BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between TEAMSTERS UNION LOCAL 75 and OCONTO COUNTY	Case 139 No. 53919 MA-9487

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, by Mr. John J. Brennan, appearing for the Union.

Godfrey & Kahn, S.C., Attorneys at Law, by Mr. Dennis W. Rader, appearing for the County.

ARBITRATION AWARD

Teamsters Union Local 75, herein the Union, requested the Wisconsin Employment Relations Commission to designate a member of its staff as an arbitrator to hear and to decide a dispute between the parties. Oconto County, herein the County, concurred with said request and the undersigned was designated as the arbitrator. Hearing was held in Oconto, Wisconsin, on May 2, 1996. A stenographic transcript was made of the hearing and a copy of said transcript was received on May 15, 1996. The parties completed the filing of post-hearing briefs on July 9, 1996.

ISSUES:

The parties did not stipulate to the issues and agreed that the arbitrator would frame the issues in his award.

The undersigned believes that the following is an accurate statement of the issues:

> Was the grievant discharged for just cause? If not, what is the appropriate remedy?

BACKGROUND:

The grievant, Betty Aarant, was hired by the County as a part-time corrections officer in September of 1994, and worked in that capacity until her discharge on March 6, 1996. As a

corrections officer, Aarant's main duty consisted of checking inmates twice each hour by walking around the facility, visually observing juvenile inmates and logging information in the computer. Other duties included completing the booking of inmates, cleaning the facility, and reorganizing the storage room.

On February 12, 1996, 1/ Aarant worked from 12:00 a.m. until 8:15 a.m. in the juvenile facility with another corrections officer, Robert Roszak. There were two male prisoners and five female prisoners in the juvenile facility during Aarant's shift.

When she reported to work, Aarant had a conversation with two other employes, Marie Blaser and Betty Boucher, during which conversation Aarant made a comment about making a bed and going to sleep. At the beginning of her shift, Aarant did some cleaning in the storeroom. Shortly after 1:00 a.m., Aarant laid some blankets on the floor in the storage room and laid down. She remained in the storeroom lying on the floor until about 6:00 a.m. While Roszak thought that Aarant was asleep during the time she was lying on the floor, she denies that she was sleeping and asserts instead that she was merely resting. At approximately 6:00 a.m. Aarant came out of the storeroom and helped Roszak with various tasks for the remainder of their shift.

On March 6 Aarant received a termination notice from the County, which notice read as follows:

> Please be advised that as a result of the hearing held on March 6th, 1996, the Law Enforcement/Judiciary Committee of Oconto County, has made the decision to terminate your employment effective immediately with Oconto County because of your deliberate decision to sleep during your work shift on February 12, 1996, and on previous occasions, as a flagrant infraction under Article XV of the collective bargaining agreement.

POSITION OF THE UNION:

The County failed to prove that Aarant was asleep. The act of resting is a common and accepted practice, especially by employes on the night shift. The County relied on Roszak's testimony that Aarant was sleeping. Roszak did not see whether Aarant's eyes were closed, nor did he speak to her to see if she would respond. Aarant heard radio communications during the time she was lying on the blankets and she got up without an alarm when it was necessary to perform other duties. On a prior occasion when she was called to work on very short notice for

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1/ Unless otherwise specified, all other dates herein refer to 1996.

a night shift, Aarant told the management person who called that she was very tired and would probably be kicking back, i.e. resting. Said management person did not instruct Aarant that such conduct could result in discipline. It is apparent that resting is an accepted practice.

Even if Aarant was sleeping, she is subject to no more than a verbal warning for this first offense. The County can make no valid distinction between sleeping in a chair with a blanket or sleeping on the floor with a blanket. The County's Policy and Procedures Manual specifically recognizes sleeping on the job as a minor violation requiring a Class 1 designation. No employe has ever been subjected to more than a verbal warning for sleeping on the job. Neither has the County disciplined employes for violating its no-smoking policy, even though such violations are intentional and flagrant acts.

If Aarant had been sleeping, there was no security risk to her co-worker. She would be able to hear him if he called to her and she was only a few steps away from him. Certainly, such a situation created no more of a security risk than if Roszak had been working alone and had to wait for help to arrive from the first floor.

Aarant should be reinstated and made whole for all lost wages and benefits.

POSITION OF THE COUNTY:

Aarant intended to sleep while she was on duty, as evidenced by the remarks which she made to Blaser and Boucher at the start of her shift. Aarant admitted that she placed blankets on the floor, turned off the lights in the room, laid down on the blankets and closed her eyes. However, she denies that she went to sleep. The testimony of the witnesses supports a conclusion that Aarant has slept on the job on previous occasions. There is a difference between an employe who inadvertently falls asleep and an employe who makes a bed for the purpose of sleeping. The past practice alleged by the Union is not on point because of that difference. Veness received a verbal warning for dozing off while at her work station in the control room. There was no evidence that Veness intended to fall asleep, as compared to Aarant. Further, there is no evidence that the County was aware of any other instances where employes put blankets on the floor and laid on the blankets to sleep.

Aarant did not have a right to sleep after finishing her duties, even if Roszak regularly did the bed checks when they worked together. If Roszak had needed backup, Aarant would not have been able to respond.

The fact that the no-smoking policy is not enforced does not mean that every other rule can be violated. There is a difference in the seriousness of the violations of the two policies.

Aarant's conduct constituted a flagrant violation for which the contract allows discharge without a prior warning notice. Moreover, law enforcement and correctional officers should be held to a higher standard of conduct than are other municipal employes. Sleeping on the job is a

more serious situation than are activities such as reading, playing cards, or, playing basketball, since employes engaged in those activities are awake and able to respond immediately to any problems.

If the arbitrator concludes that Aarant should be reinstated, she should not be given back pay or benefits, since her actions were intentional.

RELEVANT CONTRACTUAL PROVISIONS:

ARTICLE XV

RULES AND REGULATIONS

The rules and regulations for the Oconto County Sheriff's Department shall be as set forth in the "Rules and Regulations Governing oconto Sheriff Department."

Correctional Officers shall be required to fulfill duties created in the jail as a result of any possible changes in procedures for providing food or laundry services to prisoners.

No Employee (sic) will be disciplined, suspended or discharged except for just cause. All discipline shall be based on a progressive discipline system; i.e., Step 1, oral warning (written record); Step 2, written warning; Step 3, suspension; and Step 4, discharge. In a situation of a more serious infraction, the penalty need not follow the steps enumerated above. The County reserves the right to issue multiple disciplines at various steps on a nonprecedential basis.

No warning notice need be given to the employee before he/she is discharged due to dishonesty, being under the influence of intoxicating beverages or illegal drugs while on duty, drug addiction, or other flagrant violations. Discharge or suspension shall be in writing with a copy to the Union and the employee affected.

Discipline will be subject to the grievance and/or arbitration procedure.

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ARTICLE XVII

MANAGEMENT RIGHTS

The County possesses the sole right to operate County government and all management rights repose to it, subject only to the provision of this Contract and applicable law. These rights include, but are not limited to the following:

. . .

D. To suspend, demote, discharge and take other disciplinary action against employees for just cause;

. . .

RELEVANT PROVISIONS OF THE SHERIFF'S DEPARTMENT POLICIES AND PROCEDURE MANUAL

Section 1-2-3 DISCIPLINARY SANCTIONS.

(a) Department members violating the provisions of this Manual may be subject to disciplinary actions. Specifically, those provisions with the notation "Sanction" (either Class 1, Class 2, Class 3 or Class 4) are specifically designated as "Regulations"; the violation thereof shall subject the Department member to the disciplinary sanctions prescribed in the following "Schedule of Sanctions." Department members in violation of any other provision of this Manual not designated with a specific disciplinary sanction shall be deemed to have committed a Class 1 offense.

(b) (1) If a Department member has had no verbal warning for a Class 1 violation within one year from the date of the last violation for the same offense, the employee's personnel file will be purged of the notice of the verbal warning(s).

(2) A written warning for a Class 1 or Class 2 violation will be removed from the employee's personnel file after two (2) years from the date of the last violation of the offense if no further violation of the offense has occurred.

(3) A copy of the third offense of a violation of a Class 1 or Class 2 violation will remain in the employee's personnel file for the duration of employment with the Department.

(4) A record of all Class 3 or Class 4 violations shall remain in the employee's personnel file for the duration of employment with the Department.

SCHEDULE OF SANCTIONS

Class	First Offense		Second Offense		Third Offense	
	Min.Days	Max Days	Min.Days	Max.Days	Min.Days	Max.Days
1	n/a	Documented Oral Reprimand	Written Report of Unsatisf. Perform	3	1	5
2	Written Report of Unsatisf. Perform.	1	1	5	5	15
3	1	5	5	15	30	Dismissal
4	5	Dismissal	30	Dismissal	Dismissal	Dismissal

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Section 2-1-3 GENERAL REGULATIONS

(e) No member of the Department shall sleep while on duty. The only exception will be in times of emergency where a force of officers is required to remain on duty for an unlimited period. (Sanction: Class 1)

. . .

Section 2-2-5 (a)

Applicability. The following disciplinary procedures shall be employed in disciplinary matters of the Sheriff's Department, unless these procedures are superseded by more specific procedures contained in a current employment or collective bargaining contract, whenever rules and policies of the Department are violated or the

> Department member performs unsatisfactory. In each instance, the disciplinary action taken is to be fair, just and in proportion to the seriousness of the violation.
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> . . .

DISCUSSION:

The record is clear that during her shift on February 12 and 13, Aarant went into the supply room, took some blankets off the shelf, placed some of the blankets on the floor, turned off the lights in the supply room, positioned the door into the supply room so that it was either closed or almost closed, laid down on the blankets, covered herself with another blanket, and, possibly used another blanket for a pillow. Although Aarant was not sure of the length of time during which she laid on the floor in the supply room, Roszak testified that said period of time was from about 1:00 a.m. to about 6:00 a.m. Aarant testified that she did not sleep during her shift, but rather, that she merely laid on the floor with her eyes closed and rested. Roszak did not speak to Aarant during the time she was resting. Aarant also testified that she heard both radio communications and Roszak entering the room several times while she was lying on the floor. Such testimony was very self-serving and is not credible. It is highly probable, and it is so concluded, that Aarant did sleep during part or all of the approximately five hours during which she was lying on blankets in the supply room with the lights turned off. The undersigned further concludes that Aarant intended to sleep, as evidenced by her actions in making a bed and other arrangements. If Aarant had a headache so severe that it was making her ill and/or if she was too tired to stay awake, she could have taken sick leave and gone home. The fact that Aarant left the supply room around 6:00 a.m. to assist Roszak in performing the usual tasks fails to prove that she did not sleep during the five hours she was in the supply room. Aarant testified that her comments about making a bed and sleeping which she made to Blaser and Boucher when she arrived at work on February 12 were intended to be a joke. However, Aarant's actions later during the shift would support the opposite conclusion, i.e., that she was tired when she arrived at work and she planned to sleep during part of the shift.

Since Aarant has been found to have been sleeping, then it is necessary to determine whether such conduct justified the discipline applied by the County.

The Policies and Procedures Manual for the Oconto County Sheriff's Department contains a specific prohibition against sleeping while on duty and states that a violation of said prohibition results in a Class 1 sanction, which is a documented verbal warning. In keeping with said policy, on September 5, 1995, Carol Veness was given a verbal warning, which was documented in writing, for sleeping while on duty at the control room desk on August 26 and 27, 1995. Said warning was the only instance of discipline for sleeping on the job, prior to the instant matter, placed into evidence by the parties. This is the level of discipline which the Union believes should be applied to the instant situation. The County would distinguish this matter from the Veness case on the basis that Aarant intended to sleep, while Veness fell asleep without intending to do so.

The County argues that Aarant's conduct constituted a flagrant violation of the rule prohibiting sleeping while on duty and, therefore, discharge was an appropriate discipline under the contract. The undersigned believes that it is reasonable for the County to distinguish between instances where an employe unintentionally falls asleep at a duty station as compared to instances where an employe demonstrates a deliberate intent to sleep by making a bed in a darkened area, as the grievant did herein, and for the County to administer more severe discipline to the latter employe.

The Union presented witnesses who testified either that they had made a bed on which to rest and/or sleep as the grievant had done, or, that they knew of other employes who had made a bed, without any discipline being given to any of the employes. While such testimony may be accurate, none of those witnesses thought that the County was aware of any specific instances of such actions. Thus, such testimony fails to support a reduction of the discipline in the instant case.

The Sheriff has modified the departmental no-smoking policy to a policy which he believes is consistent with the policy for other County employes. Such a modification does not prevent the County from taking more severe discipline for the reasons set forth in paragraph four of Article XV of the contract. Aarant's conduct fell within that contractual provision. Accordingly, the County had the contractual right to deviate from the four step progressive discipline system set forth in paragraph three of Article XV when it discharged the grievant.

The Union notes that there are no blemishes on Aarant's employment record and that she was rated as an acceptable employe in her only performance review by the County. If the grievant had been a long-time employe of the County, then an unblemished work record might have been a basis for a less severe disciplinary action. However, the grievant has been a County employe for a relatively short period of time.

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

AWARD

That the County did have just cause to discharge the grievant, Betty Aarant, on March 6, 1996; and, that the grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 12th day of November, 1996.

By Douglas V. Knudson /s/
Douglas V. Knudson, Arbitrator