BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

DOUGLAS COUNTY DEPUTY SHERIFF'S ASSOCIATION, LOCAL 41 OF THE LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION OF THE WISCONSIN PROFESSIONAL POLICE ASSOCIATION

and

DOUGLAS COUNTY

Case 243
No. 59433
MA-11295

(Kim Keskinen Discharge Grievance)

Appearances:

Mr. Richard Thal, WPPA General Counsel, on behalf of the Association.

Lindner & Marsack, S.C., by **Mr. Oyvind Wistrom**, on behalf of the County.

ARBITRATION AWARD

The above-captioned parties, herein "Association" and "County", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Superior, Wisconsin, on March 7, 2001, at which time the parties agreed that I should retain my jurisdiction if the grievance is sustained. The hearing was transcribed, and the parties thereafter filed briefs that were received by April 27, 2001.

Based upon the entire record and arguments of the parties, I issue the following Award.

ISSUE

The parties have agreed to the following issue:

Did the County have just cause to discharge grievant Kim Keskinen and, if not, what is the appropriate remedy?

BACKGROUND

Jailer Keskinen was a part-time jailer with the County from June 23, 1994, to June 28, 1996. She was re-hired as a part-time employee in July, 1997, and she began full-time employment as a jailer on November 2, 1997.

As related in greater detail below, Douglas County Sheriff Richard Pukema on July 20, 2000, issued Keskinen an "Intent to Discipline" (County Exhibit 10), because of her alleged failures to properly serve inmates certain medications and to properly secure certain used needles in the cell block. She was ultimately suspended with pay on September 13, 2000 (County Exhibit 6), and she was terminated on November 27, 2000, via a letter from Pukema (Joint Exhibit 3), which stated in pertinent part:

. . .

1. You were involved in personal relationships with various inmates including Roy Aho, who you repeatedly visited at the Federal Prison Camp, located in Duluth, Minnesota. You did not receive permission to do so from the Douglas County Sheriff's Department.

2. You were served with a subpoena in a criminal case. Jail Administrator Pulford instructed you not to discuss the subpoena with other people. Contrary to Mr. Pulford's instructions, you approached and discussed the subpoena with the inmates, ["H.S." and "W.T."]. (For purposes of confidentiality, I have used initials rather than actual names for certain individuals.)

3. On or about May 9, 2000, you contacted ["B.J."] and threatened her by demanding that she return property that allegedly belonged to an inmate to the Douglas County Jail.

4. On or about July 5, 6, and 7, 2000, you improperly passed out medications to inmates by leaving them on the inmates food shelf. You also left a "sharps" container with hypodermic needles unattended in cellblock D where inmates could have access to the needles.

. . .

Keskinen grieved her discharge on that same day. (Joint Exhibit 2).

Sheriff Pukema, who took office on January 4, 1999, testified that he in May, 1999, became aware that Keskinen planned on marrying former inmate Roy Aho who was slated to be shortly released from prison; that her relationship with Aho was of great concern to other local law enforcement agencies; that he told Keskinen in May or June, 1999, he was greatly concerned about her relationship with Aho and that she could not allow her relationship to affect her job in any capacity; that Keskinen then confirmed that she and Aho intended to live together and that they intended to marry; and that she then assured him that their relationship would not affect her job. Pukema at that time never told her that she had to break off her relationship with Aho.

Pukema again spoke to Keskinen in July, 2000 about her prior relationship with former inmate "T. J.". Keskinen replied that she did not have a relationship with "T.J." and that she had gotten permission from former Acting Jail Sergeant Joseph P. Matilla to see Aho. Pukema had a subsequent conversation with Keskinen wherein she admitted to seeing "T.J." before her employment.

Pukema also said that Keskinen had acted improperly when she telephoned "B.J." and told her she would be jailed if she did not immediately return a cell phone and jacket owned by inmate "A.N.".

Pukema added that Keskinen was subpoenaed in a very high profile case; that she was told by Jail Administrator Arthur Pulford not to have any contact with inmates "H.S." and "W.T." who were in the County's jail at the time and who also were charged with fire-bombing the District Attorney's house; and that he was subsequently told that Keskinen had asked them questions about the subpoena. Pukema said that this latest incident led him to suspend Keskinen with pay effective September 13. (County Exhibit 6). He also testified that Keskinen in July, 2001, had improperly left medicines and a Sharps container, which contained used hypodermic needles, out in the open where inmates could get them and use them as weapons. He then also spoke to her about a personal letter she had received from a former inmate.

On cross-examination, Pukema stated that he in 1999 did not discipline Keskinen over her relationship with Aho because he was "very conflicted as to what I could do with a marital relationship", and that he did not discipline Keskinen earlier in 2000 because "there was a whole litany of issues that had – that had been piling up."

Chief Deputy Charles Law testified that he in 1999 transferred former inmate Aho to a different jail because of his relationship to Keskinen and because he believed there was a conflict based on that relationship. He also said that he asked "W.T." and "H.S." whether

Keskinen has spoken to them about her subpoena; that "They said yes"; and that "H.S." then told her to speak to his attorney and that "W.T." told her to tell the truth. He also related how an inmate had complained to him about Keskinen's failure to properly secure the Sharps container. On cross-examination, Law acknowledged that Keskinen's relationship with Aho was well known among the Jailers; that Jailer Angel Swanson's father was once jailed; and that his incarceration did not present any great problems.

Kathleen Brown, a Probation and Parole agent with the Wisconsin Department of Corrections, testified that "B.J.", who was on probation and who thus was required to report all law enforcement contacts, told her that Keskinen had threatened her over the telephone by saying she could be jailed if she did not immediately return "A.N."'s property and that "B.J." was upset because she hadn't stolen those items, but believed that Keskinen could charge her with theft. She said that because of Keskinen's conduct regarding certain jail inmates, her department "has been reluctant to share information with the jail for fear that this information is relayed back." Brown by letter dated August 14, 2000, informed Pukema about this situation (County Exhibit 8).

On cross-examination, she acknowledged that she could not give a single example of where Keskinen ever revealed confidential information and that she never spoke directly to Keskinen about her contacts with inmates. She also said that "B.J." initially lied about her involvement in a hit-and-run accident.

Former Acting Jail Sergeant Matilla testified that Keskinen spoke to him about her relationship with Aho and that, "to the best of my recollection, no" she never asked him for permission to maintain a relationship with Aho.

Former detective Joe McKenzie – who was asked by Pukema to investigate the matter – testified that "B.J."'s grandfather had told him that he had spoken to Keskinen about having "B.J." return some property. McKenzie also said that "B.J." had told him she had spoke to Keskinen who told her she would be "in a lot of trouble" unless she brought back the property. He also said "B.J." felt threatened by Keskinen. McKenzie prepared a report of what he had learned (County Exhibit 7).

Thomas M. Renz - a part-time jailer/cook, transport officer, and bailiff - on September 13, 2000, overheard inmates "W.T." and/or "H.S." tell the other one that Keskinen the night before had spoken to him and that she was nervous about the trial. Renz later asked "W.T." whether Keskinen had spoken to him and he said that she had and that he had told her he was unable to talk to her about the trial. Renz prepared a report of the incident (County Exhibit 16), and said that he was concerned because there might be a mistrial because of Keskinen's comments and because "W.T." or "H.S." might testify about the incident and thereby put him on the spot if he did not report it. He added that when sequestered witnesses are subpoenaed, they cannot talk to each other, which is why he was afraid of a mistrial.

Jail Administrator Pulford testified that other law enforcement officials were "extremely concerned" with some of Keskinen's activities and her relationship with Aho in part because they saw her embrace Aho when he was in prison and that, as a result, the training program had to be altered. He added that other law enforcement officials "were concerned about information being leaked to probationers" and with "transport concerns" and that the department now has "a very good working relationship" with other law enforcement departments because Keskinen no longer works there. He explained that it is improper for a jailer to have a relationship with an inmate because:

> ". . .They can provide favors to inmates. They can allow contraband to be introduced to the institution. Inmates can get special treatment. In fact, most areas – I was trying to look this up today and I couldn't find it all, but most areas it's criminal conduct for a staff member to have that type of relationship."

He said that he told Keskinen "to respond to the subpoena" and that if she had any questions, "she needs to deal with the prosecution team, she needs to call them, talk to them about the situation." He also stated that he personally spoke to "W.T." and "H.S." and that both of them separately told him "Miss Keskinen had come to see them and asked them about why she was being subpoenaed, what she was supposed to say", and that both of them told her to "go to court, tell the truth." Pulford also said that Keskinen had denied leaving medications unattended in the cell block on July 6, 2000, when he asked her about it in July, 2000.

On cross-examination, he acknowledged that he had no information that Keskinen had ever revealed any confidential information. He also stated that a social involvement between an inmate and a jailer does not represent an automatic violation of jail policies.

Jailer Robbi R. Sherlock (a/k/a Lindberg), testified that Keskinen between June, 2000-July, 2000, left the Sharps container out in the cell block on at least five occasions and that Keskinen on July 6, 2000, left medicine in the feeder tray and that "she yelled to the inmates to get up and get the medication. . ."

Keskinen testified that she was engaged to Aho and that they were living together; that she told former Acting Jail Sergeant Matilla about her relationship with Aho in the summer of 1998; that she subsequently asked Matilla for permission to have contact with Aho; and that Matilla gave it. She also said that she opened a letter from former inmate "D.H." in front of Captain Pulford. She said that she never spoke to "W.T." or "H.S." about her subpoena; that Pulford never told her that she should not have any contact with anybody; and that he also never told her to go to the prosecution team if she had any questions about her subpoena. She also denied ever speaking to "B.J." about the return of "A.N."'s property and said that she never told anyone that "B.J." could be jailed if she did not return that property. She, instead,

claimed that she spoke to "B.J."'s grandfather about the property and that the jacket was then returned.

As for leaving needles in the Sharps container, she said: "I just honestly don't remember doing it"; that, "it's been so long since this happened"; that, "I don't remember leaving the Sharps container in there"; that, "I just don't remember doing it"; and that, "I just said I don't remember doing it." (Despite these denials, and faced with the testimony from certain witnesses would testify that they saw Keskinen leave out the Sharps container on several occasions, the Association stipulated that Keskinen in July, 2000, left the Sharps containers out on more than one occasion.)

Asked whether she in July, 2000, ever left medications out on a tray shelf and whether she did not witness the inmates take their medications as she was required to do, she replied: "I guess I am disputing that that happened, because I don't remember doing that, either." As for whether she on July 12, 2000, admitted to Jail Administrator Pulford that she had left the medications out, she replied: "I don't recall it happening."

Recalled as a witness, Keskinen testified that she was never disciplined or counseled over her relationship with Aho before she was terminated on November 27, 2000. She also said that she once was wired in an unsuccessful attempt to get incriminating evidence on "A.R." who, along with "W.T." and "H.S.", had been charged with fire-bombing the District Attorney's home; that "W.T." and "H.S." must have known about the wire and that she believes they have lied against her because they were angry over the wire attempt; that she never talked to "W.T." and "H.S." about her subpoena; and that to protect herself, she always insisted that another jailer accompany her when she dealt with them in jail.

On cross-examination, she denied ever telling "B.J."'s grandfather that "B.J." would be in trouble if she did not return the property. She also disputed Sherlock's testimony that she had left out the Sharp's container on at least five occasions and said that she could not remember whether she ever told Pukema in June, 2000 – July, 2000, that Matilla had given her permission to see Aho.

POSITIONS OF THE PARTIES

The Association claims that the County lacked just cause to discharge Keskinen because it failed to warn her of any disciplinary consequences of continuing her relationship with Aho; because it failed to prove that she approached inmates "W.T." and "H.S." and discussed her subpoena with them; and because, "The penalty of termination is far too severe in this case." The Association therefore requests a make-whole order that includes Keskinen's reinstatement and a backpay award.

The County asserts that it had just cause to terminate Keskinen because she knew that her relationship with Aho created a conflict of interest under the then-existing County policy; because she improperly distributed medications and needles; because she improperly spoke to "W.T." and "H.S." about their trial after being expressly told by Pulford that she should not do so; and because she improperly threatened "B.J." over the return of the property. The County adds that since its Sheriff's Department is a "paramilitary organization", it is particularly egregious for a Sheriff's Department employee to impair the proper functioning of the Department, which is why there should be "a higher degree of deference to the County's judgment regarding the discipline nature of an employee's conduct."

DISCUSSION

In agreement with the County, I find that the County had just cause to discipline Keskinen over her failure to properly serve medications to inmates in June, 2000-July, 2000, and over her repeated failure to properly secure the Sharp's container in the cell block in June-July, 2000. Hence, I credit Jailer Sherlock's testimony that Keskinen on July 6, 2000, "yelled to the inmates to get up and get the medication. . ." Since Keskinen was trained on how to serve medications and on how to properly secure the Sharp's container, I further find that Keskinen's failure to properly perform these important functions represented a wanton disregard of her job duties. Keskinen therefore did not tell the truth to Pulford in July, 2000, when she denied leaving the medicines out on July 6, 2000.

I also discredit her claim that Jail Administrator Pulford never told her to speak to the prosecution team if she had any questions over her subpoena. For while Keskinen denies ever receiving any such instruction, I credit Pulford's testimony that he gave her that directive.

In addition, Keskinen tried to shade her testimony when she was asked whether she disputed Sherlock's testimony that she had left the Sharp's container out more than five times, to which she replied:

. . .

Q But if you don't remember if it happened, it's possible it happened that many times?

A Well, in the report that we have she only states it happened once.

Q Okay. But her testimony today, you were here when she testified, were you not, or were you here?

A Yeah, I was here.

Q And her testimony was that it was between five and 12 times?

A And I don't think that it was.

Q Okay. But if you don't remember whether you did it the one time, whether you remember doing it at all, how can you say that's accurate or not?

A I guess I don't know. (Transcript, p. 322).

. . .

I don't know either.

Keskinen's credibility also must be considered in determining whether she truthfully testified about her relationship with former inmate Aho.

As to that, the record clearly establishes that Keskinen's relationship – along with several other incidents – have severely undermined her status within the Superior law enforcement community, as Pukema, Brown, and Pulford all credibly testified to that general effect.

Moreover, Keskinen either knew or should have known that her close relationship with Aho – which led her to visit him about 50 times in only a four-month period when he was in the federal prison – would raise questions about her ability to serve in a law enforcement capacity. Hence, she was required to disclose her relationship with Aho under the Department's Policy and Procedure Manual (County Exhibit 4), which states in pertinent part:

. . .

12-2 Definitions:

Conflict of interest:

A set of circumstances which prevent a member of the department from acting fairly and impartially in accord with his/her oath, the orders of superiors, or law.

Source of conflict of interest:

Primarily, a relationship based upon favors, gratuitousness, friendship, blood or marital ties, outside employment, financial obligation and other reasons. A conflict does not necessarily arise from any of these relationships.

12-3 Unacceptable conflicts. The department recognizes that not all conflicts are condemned. The key consideration is whether the conflict of interest is (a criminal, (b does prevent fair and impartial action, or (c has the potential to prevent fair and impartial action, or (d makes members of the department reasonably certain that fair and impartial actions will not occur.

12-4 Responsibility for eliminating and reducing conflicts. Each member of the department is responsible for insuring that he/her is engaged in no illegal conflicts. If doubt exists, that member should resolve it against the activity or relationship until a definite answer can be obtained. Guidance is always available from the Sheriff. Each member of the department is responsible for seeking to reduce to a minimum all actual and potential conflicts of interest. (Emphasis added).

12-5 Disclosure of conflicts. It is the responsibility of each member of this department to disclose a real or potential conflict of interest to the Sheriff or senior deputy available, immediately upon realizing that the conflict exists. Some conflicts of interest may be more readily apparent to a member other than the one involved, and such a conflict would be brought to his/her attention immediately. (Emphasis added).

The ranking deputy to whom the conflict is disclosed shall immediately determine whether:

A. A conflict or potential for conflict exists.

B. Is criminal.

C. The real or potential existence of a conflict of interest will affect fair and impartial action in a situation at hand.

D. An emergency situation exists which is of severity or importance as to override the presence of a conflict until alternative means of handling a situation are available.

E. Alternate means of handling a situation are available.

All conflicts of interest shall be reported to the Sheriff immediately.

12-6 Effect. Effect of disclosure or failure to disclose. Disclosure by a member of conflict of interest that is not unlawful shall be taken as a responsible action by a professional not as evidence of wrongdoing. Failure to disclose a conflict of interest is unprofessional conduct. Failure to disclose a potential conflict of interest can be evidence of unprofessional conduct.

The key phrases here are the ones stating that "Guidance is always available from the Sheriff" and that disclosure must be made "to the Sheriff or senior deputy available. . ."

Here, Keskinen claims that she twice revealed her relationship to former Acting Jail Sergeant Matilla and that he on the second occasion gave her permission to see Aho. Matilla, who was in the bargaining unit, testified that he did not recall ever giving such permission.

However, it is immaterial whether Matilla gave her permission since Pukema himself knew about the relationship in May or June, 1999, and he then chose not to do anything about it other than to tell Keskinen that she should not let her relationship interfere with her work. In addition, Jail Administrator Law knew about their relationship and he also never told Keskinen to end it.

Given management's prior knowledge and lack of forewarning, I find that the County lacked just cause to discipline Keskinen over her relationship with Aho. For as the Association rightfully points out: "it was management's responsibility to forewarn Keskinen if she were to be disciplined for visiting Aho." By failing to do so, the County violated one of the most important procedural safeguards encompassed by the just cause standard. See Elkouri and Elkouri, *How Arbitration Works*, p. 930-933 (BNA, 5th Ed., 1997).

Left then, is Keskinen's supposed conversation with "B.J." and her supposed contacts with "H.S." and "W.T." about her subpoena. Since neither "B.J.", "W.T." nor "H.S." testified, all of the statements attributed to them by various County witnesses constitute hearsay. Since hearsay can be considered as evidence, the real question here centers on how much weight, if any, can be given to the hearsay statements of individuals who are not subjected to cross-examination and whose statements were flatly contradicted by a witness who did testify.

As I related at the hearing, I am reluctant to credit the hearsay statement of individuals who do not testify over the testimony of witnesses who do testify and who are subjected to the rigors of cross-examination. Hence, such hearsay statements ordinarily will be disregarded

unless the record shows that a witness has not testified truthfully and unless all of the other circumstances show that the hearsay statements appear to be true.

Here, "B.J." had no reason to falsely claim that Keskinen had spoken to her over the telephone and that Keskinen then threatened that "B.J." could be jailed if "B.J." did not immediately return some property. Moreover, it would have been foolhardy for "B.J." to have fabricated such a claim because, if proven false, it could lead to revocation of "B.J."'s probationary status. In addition, the record contains "B.J."'s statement which she reviewed and then initialled. (County Exhibit 7). Since Keskinen was not a credible witness, I discredit her denial and find that she did, indeed, threaten "B.J." over the return of certain property.

As for "W.T." and "H.S.", the Association asserts that they had a "motive to harm Keskinen" because they "knew that Keskinen had been wired to gather incriminating evidence" against "A.R.". However, neither "W.T." nor "H.S." could have known that Pulford had instructed Keskinen to speak to the prosecution team about her subpoena. As a result, "W.T." and "H.S." had no reason to fabricate a story about her subpoena. In addition, since Renz originally overheard "W.T." and "H.S." talking to each other about Keskinen's subpoena, this is hardly a case where they went running to a jail administrator so that they could get Keskinen in trouble.

As related above, I do not credit Keskinen's claim that Pulford never told her to contact the prosecution team if she had any questions over her subpoena. Her failure to truthfully relate Pulford's instructions – along with the other holes in her testimony – leads to the conclusion that "W.T." and "H.S."'s hearsay statements must be credited over her denials.

The County therefore had just cause to discipline her over her failure to properly secure the Sharps container, her failure to properly secure medications, her threat to "B.J.", and her remarks to "W.T." and "H.S." about her subpoena. Any one of these episodes warranted the imposition of severe discipline. When they are all combined, I find that the County had just cause to terminate Keskinen since she no longer can be trusted to perform her job properly. The Association's request for a lesser punishment is therefore denied.

In light of the above, it is my

AWARD

1. That the County had just cause to discharge grievant Kim Keskinen;

2. That her grievance is therefore denied.

Dated at Madison, Wisconsin this 19th day of July, 2001.

Amedeo Greco /s/
Amedeo Greco, Arbitrator

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