BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

KENOSHA COUNTY SHERIFF'S DEPARTMENT EMPLOYEES, LOCAL 990, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO

and

COUNTY OF KENOSHA, WISCONSIN

Case 231
No. 64103
MA-12803

Appearances:

Thomas G. Berger, District Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 044635, Racine, Wisconsin 53404-7013, appearing on behalf of Kenosha County Sheriff's Department Employees, Local 990, American Federation of State, County and Municipal Employees, AFL-CIO, referred to below as the Union.

Lorette Pionke, Senior Assistant Corporation Counsel, Kenosha County, 912 56th Street, Kenosha, Wisconsin 53140, appearing on behalf of County of Kenosha, Wisconsin, referred to below as the County.

ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin to resolve a grievance filed on behalf of Connie Desotell, who is referred to below as the Grievant. Mediation was conducted on February 24, 2005, and hearing was conducted in Kenosha, Wisconsin on August 16 and 18, 2005. The hearing was not transcribed, and the parties submitted their arguments at hearing.

ISSUES

The parties stipulated the following issues for decision:

Was the Grievant discharged for just cause?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE I – RECOGNITION

. . .

Section 1.2. Management Rights: Except as otherwise provided in this Agreement, the County retains all the normal rights and functions of management and those that it has by law. Without limiting the generality of the foregoing, this includes the right to . . . demote or suspend or otherwise discharge or discipline for proper cause . . .

ARTICLE III - GRIEVANCE PROCEDURE

. . .

Section 3.5. Work Rules and 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 . . .

The Foregoing procedure shall govern any claim by an employee that he/she has been disciplined or discharged without just cause. Should any action on the part of the County become the subject of arbitration, such described action may be affirmed, revoked or modified in any manner not inconsistent with the terms of this Agreement.

BACKGROUND

The grievance alleges that the County violated Section 3.5 because it did not use progressive discipline and imposed too harsh a penalty.

The County hired the Grievant as a Correctional Officer in August of 1997, and discharged her effective June 7, 2004. Chief Deputy Charles Smith authored the notice of termination, which approved a recommendation for discharge made by Lieutenant Edward Van Tine after a pre-disciplinary meeting conducted on May 25. Van Tine's written recommendation noted that the Grievant violated Item 8 of the Work Habits section of the County's Uniform Work Rules. Item 8 reads thus:

> Employees shall not bring electronic voice . . . recording equipment, whether personal or County property, into the work environment without proper supervisory authorization. This rule specifically excludes open public meetings.

Van Tine's recommendation also noted the following violations of "Kenosha County Sheriff Department Policies and Procedures:"

- **Policy 125.3 Use of Tape Recorders, Issuance, 4.** A recorder will not be used for any other purpose unless specifically authorized by a Supervisor and then only if the specific request is made and the use is work related and other priorities for a recorder do not exist.
- **Policy 165: Department Work Rules, II. Work Performance C.** . . . engaging in unauthorized personal business . . .
- **Policy 165: Department Work Rules, III. Conduct, C.** Employees will not give false testimony . . . nor will they falsify or withhold information from any official report . . .
- **Policy 165: Department Work Rules, V. Use of property and Equipment, A.** Abuse or misuse of county or private property, equipment or materials.
- **Policy 151.1: County Code of Ethics, E-1.03-1, Responsibility of Public Office:** Public . . . employees are agents of public purpose and hold office for the benefit of the public. They are bound to . . . observe . . . the highest standards of ethics and to discharge faithfully the duties of their office regardless of personal considerations . . .

His recommendation rests on a course of conduct leading to May 18, 2004, when the County discovered that the Grievant used in a County correctional facility, without supervisory authorization, "a small voice activated tape recorder". The recommendation notes she tried to hide the device and asserted the tape had nothing on it. The recommendation asserts that the events of May 18 were preceded by a course of conduct dating from September of 2002, which Van Tine characterized thus:

> (The Grievant) has created distrust and deterioration of working relationships between her and her co-workers, union representatives and supervisors. She continues to create a hostile work environment by challenging authority and questioning every directive given. She has been disrespectful toward her fellow staff and supervision. (She) has been a constant disruption, continually finding fault, being negative and non-supportive, undermining the Sheriff's command and control. I feel that she can no longer be trusted to perform the normal essential functions of the job as a Correctional Officer.

Van Tine's recommendation states, "I recommend that all steps of progressive discipline be set aside and (she) be terminated." Smith's decision affirmed Van Tine's recommendation.

The chain of command in the Sheriff's Department for the purposes of this disciplinary matter is headed by Smith, then by Larry Apker, the Captain of Operations, then by Van Tine, then by Sergeants, including Hunter Johnson and Oscar Salas, then by Corporals, including John Levonowich and James Kaiser. As a Correctional Officer, the Grievant reported at different times to the corporals and sergeants as her immediate supervisors. The Union represents County employees in three units, including non-sworn Sheriff's Department employees (990J), Courthouse employees and Social Services Department employees. Each unit is headed by two officials and the unit as a whole is headed by two officials. Kathleen Fleiss is the President of Local 990, and oversees the entire unit. Sue Tump serves as a Steward for Local 990J, and Joseph Borden is its President.

The immediate cause for the discharge is traceable to the events of May 17 and 18 of 2004. On May 17, administration from the Sheriff's Department and from the Personnel Services Department met with the Grievant and Union officials, including Fleiss, Tump and Borden. Although the parties each understood that a meeting would take place at 7:00 a.m., they shared virtually no other understanding on what would take place at the meeting.

County management representatives had determined at a meeting held on May 13 that the Grievant's conduct had so dominated the time of administrative staff that she would be afforded a "decision day". This meant that the County would lay out its concerns with her work performance and offer her the option of leaving County employment with a severance package or continuing County employment under a Corrective Action Plan. The County anticipated that it would detail the options at the May 17 meeting, and then give her twenty-four hours to consider the options, reconvening on May 18 to confirm her decision. The Union representatives originally sought a meeting with County administration to address an escalating conflict between the Grievant and Johnson. Tump made the request to Johnson, who referred it to Van Tine in a May 12 e-mail. The e-mail notes that Tump had requested the meeting to include Johnson and Van Tine, but not Acker, "to resolve some of the issues surrounding (the Grievant) . . . once and for all." Fleiss viewed the meeting as a mediation to diffuse a personality conflict. Van Tine viewed the meeting as the opportunity for each side to air its concerns, within the context of the County's implementation of a decision day. The meeting met neither party's expectations, producing a conflict that led to discharge.

The Grievant, unknown to any other meeting participant, tape recorded the May 18 meeting. Kaiser discovered her later that day with the tape recorder.

The fundamental differences of the parties regarding these events make an overview of witness testimony the only way to sketch out the background detailed at the arbitration hearing.

Robert Reidl

Reidl has served as Director of Personnel Services for two years, and has worked for the County in Personnel Services for eight. From his perspective, the process leading to the Grievant's termination starts with a formal request for Family and Medical Leave (FMLA) that

she filed on September 19, 2002. Leave requests are subject to the approval of the Sheriff's Department, but requests for FMLA leave or for benefits under the County's Accident and Sickness Pay Maintenance Plan (A&S) are subject to the approval of Personnel Services.

The Grievant's September, 2002 request noted the leave was necessitated by the condition of a child, which prompted a need for ongoing therapy, medication and supervision. The Grievant responded to the form entry "The patient was treated on an inpatient/outpatient basis (*circle which is applicable*)" by circling both entries and writing, "both at various times". Where the form provided separate boxes for the entries "Scheduled in advance" and "Emergency Basis", the Grievant responded, "at times either one might apply." The Practitioner portion of the form notes the following response to the entry "The employee will be needed to care for the spouse, parent, son or daughter on the following dates:", "TBA". The County approved the Grievant's request for "medical treatment and family therapy as needed" in late September. Prior to this approval, however, the Grievant had been informed that she should use casual days to cover the absences. When she asked for FMLA leave to attend a court hearing on October 9 concerning her child, the County initially denied the request. The Grievant pursued the matter within both the Personnel Services and Sheriff's Departments. Personnel Services ultimately granted the leave. Differences, however, continued to mount. Both the Sheriff's and Personnel Services Departments sought to have her schedule her absences in a manner and for increments of time that made it possible to cover her absence. They perceived the Grievant to be uncooperative, and the Grievant perceived County management to be hostile to her requests.

On January 6, 2003, the Greivant submitted another formal FMLA request, for ear surgery for her child on January 16. She declined to include a medical authorization form and release with the application. Personnel Services Department staff informed her of the need for these documents and understood her response to be that she would take the leave regardless of the County's approval process. Personnel Services Department staff faxed the necessary forms, which she returned on January 15. The County approved the leave on January 16. Notes of Personnel Services Department staff indicate that the Grievant took notes of conversations, stating she was conducting an investigation. In late January of 2003, the Grievant advised Johnson that she was going to sue the County for its conduct regarding FMLA leave.

The Grievant filed a complaint with the Department of Labor (DOL), which conducted an investigation between February and June of 2003. The DOL investigation focused on three areas of potential violation of federal law: County denial of FMLA leave for court appearances; contact by Personnel Services staff with a social worker to determine whether an appointment could be rescheduled; and County desire to restrict FMLA leave usage to four hour increments. The investigation also considered a policy issue regarding whether County documentation of leave policies adequately mentioned FMLA usage as an excused absence. DOL declined to find a violation regarding denial of FMLA leave for court appearances, but found County violations on the remaining issues. After County/DOL discussions, the County agreed to take certain remedial steps to bring its policies into compliance with the DOL

interpretation of federal law, including permitting FMLA leave in increments of one hour. No finding resulted in a monetary remedy for the Grievant.

Tension, however, continued to mount. Personnel Services Department staff approved FMLA leave requests in February, March, April and May of 2003 to cover court appearances and physician appointments. Personnel Services Department staff attempted to communicate the need for the Grievant to try to schedule appointments in a manner that assisted coverage for her vacancy. Sheriff's Department and Personnel Services Department staff continued to believe the Grievant made little, if any, attempt to assist regarding scheduling. Conflict between the Grievant and her supervisors became more regular.

The Grievant submitted a medical statement noting she received treatment on April 25, 2003 for an injury to her left elbow. The County granted A&S benefits and attempted to have her work under limited duty restrictions. Over the course of the next month, the County received medical statements from two physicians, noting problems to the Grievant's right arm.

In June of 2003, the Grievant filed a physician's statement indicating she suffered from "bilateral moderately severe carpal tunnel syndrome". The Grievant sought A&S benefits, and submitted forms concerning the elbow ailment and the carpal tunnel difficulties. On July 10, the Grievant had carpal tunnel surgery, and the County approved full A&S benefits from that date. On August 9, Johnson observed the Grievant at a public pool, and believed she acted as if her arms were recovered sufficiently to warrant a limited duty return to work. Johnson recorded his observations through e-mail with his supervisors. The County determined she had a physician's appointment set for August 19, and would await the conclusion of that appointment before independently determining whether to determine her fitness for work. On August 20, the Grievant returned to work on limited duty in the Jail Control Room.

In a memo to the Grievant dated September 25, 2003, Reidl stated:

> The healing period for your current medical condition has significantly exceeded the usual time required to return to unrestricted duty. In cases where an employee experiences an unusual healing period, Kenosha County can request an updated condition report through an independent evaluation. To that end, you have been scheduled for a Functional Capacity Evaluation to ascertain your progress toward unrestricted work status.
>
> Your appointment is scheduled for . . . September 29, 2003 . . .

The Grievant reported for the appointment the County scheduled with a Physical Therapist. She refused, however, to submit for testing unless the therapist would release the results only to her, specifically refusing to sign a consent form if information would be released to Reidl or her physician. She also submitted a Return to Work Report from her physician, dated September 29, indicating that she should have "No direct contact with inmates" through at least October 17. On September 29, the County advised the Grievant that the FCE exam was vital, and that she should report for it.

The Grievant reported to the physical therapist for an FCE on September 30. The physical therapist recommended that she return to her physician's care for "another therapy trial." In a report dated October 17, her physician continued her limited work restrictions through December of 2003.

In late October, the Grievant began to complain of eye strain, due to flickering monitors in the Jail Control Room. She consulted a physician, who recommended she receive a ten minute break for every hour of work. The physician's recommendation demanded ten minutes beyond the amount of break time permitted under the contract, and set a schedule unlike that stated in the contract. On October 27, 2003, the County informed the Grievant it could not accommodate her request, and returned her to full A&S leave.

On November 6, 2003, the Grievant filed a Worker's Compensation claim for "computer eye strain". The County requested she undergo an independent medical examination. On December 4, 2003, the physician submitted his report, concluding:

> It is my medical opinion with a reasonable degree of medical certainty that there has been no work event that has directly caused the above conditions. In addition, it is improbable that any event at work has caused any of the above problems to be . . . accelerated beyond their normal progression . . . Although some breaks may be helpful to reduce strain on her eyes, this is clearly not a work-related problem.

Based on this opinion, the County denied the claim. The Grievant submitted a Return to Work Report dated December 5, 2003 which contained a work restriction of a 5-2 work schedule for her carpal tunnel difficulties. The Jail works a 6-2 schedule. The Grievant insisted on the schedule, Reidl declined to offer her a 5-2 schedule, and she remained on leave through February of 2004.

The Grievant submitted a Return to Work Report dated February 8, 2004, allowing her to return to work without restriction due to her carpal tunnel symptoms. After this, the County obtained a statement from the physician who conducted the independent examination, which indicated she should receive a fifteen minute break every two to four hours to ease her eye strain. Reidl found this restriction consistent with the contract, and she returned to full duty in the Control Room. Between February and May of 2004, the Grievant, Reidl and Jail management engaged in a series of disputes regarding her break schedule and whether her physician's statements warranted giving her a break schedule other than that contained in the contract. These disputes began to pull in other employees, and her conflicts with Johnson became more frequent.

Reidl received an increasing number of complaints from the Sheriff's Department concerning the Grievant's conduct. The complaints alleged that she was using a green folder to document conversations with supervisors and that she was speaking often of a lawsuit. The complaints also alleged that other employees did not believe she was performing her Jail duties

because she was obsessed with her note-taking. Reidl determined to call a meeting on May 13, 2004, to address the concerns. Smith, Van Tine, Johnson and Reidl attended the meeting. Reidl was astounded by the number of complaints and the amount of supervisory time and attention which was being devoted to her. At this meeting, Reidl decided to use a decision day to address the problem. In his view, certain employees believe their work performance cannot be questioned and must be confronted directly regarding its seriousness. He recommended this course and the Jail supervisors agreed. He has used the procedure on four prior occasions, one involving a non-represented employee.

On May 17, at the Pretrial Facility, Reidl, Smith and Van Tine met with Fleiss, Borden, Tump and the Grievant. Reidl did virtually all of the talking, using a written statement. He offered the Grievant two options. One was to submit a letter of resignation and receive a severance package. The other was to remain a County employee and submit to a Corrective Action Plan. He detailed the problems that Jail supervisors had highlighted to him, and indicated that a split in the employment relationship could be desirable, analogous to "an amicable divorce." After explaining the options, the management representatives left the room, allowing the Union team to caucus. When the parties reconvened, Reidl indicated the Grievant could take the next twenty-four hours to consider her options.

On May 18, the same parties reconvened at the same site, and the Grievant noted that she did not wish to resign. Reidl responded that she would have to respond favorably to a Corrective Action Plan, and he documented the point by giving her a memo authored by Johnson, dated May 18, which states:

> This memo is intended to express my disappointment with your work performance in several areas.
>
> 1. You are discourteous, disrespectful and unprofessional in your treatment of co-workers, and your supervisors.
> 2. You have consistently challenged the authority of your supervisors.
> 3. You have made statements which misrepresent the Sheriff's Department and which could harm the effectiveness of the department's mission.
> 4. You have unnecessarily restricted the work you can perform and extended A&S leaves beyond reasonable limits.
>
> The behaviors identified above have disrupted the daily operations and reputation of the department.
>
> To achieve the appropriate level of conduct, you are directed to meet the following job performance standards immediately.
>
> 1. You will perform the essential functions of your job with respect for the department and with a professional attitude toward your supervisors and co-workers.

2. You will comply with supervisory directives. Any disagreement with said directives will be discussed with your supervisor in a professional manner, with your full attention.
3. Documenting on county time or on county premises occurrences perceived by you to be notable will cease immediately. Any logbook or other documents authored by you unrelated to the essential functions of your job will be confiscated.

Strict adherence to these corrective actions is essential if you are to continue as an employee of the Kenosha county Sheriff's Department. Failure to comply with this plan will result in discipline. You progress will be assessed at a meeting with me and Lt. Van Tine on or about June 30, 2004.

When Reidl learned that the Grievant had recorded the meeting, he could not believe it. He found the act a "huge act of insubordination." Reidl and Smith decided to put the Grievant on administrative leave, pending a pre-discipline meeting. Reidl ultimately recommended her termination. He did not believe progressive discipline applied to willful actions such as hers.

Hunter Johnson

Johnson has served the County for eight years, four as a corporal and four as a Sergeant filling the position of First Shift Commander. He became the Grievant's direct supervisor in August of 2001. He supervises between twenty and thirty employees.

Johnson noted that he played no role in the approval of FMLA requests, and would only advise employees which form to file and where to file it. He would supply forms on occasion and would on occasion advise employees when a request had been acted on by the Personnel Services Department. The Grievant became increasingly frustrated and argumentative with him after her January, 2003 request for FMLA leave. He acknowledged he reported his concerns regarding her requests through the chain of command, including e-mails noting her failure to document the reason for the request and his "prudent" action advising the chain of command of his observations of her conduct at the pool in August of 2003. He watched her swim and bear weight on her wrists.

The Grievant's complaints mounted with time. She spent so much time documenting her conversations with him and other supervisors that second shift officers complained that she was so busy with her lawsuit that she could not perform her job. One officer was "visibly upset" that the Grievant failed to log an inmate's seizure disorder, reported the matter to her corporal and stated employees had to speak up because the Grievant was not performing her job, unless her job was to sue the County.

In early May of 2004, the Grievant complained that Johnson yelled at her, when he had raised his voice to carry above the din of a hectic area she was observing. She was hypersensitive regarding him, questioning his every move. In his view, she consistently undermined his authority, and sought to have other employees "buy in" to her efforts.

Those efforts peaked in May of 2004. In e-mails to Van Tine dated May 12, Johnson detailed complaints from Correctional Officers that "it is common knowledge among staff that every time (the Grievant) leaves the Corporals office after talking with a supervisor she documents the entire conversation." One officer "stated that (the Grievant) has a large binder full of County schedules, excerpts from conversations, copies of forms, etc. that comes to work with her every day." In another e-mail, Johnson detailed the Grievant's questioning of his referral of Officer Post to light duty on May 6 due to "a significant burn to his right hand while off duty." Post returned to work on May 7 after having seen a burn specialist. Johnson "advised him that I needed paperwork from his treating physician returning him to work and an A/S form completed that outlined his restrictions." He noted that Post approached him on May 8 to advise him "he was 'totally fed up' with (the Grievant) dragging him and other officers into 'whatever she is trying to pull with the department.'" Johnson advised Van Tine during this period that the Grievant was undermining his ability to command.

Johnson was moving into a new home on May 17 and did not attend the decision day meeting. He thought the Grievant had once been a good employee, but had lost the ability to function in a para-military environment. He acknowledged he did not formally discipline her. Rather, he periodically counseled her on her deteriorating attitude in an attempt to "salvage" her. He explained the difficulty in dealing with her by noting that when they disagreed over her break times in the Control Room, she would not leave the room to discuss the matter in a corporal's office. Rather, she preferred to have other employees listen, and constantly qualified what he said, writing it down and alleging a lawsuit was pending and her lawyer would be involved.

John Levonowich

Levonowich has served as a corporal for eight and one-half years, and as a Detentions Corporal on the first shift for one year. He has served as the Grievant's immediate supervisor for the bulk of her tenure. He had some contact with the Grievant regarding her FMLA requests, but that contact was limited to providing her forms. On balance, he viewed the Grievant as an average employee early in her tenure, but he noted a pronounced change in her attitude over the past two years of her employment. From his perspective, she became increasingly convinced that the County was out to get her. He was present when Johnson informed her that the County could not continue to afford her limited duty if she required a break or work schedule unique to her. She would not discuss the matter in a corporal's office and insisted on discussing the matter in the presence of other employees. She would not accept any explanation from Johnson, and continued to qualify his statements and put words in his mouth. He ultimately had to tell her he could offer her no further explanation than he had.

Levonowich was present when the Grievant's locker was searched on May 18. She was cooperative throughout the search.

Oscar Salas

Salas has served as a Detentions Sergeant since 2001, and as a County employee since 1986. He supervised the Grievant for one hour of her shift. He oversaw the search of her purse and locker on May 18. Kaiser, Levonowich, the Grievant, Shane Gerber and Salas were present for the searches. Salas explained in his office that the County was looking for a tape recorder, the possession of which would violate County Jail policy. The Grievant cooperated in the search of her purse and locker.

Salas was unaware of the problems that prompted the decision day, with one exception. In March of 2004, the Grievant had a dispute with Mark Ohmstead, another Correctional Officer. Ohmstead wanted the Grievant to turn over to him at the close of her shift a radio with a shoulder-mounted microphone. The Grievant was unwilling to do so, and wanted to turn the unit into a supervisor rather than to Ohmstead. An argument ensued, which became sufficiently heated that the Grievant complained to Salas that Ohmstead had communicated with her in a threatening manner. Salas called both employees to his office. The Grievant demanded an apology that Ohmstead refused to give. Salas ultimately summoned Johnson and Wally Kozel, a Union representative, to his office to attempt to resolve the matter. Ultimately, Salas and Johnson left the office to permit the employees to try to work out their differences with Kozel's assistance, "as this was not a discipline matter." No resolution proved possible, and the Grievant demanded "written reports from all parties involved." No such reports were given her.

Salas viewed the Grievant as a "very good" employee. He believed, however, that the bottom fell out of her performance toward the end of her tenure.

Larry Apker

Apker has served as Captain of Operations since January of 2005, and served as Jail Administrator from 2001 through 2004. His present position demands his oversight of both County Jail facilities. In October of 2000, Apker served as a Lieutenant assigned to the Jail. He was familiar with the Grievant.

In all of his administrative positions, Apker was aware of FMLA and A&S requests. He played no role in the approval of either, since that authority was exercised by the Personnel Services Department. He was, however, aware of the scheduling problems posed by the Grievant's leave requests. The County originally tried to keep leave requests to four hour increments, since they could be covered by calling in the Correctional Officer from the adjacent shift. Because the Grievant filled a position that demanded staffing and because the County tries to staff at or close to minimum staffing levels, it was extremely difficult to fill vacancies mid-shift.

In his view, the Grievant's work performance was acceptable early in her tenure, but deteriorated over time. He had to formally counsel her on one occasion. He thought he had a

good working relationship with her, but during the processing of her FMLA requests he heard from other officers that she was not comfortable talking to him and he stopped speaking directly with her. In his view, the problems involving the Grievant became unmanageable in the Spring of 2004. He expressed this view in an e-mail to Personnel Services Division staff dated April 29, 2004, which states:

> . . . this looks just like what we thought would happen with (the Grievant). Now she thinks that she can just call in an FMLA day whenever she wants to. We all understand that causal days can be called in on short notice but when we open up FMLA days for short notice, we are putting ourselves in a difficult situation to run this place. Then she says today that she MAY need to be off today at 2pm for a meeting. This is getting ridiculous with her. We get nothing in writing from her for this stuff and we are left in a trick bag. She is taking advantage of this to the full extent and it is getting ridiculous. It is difficult enough to work around her time off when she gives us advance notice but now she just drops this stuff on supervision and thinks we have to deal with it without explanation due to HIPAA.
>
> We need some HELP here!

He was present for the May 17 meeting, but not on May 18. He played no role in the decision to discharge the Grievant.

Edward Van Tine

Van Tine is the Jail Administrator of the County's downtown Kenosha facility. He thought he had enjoyed "pretty good rapport" with the Grievant. He spoke with her in late 2002 about her experience with FMLA requests and tried to communicate to her that the Sheriff's Department was not used to the requests and was getting used to handling them. He perceived that she could not get past a perception that County administration was out to get her. He and Johnson also spoke with her in late 2003 or early 2004 regarding her difficulties with break scheduling in the Control Room. She was visibly upset regarding the County's unwillingness to alter her shifts. Johnson and Van Tine tried to assure her the County was trying to run its Jail rather than trying to hurt her. They succeeded only in getting her to repeatedly assert that her legal rights were being violated. At that point, they counseled her that she should sue the County if necessary, but needed to pay attention to her attitude about work. In his view, she started off as an acceptable employee, but manifested a continuing deterioration that made her unacceptable as an employee. He never disciplined her, but tried to counsel her on several occasions to "salvage" her employment. His recommendation to Smith noted that when the Grievant approached him regarding the Ohmstead incident, she demanded an apology and "was getting almost out of control with her demands and aggressive attitude." Van Tine investigated the complaint and determined the matter warranted no further action. When she demanded a meeting involving the employees, he agreed, and she "then demanded to be paid for her attendance".

Van Tine heard numerous employee complaints about her behavior, and felt she was effectively isolating herself from the vast majority of her co-workers.

He participated in the May 13 meeting. He was unaware, until that meeting, of how much time his fellow supervisors had to devote to the Grievant. Reidl recommended a decision day. Van Tine was unfamiliar with it, but approved of its use with the Grievant. Van Tine was aware, during this meeting, that Tump had requested a meeting regarding the Grievant and Johnson. From his perspective, the two concerns fell together and would be addressed at the May 17 meeting. He did not set an agenda for the meeting or advise the Union that it could expect it to involve a decision day. From his perspective, the basic purpose of the meeting was to address the two essential points constituting a decision day. He attended the May 17 and May 18 meetings, but did not actively participate in the discussions. He could understand how the Union could perceive the meeting as a "set-up", but the County had no agenda other than the communication of a decision day.

Kaiser discovered the tape, and gave it to Van Tine, who listened to it, recognizing that it was of the May 18 meeting. Van Tine reported the matter to Smith. The two of them determined she should be sent home and they decided a search was necessary to determine if the tape included inmate discussions or posed other security issues. In his view, the possession of the tape, coupled with her attempt to conceal it, fundamentally breached the trust necessary to operate effectively within the department. Employees within the Sheriff's Department are excellent, and must be held to a higher standard than other County employees to assure the security of Jail facilities. Her conduct made her unacceptable as an employee.

James Kaiser

Kaiser has served as a County employee for nineteen years. He is a corporal, and served as one of the Grievant's supervisors. He handled some of the Grievants requests for FMLA leave, but played no role in approving them.

He documented his concerns regarding the Grievant's conduct in an e-mail to his supervisors dated May 9, 2004, which states:

> On the morning of 05/08/04 in the tab-room at shift change I heard (the Grievant) stating to C/O's Maddern, Bell, Moore, Frizzle, Pallamolla and Shimkus how Sgt. Johnson had yelled at her on 05/07/04. She was going on and on about how she got yelled at by Sgt. Johnson in the conference area.
>
> At 1015 hours (she) came into the Cpl.s office and spoke with Sgt. Johnson (which has been a daily occurrence . . .), she has been questioning every thing that happens in the jail and wanting to know why we do things the way we do.
>
> (The Grievant) stated she had heard Sgt. Johnson felt she was upset with him because of the way he had yelled at her the day before. She stated she was not

> upset but was (wondering) why he had yelled at her. Sgt. Johnson explained to her he did not yell at her but was informing her that an inmate was following him from the conference room into the library room and called her to take the inmate back to the holding cell. (The Grievant) stated . . . he did yell at her and several other C/Os had heard him. Sgt Johnson stated again he was just getting her attention about the inmate following him into the library room. She stated **no** he had yelled at her.
>
> I then questioned (the Grievant) as to why she was telling the other C/Os at shift change the Sgt. Johnson had yelled at her in the conference room on 04/08/04 and that I felt she was attempting to under mind his authority by doing this. She stated she was not trying to undermine Sgt. Johnsons authority and if he felt that way she was sorry and that was not her intent. Sgt. Johnson informed (the Grievant) that she was not to go around making statements or complaints about her supervisors to other C/O's while she was at work and she stated she would not do that anymore while at work.
>
> (The Grievant) then went back to the issue of why Sgt. Johnson had yelled at her and Sgt. Johnson stated we are not going there again, that we had just discussed that issue. (The Grievant) then left the office.
>
> It should be noted that (the Grievant) complains and questions the decisions Sgt. Johnson makes on a daily basis.

Neither he nor Johnson raised their voices to the Grievant at any point during this meeting.

At about 1:20 p.m. on May 18, while reviewing the Correctional Officer Zone Logs, Kaiser entered through the closed door of the Zone 3 office to obtain the Zone 3 logbook. He found the Grievant sitting at a desk, holding what Kaiser suspected was a small recording device. She cupped her hands over the device when he entered, and when he asked what she had, responded, "Oh, nothing." Kaiser directed her to give the device to him. She reluctantly did so, asking that he give her the tape. He declined to, and informed her that he would take the recorder and tape to Van Tine. She followed him, asking again for the tape. He again declined and said Van Tine would decide what to do with the tape.

Roughly one hour later, Salas directed Kaiser to search the Grievant's belongings. Kaiser, Salas, Levonowich, Gerber and the Grievant were present for the search, which started in Salas' office, where the Grievant voluntarily emptied her purse. She produced a receipt for the tape recorder, said she had purchased it on May 17 and that "there is nothing on it." After this, the same personnel searched her locker. No other recorders or tapes were found.

Kaiser viewed the Grievant as a good worker who went bad. He thought he had good rapport with her, but by the Spring of 2004 felt that rapport was deteriorating. Correctional Officers told him to be careful around her, since she seemed to be taking notes on her

supervisors. He tried to communicate with her to understand why she had such a bad attitude toward Johnson. He informed her that Johnson never spoke ill of her. She responded that he would not assist her with FMLA requests and was out to get her, adding that she would have to file a law suit.

Kaiser acknowledged that Correctional Officers take notes to make logbook entries, and that there is no work rule prohibiting the taking of notes. He did not know if she was documenting workplace issues for a law suit, but did not think so.

Charles Smith

Smith has been Chief Deputy for twelve years. He reviews all Correctional Officer discipline prior to its consideration by the Personnel Services Department. The Personnel Services Department is the sole authority for approving FMLA requests. He participated in the May 13 meeting, and agreed to proceed with a decision day, which seemed an innovative approach. In his view, the meeting disclosed a fundamental issue regarding trust, which is crucial in a secure setting.

Smith attended the May 17 and 18 meetings. Reidl did the bulk of the talking, and highlighted the concerns regarding her constant note-taking and disruptive behavior. Smith did speak at the May 18 meeting, to stress that the decision day was not discipline and not necessarily a way to discharge her. The Grievant attempted to speak up during the May 18 meeting, but the Union counseled her to remain silent. After the May 18 meeting, Smith thought the Grievant understood that the meeting afforded her a "new lease on life" if she corrected her behavior. Later that day he learned that she possessed a tape recorder and had recorded the meeting. He was part of the decision to search her belongings, and to place her on administrative leave. He conducted the pre-disciplinary hearing and decided to accept Van Tine's recommendation.

Shane Gerber

Gerber serves as an Admissions Release Specialist at the County's Pretrial Facility. He is a Steward for Local 990J. On May 18, Salas summoned him for the search of the Grievant's belongings. Salas did not give a reason for the search. The Grievant voluntarily emptied her purse and opened her locker. She did not raise her voice or act improperly in any way throughout the process. Gerber did not question the reason for the search, since the possession and personal use of a tape recorder would be a "blatant violation of a County work rule." This cannot, however, obscure that the policy violations cited by the County to discharge the Grievant include policies that apply to Deputies rather than to Correctional Officers. County assertions that the Grievant was expected to know those policies ignore that the policy book is several inches thick, and is not totally understood by any employee.

From his perspective, the Grievant suffered from a system that permits supervisors to treat employees differently, based on the supervisors' like or dislike of an employee. Gerber,

for example, can actively question the actions of supervisors who like him. This was not true for the Grievant with Johnson. From Gerber's perspective, Johnson's management style "lacks friendship". Several employees have complained to Gerber concerning Johnson's supervision. Until the meeting of May 17, he had never heard of a decision day. He viewed the Grievant as a "very good" employee. He knew she felt that supervisors were "gunning" for her and he felt that she was right.

Kathleen Fleiss

Fleiss was aware since December of 2003 that the Grievant was having difficulty with her supervisors, particularly Johnson. By April of 2004, Tump was regularly contacting her regarding her growing fear for the Grievant's job security. Tump was convinced Fleiss had to become involved in the growing difficulty between Johnson and the Grievant. Fleiss agreed, and Tump contacted Johnson to set up a meeting. The Union approached the May 17 meeting as an opportunity to conciliate the differences between the Grievant and Johnson.

Fleiss came downtown at roughly 6:50 a.m. on May 17, but reported to the Safety Building rather than the Pretrial Building. No one at the Safety Building knew where the meeting was to take place. By the time she approached the Pretrial Building, it was three to four minutes past the scheduled start of the meeting. As she approached the building, she ran into Borden, Tump and the Grievant, who were rushing from the building. They met, and the Union officials stated "they're firing her, they're firing her, my God". Fleiss could not believe her ears, headed into the facility with her team, and approached Reidl.

Fleiss confronted Reidl alone, while her team caucused. She asked him "what the heck is going on." She did not think Reidl expected her, and did not think Reidl knew that the Union had requested the meeting to mediate the situation between Johnson and the Grievant. Reidl explained his view that the meeting was for a decision day. Fleiss had never heard those terms used, but was familiar with a similar "stunt" where Reidl confronted another employee with a "wake-up call" to either leave voluntarily or adhere to a Corrective Action Plan. In that case, the stunt worked, and the employee rehabilitated their relationship with the County. Here, however, she questioned Reidl's approach, since the meeting was in response to a Union initiated attempt to reconcile two personalities. She voiced her displeasure that Reidl communicated that the decision could involve an "amicable divorce", which she felt gave it improperly disciplinary overtones. Beyond that, she voiced her view that her representatives felt that they had been ambushed, to set the Grievant up for discharge.

Fleiss left the meeting to attempt to calm down the Grievant and her representatives. She informed them they should come back the next day and that it should be possible to work through the situation to a satisfactory conclusion. She did not sense that the County's intent was to discipline the Grievant. She admitted the "stunt" had gotten the Grievant's attention "but good". From her perspective, Reidl had scared the wits out of her.

On May 18, the Grievant expressed her desire to stay, and Reidl set out her Corrective Action Plan, reflected in the Johnson memo. Fleiss thought the plan was basic and innocuous. During the meeting, the Union caucused with the Grievant. Fleiss spoke with the Grievant and was "pretty blunt." The Grievant was very upset and angry. Fleiss tried to communicate that the Grievant had a problem with her supervisors and needed to be careful addressing it. The parties met again jointly, with Reidl ending the meeting by stressing the need for the Grievant to follow the rules. Fleiss was not aware that the Grievant had recorded the meeting.

Fleiss left the meeting with mixed emotions. She was concerned about Jail administration, particularly Johnson. She felt she was being increasingly involved in disputes within the Jail because stewards felt intimidated. In her view, Johnson generated the bulk of those problems.

Fleiss was "surprised" at the Grievant's use of a tape recorder, but on reflection felt she understood it. She was ashamed that the meeting of May 17 would appear to be a set-up, and ashamed that the Grievant could feel she had been ambushed. Fleiss understood that the May 17 meeting was not disciplinary, but even if "a stretch", was only an attempt to communicate to the Grievant that she could be fired if her course of conduct did not change. The Grievant, Borden and Tump, however, perceived the meeting as a prelude to a discharge. This aspect of the meeting could lead the Grievant to act as she did. Had anyone else taped the meeting, Fleiss would have strongly objected. In her view, the Grievant went through Hell on May 17, and Fleiss regretted not seeking a day off for her before discussing the matter covered on May 18.

The Grievant

The Grievant noted that her problems at work started with Johnson's becoming her supervisor. Before that, she did not have problems at work. She never felt comfortable with Johnson, unlike any of her other supervisors. She approached Kaiser to try to resolve her problems with Johnson. Kaiser advised her to speak to Johnson directly and privately. She did so, to try to resolve "this uneasy feeling" between them. Johnson simply responded that he did not feel there was a problem. She approached him twice on the point, and got a similar response each time.

She informed Personnel Services that she did not want to route her September, 2002 FMLA claim through Johnson, and was advised to give it to Van Tine. However, he was not in and she presented the initial claim request to Johnson. Johnson informed her that her daughter's condition was not an acceptable diagnosis for FMLA purposes, alleging he had prior experience with FMLA claims and that his opinion reflected fact. Johnson did not, however, decline her claim and Personnel Services staff approved it, but only for counseling sessions. The Grievant disagreed with this, but found herself caught between Personnel Services Department staff and Johnson to communicate her disagreement. She did not sense either department understood FMLA requests, and had to supply a copy of federal regulations to the Personnel Services Department.

She again filed a FMLA request for her daughter's ear surgery in January of 2003. County administrators informed her that the original request, completed by a Psychiatrist, would not be acceptable for the surgery. This confirmed her view that County administrators offered only resistance to her attempt to care for her child. She reluctantly submitted another packet. Her frustration led her to file the DOL complaint.

The County's attempt to put her on full duty in the Control Room reflected a fundamental misunderstanding on their part. Her doctor required her to get a ten-minute break every hour of a shift. To assign her to full duty, the County relied on the opinion of its own doctor, but never supplied a copy of that opinion to her. Her insistence on her physician-ordered breaks was reasonable and their refusal to accommodate her is not supportable. She did discuss this matter with Johnson. She viewed the discussions as something other than an argument. She acknowledged Johnson made several tries to change the monitor in the Control Room. None were successful in reducing the flickering that bothered her eyes.

The Ohmstead incident occurred on her first day on the floor after A&S leave related to her eye strain. The County had, while she was on limited duty and on A&S leave, purchased a new radio system with a shoulder microphone. At the close of her shift, she did not know what to do with the equipment since no relief person had appeared. She asked Salas what to do, and he told her where to turn it in. Ohmstead caught her on her way and demanded the radio. She declined, but Ohmstead would not let her explain. The Grievant went to Kaiser, who told her to give it to Ohmstead. She did so. She complained to Kaiser the following day that she should not have been yelled at. She ultimately had a meeting with Salas, Johnson and Ohmstead. Ohmstead denied the entire incident, and Salas and Johnson told her she had perceived it wrong. She then took the matter to Van Tine, who was no more helpful.

She denied challenging Johnson regarding his assignment of Post to the Control Room due to a burn. She had no problem with it, but could not understand why she could not get doctor-ordered breaks in the Control Room, while Post could get assigned to it without a physician's order.

She acknowledged she took notes on the job, using a green folder for the purpose. She denied ever telling anyone the notes were anything other than her documentation of job-related material. She openly spoke of her lawsuit, but the notes had nothing to do with it.

During the meeting of May 17, she tried to explain that she enjoyed her job. She had no idea why she would be asked to quit. She approached the meeting in the belief that her Union representatives were going to meet with her and Johnson to address their differences. To her surprise, Reidl was there with virtually the entire Jail chain of command except Johnson. Tump was no less surprised, and the meeting never addressed any of their concerns.

She purchased a tape recorder on May 17 to tape the May 18 meeting. The Grievant denied any knowledge that possession of a tape recorder violated County rules.

Reidl opened the May 18 meeting by stating he "would do all the talking and you will do all the listening." The Grievant was confused and angry and thought that if she recorded the meeting she "could reflect back" and recall what had happened. The tape was a means for her to understand what was happening. She never tried to hide the recorder from Kaiser. She simply put her hand over it while she reached for her purse for some gum. When Kaiser asked what it was, she responded "Oh, nothing just something of mine." Kaiser then asked why she was taping in the Jail, and she responded that there was nothing on the tape from the Jail. The earlier meeting had not, she asserted, taken place in the Jail. Kaiser demanded the recorder, and she complied, seeking only to keep the tape since it was her personal property. This took place in the Zone 3 officer station, which is in the Jail, but is not accessible to inmates, although they can pass the room in an adjacent hallway. She closed the door to keep inmates from observing her logging the events of her shift.

The Grievant stated she did not understand why the County thought her job performance had deteriorated. She enjoys her work, has had satisfactory or better evaluations and has no disciplinary history. She filed for and received Unemployment Compensation benefits.

The Grievant noted that the County attempted to deny some of her FMLA claims, but ultimately granted all of them. This required constant pushing on her part and some of the denials took considerable effort to change. Three of the days she requested were originally granted as casual days, and then denied. The Sheriff ultimately restored them when the Personnel Services Department granted them as FMLA leave. At one point, County Personnel Services Department staff attempted to work directly with her care providers to alter the scheduling of her appointments.

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

The County's Position

At the start of the hearing, the County contended that it accommodated the Grievant's FMLA and sick leave issues. At some point, however, the Grievant's attitude changed and grew hostile. She began to take notes on every conversation, threatened lawsuits and became a disruptive force in the workplace. County supervision met to consider their options and decided to implement a Corrective Action Plan designed to make her choose to modify her behavior or to leave County employment. At roughly the same time, the Union sought to arrange a meeting between the Grievant and her immediate supervisor. Both sets of concerns came to a head at the same meeting. During this meeting, the Grievant indicated her desire to stay with the County and to amend her behavior. Without notice to Union or County representatives, the Grievant tape recorded the meeting. When found with the tape, the Grievant tried to lie to cover up her actions. Based on this series of flagrant violations, discharge was warranted.

At the close of the hearing, the County asserted that the discharge cannot be faulted due to the lack of progressive discipline. The Grievant had a long-standing history of counseling with supervisors and had ample warning that her conduct was undermining the workplace. There were misunderstandings between the Grievant and the County regarding the accommodation of her leave requests, but the County ultimately granted each request. Her conduct shows a consistent pattern manifesting that she would perceive any denial of a request as an expression of personal hostility and that she would work to undermine the supervisor she perceived as hostile. Her conduct was singular in the Jail. Ultimately, Jail supervision discovered she was dominating their time with an unrelenting series of disputes on points no other employee had concerns with. Reidl's solution was the decision day. The Grievant's response to the decision day was her sole responsibility. She had been warned that the divisive impact of her conduct was undermining Jail morale. Her recording the May 18 discussions is inexplicable and inexcusable. She knew the recording violated County policy and lied to cover the violation up. Against this background, she left the County no choice but discharge.

The Union's Position

At the start of the hearing, the Union argued that discharge is the ultimate penalty and that the Grievant did nothing to warrant it. She had to fight the County for her statutory benefits. Her note-taking is neither wrong nor ill-advised. The decision day meeting was less a counseling session than an ambush. The Union believed the meeting had been set to reconcile conflict between the Grievant and her immediate supervisor, only to discover the County viewed it as the start of an "amicable divorce." That the Grievant did not trust her supervisors is not traceable to her conduct but to theirs. She has no disciplinary history, received no progressive discipline and cannot be considered to have been discharged for cause.

At the close of the hearing, the Union argued that the case is not an extremely challenging one. At root, the discharge turns on the May 17 meeting, which from the Union's perspective was more of an ambush than a meeting. The Grievant approached the meeting looking for help in dealing with a supervisor, and instead received an ultimatum. The ultimatum was not warranted. The County had frustrated her in the attempt to use statutory and contractual leave. The County may have demonstrated a violation of Item 8, but the violation does not warrant discharge. The other policies cited by the County apply to Deputies and not to Jailers. In this case, the County failed the employee and itself. It must invest a considerable amount to train a Jailer, and in this case it has improperly discharged a good employee, with no history of discipline. Because it lacked cause for its action, the County should be ordered to reinstate the Grievant and to make her whole.

DISCUSSION

The stipulated issue is whether the County had just cause for the discharge. In my view, unless the parties stipulate otherwise, two elements define just cause. The first is that the County must establish conduct by the Grievant in which it has a disciplinary interest. The second is that the County must establish that the discipline imposed reasonably reflects its disciplinary interest.

Here, the County maintains Report #139, adopted by the Personnel Committee in January of 1982 to establish "disciplinary policy and procedure for use by Kenosha County." Report #139 confirms the two-element analysis stated above, in these terms:

> It is important in invoking progressive discipline, up to and including dismissal, that each time disciplinary action is contemplated, it must be definitely established that an infraction did occur which is organizationally inappropriate. . . .
>
> After the infraction has been established, then an assessment of the type of corrective action required is made, taking into account the previous disciplinary actions that have been taken. . . .

Report #139 further underscores that whether or not the Grievant's conduct on May 18 warrants immediate termination is the fundamental issue.

Report #139 "sets in place a 'progressive' disciplinary system consisting of a verbal warning, written warning, suspension, and finally, if necessary dismissal." However, it states this exception to the normal sequence:

> e. Discharge:
>
> Discharge may be recommended for . . . first offenses of a serious nature. Examples of some of the more serious infractions (but not limited to those listed):
>
> - being under the influence of alcohol or drugs on the job
> - possession of an unauthorized weapon on the premises
> - willful destruction of County property
> - insubordination
> - fighting on the job
> - theft of County property or funds
> - abandonment of position . . .

The Sheriff's Department maintains, in its Policy & Procedures Manual, Policy Number 165, which defines "Insubordination" at Section II, A, thus:

> Insubordination, which includes but is not limited to: disrespect, disobedience, failure or refusal to follow written or oral instructions of supervisory authority, or to carry out work assignments.

With this as background, it is necessary to apply the two elements of just cause to the evidence.

Van Tine's recommendation cites several bases for the termination, but an examination of the record establishes that the first element rests on Item 8. The citation of Sheriff's Department Policies and Procedures affords little, if any, support beyond Item 8. Policy 125.3 governs the use of tape recorders. Its application to the Grievant is, at best, debatable. Its stated "Intent" is "for the use of portable tape recorders by Department personnel." This reference is broad enough to cover Correctional Officers. However, the "Priority" section refers to officers "reporting suspect information" and to "in-custody arrest". These references point to sworn officers, and the policy affirms this by noting "DISTRIBUTION" to "All Sworn Personnel".

Policy 165 notes "DISTRIBUTION" to "All Department Personnel". Van Tine's recommendation and Smith's opinion do not, however, cite the "Insubordination" section of Policy 165. More specific examination of the sections cited by Van Tine affords little assistance in the evaluation of the first element. Section II, C, applies to "unauthorized personal business", but there is no way to consider the Grievant's use of a tape recorder "unauthorized personal business" without reference to Item 8. The decision day was departmental business, potentially involving the termination of a departmental employee. It was "unauthorized personal business" only to the extent tape recorder usage was improper, and that impropriety turns on Item 8. The citation of Section III, A does not isolate conduct the Grievant committed which is "organizationally inappropriate", and is thus relevant, at most, to the second element of the cause analysis. Citation of Section III, C has no demonstrated applicability to establishing the "organizationally inappropriate" element of the Grievant's conduct. The Grievant may have misrepresented her conduct to Kaiser and other supervisors, but this is not necessarily "false testimony" nor withholding of information "from any official report". Citation of Section V, A has no meaning outside of Item 8. That the Grievant's conduct aggravated supervisors affords no insight into what aspect of her conduct may have been unethical under Policy 151.1.

Van Tine's summary of a course of conduct dating from September 8, 2002 affords little guidance in the application of the first element of the cause analysis. It appears Sheriff's Department supervisors were concerned with conduct arguably constituting abuse of FMLA and A&S leave, as well as Worker's Compensation. However, the Department's choice to informally counsel the Grievant or to not voice their concerns at the time rather than use progressive discipline makes it impossible, after the fact, to define that conduct as "organizationally inappropriate" within the first element of the cause analysis. In sum, the sole citation in Van Tine's recommendation with demonstrated applicability to the first element of the cause analysis is Item 8.

The weakness of the County's establishment of improper conduct outside of Item 8 cannot, however, obscure the strength of the evidence on that issue. The County established that it issued the Grievant a copy of the Uniform Work Rules containing Item 8, and that she received them.

Beyond this, the evidence establishes that Item 8 is a generally understood component of the workplace, particularly in the secured settings of the Sheriff's Department. Unlike the Sheriff's Department Policy Manual, the Uniform Work Rules publication is a small, easily read document. More significantly, each testifying witness from the Sheriff's Department with the sole exception of the Grievant, noted that possession and use of a tape recorder in the secured setting was a blatant violation of work rules.

The Grievant's testimony is unpersuasive and affords no basis to conclude she was unaware that she was committing an improper act on May 18. At best, her testimony that she was unaware of Item 8 leaves her behavior inexplicable. The May 17 and May 18 sessions dealt in significant part with supervisory concerns that she used work time to document personal disagreements with supervisors. During the May 18 session, County supervisory personnel specifically directed her to stop the practice. If she was unaware of Item 8, her failure to tell anyone that she was taping is inexplicable.

More to the point, her testimony belies the assertion that she was unaware of the substance of Item 8. Ignoring the credibility of Kaiser's testimony, her testimony is inconsistent with her own conduct. If she was unaware of Item 8, it is difficult to understand her explanation why she had closed the door to the Zone 3 office. The assertion that she wanted to keep inmates from observing her entries to the logbook ignores that she was not using the logbook when Kaiser entered. That point is not at issue, under her testimony or Kaiser's. Beyond this, she testified that she covered the recorder while she got some gum from her purse. This testimony, difficult enough to understand on its own, affords no insight into why she tried to keep the tape from Kaiser. Nor does it afford any insight into why she described the recorder to Kaiser as "Oh nothing, just something of mine", or why she told him there was nothing on the tape. All of this behavior is explicable if she knew of Item 8 and of the significance of possessing a tape recorder in a secure setting.

It must be noted that Kaiser's testimony on these points was credible. The Grievant's, at the time of hearing was not, and on review is not. She was not led through her testimony, yet her account is less a statement of her perceptions than an attempt to respond to Kaiser. The assertion that she thought it was permissible to tape in the meeting area in the Pretrial Facility as opposed to the Jail is a stretch, particularly if she was unaware of the existence of Item 8. Her assertion that she bought and used the tape recorder to assist her in understanding the events of the day has some plausibility regarding her response to the County's May 17 presentation. It has no plausibility regarding her hiding the tape from her Union representatives who were no less upset with the events of May 17.

In sum, the County has established the Grievant's violation of Item 8 and that this is organizationally inappropriate conduct in which the County has a disciplinary interest.

The second element is whether the County's disciplinary interest in that conduct warrants summary discharge rather than progressive discipline. As the Union points out, this is the fundamental issue of the grievance.

The Union also persuasively points out that much of the County's case affords little help in addressing this issue. Johnson, Kaiser, Van Tine and Apker each noted that they had counseled the Grievant in an attempt to "salvage" her employment outside of the disciplinary process. This choice, however, does little to assist the County's case. If the Grievant abused FMLA leave, A&S or Worker's Compensation benefits, it is not clear why her conduct warranted a salvage effort rather than discipline. From the arbitration perspective, if that conduct was not worthy of lower levels of discipline at the time, it is unclear why it is worthy of discharge well after the fact.

Similar considerations apply to the assertion that the Grievant was a disruptive force, undermining the authority of supervisors. The evidence shows she faced significant medical issues within her family and that she faced resistance in securing contractually permitted leave. Beyond this, the record will support Union concerns regarding the conduct of Sheriff's Department supervision. Their testimony was notably similar. References to the Grievant's conduct in a "paramilitary" setting were common to each witness. Similarly, the assertion that the Grievant was once a satisfactory employee who "went bad" was common to the supervisors, even Salas, who had little contact with her and was unaware, until May of 2004, of the problems others were having with her. The testimony manifests common themes reflecting common discussions and, arguably a "groupthink" evaluation of her conduct.

The most significant aspect of this is that it is difficult to assess whether the Grievant could correct her behavior through progressive discipline. Sheriff's Department supervision, by not using it, played a role in creating an environment that increasingly became all-or-nothing, and the events of May 17 and 18 pose an all-or-nothing issue regarding the application of the second element.

Viewed as a whole, the evidence supports the County's evaluation that the Grievant's conduct was sufficiently egregious to warrant summary discharge. The Union's evaluation of the "ambush" of May 17 has considerable persuasive force. Fleiss' evaluation that the Grievant's conduct was provoked and that it might have been ameliorated had the Union been advised of the purpose of the meeting or had there been a "cooling off" period prior to the May 18 meeting has considerable persuasive force.

The persuasive force of the Union's evaluation, however, breaks down when applied to the evidence, particularly the Grievant's conduct and testimony. Fleiss' evaluation of the Grievant's provocation ignores that she specifically advised the Grievant on May 17 that it was necessary to calm down and that the County's show of force did not amount to a firing. She counseled that the Grievant should return on May 18, and that there was reason to believe the matter could be brought to a satisfactory resolution. The Grievant returned, with a recorder, chose to tape the meeting and chose not to tell anyone she was doing so. An examination of the evidence establishes the accuracy of Fleiss' evaluation that the County did not take any disciplinary action on May 18, but essentially told the Grievant to "go forth and sin no more." The significance of this action was that but for the presence of the tape recorder, the meeting of May 18 ended with the Grievant having the full progressive discipline system available to her. Johnson's memo does not constitute even the first step of progressive discipline.

Whatever weakness there may be in the County's failure to use progressive discipline prior to May 18 cannot obscure that but for the presence of the tape recorder, the Grievant was returned to work with the opportunity to address her workplace issues with the benefit of progressive discipline. Even if her supervisors' actions make it difficult to assess whether she would respond to progressive discipline, her own conduct makes the evaluation impossible.

Her failure to advise her own representatives of the tape recorder is, standing alone, unprovoked. Those representatives offered her sound advice and her failure to advise them of the recorder is indefensible. More to the point, supervisory provocation cannot account for her conduct following the meeting. As noted above, the Grievant reviewed the tape on work time, and when discovered doing so, tried to hide what she was doing. Also as noted above, her testimony to account for her actions is not credible. The assertion that she was unaware her conduct violated Item 8 is unpersuasive. If considered persuasive, her deliberate attempt to hide the recorder and the tape is inexplicable. This was not provoked, and fatally undermines the Union's attempt to make County actions the source of the impropriety in her conduct.

Beyond this, the Grievant's conduct on May 18 affirms County assertions that related conduct was long-standing and improper. The Union forcefully argues the Grievant had to fight to secure contractually permissible leave. This can be granted, but cannot obscure that the resistance she complained of was, in significant part, of her own making. Her September, 2002 FMLA claim form afforded little detail beyond a desire to use FMLA at her discretion, whenever possible. County difficulty in responding reflected unfamiliarity with the process as well as the administrative difficulty of accommodating it. This may not justify each County response, but is not significant provocation. In her January 2003 request, the Grievant initially refused to supply any detail, and the evidence indicates that she asserted that the leave was hers to take without regard to County approval or disapproval. Her testimony at hearing supports the County's position more than the Union's assertion that she was fighting a hostile adversary. Asked to identify what, if any, leave request the County had turned down, the Grievant responded with lengthy and impenetrable responses. The paper record of the requests affords little reason to believe she faced the resistance her responses point to.

Similar considerations extend to events past January of 2003. If there is a common theme, it is that the Grievant reacted with persistent hostility to any attempt to oppose her requests. Kaiser's testimony and May 9, 2004 e-mail concerning the events of May 8 reflect this. Significantly, the Grievant's testimony at hearing parallels this account. When asked to describe her interaction with Johnson regarding breaks, the Grievant responded with little detail other than that "discussions" were involved. When asked if the discussions were more accurately characterized as "arguments", she responded "define argument". Her testimony is more readily explained as that of a puncher rather than a counter-puncher.

In sum, allegations of supervisory provocation should not be overstated. Gerber and Fleiss, in my view, correctly perceived that the supervisors acted in concert. This falls far short, however, of establishing that those supervisors were "gunning" for her. Rather, the evidence affirms that those supervisors tried in good faith to "salvage" her employment, and

that much of the "in concert" nature of their conduct must be accounted for with recourse to the Grievant's behavior. Smith, Reidl and Fleiss explained to the Grievant that the May 18 meeting was not discipline in the progressive discipline sense, but a "wake-up" call.

In sum, the County's conclusion that the Grievant's conduct on May 18 was tantamount to insubordination, and that her work history did nothing to mitigate its seriousness is supported by the evidence. It cannot be considered unreasonable, and the County has thus met the second element of the cause analysis. The Grievant's use of a tape recorder and attempt to hide it constitute a violation of Item 8, which is sufficiently egregious to warrant the sanction of discharge without benefit of progressive discipline.

It should be stressed that the conclusions stated above turn solely on the contract. The statutory propriety of her FMLA requests or her Worker's Compensation claim plays no role in those conclusions.

AWARD

The Grievant was discharged for just cause.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 8th day of November, 2005.

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

RBM/gjc
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