jail because of the grievant's alleged lax regard for severity. In fact, there is only one demonstrated instance where the grievant placed another employe at risk, on July 10, 1996. Yet this matter was reported by Corporal Rugen to management. The grievant not only was not disciplined at the time, he was not even counseled about his actions. Thus, the undersigned finds no factual basis in the record to conclude the grievant is a safety risk to other employes.

Based upon the above and foregoing and the testimony, evidence and arguments presented the undersigned finds the County did not have just cause to terminate the grievant's employment. The County is directed to reinstate the grievant, make him whole, and to cleanse his record. The grievance is sustained.

AWARD

The County did not have just cause to terminate the grievant's employment. The County is directed to reinstate the grievant, make him whole and cleanse his record.

Dated at Madison, Wisconsin, this 8th day of November, 1996.

By Edmond J. Bielarczyk, Jr. /s/