BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MARATHON COUNTY OFFICE AND TECHNICAL EMPLOYEES' UNION, LOCAL 2492-E, AFSCME, AFL-CIO

and

MARATHON COUNTY

Case 321
No. 66001
MA-13400

(Brian Fendos Grievance)

Appearances:

Mr. John Spiegelhoff, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1105 E. 9th Street, Merrill, Wisconsin 54452, on behalf of the Union.

Ruder Ware, L.L.S.C.**, by Attorneys Dean R. Dietrich and Christopher M. Toner,** 550 Third Street, P.O. Box 8050, Wausau, Wisconsin 54402-8050, on behalf of the County.

ARBITRATION AWARD

Marathon County Office and Technical Employees' Union, Local 2492-E, AFSCME, AFL-CIO (herein the Union) and Marathon County (herein the County) are parties to a collective bargaining relationship. At the time of the grievance herein, the collective bargaining agreement between the parties covering the period from January 1, 2003 to December 31, 2005, had expired and the parties were in negotiations over a successor agreement. On June 22, 2006, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over the discharge of Brian Fendos (herein the Grievant). The undersigned was appointed to hear the dispute and a hearing was conducted on October 4, 2006. The proceedings were not transcribed. The parties filed initial briefs on October 30, 2006, and reply briefs on November 17, 2006, whereupon the record was closed.

ISSUES

The parties stipulated to a statement of the issue, as follows:

Did the Employer violate the collective bargaining agreement when it terminated Brian Fendos on April 5, 2006?

If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

Article 2 – Management Rights

The County possesses the sole right to operate the departments of the county 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 operations 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.

. . .

Any dispute with respect to the reasonableness of the application of said management rights with employees covered by this Agreement may be processed through the grievance and arbitration procedure contained herein; however, the pendency of any grievance or arbitration shall not interfere with the rights of the County to continue to exercise these management rights.

OTHER RELEVANT PROVISIONS

FRATERNIZATION POLICY

Date of Approval: 12/1/94 Effective Date: 12/1/94

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 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;

C. Inmate also includes spouses of inmates and individuals who live in the household or previous household of an inmate.

D. Immediate members of the employees family include:

1. the parents, stepparents, grandparents, foster parents, children, stepchildren, grandchildren, foster children, and siblings (and their spouses) of the employee or of the employee's spouse; the spouse; aunts and uncles of the employee or spouse; sons-in-law or daughters-in-law of the employee or spouse; or other relatives of the employee or spouse residing in the household of the employee.

33202.00 Application of Policy

A. This policy is applicable to all employees of the Marathon County Jail in relationship to all adult and juvenile offenders under the custody and supervision of the Marathon County Sheriff's Department, Department of Corrections and the Department of Health and Social Services, Division of Youth Services. This would include individuals on adult probation and parole, juvenile aftercare, or adults and juveniles committed to state correctional institutions, including the Wisconsin Resource Center. This policy also applies to relationships between Marathon County Jail employees and the spouse of an inmate or an individual who lives in the household or former household of an inmate. This policy does not apply to inmates not currently in custody of the Marathon County Jail or supervision of the Department of Corrections or the Department of Health and Social Services, Department of Youth Services. This policy also does not apply to relationships between Marathon County Jail employees and immediate members of the employee's family who are inmates in the custody or supervision of the Marathon County Jail, Department of Corrections, or Department of Health and Social Services, Division of Youth Services.

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.

B. Relationships that are prohibited under this policy include:

1. living in the same household with an inmate. It does not include living in the same apartment building or complex, but in separate apartments. It also does not include living in the same duplex, but in separate units.

2. working for an inmate. The employer/employee relationship required in such a relationship can cause a conflict of interest for the employee. It also violates the ethical standard of not receiving anything of value from an inmate.

3. employing an inmate. This would not prohibit approved work-release programs where agency funds are used to pay the wages.

4. extending, promising or offering special consideration or treatment to an inmate such as giving preference outside of normal work practices. Examples are granting a furlough to an inmate who does not meet the furlough requirements, or granting work release to an inmate who does not meet the requirements for work release.

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 contacts 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 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.

C. Nothing in this policy shall prohibit an employee from having contact with an inmate who is a member of the employee's immediate family. Employees are prohibited from providing special favors or services for any inmate, including family members.

BACKGROUND

Brian Fendos, the Grievant herein, was employed by the Marathon County Sheriff's Department for over six years as a Corrections Officer in the county jail and was a member of the bargaining unit represented by Local 2492-E, AFSCME. During that period of time, Fendos rose to the position of Jail Training Officer, which designated him as one of the employees responsible for training new Corrections Officers in their duties and in the policies and procedures of the Department. He also acquired a reputation as having investigative skills, and as being able to discover illegal activity occurring within the jail. He received one performance review while employed by the County in August 2003. The review was generally positive and Fendos received a rating of outstanding in the area of investigative skill, in part due to his practice of regularly keeping supervision informed as to his investigative activities.

One of the policies applicable to Corrections Officers is a Fraternization Policy, set forth above, which delineates the types of contacts and relationships a jail employee may have with an inmate or someone under county supervision. Essentially, the policy forbids relationships between employees and inmates or supervisees except under specified conditions, including keeping all contact with inmates businesslike and informing the employee's supervisor of all non-employer-directed contact with inmates.

On March 14, 2006, Jail Administrator Bob Dickman received a complaint from inmate Victoria Espinoza to the effect that Fendos had developed a personal relationship with another inmate named Elania Betts and that he was giving preferential treatment to Betts, which Dickman passed along to Chief Deputy John Reed. As a result of the report, the Chief Deputy ordered Sheriff's Department Detective Dan McGhee to investigate the matter. When questioned by McGhee, Betts initially denied any contact with Fendos outside the jail. Fendos, however, admitted to having telephone contact with Betts while she was on probation, but asserted that the contact was investigatory in nature because Betts had claimed to have information about contraband being smuggled into the jail. Fendos claimed that Betts did not provide any useful information, so he terminated the contact and did not see a need to report it to his supervisor. He agreed to provide McGhee with copies of his telephone records. Fendos also admitted receiving a valentine card from another inmate, Michelle Ganski, whom he had known before her incarceration, which he had not reported to his supervisor. He denied having made any effort to seek contact or form a relationship with Ganski, but he kept the valentine, which he produced at McGhee's request.

McGhee interviewed Betts a second time and told her about his meeting with Fendos, at which time Betts admitted the contacts. She claimed she had originally denied them for fear of retaliation from other inmates and/or jail employees. She told McGhee she and Fendos had talked about their respective divorces and families and that Fendos had invited her out to eat, but she had declined because she couldn't get child care. She did not say anything to McGhee about reporting contraband coming into the jail. McGhee reported this conversation to Fendos, who denied asking Betts out to eat and stated that he always steered conversations with Betts away from personal matters. McGhee also spoke to Michelle Ganski, who admitted sending Fendos the valentine card. Ganski said she had known Fendos while she was dating Fendos' cousin and had a crush on him. She indicated that she was on probation at the time, but that Fendos had been unaware of it. She was put in jail in November 2005 for a probation violation. She stated that she sent the card as a joke, and that Fendos had avoided any contact with her in the jail and after her release.

Subsequently, McGhee interviewed inmate Victoria Espinoza, who had made the original complaint against Fendos. Espinoza told McGhee that Fendos wanted to "go out" with Betts, but that she wasn't interested. She also stated that Fendos had given special privileges to another inmate who had flirted with him. She also referred McGhee to another inmate, Michelle Richmond, for further information. McGhee subsequently met with Richmond, who told him she saw Betts pass a note to Fendos. She said she believed Fendos was interested in Betts and that he once asked her if Betts had a boyfriend. She also claimed that Fendos had once entered the women's shower while Betts was showering. McGhee later asked Betts about the shower incident and Betts denied it and stated that she had never had physical contact with Fendos.

McGhee obtained Fendos' telephone records, which showed that he had made eight telephone calls to Betts between August 25, 2005 and September 10, 2005 for a total of 58 minutes. Betts' phone records, indicating calls she made to Fendos, were unavailable, but both

Fendos and Betts admitted that she had called him on multiple occasions. He also had made three calls to Ganski between June 26, 2005 and July 10, 2005, for a total of 6 minutes. McGhee then produced a report of his investigation, which he gave to the Chief Deputy and Jail Administrator.

After receiving McGhee's report, Dickman decided to terminate Fendos. On April 5, 2006, he sent Fendos the following notice:

RE: TERMINATION OF EMPLOYMENT

> With regret, I must inform you that I am terminating your employment as a Corrections Officer with the Marathon County Sheriff's Department effective April 5, 2006.
>
> This decision is based on the following job performance issues:
>
> On August 27, 2004, you drove to the Huber facility and requested an officer test a sample of your breath on a PBT. After testing above .10, you drove your vehicle off the premises. You received a one day suspension without pay as a result of this work rule violation which clearly showed a lack of judgement [sic] and professional ethics.
>
> On December 28, 2005, you used pepper spray in an inappropriate and reckless manner on an inmate. You attempted to circumvent a supervisory directive and later publicly criticized a Supervisor. You received a two-day suspension without pay, suspension of Field Training Officer duties for six months, and a formal referral to the Employee Assistance Program as a result of violating a work rule and poor job performance.
>
> On Friday, March 31, during the course of an internal investigation conducted by Jail Administrator Dickman, Chief Deputy Reed, and Employee Resources Director Matel, you indicated that you had numerous personal phone contacts with an individual under the supervision of the Department of Corrections. You also indicated you received notes and a card from inmates without informing supervision of these facts. This clearly violates the Sheriff's Department's Fraternization Policy and again show a lack of judgement [sic], professional ethics, and disregard for the Sheriff's Department and Marathon County's Core Values.
>
> As you are well aware, behavior of this type may result in disciplinary action up to and including termination of employment. Based on your ongoing job performance problems, I can find no alternative to termination of your employment with us. Your employment is terminated effective Wednesday, April 5, 2006.

Please contact Mary Jo Maly (261-1181) to discuss possibilities of continuing your health insurance beyond April 30, 2006.

Robert Dickman
Jail Administrator

Fendos grieved the termination, which was denied, and the grievance was processed to arbitration. Additional facts will be referenced, as necessary, in the **DISCUSSION** section of the award.

POSITIONS OF THE PARTIES

The County

The County asserts that it had just cause to terminate Brian Fendos based on his violation of the fraternization policy and his prior misconduct. Just cause requires a finding that the employee committed an offense for which discipline was warranted and that the degree of discipline was commensurate with the offense. The County maintains that both criteria have been met.

The evidence supports a finding that Fendos violated the fraternization policy by having personal phone contact with a former inmate and failing to disclose the contact to his superiors. The policy is reasonably related to safe operation of the county jail and management thus has a legitimate concern in preventing fraternization which has been upheld by the courts. KEENEY V. HEATH, 57 F.3D 579 (7TH CIR., 1995), PARADINOVICH V. MILWAUKEE COUNTY, 189 WIS. 2D 184, 525 N.W. 2D 325 (CT. APP., 1994). Fraternization places Correctional Officers at risk of being placed in compromising positions when they are perceived as favoring one inmate over others and makes it difficult to maintain discipline and control in the jail. Here there was a widespread impression among inmates that Fendos had a personal relationship with an inmate and was giving her preferential treatment because of his contacts with the inmate, which is exactly the situation the policy is intended to avoid. Had Fendos obtained prior approval for the contact, management would have been aware of the situation, but his failure to seek authorization makes his conduct improper and motivations suspect.

Fendos also had two previous disciplines for serious violations of work rules. The just cause standard embraces the concept of progressive discipline. Progressive discipline allows an employee an opportunity to correct unacceptable behavior. When the behavior does not change, and it is clear progressive discipline will not work, the employer is justified in terminating the employee. Thus, just cause applies in situations where there is a single incident of serious misconduct and as the last step in a progressive discipline process. A “last straw” discharge” will be upheld where, as here, the employer can show a pattern of unsatisfactory conduct.

In this case, termination is appropriate considering the employee's conduct and past offenses. His actions in contacting an inmate were an explicit violation of the fraternization policy. The contact falls within the definition of an unacceptable relationship and he failed to utilize the exception procedure by informing his superiors. More troubling is Fendos' claim that he was unaware of the fraternization policy, even though he was responsible for training other Correctional Officers. This is also inconsistent with his testimony that he was aware of other employees being disciplined for violating the policy and that the suspensions they received were considered a joke.

The statements of the various inmates was inconsistent, but what is clear is that Fendos contacted Elania Betts on his cell phone after working hours without notifying his supervisor. He completed no reports and asked for no overtime pay for the time spent on these contacts. Correctional Officers have no duty to contact inmates after release, so the presumption is that Fendos' contacts with Betts were personal, not professional. The policy is intended to avoid not just personal relationships, but also the appearance of relationships, as well. Other inmates believed a relationship existed and by not obtaining authorization, Fendos gave credence to that impression.

Fendos has had three serious work rule violations in an eighteen month period and has shown no contrition or willingness to amend his behavior. The County was justified in terminating him and the discharge should be sustained.

The Union

The Union does not dispute the right of the County to promulgate work rules, but asserts that the rules, as well as their application, must be reasonable. In this case, the Union asserts that the County's application of the fraternization policy was not reasonable.

Jail Administrator Dickman testified as to a number of possible problems that could arise due to fraternization and nothing in the record indicates that the intent of the policy is improper. However, the policy seeks to prevent relationships between jail staff and inmates, which is not what happened here. Brian Fendos did not have a relationship with Elania Betts. The County did not produce Betts at the hearing, but relied on the testimony of Detective McGhee and his notes of interviews with Betts and other inmates. McGhee testified that Betts was dishonest with him, so her statements are inherently unreliable. Michelle Ganski appeared to have a fantasy about a relationship with Fendos and Victoria Espinoza had a vendetta against him. None of the se people was a reliable witness and it appears that the County actually engaged in a 'witch hunt" against Fendos. On multiple occasions they tried to get Betts and Ganski to admit a relationship with Fendos and they did not succeed because no relationship existed.

The County asserts that Fendos violated subparagraph B.5 of the section defining a relationship, which prohibits "personal contact (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." Fendos does not deny phone contact with Betts, but the arbitrator must consider the purpose of the contact. He was seeking information regarding contraband, not a personal relationship with Betts, and her statements to the contrary are not credible. Lacking evidence of a relationship, the County relies on the language forbidding other than job related contact. Fendos, however, believed that seeking information about contraband in the jail was part of his job and believed he had skills in this area, which had been noticed by his superiors and co-workers. Further, he had engaged in similar contact with a previous inmate named Chris Hill without discipline, which led him to believe the contact with Betts was permissible.

The County also noted the fact that Fendos did not inform his superiors about his contacts with Betts. Dickman, however, testified that Corrections Officers have investigatory discretion and do not always get prior permission before contacting inmates. Fendos was more proactive than many employees in this regard and also testified that officers do not always write reports about their investigations when no useful information is forthcoming. Fendos received information from Betts, which he followed up and found inadequate, so he did not report it, and the County, though it determined there was no relationship between Fendos and Betts, chose to terminate him for failing to report his activities, which was unreasonable.

The County also cited the fact that Fendos received a Valentine card from inmate Michelle Ganski, which he did not report, as a violation of the fraternization policy. The record shows that Fendos knew Ganski before she was incarcerated, but did not know she was on probation. He made no contact with her, nor did he pursue a relationship with her, after she was taken into custody. He did not solicit the card and did not respond to it, so he saw no need to report it to his superiors. Nonetheless, the County used this incident as a basis for discipline, even though Fendos did nothing improper.

The County asserts that Fendos' conduct undermines effective operation of the jail, but this is difficult to believe. To substantiate this claim, the County must show both a violation of policy and a concrete effect on jail operations. It can do neither. Dickman speculated about possible negative effects, but there was no evidence of actual problems. Further, Fendos had no relationship with Betts or Ganski. No other officers complained about Fendos or stated they could not work with him and there is no evidence he gave special treatment to Betts, Ganski, or anyone else. Thus, the County's argument has no merit.

It should also be noted that the treatment of Fendos was out of proportion to how other officers have been dealt with for violating the policy. The County submitted evidence of the terminations of Cindy Guralski, Shawn Hansen, Julie Hatleback-Wolfe and Nicole Osswald for violations of the policy. Each of these employees had multiple violations and much more serious personal relations with inmates justifying their terminations. Richard Haberman received a one day suspension for meting an inmate for lunch outside the jail. Matt Lonsdorf received a four day suspension, which was reduced to two, for transporting an exotic dancer back to the jail after work and after he had been drinking. Both of these instances involved direct contact with inmates and were more serious than the conduct attributed to Fendos, yet

they were not terminated. Fendos' conduct is more comparable to Haberman and Lonsdorf, than to Osswald, Hansen and Hatleback-Wolfe, thus there is no justification for termination, even where there is just cause for discipline.

Also, there is no nexus between Fendos' past discipline and the current case. Fendos' received a one day suspension for coming to the Huber facility while intoxicated, and was notified that further conduct of that type would be subject to more stringent discipline. The record reflects no repeat of that type of conduct, yet he was terminated. The second instance was a two day suspension Fendos received for improper use of pepper spray and insubordination. In that case, he was confronted with a dangerous, unstable inmate and was worried about his safety. He questioned their decision to not use a Taser and was disciplined. Here, again, there has been no repeat of that conduct. The current incident is comparatively insignificant, yet the County argues it justified discharge. This is not credible. The only performance evaluation in Fendos' file shows him to be a good, competent employee. The only conclusion, therefore, is that the County used the Betts incident as a pretense to rid themselves of an employee. That decision should be overturned.

The County in Reply

The County reiterates that its investigation showed contact between Fendos and Betts that violated the fraternization policy. It is undisputed that he had phone contact with Betts, that the contact was not required by his job duties and that he did not disclose those contacts to his superiors until contacted as part of the investigation. The policy requires that an employee's supervisor be notified about any contacts with inmates. Without such disclosure, the County is permitted to assume that the contact is unauthorized and improper. The Union cannot justify the contact other than to argue that it is "discretionary." There is no evidence that the County permits that kind of discretion to its employees. The County has never permitted contact between Correctional Officers and inmates outside the jail. The evidence is that all officers who have engaged in such conduct have been disciplined.

The Union draws a meaningless distinction between "face to face" contact and telephone contact between employees and inmates. There is no such distinction in the policy and Fendos' conduct was a clear violation. The Union also points to previous contact between Fendos and another inmate, Chris Hill, to show that such contact is permissible, but the Hill case is distinguishable. There, Fendos' communications were on a jail phone, his superiors were aware of it and he filed a report on the contact. Here, he contacted Betts while away from the jail, used his personal cell phone, filed no reports and disclosed the contact to no one. Other inmates reported that his inquiries to them about Betts were of a personal, not a professional, nature, which also did not occur with Hill. There is no comparison between the cases. The County takes the fraternization policy seriously and there is no instance that a violation has not resulted in discipline. Further, while the Union challenges the credibility of the inmates who reported Fendos' activities, it is also true that Fendos had an incentive to be untruthful in order to keep his job. This is why disclosure is important and why the County views the failure to report so seriously.

The Union contends that Fendos' actions had no adverse effect on the operation of the jail. In the first place, the County need not show adverse effect, only the potential for an adverse effect. Nonetheless, jail operations were harmed. Inmates perceived that Betts received preferential treatment, which compromises the credibility of the Correctional Officers because it gives the impression of disparate treatment. Under the Union's theory, an officer could not be disciplined for a physical relationship with an inmate unless actual harm to jail operations could be proven. Clearly this is an unreasonable interpretation. The policy is intended to avoid harmful occurrences and County must have discretion to enforce it before such harm occurs.

The termination is also justified as the final step in a process of progressive discipline. The termination notice states that in part it was based on Fendos' past infractions. The Union does not acknowledge the concept that an employee may be terminated when they are unwilling or unable to modify their conduct to conform to the rules. The Union would prefer to compartmentalize Fendos' conduct and require that each infraction be dealt with individually or to prevent progressive discipline unless the infractions are identical, which would be absurd. Fendos broke work rules on three separate occasions and the County is entitled to consider the entire body of conduct in issuing discipline.

At the hearing, Fendos refused to take responsibility for his actions in this instance or in the instance involving pepper spray. This shows that he has not learned to be accountable. He also stated that the knew of the discipline issued to Haberman and Lonsdorf for fraternization, showing that he was aware of it, but stated it was "wide open," even though he was responsible for training new employees on the policy. The Union wants the arbitrator to compare Fendos' case to Haberman and Lonsdorf. In those cases there was just one contact with an inmate, whereas Fendos had several, and neither employee tried to conceal the contacts. On that basis alone, Fendos' violation merits termination,

The Union in Reply

The Union notes that the County failed to provide direct testimony from Betts, Ganski, or Espinoza regarding their claims that Fendos violated the fraternization policy. There is no credible evidence that Fendos had personal phone conversations with Betts. Fendos stated that all their conversations were business related and that the inmates had ulterior motives for making false statements.

Fendos' contract with Betts was isolated, similar to the Lonsdorf case, which should have gotten him similar punishment, but Lonsdorf didn't lose his job, even though Lonsdorf's offense involved greater risk to jail security. In describing the Haberman case, the County relied on the employee's own description of the event to characterize the seriousness of his offense and suspended him. Here, the County relied on the statements of inmates over against the statement of Fendos and terminated him. This is disparate treatment.

The Union contends that the County did not have just cause to discipline Fendos and applied the fraternization policy unreasonably. His conduct did not harm safe and efficient

operation of the jail. He had not been disciplined in the past for similar conduct. There were no complaints about his actions by co-workers. The County's evidence is primarily hearsay and the statements of the inmates are not supported by the record.

In the event just cause for discipline is found, the degree of discipline was unreasonable. Unlike other disciplined employees, Fendos' contact with Betts was not face-to-face. His offense, if any, was less serious than those of the other disciplined employees. In Fendos' disciplinary history, the last offense was the least serious and bore no similarity to his previous offenses. The cases cited by the County supporting its progressive discipline theory are not comparable to this situation. The employees in those cases had far more disciplines than Fendos. The County has tried to portray Fendos as a problem employee that it had to release, but its arguments do not stand up to scrutiny and should be rejected.

DISCUSSION

The question posed by the parties in this arbitration is whether the County violated the collective bargaining agreement when it terminated Brian Fendos from his position as a Corrections Officer. Under Article 2, Section D of the agreement, termination must be for just cause. Thus, the issue before me is whether the County had just cause to terminate Fendos. I have in the past employed a two-pronged analysis to determinations of just cause, inquiring whether the Grievant committed wrongdoing for which discipline is warranted and, if so, whether the discipline imposed was commensurate with the seriousness of the offense. I find such an analysis to also be appropriate to the circumstances here.

The conduct which ultimately led to the termination was unauthorized contact between Fendos and two inmates of the Marathon County jail, Elania Betts and Michelle Ganski, which came to the attention of Jail Administrator Bob Dickman and which he determined was a violation of the County's fraternization policy, set forth above. The County maintains that Fendos' conduct in this regard was, standing alone, sufficient to warrant his termination. The County argues in the alternative, furthermore, that, inasmuch as Fendos had received two disciplinary suspensions in the previous eighteen months, the termination was also justified under the principle of progressive discipline.

The County's evidence regarding Fendos' conduct was provided principally by Sheriff's Department Detective Dan McGhee, who was assigned to investigate the matter by the Chief Deputy after another inmate complained that Fendos was giving Betts preferential treatment. McGhee interviewed the principals, including Fendos, Betts and Ganski, on multiple occasions and his report to Dickman provided the basis for Fendos' termination. McGhee's report, which is County Ex. #1, and about which he testified regarding its compilation sets forth the details of his investigation and the substance of his interviews with the principals. The Union argues that McGhee's report and testimony were hearsay, but the report was deemed admissible under the regularly kept records and public records exceptions to the hearsay rule.

On the facts established in the record, I have little difficulty concluding that Fendos' actions violated the fraternization policy and, thus, warranted discipline. The policy, which the Union concedes is reasonable, bars employees from having relationships with inmates or those under supervision unless an exception is granted under the rules set forth therein. A relationship, as defined in Sec. 33201.00, subpara. B.5., includes "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." Fendos had numerous phone contacts with Elania Betts outside the jail on his personal cell phone and received at least one written personal communication from Michelle Ganski, in the form of a Valentine. Even accepting Fendos' version of the story that he was trying to obtain information from Betts about contraband coming into the jail, Dickman testified without contradiction that Corrections Officers are not investigators and do not have discretion within their job duties to conduct investigations outside the approval and supervision of their superiors. The Ganski contact was not initiated by Fendos, but was also not disclosed prior to the investigation. Thus, Fendos' contacts with Betts and Ganski fit the definition of prohibited relationships set forth in the policy.

The exception procedure set forth in Sec. 33203 permits employees to engage in what would otherwise be prohibited relationships under narrowly specified circumstances. Specifically, to obtain an exception an employee must:

1. inform his immediate supervisor of any relationship he is having or has potential for having with an inmate which might violate the policy;

2. report any unanticipated non-employer directed contacts with inmates;

3. see to it that any inmate contacts are brief and businesslike; and

4. request any exceptions to the policy through the Jail Administrator.

Fendos's contacts with Betts and Ganski constitute prohibited relationships under the policy, yet he did not inform his supervisor of those relationships, nor did he reveal receipt of the card from Ganski. The phone records retrieved by McGhee reveal eight phone calls from Fendos to Betts' home phone between August 25, 2005 and September 10, 2005, ranging in length from 1 to 28 minutes. Betts also claimed to have made calls to Fendos during this period, but this could not be verified because she used a prepaid Tracfone and records of outgoing calls are not available from a prepaid service. Likewise, Fendos' phone service would not have records of incoming calls. In his testimony Fendos denied receiving any calls from Betts, although he had previously admitted receiving calls from Betts in his interview with McGhee. Fendos testified that the calls were always limited to asking about contraband in the jail. Betts initially denied any contact with Fendos whatsoever, but later admitted the contact and stated her initial denial was due to fear of retaliation. She claimed the conversations were personal in nature and said nothing to McGhee about Fendos asking about contraband. Certainly, however, if she were afraid of retaliation, one would expect her to deny acting as an informant and claim the

contacts were about personal matters. This does not explain, however, why Betts would initially reveal the contacts to Espinoza and claim to her that Fendos was seeking a relationship with her. Fendos claimed he ended the contacts when Betts' information proved inaccurate. Betts stated that the contacts ended when she was returned to jail for a probation violation. In any event, it is clear that Fendos did not seek an exception to the policy from Dickman. In sum, therefore, by engaging in prohibited contacts with Betts and Ganski without obtaining an exception Fendos violated the County's fraternization policy and subjected himself to discipline.

The Union also argues, on various grounds, that, in the event discipline was warranted, termination was excessive under the circumstances and that a lesser level of discipline should have been imposed. The various arguments advanced by the Union include that Fendos believed his contact with Betts was within the scope of his job duties, that he had previously engaged in similar conduct without discipline, that his conduct did not undermine the safe operation of the jail, that his conduct was dissimilar to the acts for which he was previously disciplined, that other employees received lesser discipline for more serious violations of the policy and that the termination was based on a less serious offense than those for which he had been previously disciplined.

The Union's contention that Fendos reasonably believed that his conduct was authorized was based on his history of conducting investigations regarding contraband and Huber violations in the past, and specifically an investigation he had previously conducted involving an inmate named Chris Hill. He also testified that he was unaware of the details of the fraternization policy, so did not know his conduct was prohibited. I find this argument unpersuasive. Dickman testified to being aware of the Hill investigation. However, in that case Fendos obtained prior authorization, made his contacts with Hill on a jail phone and reported his findings. This reveals awareness on Fendos' part of both the policy and the proper steps to obtain an exception under it. The Betts matter is thus the more troubling because none of those elements of proper procedure were present here, permitting an inference by Dickman that his motives for the contacts were not legitimate. Also, Dickman testified unequivocally that investigation was not part of a Corrections Officer's regular duties and that, while interdicting contraband is important, such inquiries can only be made with authorization. Dickman clearly enunciated the rationale for the policy that the operations of the jail are compromised when officers operate outside the chain of command because such behavior increases security risks and also gives inmates the opportunity to make allegations of favoritism, disparate treatment and improper conduct that are difficult to contradict, even if untrue.

Likewise, the Union's assertion that termination was unwarranted in that jail operations were not harmed by Fendos' behavior does not bear scrutiny. In the first place, I am of the mind that the appropriate degree of discipline is not necessarily determined by the actual harm arising from the misconduct. Borrowing an analogy offered by the County, would the County be unable to discipline an employee who arrived at work intoxicated unless the employee caused an accident on the way? Clearly not. The point of the fraternization policy is to prevent problems from occurring by prohibiting certain behaviors. Therefore, to require the County to

have to wait until actual harm results before it can enforce the policy would undermine its purpose. Further, the imbroglio caused by Espinoza's initial allegations shows that Fendos' behavior did cause problems. Had Fendos obtained Dickman's authorization to contact Betts and reported on his findings, Espinoza's claims would have been much easier to address. As it was, the County was required to devote resources to conducting a lengthy investigation, numerous inmates were given the impression that Betts was receiving preferential treatment due to her relationship with Fendos, which caused attitude problems, particularly as regards Espinoza, and Fendos' conduct was inherently suspect due to his failure to follow established procedures.

The Union points out that this is the first time Fendos has been disciplined for violation of the fraternization policy and that his previous suspensions were for unrelated matters. This is true. Fendos received a suspension in August 2004 for driving to the Huber facility while intoxicated and then leaving in his vehicle after administration of a PBT test determined his breath alcohol content was in excess of .10%. He received another suspension in December 2005 for using excessive force on an inmate. Neither of these offenses involved a violation of the fraternization policy. The County argues, however, that each of these incidents demonstrates a lack of good judgment on Fendos' part that put others at risk and that three events in eighteen months demonstrates that he is either unwilling or unable to modify his behavior and improve his judgment. This is underscored, in the County's view, by the fact that at the hearing Fendos continued to dispute the basis for the December 2005 suspension, indicating a continuing belief that he had not acted improperly, even though he did not grieve the discipline at the time. I am inclined to agree with the County's view. Each of these incidents, while disparate in nature, reflects a tendency to willfully operate outside the rules, as well as a tendency to rationalize such behavior as being justified or not a problem, and an unawareness of the risks posed by the behavior. In a jail setting, good judgment, adherence to prescribed security procedures and an awareness of potential risks are essential to safe, orderly and efficient operations. An employee who consistently demonstrates a lack of those skills and an indifference to their importance is a risk to the operations of the facility, as well as the other staff and inmates. While Fendos' infractions involved different conduct, they all demonstrate, in some degree, the behavioral concerns set forth above and, taken as a whole, show a pattern of poor judgment and indifference to important rules and procedures.

Both parties point to discipline issued to other employees for violations of the fraternization policy in support of their arguments here. The record reflects that Corrections Officers Cindy Guralski (Co. Ex. #10), Nicole Osswald (U. Ex. #4), Shawn Hansen (Co. Ex. #11) and Julie Hatleback-Wolfe (Co. Ex. #12) were all terminated for violations of the policy. Corrections Officer Richard Haberman was given a one day suspension for a policy violation and Corrections Officer Matt Lonsdorf was given a four day suspension, which was subsequently reduced to two. The County asserts that these prior incidents reveal the seriousness with which the County views fraternization and its consistency in enforcing the policy. The Union, however, argues that the previous cases show that the policy is not applied uniformly and that less serious violations do not merit termination. In that regard, the Union asserts that the Haberman and Lonsdorf cases are more analogous to Fendos' case and should

be relied upon in determining the appropriate degree of discipline. I believe that both cases are distinguishable from the one before me.

Haberman was suspended for one day in October 1997. The disciplinary notice describes his conduct as follows:

> "Through investigation it was determined that you did meet a [sic] 18 year old female for what was described as lunch and counseling on 8-26-97. This took place only three days after her release from jail on 8-23-97. The female was on active supervision by Probation and Parole."

The record does not detail any other disciplinary history for Haberman, so I assume that this was a first offense. The Union contends that Haberman's action was at least as serious as Fendos' because it was face to face, and criticizes the County for apparently accepting Haberman's characterization of the event as "lunch and counseling." In the first place, the discipline notice does not say that "lunch and counseling" was Haberman's story, but states that was the County's conclusion after an investigation. Second, Haberman's contact was an isolated, one time event, whereas Fendos had multiple unreported contacts with Betts and Ganski. From the standpoint of jail morale and discipline, an ongoing relationship by phone between a Corrections Officer and an inmate seems to me as big a problem, if not more so, than a one time meeting outside the jail.

Lonsdorf was suspended for four days in 1992 when he returned an inmate to the jail from her place of employment, an exotic dance bar, apparently after he had been patronizing the establishment. The County and Union subsequently agreed to a reduction of the suspension to two days. Here again, the record is silent as to any previous discipline of Lonsdorf and the event, while a serious breach of the policy, was an isolated event. As previously noted, Fendos' conduct involved numerous contacts, leading to the impression among the inmates that there was a relationship between him and Betts which resulted in Betts receiving favorable treatment. Further, this incident occurred after two prior rule violations by Fendos' in the previous eighteen months, both of which resulted in suspensions. Taken in context, therefore, I view Fendos' misconduct as being at least as serious as those of Haberman and Lonsdorf, especially when viewed as the last in a sequence of serious lapses in judgment. Parenthetically, Fendos' testified that the disciplines issued to Haberman and Lonsdorf were viewed as a joke among the Corrections Officers, as if they had been given a day off. Inasmuch as both these events happened several years before Fendos was hired by the County, I am dubious as to the credibility of his testimony as to his knowledge on this point. I also am unpersuaded by the argument that the Betts incident was less serious than the misconduct for which Fendos was previously disciplined and so should not result in more severe discipline. In the first place, I do not accept the premise that his contacts with Betts in violation of the fraternization policy were a minor infraction. The record reflects the manifold problems that arose from the behavior and there was potential for even more problems than actually arose. Secondly, as the County asserts, the incident was a reflection of an ongoing problem with Fendos exercising poor judgment in conducting his duties, which he apparently was unable to correct, even after he

had received significant discipline on two prior occasions. Under the circumstances, therefore, the County was justified in terminating his employment.

For the reasons set forth above, and based upon the record as a whole, I hereby enter the following

AWARD

The Employer did not violate the collective bargaining agreement when it terminated Brian Fendos on April 5, 2006. The grievance is denied.

Dated at Fond du Lac, Wisconsin, this 8th day of May, 2007.

John R. Emery /s/
John R. Emery, Arbitrator

JRE/gjc
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