BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MARATHON COUNTY

and

OFFICE AND TECHNICAL EMPLOYEES UNION
AFSCME LOCAL 2492-E

Case 320
No. 65832
MA-13335

(Hansen Grievance)

Appearances:

Mr. John Spiegelhoff, AFSCME Council 40, AFL-CIO, 1105 East Ninth Street, Merrill, Wisconsin 54452, appearing on behalf of the Union.

Ruder Ware, L.L.S.C., by **Attorney Dean R. Dietrich** and **Attorney Christopher M. Toner**, 500 Third Street, P.O. Box 8050, Wausau, Wisconsin 54402-8050, on behalf of Marathon County.

ARBITRATION AWARD

The Office and Technical Employees Union AFSCME Local 2492-E, hereinafter referred to as the Union, and Marathon County, hereinafter referred to as the Employer or the County, are parties to a collective bargaining agreement (Agreement) which provides for final and binding arbitration of certain disputes, which Agreement was in full force and effect at all times mentioned herein. The parties asked the Wisconsin Employment Relations Commission to assign an arbitrator to hear and resolve the Union's grievance regarding the termination of Shawn Hansen, hereinafter referred to as the Grievant or Ms. Hansen. The undersigned was appointed as the Arbitrator and held a hearing into the matter in Wausau, Wisconsin, on August 1, 2006, at which time the parties were given the opportunity to present evidence and arguments. The hearing was not transcribed. The parties filed post-hearing briefs by August 31, 2006 at which time the record was closed. Based upon the evidence and the arguments of the parties, I issue the following decision and Award.

ISSUES

The parties did not stipulate to a statement of the issues. The union frames the issue as follows:

> Did the employer violate the Collective Bargaining Agreement when it terminated the employment of Shawn Hansen on February 17, 2006?
>
> If so, what is the appropriate remedy?

The County frames the issue as follows:

> Was Hansen terminated for just cause pursuant to the terms of the Fraternization Policy and the County's Core Values?

I adopt the issue as stated by the Union.

RELEVANT CONTRACTUAL PROVISIONS

Article 2 - Management Rights

The County possesses the sole right to operate the departments of the county (sic) and all management rights repose in it, but such rights must be exercised consistently with the other provisions of the contract. These rights include, but are not limited to, the following:

A. To direct all operation of the respective departments;

B. To establish reasonable work rules;

. . .

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

. . .

F. To maintain efficiency of department operations entrusted to it;

. . .

OTHER RELEVANT PROVISIONS (IN PERTINENT PART)

FRATERNIZATION POLICY
EFFECTIVE DATE: 12/01/94
(COUNTY EXHIBIT 4)

I. PURPOSE

A. In order to administer effective correctional programs, and to provide for the safety and security of inmates, employees, and the general public, the Marathon County Sheriff's Department has developed a policy on the relationships between employees of the Marathon County Jail and inmates under the department's control. This policy is designed to eliminate any potential conflict of interest or impairment of the supervision and rehabilitation provided by department employees for inmates in correctional settings.

II. POLICY

A. Employees of the Marathon County Jail:

1. may not have a relationship with an inmate in the custody of the Marathon County Jail or under the supervision or custody of the Department of Corrections or the Department of Health and Social Services, Division of Youth Services;

2. may be granted an exception to (1) by following the procedures outlined in the section titled "Exception Procedure" below.

33201.00 Definitions

A. Employee is any person employed by the Marathon County Jail. This definition does not include inmate employees.

B. Relationship includes an employee:

1. living in the same household with an inmate;

2. working for an inmate;

3. employing an inmate with or without remuneration;

4. extending, promising, or offering any special consideration or treatment to an inmate;

5. having personal contacts (other than those required by the employee's job duties) such as communicating through verbal or written means or being in a social or physical relationship with an inmate;

6. providing or receiving goods and/or services with or without remuneration for or to inmates;

. . .

33203.00 Exception Procedure

A. Each employee is responsible:

1. for informing his/her immediate supervisor in writing of any relationship he/she is considering or is presently involved in which has the potential of violating this policy;

2. for reporting unanticipated non-employer-directed contacts with inmates;

3. to see that any of the contacts in (b) are brief and businesslike in nature;

4. for requesting any exceptions to this policy through the jail administrator.

33204.00 Clarification of Policy

A. This policy applies only to employees of the Marathon County Jail as defined above . . .

B. Relationships that are prohibited under this policy include:

. . .

5. having personal contacts or being in a social or physical relationship with an inmate. This does not prohibit personal contacts required to perform the employee's job. It also does not prohibit incidental personal contcts in group activities such as church-related activities, social-club-related activities, and sporting events. It does include personal contacts that are usually one-to-one, including dating, knowingly forming close friendships, corresponding without an exception granted, and visiting that is not job related or without an exception granted.

6. providing or receiving goods and/or services for or to inmates. This provision is not meant to prohibit casual relationships such as buying gas at a gas station where a work release inmate or parolee pumps the gas for your car. It does cover situations such as accepting or giving gifts.

. . .

PERSONNEL POLICY
EFFECTIVE DATE: 8/1/89
(COUNTY EXHIBIT 5)

I. PURPOSE

The purpose of this order is to set forth employee conduct guidelines and standards as they apply to all members of the Sheriff's Department.

. . .

33102.00 Personal Conduct

A. No employee will knowingly alter, falsify, or misrepresent the true facts on any Facility document.

. . .

331009.00 Misrepresentation

. . .

B. Employees shall not falsify reports or documents knowingly, or allow inaccurate or incorrect material to be accepted as valid.

33110.00 Conduct of Detention Personnel

Purpose

1. The purpose of this section is to set forth code of conduct for Facility personnel.

2. The code represents the philosophy of the Facility and the intended attitude of the staff.

33111.00 Code of Conduct

. . .

B. Maintain self-control and self-discipline at all times.

. . .

MARATHON COUNTY'S CORE VALUES
(COUNTY EXHIBIT 10)

These core values are principles for which we stand and provide us direction on how people are to conduct themselves as representatives of Marathon County:

SERVICE

is responsively delivering on our commitments to all of our internal and external customers.

INTEGRITY

is honesty, openness, and demonstrating mutual respect and trust in others.

QUALITY

is providing public services that are reflective of "best practices" in the field.

. . .

BACKGROUND

The facts leading to the termination of the Grievant are not in material dispute. For roughly seven years prior to February 17, 2006, the date of Ms. Hansen's termination, she was employed by the County as a correctional officer at the Marathon County Jail, a division of the Marathon County Sheriff's Department. Her work record during this period of employment, with the exception of the events leading to her termination was, by all accounts, good to above average and her discipline history was essentially clean. She had, over the years, received two positive citations for her work. The Grievant was designated as a Field Training Officer (FTO) and charged with the responsibility of helping to train new correctional officers and, among other things, reviewing the various policies and procedures applicable to them in their new position.

Sometime around May, 2005, Ms. Hansen came into contact with an inmate named Marvin Matney. At that time Ms. Hansen was involved in divorce proceedings and engaged the inmate in numerous personal conversations about her divorce. During the inmate's period of incarceration she wrote numerous (five or six) personal letters to him counseling him to "stay on the right side of the law" and to "keep up the good work." In order to pass these letters through the security system to the inmate without detection the Grievant falsified her name and allowed another correctional officer to do the same on her behalf. At this time she was a "Huber" officer responsible for, among other things, logging incoming and outgoing inmate mail.

As a "Huber" inmate, Matney had work privileges. Ms Hansen was familiar with the owners of a business called Countryside Fencing who, she knew, was looking for laborers. The Grievant arranged for an interview between the inmate and Countryside Fencing and, following that interview, drove him back to jail. In July, 2005, Matney was released from jail and placed on probation. He obtained her phone number from the records of Countryside Fencing and called her asking for her help in moving furniture to his new apartment. She agreed. While in transit with the furniture they stopped at the home of Nicole Osswald, another correctional officer, and made plans to go grocery shopping, have a cook out and watch a movie at Ms. Hansen's home later that day. Enroute to Ms. Hansen's home they dropped off the furniture at Matney's apartment. They had the cook out and then watched a movie. During the movie Ms. Hansen noted that Osswald and Matney were physically intimate and "kind of messing around." At some point during the day the Grievant gave Matney a microwave oven. Following these events Osswald took Matney home. Matney called Ms. Hansen on successive occasions asking for other favors and she declined.

At some time following the cook out/movie event she determined that Matney was on probation and she discussed this with Osswald. She was concerned that their involvement with Matney might result in discipline if it were discovered. She failed to notify her employer because she just "wanted it to go away."

On January 30, 2006 Captain Scott Sleeter of the Everest Metro Police Department met with the Grievant. He had been requested to conduct an investigation into inappropriate conduct between Matney and other correctional officers and Hansen's name had come up during that investigation. During the interview she was honest with the Captain and freely discussed her involvement with Matney. The Captain's final report was submitted to Robert Dickman, the Jail Administrator who then drafted a summary of her involvement with Matney and outlined various violations of the Fraternization Policy and the Personnel Policy (County Exhibit 8) as follows: Hansen wrote letters to Matney during his incarceration, used a fictitious name on the envelopes and entered the erroneous information into the Marathon County corrections management system (Clues) in Matney's official record; assisted Matney in moving furniture; went grocery shopping, cooked a meal and watched a rented video with him; gave him a microwave; provided transportation from a job interview to the jail; and may have manipulated Matney's Huber release schedule. (County Exhibit 8 is not dated, however Dickman testified that he drafted this document on or about February 13 thru 16, 2006.)

Dickman weighed the aforesaid conduct and concluded that Ms. Hansen presented a risk to the facility and that due to her blatant and knowing violations of the policies referenced above she could not be trusted to supervise prisoners in the future. Her employment was terminated on February 17, 2006 and this grievance followed in a timely manner.

THE PARTIES' POSITIONS

The Union

The Union questions the timeliness of the Grievant's termination due to the fact that the results of Captain Sleeter's investigation relative to Ms. Hansen were revealed to the Jail Administrator, Bob Dickman, as early as January 7, 2006. If Dickman thought her actions were as serious as he makes them out to be now then why, asks the Union, did he not at least suspend her without pay pending the conclusion of the investigation? The County allowed her to work for almost six weeks following Dickman's knowledge of her activities with Matney and allowed her to continue her work as a Huber officer, thus leading the Union to observe that "she did not seem to be such a grave threat to the jail" as the County now contends.

The County has treated former correctional officers guilty of similar offenses differently, and less harshly, than it treated Ms. Hansen. Richard Haberman violated the Fraternization Policy by having lunch with an inmate while she (the inmate) was on probation. He was also a Field Training Officer. He was only suspended without pay for one day. Matt Lonsdorf violated the Fraternization Policy by transporting an inmate to the jail after she finished working and, at the time of the transport, he had been drinking alcohol. He had previous disciplinary proceedings in his file and was only ordered to submit to an alcohol assessment and issued a four-day suspension which was later reduced to a two-day suspension without pay. On the other hand, some correctional officers have been guilty of far more egregious violations than the Grievant, and yet the Grievant was given the same harsh punishment as they were - termination. Cindy Guralski, for example, had two separate violations involving inmate Matney. She was observed holding hands with him outside the jail and lied about her involvement with him to her superiors which earned her an oral reprimand. The second violation of the fraternization policy also concerned inmate Matney. She transported him to work and to her home many times; she had him over to her home many times; she maintained a joint bank account with him and she wrote notes to him. For this second violation she was terminated. Ms Hansen, on the other hand, only engaged in the following:

1. one continuous incident (transported his furniture, went grocery shopping, cooked a meal and watched a movie) with Matney in July, 2005;

2. transported him to the jail following a job interview.

She cut off contact with him after she found out he was on probation and did not lie to Captain Sleeter during the interview. In fact, she gave him additional information to aid him in his investigation. She also attempted to speak with Jail Administrator Dickman about her involvement with Matney prior to the interview with Cpt. Sleeter and she sought self-help in the form of counseling.

Guralski, who was also terminated, had different circumstances than did Ms. Hansen: Guralski, a) had prior discipline for the same policy violation, b) lied in an investigation, and c) had numerous contacts with Matney on separate occasions. In comparison to the actions of the Grievant, the Union argues that she should have been given a lessor form of discipline. The Union says that the Haberman and Lonsdorff cases are similar to Ms. Hansen's and, given the use of alcohol and previous disciplines (in the Lonsdorff case) may be even worse. Thus it has proven "both sides of the (disparate treatment) equation; employees have been treated differently in the form of discipline and circumstances surrounding the offense are substantively similar in nature."

The Union argues that "The Grievant has less culpability to others involved with inmate Matney in July 2005" and consequently the Employer acted unreasonably by applying the same punishment as was received by Osswald, Guralski and Julie Hatleback-Wolfe. It failed to account for the different degrees of fault and simply applied a "one shoe fits all" mentality. While the Union agrees that consistency in the enforcement of discipline is preferred, it notes that mitigating circumstances should be taken into account. Ms. Hansen, it says, has such mitigating circumstances. Hatelback-Wolfe, for example, made over 40 phone calls to Matney following his release from jail; had him over to her house to play cards; gave him household items; transported him in his efforts to obtain a cell phone; acted as a reference on his apartment lease application; gave him money; allowed him to assemble a bench at her home; and was dishonest with Cpt. Sleeter during the internal investigation. It is apparent from comparing the activities of Ms. Hansen to those of the other three officers that Ms. Hansen's involvement was less intense.

The Grievant should receive some consideration due to the fact that she sought self-help in the form of counseling. She did this on a voluntary basis and her counselor, Patricia Gillette, testified that Ms. Hansen has made significant progress during her treatment in the areas of self esteem, divorce issues and social interaction. She felt that Ms. Hansen was now more emotionally stable. The Grievant continues to see Ms. Gillette.

Ms. Hansen's previous job performance, commendations and minor discipline history should also be considered by the Arbitrator as mitigating circumstances. Dickman referred to her as a good employee (pre-Matney); her performance evaluations were above average; and she had received two commendations in the past. Her only previous discipline was an oral reprimand for tardiness due to oversleeping. Since that discipline has no bearing on the present case, it should not be considered by the Arbitrator.

Finally, the Union points out that the Sheriff's Department is now putting employees "on notice" of the Fraternization Policy. According to Barbara Ermeling, Chair of the Employee Resources Committee, fraternization had become "problematic" in the recent past thus necessitating the need to revisit the policy and clarify, with examples, the types of behavior which are acceptable. (Union Exhibit 10) From this, the Union concludes that there must be some confusion about the interpretation of the policy. As confirmation of this conclusion, Lynn Muerette, Union Vice President, testified that there is "widespread confusion" of the policies because of the number of them - 121 in total. There are a lot of policies to read, let alone understand, and even though the Grievant was a Field training Officer charged with the duty to train new officers about the existence of "policies" and their meaning, she should not be held to a higher standard of knowledge about one policy, the Fraternization Policy, than officer Haberman, also an FTO, who violated it and received only a suspension.

The District

The County had just cause to terminate Ms. Hansen. She admitted to having a personal relationship with the inmate before and after his release on probation. She admitted falsifying the names on letters she sent to Matney in order to conceal her involvement with him; she admitted giving him a ride from a job interview to the jail; helping him move furniture; going grocery shopping with him; cooking him a meal; watching a video with him and giving him a microwave oven. All of these things violate the well defined Fraternization and Personnel Policies and clearly constitute just cause to terminate. In support of this position the County cites BARDEN V. UW-SYSTEM, 82-2237-PC (6/9/83) which defines the just cause standard thus:

> . . .one appropriate question is whether some deficiency has been demonstrated which can reasonably be said to have a tendency to impair his performance of the duties of his position or the efficiency of the group with which he works.

Daugherty's seven test questions for determination of just cause (ENTERPRISE WIRE, 46 LA 359 (Daugherty, 3/28/66)) are all met in this case supporting a finding of termination for just cause. The test questions are:

1. Was the employee given advance warning of the possible or probable disciplinary consequences of his conduct?

2. Was the rule or order reasonably related to the efficient and safe operation of the business?

3. Before administering discipline, did the employer make an effort to discover whether the employee did, in fact, violate a rule or order of management?

4. Was the employer's investigation conducted fairly and objectively?

5. Did the investigation produce substantial evidence or proof that the employee was guilty as charged?

6. Had the company applied its rules, orders, and penalties without discrimination?

7. Was the degree of discipline administered in the particular case reasonably related to:

   a) the seriousness of the employee's proven offense; and
   b) the employee's record of company service.

Application of the "seven tests" to the circumstances in the present case justifies the finding of just cause. First, she was given advance warning of the fact that violation of the Fraternization Policy would/could have resulted in discipline. She was a FTO who trained new officers about the policy and she falsified the names on her letters to Matney to avoid detection and discipline. She and Osswald actually discussed their continued contact with Matney and the fact that it could lead to discipline.

Secondly, the Fraternization Policy is reasonably related to the safe operation of the jail. Citing KEENEY V. HEATH, 57 F. 3D 579 (7th Cir. 1995), which held that "just the suspicion of favored treatment could create serious problems of morale." Id. At 581, and "judges should be cautious about disparaging disciplinary and security concerns expressed by the correctional authorities." Id. supports this presumption. The County also cites PARADINOVICH V. MILWAUKEE COUNTY, 189 Wis. 2D 184, 525 N.W. 2D 325 (Ct. App. 1994) in which a female deputy sheriff who had fallen in love with an inmate and agreed to aid in his escape resulted in the shooting of another deputy sheriff. Dickman testified to a number of scenarios which caused serious problems as a result of personal relationships between inmates and corrections officers. Inmates may attempt to take advantage of the relationship to their benefit. The reason for the policy is that officers may loose control of the inmate if they give a benefit to one and not to others because the officer is placed in a compromising position: acquiesce to the inmates demands or face discipline.

The third and fourth “Daugherty” test questions must be answered in the affirmative. The County conducted a fair and impartial investigation and Ms. Hansen was given a pre-determination hearing to present any mitigating factors before formal discipline was imposed.

Once just cause is shown the focus shifts to the question of whether the discipline imposed was excessive. Factors such as the weight or enormity of the offense including the degree to which it did or reasonably could be said to have impaired the employer's operation; the employee's prior work record; the discipline imposed by the employer in other (like) cases;

and the number of incidents cited as the basis for the discipline all should be considered in the analysis.

Considering the number and nature of the incidents in this case, termination is the appropriate remedy. Many things distinguish the Lonsdorf and Habermann cases from this case. In those cases there was no personal relationship and no attempt to hide the facts. The Lonsdorf and Habermann cases were isolated incidents whereas Ms. Hansen's were several and lasted over a period of time. On the other hand, Ms Hansen's actions were similar to those of Guralski and Hattlebeck-Wolfe. All three provided transportation; all three allowed him into their homes; all three gave him items of value; all three wrote him letters while he was in jail and all three were terminated from employment. In addition, Ms. Hansen discussed her divorce with him. The Hansen contact with an inmate is far more significant than the Lonsdorf or Habermann contact. But the most troubling of her actions, according to the County, is that she intentionally falsified the name on the letters she sent to Matney to conceal her contact with him. This act alone, considering the trust, control and responsibility a corrections officer is required to undertake on a daily basis, is cause for termination.

Arbitrators have sustained termination without progressive discipline for the falsification of employer documents and records. See CITY OF BARRON (ELECTRIC UTILITY) MA-10438 (Burns, 5/6/99) and SAWYER COUNTY, MA-7729 (Jones, 1993)

The County concludes that she had a personal relationship with an inmate and that she admitted to falsifying County documents to conceal this relationship. She also admitted the other acts referenced above. Hence, the County had just cause to terminate her employment and the level of discipline she received was appropriate considering the past application of the Fraternization Policy and the number and nature of the violations.

The Union's Reply

Given the mitigating circumstances existing in this case the penalty meted out by the County is too excessive. Regarding the issue surrounding the job interview with Countryside Fencing, the only contribution by Ms. Hansen was to offer to give Matney a reference, an act that Administrator Dickman testified was not in violation of the Fraternization Policy. She did not find him a job. As for the ride back to jail following the job interview, Ms. Hansen was in an "unusual situation" because the business owner asked her to take him back and she did not want to appear "cold-hearted." Her intent was not to form a relationship with him but only to satisfy his "compelling need" to get back to the jail.

Because the jail was not actually compromised because of Ms. Hansen's actions, which were benign and not romantic, it is "pure speculation" to assert, as the County does, that it could have been compromised. The County's examples of the dire consequences which could occur in these situations are overblown.

Ms. Hansen "got caught up in a situation that spiraled." Her actions were not blatant and she testified truthfully when under oath and had no "hidden agendas." There is no evidence that she gave preferential treatment to Matney or that she had a romantic or sexual relationship with him. Further, she terminated her contact with him once she determined that he was on probation. Unlike Hatelback-Wolfe and Osswald, whose actions were blatant and deserving of termination, Hansen's were not.

The facts in this case fail to satisfy Dougherty's sixth test of just cause because the County did not apply its rules, orders and penalties without discrimination. For instance, the Union gave examples of other employees who received lessor penalties for violations of the Fraternization Policy. Further, it is unfair to compare the Guralski case with Ms. Hansen's case. Guralski had prior discipline, did not learn from it, and violated the Fraternization Policy again for which she was justifiably terminated. Consequently, "Rule #6" (Dougherty) has not been met and so there is no just cause to terminate her.

Whereas Osswald had an ongoing relationship with Matney (some evidence suggests that Matney was living with her at some point and had mail sent to her home) and Hatelback-Wolfe had given him a significant amount of money ($1500.00), Hansen only gave him a microwave oven as a good will gesture, not as an exchange for special favors "or the like." Hence, there is no meaningful comparison between the two and the Union urges the Arbitrator to look to the intent of the Grievant (presumably meaning the lack of the intent on the part of the Grievant to give Matney significant gifts in exchange for special favors).

Relative to the issue of Ms. Hansen's falsification of County documents the Union says that the CITY OF BARRON case, wherein the employee was terminated for falsification of documents, should not apply to this case because that employee had prior discipline whereas Hansen did not. In addition, the employee in the BARRON case intentionally falsified an accident report to cover up his misconduct. Because Ms. Hansen had no intent to harm the security of the jail in passing letters to Matney, and her actions were naive and because she now realizes she was wrong, BARRON does not apply. Neither does the case of SAWYER COUNTY where the employee falsified several documents relating to his mother's septic system in an attempt to "end round" a filing process. In that case there were a multitude of violations and in Hansen's case just one. Besides, Hansen's letters were meant to be words of encouragement to Matney, not an attempt to develop a relationship. The County did not have copies of any letters she wrote to Matney and, if Ms. Hansen had not told the County about them, it would never have known of them. "She came clean to her employer when she did not have to."

The Arbitrator has the authority to modify a penalty imposed by the employer if he/she finds it to be too harsh under the circumstances. Because of the disparate treatment of those who have violated the Fraternization Policy, the lessened culpability of the Grievant compared to other employees involved with Matney and the fact that her personal life adversely affected her decision making process at the time, the Arbitrator should consider these things and find that discharge was too severe.

The District's Reply

Because Ms. Hansen violated the Fraternization Policy and the Core Values of the County, she was terminated for just cause. The Union does not contest the fact that the Grievant violated these policies. It only contests the extent of the punishment.

The number and nature of Ms. Hansen's violations of the Fraternization Policy alone supports termination and, hence, the only issue the Arbitrator should consider is whether "the punishment fits the crime." Although the Union asks that the Arbitrator compare other instances of violations of the policy, such a comparison does not address the real issue relating to the punishment here, that being the fact that any violation of the policy is a serious matter supportive of termination in and of itself.

The Lonsdorf and Haberman policy violations are not equivalent to the Hansen case. In both of those cases there was only one violation and only one inappropriate contact with an inmate whereas in Hansen's case there were many, including her attempts to conceal her actions from her supervisors. She knew her actions were wrong and by falsifying County documents has demonstrated that she cannot be trusted. The fact that she was forthright with the investigator (Sleeter) should not result in mitigation of her actions. She clearly understood that lying to the investigator could result in further discipline and potential criminal penalty.

The Union says the Fraternization Policy is vague but the testimony in that regard is unpersuasive. Ms. Hansen was a Field Training Officer and testified that she instructed new officers on the policies and procedures of the County. The Union's arguments are inconsistent and should be ignored. Nor is the policy inflexible because it provides that officers may receive prior permission from a supervisor to have contact with inmates.

Finally, the County argues that it is not responsible for Ms. Hansen's repeated policy violations due to the asserted (and contested) fact that the policy is vague. The evidence clearly demonstrates that she knew of the policy and she knew that a violation of that policy could result in discipline.

DISCUSSION

Just Cause:

The Collective Bargaining Agreement requires just cause to support the discipline of employees. While the Union, in it's initial brief, seems to agree that just cause exists with regard to the Hansen discharge, it does assert in it's reply that the Employer failed to satisfy the sixth test of Daugherty's just cause analysis, which the Employer referred to in its initial brief. (The Union apparently agrees that the remaining six “Daugherty” questions may be answered in the affirmative.) Because of this failure, and because Daugherty tells us that a negative answer to any of the seven question results in the absence of just cause, the Union suggests that just cause does not exist in this case. Arbitrator Daugherty's seven tests have

been criticized as being too mechanistic. They are objective and require a "yes" or "no" response to each question and Daugherty himself admitted that "The answer to the questions in any particular case are to be found in the evidence presented to the arbitrator at the hearing thereon. Frequently, of course, the facts are such that the guide lines (sic) cannot be applied with slide rule precision." GRIEF BROS. COOPERAGE CORP., 42 LA 555, 557 (Daugherty, 1964) The County suggests that the Commission (WERC) "traditionally applies Professor Daugherty's seven test questions" for determining just cause. I believe that is overstated. I apply them only in those instances where the parties jointly request that the seven tests be used to make the just cause determination. Absent a contractual explanation of the just cause standards to be applied, as here, I apply a two pronged test: first, has the employer proven misconduct and, second, if so, was the discipline imposed proper under the circumstances and the contract. As it happens, in this case the use of the two pronged test and the application of Daugherty's seven test questions yield the same result.

Since the parties here have both referred to Daugherty's seven tests, at least in minimal part, I address the Union's assertion that test question six should be answered in the negative thus defeating the existence of just cause. The sixth question asks whether the employer has applied its rules, orders and penalties evenhandedly and without discrimination to all employees. The Union compares the actions of Ms. Hansen to those of Richard Haberman and Matthew Lonsdorf and concludes that the County is guilty of "disparate treatment" because Haberman and Lonsdorf were given short suspensions whereas Hansen was discharged and the actions of all three are essentially synonymous. The Union characterizes the actions of Haberman, Lonsdorf and Hansen as follows:

Haberman's Actions:

1. Violated the Fraternization policy by meeting an inmate for lunch outside the confines of the jail while the inmate was on probation.

2. Was, and still is, a Field Training Officer.

3. Received a one-day suspension.

Lonsdorf's Actions:

1. Violated the Fraternization Policy by transporting an exotic dander to the jail after her work.

2. Had been drinking alcohol prior to the transport.

3. Had two prior disciplines.

4. Ordered to submit to alcohol assessment and given a four-day suspension. (The suspension was subsequently reduced to two days.)

Hansen's Actions:

1. Violated the Fraternization Policy by:

    a. Engaging in one continuous incident with inmate Matney occurring on one day. (As opposed to separate days.)

    b. Transporting the inmate to jail following his job interview.

    c. Transporting the inmate's furniture, went grocery shopping, cooked out, and watched a movie together, all in the same day.

    d. Cut off contact with the inmate after she determined he was on probation.

    e. Did not lie to Captain Sleeter (investigating officer) about her involvement.

    f. Offered Cpt. Sleeter and other superiors additional information voluntarily.

    g. Attempted to speak with Jail Administrator Dickman about her involvement before the interview with Cpt. Sleeter.

    h. Sought self-help (counseling) before, during and after the incident with inmate Matney.

2. Terminated from employment.

The Union's characterization of Hansen's actions are incomplete and misleading. It fails to include at least three things which Ms. Hansen admits to doing: 1. she acted as a reference for the inmate to a prospective employer, 2. she gave the inmate a microwave oven, and, most importantly, 3. she, on four or five different occasions, falsified County documents by using fake names on letters she sent to the inmate during his incarceration in an attempt to conceal her relationship with him. Additionally, she failed to report these things to her supervisor as required and did not attempt to speak with Jail Administrator Dickman until just before her interview with Cpt. Sleeter, at which time it was too late.

The actions of Ms. Hansen are more akin to those of Julie Hatelback-Wolfe who:

1. Made over 40 phone contacts with Matney following his release from jail.

2. Had him over to her home after his release to play cards.

3. Provided him with household items upon his release.

4. Transported him to obtain a cell phone.

5. Was a reference for Matney on an apartment lease.

6. Gave him $1500 while he was incarcerated.

7. Allowed him to assemble a bench at her home.

8. Was dishonest with Cpt. Sleeter during the internal investigation.

9. Terminated from employment.

The Union does not suggest that the termination of Julie Hatelback-Wolfe exceeded the bounds of reasonable discipline given her circumstances. The only real difference between the two cases is that Hatelback-Wolfe gave the inmate money whereas Hansen did not. I do not equate the cases of Haberman and Lonsdorf with that of Hansen in terms of making the determination as to whether there was disparate treatment or discrimination. I do equate Ms. Hansen's actions to those of Hatelback-Wolfe and find that with regard to those two cases the County is not guilty of discrimination and that its rules, orders and penalties were applied evenhandedly. Hence, I find that the answer to Daugherty's question six is "yes". This being the case, and the Union having agreed that the remaining six tests have been answered in the affirmative, I find that just cause did exist to form the basis for the discipline of Ms. Hansen.

Degree of Discipline:

A finding of just cause as a basis for discipline, in and of itself, does not address the question surrounding the extent to which discipline is imposed and does not answer the question of whether that discipline is too harsh. Said another way, "Does the punishment fit the crime.?" The Union is quite correct when it says that the Arbitrator should look at things like mitigating circumstances, intent and culpability when analyzing the extent of discipline. In cases where rule or policy violations form the basis for discipline I also look at the reasonableness of the rule/policy and whether the rule/policy is known and understood by the employee, or should be.

The Union does not argue that the Fraternization Policy, Personnel Policy or Core Values are unreasonable. It would be difficult to do so persuasively. The Union does question whether the Fraternization Policy was clearly understood by the Grievant. In support of this

proposition it directs my attention to Union Exhibit 10, a memorandum dated July 12, 2006 from Barbara Ermeling, the Chair of the Employee Resources Committee, to Bob Dickman, Jail Administrator entitled Jail Policies and Procedures. It says:

> On behalf of the Employee Resources Committee (ERC) of the Marathon County Board, I am writing to convey the committee's recommendations regarding certain policies and procedures which have become problematic the past few months as evidenced by four Corrections Officer grievances.
>
> We encourage you to revisit the fraternization policy and clarify, with examples, what types of behavior are inappropriate and what types of contact would be acceptable. You should consider enhancing employee training by strongly emphasizing the fraternization policy and the reasons for the policy.
>
> We recommend development of a clear policy regarding contraband investigations. This committee feels that no corrections officer should be conducting any investigations regarding jail contraband without supervisory approval.
>
> It should clearly state in jail policies that "any violations of the above policy may result in disciplinary action, up to and including termination of employment". Ensuring that employees sign off on policies received is good practice as well.
>
> Every single disciplinary warning should include the following statement: "Future job performance problems may result in further disciplinary action, up to and including termination of employment". You should contact the Employee Resources Director for counsel on disciplinary matters.
>
> I thank you for your attention to these matters. Please report back to this committee at our December 4, 2006 meeting. We are interested in hearing more about your policy assessment and/or modifications.
>
> If you desire any additional information, please don't hesitate to contact me.

This memorandum, says the Union, shows some confusion regarding the interpretation of the Fraternization Policy and also shows that the employees are now being placed on notice of it. The testimony of the Union Vice President, Lynn Muerette, supports this thesis. She referenced Union Exhibits 11 and 12 which contain lists of all of the policies in the County, some 121 of them, and discussed the fact that there was confusion about the Fraternization Policy among the employees. With all these policies to learn "how can it be conceivably possible for Shawn Hansen let alone any employee know all the policies?" (sic)

The answer to that question is simple: this case is not about whether Ms. Hansen knew and understood all of the policies in force. It is about whether she knew and understood the Fraternization Policy, the Personnel Policy and Marathon County's Core Values. And it is not about whether other employees knew and understood all 121 County policies. That issue is left to another day. For the purposes of this analysis, if Ms. Hansen knew of, and understood the policies and violated them, it makes little difference if every other County employee on the roster was unaware of them. The critical question is whether Ms. Hansen was knowledgeable about the policies, cognizant of the fact that she violated them, and was aware of the fact that her violations of them of could or would result in discipline. Based upon the record evidence in this case I can only conclude that she did. I do not find any of the policies in play here to be confusing or ambiguous. By her own admission she falsified the documentation surrounding her letters to the inmate because she knew it violated policy and knew discipline could result if she were caught. She needed to cover her tracts. She and Nicole Osswald discussed their involvement with inmate Matney and together they discussed the potential discipline which could result as a consequence. She failed to report this activity not because she thought it was sanctioned but because she "just wanted to erase it, but couldn't." She had a knot in her stomach which grew stronger with each breach of the rules. While she may have been genuinely unsure about the inmate's probationary status during some of the events with him, (and I give her the benefit of significant doubt in this regard) and thus unclear as to whether she was breaking the rules, she was not unsure about the fact that the majority of her actions were prohibited. Most importantly, she was not unsure that the falsification of the letters/County documents she sent to him in jail was wrong, and this action preceded everything else she did. She could have halted the process at that point, informed her supervisor of her violations, and taken her punishment, if any. She did not. She continued her relationship with the inmate and compounded the error over time.

From the above it should be obvious that the Arbitrator believes that Ms. Hansen had the intent to violate the Fraternization Policy, Personnel Policy and Marathon County's Core Values and is thus culpable or deserving of punishment. The remaining element for consideration in this analysis is mitigation. To be sure, Ms. Hansen is deserving of some recognition in terms of actions she took which, to some degree at least, mitigate the effects of her inappropriate relationship with inmate Matney. The question is whether the mitigating factors are significant enough to reduce her culpability to a level which would allow the undersigned to consider a reduction in the degree of the discipline assessed by the County. I find that they are not.

The Union urges the Arbitrator to favorably consider the fact that Ms. Hansen sought counseling because of some "personal issues" in her life, and I do. With the help of psychotherapist Patricia Gillette, called by the Union as a witness, she developed a treatment plan designed to raise her self esteem, improve social interaction and deal with issues surrounding her divorce. Ms. Gillette testified that Hansen made significant progress during this process and was now more emotionally stable. She felt that Ms Hansen is now less likely to repeat the same mistakes again. Interestingly, Ms. Gillette testified that she was not familiar with the events surrounding the Matney incidents leading me to conclude that Ms. Hansen and

Ms. Gillette did not specifically address those problems other than in the general sense of improving of Ms. Hansen's self esteem. While her self-growth is most commendable, Ms. Hansen's improvement in her self esteem and ability to socially interact do not ameliorate the very significant actions of falsifying County documents and lying to her Employer.

The jail administrator testified that Ms. Hansen had been a good employee. She consistently met or exceeded the standards required of her as evidenced by Union exhibits 1 - 5. She had received two commendations (Union 6 and 7). Ironically, one was an Honorable Mention she received for discovering a letter from an inmate which was subsequently used at trial. The only discipline she had received prior to the Matney episode was an oral reprimand for tardiness which was not considered by the County in its decision to discharge her.

By way of further mitigation the Union points to the fact that Ms. Hansen cut off contact with the inmate after she discovered he was on probation. I am not favorably impressed by this "mitigating" factor for two reasons. First, I question the proposition that she was not aware of his probationary status following his release; second, and more importantly, by the time the events during his probationary status occurred the damage had already been done. The activities she engaged in during his probationary status followed the more significant acts of falsification and lying. As for the Union's contention that Ms. Hansen should be given credit for her honesty during Captain Sleeter's internal investigation, I reject this argument entirely. Honesty between employees and employers is the norm, not the exception. Employers expect their employees to be honest with them and do not generally give out merit awards on the basis that the employee has never deceived them. It is certainly understandable that Ms. Hansen would wish to be honest during the internal investigation given the fact that to do otherwise would subject her to criminal penalty. In addition, the jig was up anyway and she would have been easily trapped if she had continued to lie. There was no percentage to be gained by furthering the deceit. The fact that she attempted to speak with Jail Administrator Dickman is likewise irrelevant. Her attempt to speak with him occurred on the very day of the internal investigation meeting with Cpt. Sleeter. By this time it was too late for her to undo the damage she had already done.

Falsifying documents and lying to one's employer, especially in a jail setting involving violations of the Fraternization Policy, constitutes a material breach of the employer/employee relationship. Such behavior frustrates the County's ability to safely carry out the mission of the jail and to protect its employees, inmates and public at large. When these legitimate business interests are compromised by employee misconduct serious consequences are sure to follow, including the most severe consequence of them all - discharge. Mitigating those consequences is difficult, at best, and Ms. Hansen has failed to do so here, her good work record, commendations and previous lack of discipline notwithstanding. She knew her actions were wrong and could result in serious discipline and yet she continued her actions over an extended period of time and tried to cover them up. Only when she knew she was caught did she come clean. The fact that she was a Field Training Officer, the fact that she was instrumental in arranging a job interview for the inmate and the fact that she just “happened” to be at the employer’s place of business during the inmate’s interview are all aggravating circumstances.

The County has more than a modicum of reason to fear that she will be untruthful in the future and to draw the conclusion that it is not willing to place its trust in her. The County's discharge of the Grievant was justified under the circumstances.

In light of the above, it is my

AWARD

The County did not violate the Collective Bargaining Agreement when it terminated the employment of Shawn Hansen on February 17, 2006.

The Grievance is dismissed in its entirety.

Dated at Wausau, Wisconsin, this 25th day of September, 2006.

Steve Morrison /s/
Steve Morrison, Arbitrator

SM/gjc
7044