

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

WISCONSIN PROFESSIONAL POLICE
ASSOCIATION/LAW ENFORCEMENT
EMPLOYEE RELATIONS DIVISION

and

BURNETT COUNTY

Case 78
No. 53795
MA-9463

Appearances:

Ms. Kathryn J. Prenn, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 4330 Golf Terrace, #205, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appeared on behalf of the County.

Mr. Richard Thal, Cullen, Weston, Pines & Bach, Attorneys at Law, 20 North Carroll Street, Madison, Wisconsin 53703, appeared on behalf of the Union.

ARBITRATION AWARD

On February 1, 1996, the Wisconsin Employment Relations Commission received a request from the Wisconsin Professional Police Association and Burnett County to appoint William C. Houlihan, a member of the Commission's staff, to hear an arbitration pending between the parties. On June 4, 1996, my appointment to hear this matter was confirmed with the parties by letter. An evidentiary hearing was conducted on June 27, 1996 in Siren, Wisconsin. The proceedings were not transcribed. Briefs and reply briefs were submitted and exchanged by August 28, 1996.

This arbitration addresses the discharge of employe M.H.

BACKGROUND AND FACTS

Prior to his discharge, M.H., the grievant, had been employed by Burnett County, as a dispatcher/jailer for a period of 16 years. Prior to his discharge, M.H. had received but one discipline, a written warning issued in 1994.

On or about July 31, 1995, the grievant twisted his back and worked his July 31 shift in pain. M.H. was off for the next three days (August 1 through 3) without pay, to attend the funeral of his uncle. The grievant was scheduled to be off work from August 4 through 6 inclusive. He was scheduled to return to work on Monday, August 7, the first day of a scheduled six-day work cycle. The grievant worked third shift, which begins at 10:00 p.m. On Sunday, August 6, the

grievant called a County Dispatcher and asked to use sick leave for the next day, August 7.

On Monday, August 7, the grievant made and kept an appointment to see a chiropractor, Lyle Lauritsen. The grievant was treated for a lumbar sprain, and received treatment on his lower back. At the conclusion of his treatment Dr. Lauritsen walked the grievant from the treatment area to the front of the office. Both the grievant and Lauritsen testified that during the course of their conversation the doctor made reference to a few days off. When the two men reached the front, the doctor instructed his receptionist, Darlene Miller that the grievant was to receive two days off and he then returned to the treatment area. It is the grievant's testimony that he was unaware of this conversation.

Miller prepared a medical leave slip authorizing the grievant to be off work on August 7 and on August 8. The medical leave slip is a form. Miller has a stack of pre-signed forms which she fills out at the direction of Lauritsen. Ms. Miller filled in the date, the grievant's name and the two release dates (August 7 and 8). According to Ms. Miller, the grievant took the form and left. It is her testimony that she had no conversation with the grievant with respect to changing the indicated dates, or problems that existed with the dates. Lauritsen was not physically present.

The grievant has a different version of the events. It was his testimony that the doctor indicated that he should take a few days off. He had a subsequent conversation with Darlene, where he indicated that August 7 and 8 was insufficient and that the doctor had authorized more time off. It is his testimony that she then indicated that he should change the dates on the form. His testimony is that he did so in her presence.

The disability certificate form was changed by the grievant. Every handwritten entity of Ms. Miller was retraced in felt-tip pen. (She had filled the form out in ballpoint pen.) The grievant retraced the date, his name, and where the starting date indicated August 7 he retraced August 7 included a dash and added 8. Where the end date indicated August 8 he retraced the reference to August and retraced the 8, converting it to a 9, placed a dash after it and added 10.

The grievant was subsequently advised that he had no sick leave, and asked that his request be converted to vacation. Vacation days were granted. The grievant visited the doctor for treatment on August 7, 8, 9 and 11. On August 8 he advised the doctor that he was scheduled for vacation on August 9 and on August 10. Following expiration of his vacation, the grievant returned to work. The altered certificate was not immediately provided to the employer. The employer did not request the certificate. The grievant did not volunteer it.

The grievant missed work again from September 3 through 8 and was asked to bring in a slip for that absence and for his prior August absence. Myron Schuster, the County Personnel Director, indicated that the medical verification was requested in order to authorize the grievant to return to work. The grievant provided the August 7 disability certificate on or about September 19, 1995. Jail Sergeant Patsy Pope reviewed the certificate and noted that it had been traced over and believed the document had been altered. She brought the certificate to the attention of Schuster on or about September 21. Schuster contacted Dr. Lauritsen, who confirmed that he had only authorized August 7 and 8, 1995.

A brief investigatory conference was conducted on October 19, 1995. According to Schuster's uncontradicted testimony, the grievant was asked whether the slip reflected what the doctor wrote and indicated that it did. He was subsequently asked whether the dates were the dates the doctor authorized the grievant to be off, and again, the grievant answered in the affirmative. According to Schuster, the grievant did not volunteer that he had altered the document until he was specifically asked. It is Schuster's testimony that the grievant claimed that the doctor's assistant authorized him to change the dates.

Following the meeting, Schuster again called the doctor's office and was advised that Dr. Lauritsen had not authorized Ms. Miller to alter leave dates and that Miller denied having so instructed M.H.

On December 13, 1995, the Burnett County Law Enforcement Committee determined to discharge the grievant for several violations of Sec. 3.7 of the County Personnel Policy manual. The provisions allegedly violated are set forth below.

Evidence of prior disciplinary treatment of other employees was admitted into the record. In a previous incident involving a Mr. "W", a jailer, the County discharged Mr. "W" for falsification of documents. Testimony indicates that "W", a jailer, signed a firearms permit indicating his status as Deputy Sheriff. The 12-year employee was not a Deputy Sheriff and was terminated.

In approximately 1994-95, employee "K", a member of a different bargaining unit, was terminated for theft. Allegedly, "K", a five to seven-year employee, took approximately \$100-\$150 for the purpose of paying a client's outstanding utility bill. It is alleged that "K" did not pay the bill, and was terminated. A third incident, involving employee "P", a four-year employee who was not a member of a bargaining unit, was terminated when it was discovered that this employee had ordered, kept and not paid for approximately \$125 worth of food. The employee is alleged to have resigned in the face of a disciplinary hearing.

ISSUE

The parties stipulated to the following issue:

Did the County have just cause to discharge M.H.? If not, what is the appropriate remedy?

The parties stipulated that should reinstatement be ordered I should retain jurisdiction to resolve any dispute as to the reinstatement directive.

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE III - MANAGEMENT RIGHTS

Section 3.01: The County possesses the sole right to operate the Law Enforcement Department and all management rights repose in it, subject to the provisions of this Contract and applicable laws. These rights include the following:

- A. To direct all operations of the Department;
- B. To establish reasonable work rules and regulations;

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ARTICLE V - PROBATIONARY PERIOD

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Section 5.02: Upon satisfactory completion of the probationary period, employees shall receive all rights and privileges under this working Agreement, computed from their starting date of employment, and; may be disciplined or discharged for just cause only, with full recourse through the grievance procedure of the Agreement.

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ARTICLE XVIII - DISCIPLINE

Section 18.01: The parties recognize the authority of the Employer to initiate disciplinary action against employees for just cause.

Section 18.02: The Employer recognizes the principle of progressive discipline when applicable to the nature of the misconduct giving rise to disciplinary action.

Section 18.03: Any employee shall be entitled to appeal any disciplinary action taken through the grievance procedure.

Section 18.04: If any disciplinary action is taken against an employee, both the employee and the Association will receive copies of this disciplinary action. The notice of disciplinary action shall set forth the reasons upon which the Employer bases its

decision to discipline.

RELEVANT PROVISIONS OF THE BURNETT COUNTY PERSONNEL POLICY MANUAL

. . .

3.7 Prohibited Conduct. Disciplinary action, up to and including termination depending upon the severity of the violation may be employed for violation of any of the following:

- A. Theft.
- B. Dishonesty in any form or degree.

. . .

- D. Falsification or unauthorized altering of records, employment applications, timesheets, timecards, etc.
- E. Fraudulent claims for reimbursement of hours worked.

. . .

- Q. Violation of any other commonly-accepted, reasonable rule of conduct including departmental rules, and procedures which are not in conflict with County policy.

POSITIONS OF THE PARTIES

The County contends the key facts in this proceeding are not in dispute. To a large extent, claims the County, this is an easy case because the key facts are not disputed. The County points out that the grievant was issued a disability certificate for two days, August 7 and 8, 1995. The grievant decided that two days were not enough time and thereafter altered the certificate using a felt-tip pen. The County contends that the grievant intended to use the certificate as the basis for using four days of sick leave, August 7 through 10, 1995. The County goes on to argue in detail that the grievant's testimony, with respect to the circumstances under which he altered the document, is not credible.

The County contends that its termination decision is supported by the record. The County rejects the mechanistic application of Arbitrator Daugherty's seven standards as applied to discharge cases. The Employer cites numerous arbitration awards which stand for the proposition that the arbitrator should not substitute his or her judgement for that of the Employer unless the

arbitrator finds that the penalty is excessive, unreasonable, or that management has abused its discretion. The Employer's brief infers that the appropriate standard of review is an arbitrary and capricious standard.

The Employer takes the position that not all offenses are appropriately subject to progressive discipline. It cites authority for the general premise that regardless of an employee's prior job performance record, misconduct such as dishonesty and falsification of records are "cardinal sins", which warrant discharge in the first instance.

The County notes that the grievant was employed as a law enforcement officer, a business in which complete integrity is expected. It points to the other terminations noted, and argues that its actions are consistent and that the standards applied to the grievant have been uniformly applied in the past.

The Union notes that the grievant had been employed by the County for a period of sixteen (16) years during which time he received but a single written reprimand. The Union argues that the County has failed to show just cause for discharging the grievant for gross misconduct. The Union reviews the five Section 3.7 rule violations and concludes the grievant violated none of them.

The Union argues that the grievant did not violate the County rule prohibiting theft and fraud. The Union quotes Section 943.20, Wis. Stats., as defining theft as the taking of property without consent and with the intent to permanently deprive the owner of the property. The elements of fraud require a false representation of fact made with intent to defraud, and reliance by the injured party on the misrepresentation. Gardner v. Gardner, 190 Wis. 2d 216, 243 (Court of Appeals, 1994). The Union contends that none of these elements exist. The fact is that the County authorized the grievant to take August 7 through 10 off as vacation. Once this authorization was made, the County had no basis to treat the time off as sick days. In the Sheriff's Department, vacation day requests are universally granted. The Union goes on to note that the grievant continued to receive treatment for his injury through August 11, 1995. The Union contends that the grievant was unfit for work, and would have been eligible for sick leave had such leave been available.

The Union contends that the grievant never denied altering the disability slip. Therefore, he was not dishonest with his employer. The Union characterizes the exchange between the grievant and Miller as a misunderstanding. It concedes that the grievant could have avoided that misunderstanding had he requested a corrected slip. But once the grievant realized he had no sick leave, he had no reason to tell Dr. Lauritsen that the disability slip he had made no sense. He could reasonably expect the County would never ask him for such a slip once he was on vacation.

The Union contends that the grievant did not commit forgery. The Union notes that one element of forgery is an intent to defraud. The grievant did not defraud the County. Had he

intended to defraud the County, he would surely have thrown the slip away as soon as he learned that he had no accrued sick leave, and the County would have no reasonable basis for requesting him to submit a disability slip. Instead, he kept the slip for over a month and gave the slip to his supervisor when requested.

The Union contends that under the principles of progressive discipline there is no just cause for summary discharge of the grievant. The Union notes that the grievant has 16 years of employment and has received but a single written reprimand. There is no evidence in the record that this grievant cannot again be a productive Sheriff's Department employee.

DISCUSSION

I believe that as Dr. Lauritsen and the grievant walked from the treatment room to the front desk, the doctor indicated that he would give the grievant a few days off. Lauritsen acknowledged as much on cross-examination. When Lauritsen got to Ms. Miller's desk, he indicated that the grievant was to be given two days off. The grievant indicates that he did not hear that direction. I thereafter credit Ms. Miller's version of the events. 1/ Specifically, that when the grievant left the office, he had not had the conversation he alleges to have had with Ms. Miller, she did not authorize him to change the slip, and the changes were not made in her physical presence.

The grievant heard Lauritsen commit to a few days off. I believe he felt he needed more than the two that were authorized. I believe the grievant felt that the doctor had authorized more time off, and that he thereafter altered the slip to provide that time. In his own mind, I believe he was altering the slip to reflect what he had heard from the doctor, and what he believed to be appropriate. I believe it was his intent to take four sick days off. Once the grievant discovered that he had no sick leave, this all became immaterial.

The collective bargaining agreement is silent with respect to how vacation requests are handled. Specifically, there is no provision which addresses the method or criteria of approval or disapproval of requested vacation. It was the testimony of Willis McLain, union president, that vacation is almost always granted. The grievant's testimony on this subject was the same. There was no testimony to the contrary. Schuster testified that employees need their vacation approved. Schuster's testimony is not inconsistent with that of the grievant and McLain. Schuster testified that the grievant was given time off because he indicated he was disabled. From this record, it is quite possible that the grievant was disabled. The record indicates that vacation requests are not

1/ Ms. Miller was a credible witness. Her testimony was in essence corroborated by Dr. Lauritsen. She indicated that she had a number of pre-signed slips in her presence. That being the case, there would be no reason for her to suggest to the grievant that he alter the already executed document.

accompanied by reasons or rationale. The record further indicates that such requests are typically granted. This grievant was not discharged because the employer concluded that he was not really injured. This employe was disciplined for altering a document in what the employer regarded as an attempt to misrepresent his sick leave authorization. There is nothing in this record to suggest that the grievant would not have been awarded the vacation he requested in the absence of a reason altogether.

The medical certificate serves two potential purposes. The first is that it can authorize an absence from work for medical-related purposes. That is what this slip does. The document in question declares that the individual is under professional care and is totally incapacitated during the prescribed time period. That is all that this slip does. The second potential use of a disability certificate or medical slip is as an indicator as to when the treated individual is capable of returning to work. This slip does not purport to do that.

The employer did not make a timely request of this slip for either purpose. When the grievant returned from his August injury, the slip was not presented nor was it requested. His leave was vacation. The Employer permitted him to return to work notwithstanding the absence of any authorization. The grievant worked for a period of weeks, was reinjured, and took a second leave before the request was made for slips for both absences. By mid-September, it is unclear to me as to the purpose of the August slip. It could serve a legitimate administrative, record-keeping function. It was certainly not an authorization to return to work from the August 7 through 11 leave. Neither did it serve as medical support for utilization of sick leave during the August leave. At the time the grievant turned this slip in, it had no value as an authorization for leave. At this point in time, there was no effort on his part to defraud.

The grievant intended to take sick leave for two days not authorized by his doctor. However, he did not do so. Ironically, the only thing precluding his actually doing that which he planned was the fact that he had no sick leave. I find it difficult to sustain a discharge for merely planning to extend sick leave. Employes are typically punished for their deeds, and not their thoughts. That is not to make light of the grievant's behavior. However he rationalized the alteration of the form, it was his intent to misrepresent the term of the medical leave. His formulation of such a plot is disciplinable, however, only modestly. I am mindful of the fact that this is a 16-year employe with very little prior discipline. I am also aware of the fact that these parties have explicitly recognized the principle of progressive discipline. I do not believe it appropriate to go directly to discharge where an employe formulates a plan to engage in disciplinable behavior but does not subsequently carry through. If ever there were conduct appropriate for progressive discipline, I believe that this falls into that category. Had the employe actually carried out his plan, I believe it would have warranted significant discipline.

This case is distinguishable from those cited by the Employer. In those matters, the employes actually engaged in the conduct and behavior for which they were disciplined. That is, one employe stole food (money). Another actually appropriated client's funds. The third employe represented himself to be a law enforcement officer to the public. In this instance, the grievant

planned to represent more sick leave than was authorized, but did not actually carry it out.

This grievant did misrepresent his conversation with Ms. Miller. M.H. claimed that Miller had authorized his change in the slip. He told the Employer that this was the case at his pre-disciplinary hearing. He continued that representation through his County Board hearing. He testified to that effect during the course of the grievance arbitration hearing. As noted above, I find his testimony incredible. His testimony was potentially harmful to Ms. Miller. His testimony portrays her as having violated her office protocol, and opened her up to potentially harmful employment consequences. This lack of honesty compromised the grievance procedure, the County Board procedure, and this arbitration process.

This grievant was fortuitous that he had no sick leave. Had he actually had sick leave left in his account, I strongly suspect he would have carried forth his plan and been subject to far more serious discipline. Given that fact, and his lack of truthfulness during the course of these proceedings, I believe he seriously compromised his claim for back pay during the time where he was not working.

AWARD

The grievance is sustained.

REMEDY

I direct the Employer to reinstate this grievant to the position he held prior to his discharge. I am not directing that there be any back pay. The Employer is free to treat the original offense as warranting a three-day suspension. The grievant's personnel file should otherwise be expunged of reference to the discharge. I will retain jurisdiction over this matter in order to resolve any disputes arising out of the reinstatement.

Dated at Madison, Wisconsin, this 14th day of November, 1996.

By William C. Houlihan /s/
William C. Houlihan, Arbitrator