BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

AFSCME LOCAL 1925-B

and

WALWORTH COUNTY

Case 171
No. 67099
MA-13754

(Grievance concerning discipline of Correctional Officer K)

Appearances:

Mr. Nick Kasmer, AFSCME Council 40 Staff Representative, Pleasant Prairie, Wisconsin, appearing on behalf of the Union.

Ms. Lisa Bergersen, Attorney, Lindner & Marsack, S.C., Milwaukee, Wisconsin, appearing on behalf of the County.

SUMMARY OF BENCH AWARD

The Union and County, above, agreed to submit for final and binding arbitration a dispute arising under their 2005-2007 collective bargaining agreement (Agreement). At their joint request, the Wisconsin Employment Relations Commission designated the undersigned Marshall L. Gratz of its staff as the Arbitrator. At the Arbitrator's request, the parties agreed that the case would be arbitrated on an expedited basis with a bench award followed by issuance of a short written summary of the award.

Following the conclusion of the parties' presentation of evidence and oral closing arguments at a hearing on September 15, 2007, the Arbitrator rendered a bench award. This is a written summary of that bench award.

ISSUES

The parties agreed that the **ISSUES** for determination this matter were as follows:

1. Did just cause exist for the issuance of a written warning to [Grievant] on November 8, 2006?

2. If not, what is the proper remedy?

PORTIONS OF THE AGREEMENT

ARTICLE VI - GRIEVANCE PROCEDURE

. . .

Step 3 (County Administrator). An appeal of the Step 2 decision shall be filed in writing with the Human Resources Director within ten (10) working days from the date that the decision was received. Within thirty (30) working days (or as soon as practicable) from receipt of the Step 2 appeal, the parties will schedule a meeting with the County Administrator and the appropriate parties involved at Step 2 to discuss the grievance. A decision with supporting rationale will be furnished to the employee and union representative in writing within ten (10) working days from the date of the meeting.

Step 4 (Arbitration). An appeal of the Step 3 decision shall be filed in writing with the Human Resources Director within ten (10) working days from the date that the decision was received. . . .

. . .

4.04 Extension of Time Limits. Time limits in this Article may be extended by mutual consent of both parties. The failure of either party to file, appeal or process a grievance in a timely fashion as provided herein shall be deemed a settlement in favor of the other party. . . .

. . .

ARTICLE XVI - DISCHARGE AND DISCIPLINE

26.01 Right of County. the County shall have the right to discipline or discharge any employee for just cause.

. . .

26.06 Work Rules - Discipline. Employees shall comply with all provisions of this Agreement and all reasonable work rules. Employees may be disciplined for violation thereof under the terms of this Agreement, but only for just cause and in a fair and impartial manner. When an employee is being disciplined or discharged, there shall be a Union representative present. . . . When an employee is given a written reprimand, a copy of the reprimand shall be given to the Union President.

> 26.07 Work Rules - Rescission of Disciplinary Action. If an employee has been disciplined for the violation of a minor work rule but has had no further discipline for a period of twelve (12) months such disciplinary action will be rescinded after the elapse of that period. If an employee had been disciplined for the violation of a major work rule, but has had no further discipline for a period of thirty-six (36) months, such disciplinary action after the elapse of that time shall be rescinded.
>
> The Department Head shall indicate on the discipline whether it is for a major or minor rule violation at the time the discipline is served.
>
> . . .

BACKGROUND

The Grievant has been employed by the County's Corrections Department as a Correctional Officer for about five years.

On November 8, 2006, Grievant was issued a "Major Discipline" written reprimand for "Unsatisfactory performance: Incompetence; Negligence; inability to perform job duties," which read, in pertinent part, as follows:

> On Oct 06, 2006. [Grievant] allowed (2) two inmates out together in Administrative Segregation.
> . . .
> [Essential facts; specific work rules, performance or conduct standards violated:] On Friday, October 06, 2006, [Grievant] was working as the Superpod Control Officer, which was his scheduled post. At**,** or around 4:22 pm on date listed, [Grievant] allowed inmate [J] into the dayroom area of Administrative Segregation, while inmate [B] was also out in the dayroom area.
>
> It is the job of Superpod Control to verify that all inmates are secured in their cells, prior to allowing any further inmates out of their cells. Witnesses include, but are not limited to, Officer [JR] and Inmate [JD]. Written reports are also available.
>
> . . .
>
> [Impact on departmental operations:] Administrative Segregation is a housing area that generally is used for problematic, or uncooperative inmates. Anytime that two inmates are released at the same time in the housing area, it puts the inmates, as well as responding officers in danger. The two inmates that were released by [Grievant] have shown a past history of uncooperative and threatening behavior.

. . .

> [Previous discipline record:] [Grievant] was spoken to by Sgt. [R] on April 25, 2005 in regards to an inmate that [Grievant] failed to strip search. Approximately 40 minutes later [Grievant] again changed over an inmate without completing a strip search. [Grievant] admitted to not strip searching the inmate that he had just changed over, and stated that it had been a very hectic evening.
>
> On August 19, 2005, Officers were told to not allow inmates into the main hallway as there was a tour of civilians about to begin. He was told to pay better attention.
>
> On April 18,2006, [Grievant] received a Major for entering an unsafe situation, and for having a box of juice taken in his area without him noticing.
>
> His discipline history seems to show a continuing problem of failing to pay attention to security issues.
>
> All of the above cases involve failure to provide safety to himself, the inmates, or fellow officers.
>
> [Circumstances that may increase or reduce the disciplinary level:] In the two reports received in regards to this incident, both of them explain that [B] was noted to be at the showers, walking towards his cell. Since the showers are on the other side of the dayroom, the inmate must have walked all of the way across the plain line of sight at least once, and was not seen by [Grievant].
>
> [Grievant] received a Major discipline on April 18, 2006 for unsatisfactory performance. This was a first level discipline. Following the progressive discipline, the next step will be a Second level discipline.
>
> [Specific behavior or requirements expected of the employee in the future:] [Grievant] must follow all of the required procedures while performing his duties. [Grievant] should try to take his time and not allow himself to be distracted by his work load or by inmates. If [Grievant] is not sure of what actions to take, he needs to realize that he needs to always make his decision based upon the safest choice.

In response to that disciplinary action, the grievance giving rise to this arbitration was filed. It read, in pertinent part, as follows:

> [Statement of Grievance:] On November 08, 2006, Bargaining Unit member [Grievant], was served a Second level discipline (written reprimand) for allegedly allowing two inmates out together in Administrative Segregation.

[Article or Section of Contract violated, if any:] Section 26.06 of the Collective Bargaining Agreement, in that discipline is not fairly or impartially applied. Other officers have been similarly compromised by inmates two of which resulted in the inmates fighting and NO disciplines were issued against those officers. The discipline sanctions are excessive and may be based on incorrect information.

[Settlement or corrective action desired:] Reduce this discipline to a Counseling Session.

The grievance remained unresolved and was submitted for arbitration as noted above.

At the arbitration hearing, County witnesses testified that the Grievant's written reprimand was for violation of a work rule consisting of the following portions of the Department Code of Conduct in effect since July 1, 2005:

A. Employees are liable for disciplinary action for the following violations:

. . .

11. UNSATISFACTORY PERFORMANCE

a. . . . Unsatisfactory performance may be demonstrated by, but not limited to:

. . .

(3) the failure to conform to work standards established for the employee's rank, grade, or position;

(4) the failure to take appropriate action on the occasion of a crime, disorder, or any condition deserving of the employee's attention; . . . .

• • •

County witnesses also stated that in determining the level of discipline to be imposed, the fact that Grievant promptly self-reported the incident was considered as a mitigating factor.

The record establishes that this is the first instance in which an employee has been disciplined for allowing two inmates out of their Administrative Segregation cells at the same time. On three prior occasions, two on March 15, 2003 and one on July 1, 2005, supervisors received and reviewed Correctional Officers' Inmate Incident Reports citing Administrative Segregation inmates for fighting with another inmate in circumstances when two inmates were allowed out of their cells at the same time. In each of those instances, at least one inmate involved was disciplined. No employee was disciplined as regards any of those incidents.

On July 2, 2005, an e-mail was sent by Sgt. [KH] to all Jail Correctional Officers which read as follows:

> Subject: Procedure for Administrative Segregation.
>
> There have been two fights this year in Administrative Segregation. One on 03/13/2005 and one on 07/01/2005. Both occurred when an inmate hid and when asked over the intercom if he was in his cell the inmate answered yes. The officer assumed this was the case and shut the empty cell and the target inmate's cell. Please be advised that from this point forward we will not take the inmate's word for it that they are in their cell. An officer must get a visual confirmation that the inmate is in his cell. I realize that this will slow things down at times but I see no other way at this point to prevent this from happening again. I am, of course, open to suggestions and comments. This procedure is effective immediately and until further notice.

The July 2, 2005, e-mail was not included by the County in response to the Union's request during the pre-arbitration processing of the grievance for the policy that Grievant was being charged in this case with having violated.

Grievant testified that he leaned forward at his post in order to watch inmate B enter his cell and saw him move well into the cell, but that he did not visually confirm that B remained in the cell once the cell door fully closed. According to Grievant, B must have exited the cell before the cell door closed by crawling below Grievant's line of sight. Union witnesses gave uncontradicted testimony that the view of B's cell door from Grievant's post is partially obstructed by a wall and the floor of the deck outside the upstairs cell.

POSITIONS OF THE PARTIES

The County

The County argues, for reasons including those that follow, that the record supports the conclusion that just cause existed for the issuance of the written reprimand at issue. The discipline imposed in this case was warranted in light of Grievant's prior disciplinary record. None of the employees involved in prior failures to prevent one-out-at-a-time procedure violations had a comparable history of prior discipline and counseling regarding safety and security incidents. There has not been a violation of that procedure since the County's July 2, 2005, e-mail clarified and tightened up enforcement of that procedure. The evidence establishes that Grievant had reason to know that he could be disciplined for his October 10, 2006, conduct. The fact that he self-reported the incident to supervision was considered by the County as a mitigating factor in determining that a written warning was appropriate in all of the circumstances.

The Union

The Union argues that the written warning should be expunged or at least reduced for various reasons including the following: that Secs. 11.a.3 and 4 are too vague to be reasonable work rules; that the Employer failed to put the employees on fair notice that they could be disciplined for violating the one-out-at-a-time procedure; that the Grievant is being disciplined for a self-reported incident that he could not have reasonably avoided given the limited view of B's cell from Grievant's post; that Grievant is being disciplined for an incident that resulted in no fight or other actual harm, whereas, in three previous instances, (including one when the Code of Conduct was in effect) officers were not disciplined when fights resulted from their allowing 2 out at the same time in Administrative Segregation; and that the previous verbal warning on which the instant written warning was issued was not imposed for just cause.

DISCUSSION

Under Agreement 26.01 and 26.06, resolution of ISSUE 1 turns on whether Grievant has been shown to have violated work rules, whether those work rules were reasonable, whether there was just cause for the discipline imposed for Grievant's work rule violation, and whether Grievant was disciplined in a fair and impartial manner.

The record establishes that the Grievant violated Department Code of Conduct Secs. 11.a (3) and (4). Grievant permitted two Administrative Segregation inmates to be out of their cells at the same time. He thereby failed to conform to a work standard which has been in effect for years and that has been shown to be well known to Jail staff members, including the Grievant. While that work standard has not been shown to have existed in written form until the July 2, 2005, e-mail clarifying it was issued, and while even that e-mail did not include a statement that failure to conform to that standard could subject an officer to discipline, Code of Conduct Sec. 11.a.(3) together with Agreement Sec. 26.06 suffice to fairly notify employees that a failure to conform to that work standard could subject an officer to discipline.

The July 2, 2005, e-mail also put Correctional Officers, including the Grievant, on fair notice that before opening another Administrative Segregation cell, it is necessary that a "visual confirmation" be made to assure that an inmate returning to his cell is in his cell after the cell door has closed. While the Grievant saw the returning inmate enter well into his cell, he did not take the appropriate action of obtaining a visual confirmation that the inmate was in the cell after the cell door was closed, thereby permitting B to crawl back out before the cell door fully closed, outside of Grievant's view from his post, and hence without Grievant's knowledge. Grievant then opened a second inmate's door allowing him out of his cell, violating 11.a.4.

While the Union has shown that the physical location of the cell in question prevented the Grievant from making the required visual confirmation by direct observation of the cell door in question from his console location, he could have intercomed the returning inmate to

stand close to the inside of the cell door where Grievant could see him from his console location after the door fully closed, or he could have asked another officer present, if any, to make the visual confirmation, or, if necessary, he could have called for another officer to provide that assistance before opening the door for the other inmate. While the County has not provided specific training to that effect, those were all available ways known to the Grievant by which he could have complied with the visual confirmation standard.

Both the one-out-at-a-time in Administrative Segregation work standard and the clarification of that standard to include the requirement of a visual confirmation that a returning inmate is in his cell after the cell door has closed have been shown to be reasonably related to legitimate County interests in safety and security of inmates and correctional staff. While compliance with those standards of performance can "slow things down at times," as the July 2, 2005, e-mail acknowledges, they have not been shown to be impossible or unreasonably burdensome on employees so as to render them an unreasonable work standard for Grievant's position.

In addition, as applied in this case, Code of Conduct Secs 11.a.3 and 4 have been shown to be reasonable work rules that are persuasively related to legitimate County safety and security interests. While they do not enumerate every "work standard" or "condition deserving attention" to which they make discipline applicable, the limitations on discipline for work rule violations set forth in Agreement Sec. 26.06 assure that the County cannot discriminatorily or arbitrarily discipline employees for violating 11.a.3. or 4 as regards virtually any conduct it chooses after the fact to make the basis for disciplinary action.

The County's disciplinary investigation and decision-making processes have been shown to have been fair and impartial.

The County's failure to provide the Union with a copy of the July 2, 2005, e-mail in its response to the Union's request for all of the work rules claimed violated by the Grievant, deprived the Union of the opportunity to prepare with knowledge of a key piece of evidence regarding the nature of the work standard alleged violated in this case. However, it is not clear from the limited evidence in the record on the subject that the non-disclosure of that document was intended to violate the Union's request for the policy that the Greivant violated. For that reason, and because the nondisclosure did not prevent the Union from presenting a full and vigorous defense in this matter regarding the July 2, 2005 e-mail as well as all other aspects of this case, the Arbitrator has considered and given appropriate weight to that e-mail in rendering the Award in this matter.

The decision to impose a second level discipline, i.e., a written warning, is consistent with progressive discipline. The Grievant's disciplinary record at the time the instant written warning was imposed included a verbal warning for unsatisfactory conduct related safety and security issues, preceded by multiple counselings on such issues.

The verbal warning was grieved and processed through a denial issued at the Third Step. The Union responded to the Third Step denial by letter dated December 11, 2006, stating, "the Union will continue to insist that [Grievant] did nothing wrong and Local 1925 B will maintain its right to protest any further discipline based on this incorrectly imposed verbal warning." However, because the time for appealing that denial to arbitration has expired, and especially upon consideration of Agreement Sec. 4.04, the Arbitrator has treated the facts and violations asserted on the face of that verbal warning to be settled matters that cannot be challenged in this arbitration.

But for the July 2, 2005 e-mail, the evidence -- that three other officers, known by supervision to have allowed 2 out at a time in administration segregation, were not disciplined even though fights between inmates resulted in those instances -- would have been a persuasive basis for concluding that the County lacked just cause for the instant discipline of the Grievant. Those prior instances, one of which occurred on the day when the Code of Conduct took effect, revealed that management's history of enforcement of the one-out-at-a-time procedure was lax in the extreme.

However, the July 2, 2005, e-mail put the Corrections Officers, including the Grievant, on fair notice that the County intended to strictly enforce the one-out-at-a-time procedure in the future, and that employees were expected to get a visual confirmation that the returning inmate is in his cell when the door has closed, even though doing so "will slow things down at times." In the context of Code of Conduct Secs. 11.a.3. and 4. and Agreement Sec. 26.06, that e-mail also put the employees on fair notice that failure to get the required visual confirmation could subject the employees to discipline.

Significantly, there is no evidence of any one-out-at-a-time procedure violation occurring between the July 2, 2005 e-mail and the October 10, 2006 incident at issue in this case. There is also no evidence of another employee with a disciplinary record generally comparable to the Grievant's having been treated more leniently than the Grievant is being treated for a work rule violation of a generally comparable nature. For those reasons, the Union's argument that the instant discipline lacks the sort of evenhandedness required by just cause is not persuasive.

The Arbitrator agrees with the Union that the seriousness of Grievant's work rule violations in this case is mitigated by the fact that no fight or other harm resulted from those violations and by the fact that the Grievant promptly self-reported the incident to supervision. However, the Arbitrator is not persuaded that those factors or any others of record establish that the penalty imposed in this case by the County exceeds the range of reasonable alternatives that the County could have chosen to impose in this case.

Accordingly, the Arbitrator has concluded that the written warning in this case was issued for just cause and in a fair and impartial manner within the meaning of Agreement 26.06.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole, it is the **DECISION AND AWARD** of the Arbitrator on the **ISSUES** noted above, that

1. Yes, just cause did exist for the issuance of a written warning to [Grievant] on November 8, 2006

2. Consideration of a remedy is therefore neither necessary nor appropriate.

Dated at Shorewood, Wisconsin this 17th day of September, 2007.

Marshall L. Gratz /s/
Marshall L. Gratz, Arbitrator

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