BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

IRON COUNTY DEPUTY SHERIFF'S ASSOCIATION
WISCONSIN PROFESSIONAL POLICE ASSOCIATION/ LEER DIVISION

and

IRON COUNTY

Case 68
No. 66474
MA-13535

(Denise Lotzer Grievance)

Appearances:

Gordon McQuillen, Attorney at Law, 822 S. Gammon Road, #2, Madison, Wisconsin 53719-1377, appearing on behalf of the Wisconsin Professional Police Association/LEER Division.

Michael Pope, Dean & Pope, Attorneys at Law, Woodlands Professional Building, 204 North Harrison Street, Ironwood, Michigan 49938-1798, appearing on behalf of Iron County.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Association and County, respectively, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to the parties' request, the Wisconsin Employment Relations Commission appointed the undersigned to decide the above-captioned grievance. A hearing was held on June 27, 2007 in Hurley, Wisconsin at which time the parties presented testimony, exhibits and other evidence that was relevant to the grievance. The hearing was not transcribed. The parties filed briefs and reply briefs, whereupon the record was closed August 28, 2007. Having considered the evidence, the arguments of the parties, the applicable provisions of the agreement and the record as a whole, the undersigned issues the following Award.

ISSUE(S)

The parties did not stipulate to the issue(s) to be decided herein. The Association framed the issue as follows:

Did the County violate the collective bargaining agreement – Joint Exhibit 1 – in several respects when it terminated the employment of Denise Lotzer on August 13, 2006, as reflected in Joint Exhibit 2? If so, what is the appropriate remedy?

The County framed the issues as follows:

1. Does the Union or Denise Lotzer have standing to grieve under the collective bargaining agreement?

2. Did the County violate the collective bargaining agreement when it terminated the employment of Denise Lotzer on August 3, 2006?

Having reviewed the record and the arguments in this case, the undersigned frames the issue as follows:

Did the County violate the collective bargaining agreement when it terminated the employment of probationary employee Denise Lotzer? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 2005-07 collective bargaining agreement contains the following pertinent provisions:

ARTICLE 1 – RECOGNITION

Section 1. The Employer recognizes the Union as the exclusive representative of all regular full-time employees in the Sheriff's Department. . .

. . .

ARTICLE 3 – PROBATIONARY PERIOD

Section 1. All new employees of the Employer who are covered under the terms and conditions of the Agreement, will be required to serve a one (1) year probationary period, beginning with their regular, full time starting date of employment, to determine whether or not they are suited and qualified for the job. . .A probationary employee terminated during a probationary period, including any extension thereof, shall not have recourse through the grievance procedure set forth in this Agreement.

Section 2. During the probationary period, the employee may be discharged at the option of the Employer without recourse through the Union and/or grievance procedure.

. . .

ARTICLE 6 – LAYOFF/REHIRE

Section 1. When it becomes necessary to reduce the workforce, layoffs shall occur in inverse order to length of service, provided the remaining employees are qualified to perform the available work. Application of seniority shall prevail unless exceptional circumstances occur of which the Union Committee shall be fully appraised in advance.

Section 2. Employees shall be rehired in order of their seniority and job classification provided they are qualified to perform the available work. The names of employees laid off for cause shall remain on the eligible list for a period of two (2) years after the date of his/her layoff, Vacancies or new positions shall be filled by persons on an eligible re-employment list.

Section 3. No temporary, seasonal, or part-time employee shall remain on the Employer's payroll while a regular employee is in layoff status.

ARTICLE 7 – DISCIPLINE – DISCHARGE

. . .

Section 2. . . .

A. Every type of disciplinary action taken against an employee shall be based on just cause and administered in a fair and impartial manner.

. . .

ARTICLE 8 – GRIEVANCE PROCEDURE

Section 1. A grievance is a claim by an employee or group of employees against the Employer arising out of the meaning, application or interpretation of the terms of this Agreement.

Section 2. . . .

Step 1:. . .The Union President and the aggrieved employee shall present the grievance to the Sheriff or his designee within ten (10) days (excluding Saturdays, Sundays, and contractually recognized holidays) of the date that the employee knew or should have known of the alleged violation of the collective bargaining agreement. . ."

. . .

ARTICLE 22 – MANAGEMENT RIGHTS

The Employer possesses the sole right to operate county government and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this Contract. These rights include, but are not limited to, the following:

. . .

2. To hire, promote, transfer, assign, and retain employees and positions within the County;

3. To suspend, demote, discharge or take other disciplinary action against employees;

4. To relieve employees from their duties because of lack of work or other legitimate reasons;

. . .

6. To take whatever action is necessary to comply with state or federal law;

. . .

10. To determine the methods, means and personnel by which operations are to be conducted;

FACTS

The County operates a Sheriff's Department which, in turn, operates a jail. Both the department and the jail are overseen by the County Sheriff. The Association is the exclusive collective bargaining representative for the department's full-time employees, including the jailer/dispatchers. Denise Lotzer was a full-time jailer/dispatcher with the County until August 13, 2006 when her employment with the County ended. This case involves that action.

The department has long used part-time employees to supplement the full-time work force and fill in for absent full-time employees. These part-time employees are not in the bargaining unit. They are currently paid $10 an hour with no benefits. As of the date of the hearing herein, the County had three part-time employees – two males and one female. That was the same number of part-time employees that it had a year earlier.

On July 1, 2003, Denise Lotzer started working for the County as a part-time jailer/dispatcher. As a part-time employee, she was not a bargaining unit employee. In the

summer of 2005, she was working more than 40 hours a week but was still officially considered a part-time employee.

Lotzer's employment status changed on September 1, 2005 when a full-time employee had health issues and had to retire. On that date, Lotzer moved from being a part-time employee to a full-time employee. Sheriff Robert Bruneau sent a letter to the County Clerk officially notifying him of Lotzer's change in status. New employees have to serve a one year probationary period. Although Lotzer had been a part-time employee, she was considered a new employee and thus had to serve the full one year probationary period. Since Lotzer became a full-time employee on September 1, 2005, her probationary period ran for one calendar year from that date. Thus, Lotzer was scheduled to get off probation on September 1, 2006.

In October, 2005, the jail was inspected by the State Department of Corrections and found to be in violation of a state law which is identified here as the gender specific law for jails. That law requires there to be a jailer of each gender in the jail at all times. At that time, the department's two jailers were female. Compliance with the law required a male jailer to be present.

After being found in violation of the gender specific law, Sheriff Bruneau made a number of staffing changes to try to comply with same so that one male jailer and one female jailer were on duty in the jail at all times. Those attempts, which are not identified here, did not work. According to Sheriff Bruneau, the reason they did not work was because there was an overabundance of female jailer/dispatchers in the department and a lack of male jailer/dispatchers. Sheriff Bruneau ultimately decided that in order to comply with the gender specific law, he needed to replace a female jailer/dispatcher with a male jailer/dispatcher. He further decided that the female jailer/dispatcher who would be replaced by a male was Denise Lotzer. Bruneau selected her for termination because she was still on probation. The male who was moved into the jail was Jason Geach. Geach was not a new hire; he was a deputy who, at the time, filled a utility position.

On August 2, 2006, Bruneau notified Lotzer that he would meet with her the next day. He did not tell her what the meeting's purpose was.

Lotzer learned of the meeting's purpose when she read an article in the local newspaper which contained the following headline: "Iron County to have one less deputy on duty." The article provided in pertinent part:

> The Iron County Sheriff's Department will be operating with one fewer deputy after Aug. 15.

. . .

> . . .On Aug. 15, one jailer's position will be eliminated, and that means the most recent hiree, Denise Reed-Lotzer, will lose her job.
>
> Reed-Lotzer is still on probation, Bruneau said, noting her probationary period would have expired in September. Deputy Jason Geach, whose probationary period expired on Aug. 1, will take over the jailer duties held by Reed-Lotzer, Bruneau said.
>
> Geach also is certified for road patrol, Bruneau said, and he will be spending some of his time on the road.
>
> . . .

Upon reading this article, Lotzer knew what was going to happen in her meeting with Bruneau (namely, that she was going to lose her job).

At the start of the meeting on August 3, 2006, Bruneau told Lotzer that her employment with the County was being terminated. He told her that the reasons for this action were as follows: that the County was currently in violation of the state gender specific law because it did not have a male jailer; that the County needed to comply with same by getting a male jailer; and that she had been selected for termination because she was still on probation. Lotzer asked Bruneau if she could be laid off rather than being terminated and he replied no she could not. When Lotzer asked Bruneau why that was so (i.e. why she could not be laid off), he responded that it was because she was a probationary employee. Lotzer asked if she could finish her probationary period and Bruneau replied she could not. During the meeting, Bruneau also told Lotzer that her termination had nothing to do with her work performance, and he offered to write her a letter of reference to help her get another job. Bruneau also told Lotzer that she could work until the end of that pay period (which would be August 13, 2006).

Later that day, Bruneau gave Lotzer the following letter:

> August 3, 2006
>
> Denise Lotzer
>
> RE: Termination of Employment with the Iron County Sheriff's Department
>
> Dear Denise:
>
> I regret to inform you that due to circumstances beyond my control, effective August 13, 2006, your employment with the Iron County Sheriff's Department will be terminated.

> In order to come into compliance with State Statutes 302.41 (Care of Prisoners), I was forced to make some changes in the structure of the Sheriff's Department. I have eliminated a Utility Position, which was held by full-time union employee, Jason Geach. I must honor the Union Contract, which states the qualified more senior employee will remain within the department, therefore, Mr. Geach has elected to accept the Jailer/Dispatcher position, which was held by you. Due to the fact that you are still on probation, I am releasing you in compliance with Union Contract page 3, sec. 1 and 2.
>
> Your work has been excellent and if need be, you may contact me for future references.
>
> Thank you for your service.
>
> Sincerely,
>
> Robert J. Bruneau /s/
> Robert J. Bruneau
> Iron County Sheriff

Also later that day, Bruneau notified the local Association president that Lotzer had been terminated.

The Association filed a grievance on Lotzer's behalf on August 18, 2006. The grievance contended that Lotzer had been "laid off due to budgetary concerns of the Employer" and alleged a violation of Article 6 (the Layoff/Rehire section) because the County "continues to utilize four (4) part-time non-bargaining unit employees. . ." The Sheriff received the grievance by mail on August 21, 2006.

On August 24, 2006, the County's legal counsel responded to the grievance and denied it. The basis of the denial was that the grievance was untimely and also that Lotzer had been terminated as a probationary employee pursuant to Article 3, Sec. 2. The grievance was ultimately appealed to arbitration.

POSITIONS OF THE PARTIES

Association

The Association's position is that the County violated the collective bargaining agreement in several respects by its actions herein. The Association contends that the Employer's characterization of Lotzer's separation from employment as a termination governed by the probationary period language was erroneous and a sham. According to the Association, the County terminated Lotzer just short of the end of her probationary period

solely to avoid the responsibilities it would otherwise have to her had she been laid off. It also contends that the Employer continues to use part-time employees to fill vacant shifts despite the fact that Lotzer remains, in fact, on layoff status. It elaborates on these contentions as follows.

First, the Association responds to the County's assertion that the grievance was not timely filed. It disputes that assertion. The Association contends that the date which the Employer relies on – namely, August 3, 2006 – should not be the dispositive date used to determine timeliness herein. While August 3 was certainly the date that the Sheriff told Lotzer of her projected termination and the date on the termination letter, those were not the triggering events which gave rise to the grievable offense in this case. According to the Association, it was the effective date of Lotzer's planned "termination" that triggered the grievance. To support that contention, it notes that in the ensuing two weeks, the County could have changed its mind about terminating Lotzer before the effective date of her termination, or unforeseen events/contingencies could have occurred/befallen another employee which could have led to the need to retain Lotzer and obviated the "need" to end her employment. The Association notes that other arbitrators have found that the date when an action became finalized is the date when the grievance ripened into a grievable event. It asks this arbitrator to find likewise (i.e. to find that the grievable event was the actual "termination"; not the date that she was notified that the County intended to terminate her employment). Based on the premise that Lotzer's "termination" was the grievable event, and that it occurred August 13, 2006, the Association believes the grievance was timely filed and therefore is properly before the arbitrator for a decision on the merits.

Second, the Association disputes the County's assertion that the Association lacks standing to bring the instant grievance. It avers that it does. The Association opines that were it otherwise, "the Employer would be permitted to work all sorts of mischief on probationary employees" and then terminate them "under the guise that they had not met the requirement of passing through the probationary phase of their employment." The Association avers that would not pass the "smell test" as the basis for terminating a probationary employee. Building on that premise, the Association maintains that the County's action here does not pass the "smell test" either.

With regard to the merits, the Association introduces its case as follows:

> This case involves the callous attempt by the County to manipulate the probationary period of a perfectly competent employee so as to avoid the layoff provision of the parties' Agreement. Rather than lay her off, the County fired Lotzer, intentionally severing her employment with the County. In electing to terminate her employment prior to the end of her probationary period, the County also hoped to deprive her of any relief pursuant to the Agreement. In the end, however, the harmonization required to give maximum effect to all relevant provisions of the Agreement will show that the County violated the Agreement as alleged and that the Arbitrator should award the relief sought.

As noted above, the Association sees Lotzer's "termination" as a layoff which is governed by the layoff language. Conversely, it acknowledges that the Employer sees Lotzer's "termination" as governed by the probationary period language. The Association contends that after the arbitrator harmonizes these two provisions in a manner which gives them the maximum meaning, he should conclude that the layoff provision is most dispositive to the outcome herein. Here's why.

First, it notes that the stated purpose of the probationary period is to determine "whether or not they are suited and qualified for the job." As the Association sees it, this language gives the Employer the right to terminate a probationary employee if they determine that the employee is not "suited and qualified for the job." The Association maintains that if a probationary employee is fired for a reason unrelated to their qualifications for the job, they are being fired for an illegal reason.

Second, the Association contends that Lotzer was fired for a reason unrelated to her qualifications. To support that premise, it notes that during the August 3, 2006 meeting, the Sheriff made it clear that Lotzer had no defects whatsoever in her performance and that he would recommend her for hire in a law enforcement capacity anywhere. The Association maintains that these statements are significant because they show that the Sheriff determined that Lotzer was qualified in all respects to perform her job as a jailer/dispatcher. If the Sheriff felt otherwise, he would not have recommended her for work in law enforcement in another agency if he believed that she was not qualified to work for the County. Aside from that, the Association avers that the Sheriff's statements establish that the County did not use the probationary period language as it was intended (namely, to determine whether Lotzer was "suited and qualified for the job.") Instead, the County hid behind the probationary period language. The Association asserts that in doing that (i.e. deciding to terminate Lotzer's employment rather than laying her off because of asserted economic necessity), the County acted in bad faith.

Third, the Association also notes that during that same meeting, the Sheriff also told Lotzer that she was being terminated because the County needed to reduce its workforce for budgetary reasons. The Association argues that even if the asserted reason (i.e. economic necessity) constitutes legitimate grounds for layoff, it is not grounds for the termination of a probationary employee. It elaborates on this point by opining that the parties' layoff language substitutes for just cause in termination cases based on economics. It maintains that in adopting such language, the parties acknowledged that there is a subset of the termination of employees that is based purely on economics – or some other reason unrelated to an employee's performance – and that in such cases the employee is blameless. In a layoff case, the employer is excused from having to prove that it had just cause to terminate the employee (in the general sense). The Association asserts that as a trade off "for more or less plenary absolution for terminating an employee for economic and other non-performance based reasons", the Association secured three protections in the layoff provision. First, employees who are terminated in a layoff status must have their seniority recognized and considered in the layoff decision making process. Second, such employees – identified as having been laid off –

are entitled to be placed on a recall list for two years following their layoff. Third, and most significant here, the County cannot lay off a "regular employee" while any part-time, casual or seasonal employees remain on the County's payroll. The Association avers that the record evidence herein shows that there are still part-time employees on the County's payroll after Lotzer's "termination". The Association acknowledges that part-time employees have been used in the department for many years. However, as the Association sees it, that is not relevant here because at no prior time when part-time employees were serving has there ever been a layoff of a regular employee (like what happened here when Lotzer was laid off and part-time employees were still retained). The Association maintains that rather than laying Lotzer off, the County should have first eliminated the use of its part-time employees "and only then laying off Lotzer in whole or in part, if the necessity to reduce the workforce still existed."

Fourth, the Association notes that in both the August 3 meeting and his termination letter to Lotzer, the Sheriff told Lotzer that she was being terminated because she had the least seniority. The Association avers that the concept of seniority has nothing to do with probation and the probationary period language; instead, it has everything to do with layoffs and the layoff language.

Finally, the Association addresses the County's argument that Wisconsin case law establishes the proposition that the termination of probationary law enforcement officers cannot be arbitrated. It disputes that assertion. According to the Association, the cases cited by the County establish that the purpose of probation is for an employer to determine whether a probationary employee is qualified for their job; if the employee is found not qualified, then the employer can remove the employee without having to show that just cause exists for the removal. The Association argues that here, though, the Sheriff told Lotzer in their meeting that she was qualified to perform her job. That being so, it is the Association's view that the cited cases do not apply in this particular case.

In sum, the Association asks the arbitrator to sustain the grievance. As a remedy, it asks that Lotzer be reinstated and made whole for her losses.

County

The County's position is that the grievance should be denied for three basic reasons. First, the Employer avers that the grievance was untimely filed. Second, it argues that neither Lotzer nor the Association have the right under this collective bargaining agreement to grieve Lotzer's termination. This argument is based on the premise that Lotzer was a probationary employee who was terminated and the collective bargaining agreement expressly precludes a probationary employee from grieving their discharge. As the Employer sees it, the instant grievance should be denied for either of those reasons. Third, if the arbitrator does address the merits, the Employer contends it did not violate the collective bargaining agreement because, as just noted, Lotzer was a probationary employee who was terminated. The Employer avers that the collective bargaining agreement gives it the absolute right to terminate probationary employees for any reason. It elaborates on these contentions as follows.

First, the County asserts that the grievance was not timely filed. To support that premise, it notes that the collective bargaining agreement contains time limits for filing grievances, namely ten days from "the date that the employee knew or should have known of the alleged violation of the collective bargaining agreement." As the County sees it, the ten-day time limit started to run in this particular case on August 3, 2006 because that is the day that Lotzer learned of her termination from Sheriff Bruneau. Additionally, that is also the date listed on the termination letter. Building on the premise that the ten days started to run on August 3, 2006, and excluding Saturdays and Sundays, the Employer submits that the Association had until August 17, 2006 to file a timely grievance. That did not happen though because the grievance was dated August 18 and was received by the Sheriff on August 21. The Association argues that whichever event is used, the grievance was untimely.

Second, the County contends that the grievance should also be dismissed because Lotzer was a probationary employee and, under this collective bargaining agreement, probationary employees who are terminated, and the union, do not have standing to grieve their discharges. To support that premise, the County relies on the language contained in Article 3, Sections 1 and 2. According to the County, that language stands for the proposition that 1) a probationary employee does not have recourse to the contractual grievance procedure and 2) a probationary employee may be discharged by the County without recourse through the grievance procedure. The County avers that "there are no applicable standards listed in the language for the exercise of that option", so the County's "option is absolute and vested." Aside from that contractual basis, the Employer also argues that Wisconsin case law establishes the proposition that the termination of probationary law enforcement officers cannot be arbitrated. Building on that premise, the Employer maintains that this case law supports the County's right to terminate probationary employee Lotzer for any reason at all without recourse through the grievance procedure by either Lotzer or the Association.

Next, assuming that the arbitrator addresses the merits, the Employer argues that its discharge of Lotzer did not violate the collective bargaining agreement. Here's why.

First, as previously noted, the County emphasizes that it has the absolute right under Article 3, Section 2 to terminate any probationary employee. According to the County, it does not need to establish just cause for that type of discharge. The County avers that since Lotzer was a probationary employee, it had the absolute right to discharge her without showing just cause for the discharge.

Second, the Employer relies on the management rights clause to support its position here. It specifically relies on Sections 4 and 6, which give the Employer the right to relieve employees from their duties because of other legitimate reasons (#4) and to take whatever action is necessary to comply with state law (#6). As the Employer sees it, these sections are applicable here because the County was notified by the Department of Corrections that it was in violation of the gender specific law for jails. The County notes that Sheriff Bruneau ultimately determined that the only effective means of complying with the law was to eliminate a female jailer/dispatcher and replace her with a male jailer/dispatcher. According to the

County, Sheriff Bruneau had a legitimate reason to terminate Lotzer, namely compliance with state law. As such, the County maintains that its termination of Lotzer complied with its rights under Article 22.

Finally, the County disputes the Association's contention that Lotzer's termination was, in effect, a layoff governed by Article 6 of the collective bargaining agreement. In the Employer's view, that provision (Article 6) is not controlling in this case because Lotzer was not laid off. To support that premise, it first notes that both Sheriff Bruneau and Lotzer testified that at the August 3, 2006 meeting, Bruneau told Lotzer that she was being terminated; nothing was said about being laid off. Second, it notes that the termination letter also does not say anything about a layoff – all it references is termination. Third, the Employer asserts that the Association presented no evidence to support their assertion that Lotzer was laid off. Additionally, it contends that the Association's assertion that the termination was motivated by economic reasons is not supported by the record evidence. Fourth, the Employer contends that the Association's assertion that what happened here was a layoff is contrary to the finding in the MACK decision wherein the Wisconsin Supreme Court opined that a layoff "implies a temporary separation from employment rather than a permanent termination of employment." According to the Employer, there was nothing temporary about Lotzer's separation from employment. That being so, it is the Employer's position that Lotzer was not laid off.

The Employer therefore asks that the grievance be denied.

DISCUSSION

Timeliness

Inasmuch as the County has raised a timeliness defense, it will be addressed first.

The County contends that the grievance was not filed in a timely fashion. As noted in the **POSITIONS OF THE PARTIES** section, both sides made numerous arguments about this matter (i.e. whether the grievance was timely filed). The reason the parties are fighting about it, of course, is because if the grievance was not timely filed, the arbitrator could dismiss the grievance on that basis alone. However, I am not going to address any of those arguments. Here's why. I have decided to presume for the sake of discussion that the grievance was timely filed. My reason for doing so will become apparent at the end of my discussion.

Merits

From the outset, the parties have approached this separation from employment case from different perspectives. The Association sees it as a layoff case which is governed by the layoff provision. In contrast, the County sees it as a termination case which is governed by the probationary period provision. Based on the rationale which follows, I find that this case is not governed by the layoff provision; instead, it is governed by the probationary period provision.

Notwithstanding the ultimate conclusion just noted, I've decided to begin my discussion with the initial observation that if one were to review just the grievance in this case, and the contract language cited therein, the Association's position seems correct that a contract violation occurred. Here's why. The grievance avers that the "facts" are that "Lotzer was laid off due to budgetary concerns of the Employer", and that this action constituted a layoff which violated the layoff provision because the County "continues to utilize part-time employees while a regular employee is in layoff status." The layoff provision quoted in the grievance (Article 6) says in pertinent part that "no . . .part-time employee shall remain on the Employer's payroll while a regular employee is in layoff status." That provision incorporates the contractual restriction commonly found in layoff clauses that part-time employees are to be laid off before full-time employees. Applying the layoff language just quoted to the "facts" referenced in the grievance (i.e. that "Lotzer was laid off due to budgetary concerns of the Employer") and considering the additional "fact" that Lotzer was a full-time employee, the Association's claim of a contract violation seems, on its face, logical and reasonable. However, there's more to this case than just the "facts" and the contract language referenced in the grievance. When the additional facts and contract provisions are examined, as they will be in the analysis which follows, the Association's claim of a contract violation collapses.

I've decided to focus first on the County's characterization of what happened to Lotzer as a termination. My reason for doing so will become apparent at the end of my discussion.

Since I'm going to first address the topic of termination, a logical starting point, contractually speaking, is to ask rhetorically whether there is any contract language dealing with same. There is. Article 7 deals with the subject of discipline and discharge. That article provides in Section 2, A, that "every type of disciplinary action taken against an employee shall be based on just cause. . ." This clause imposes a just cause standard on employee discipline. What it means, of course, is that the Employer has the right to discipline employees, so long as it has just cause for doing so. The burden is on the Employer to show that it had just cause for the disciplinary action taken.

Next, it is necessary to note that employees who are disciplined can challenge their discipline by filing a grievance. This contractual right is granted via Article 8, Section 1.

Having just noted that disciplined employees can grieve their discipline, and that employees are protected under a just cause standard (whereby the Employer has to prove that it had just cause for the discipline imposed), the next question, contractually speaking, is whether there are any exceptions to these two contractual rights. There are. While there is nothing in Article 8 (the grievance procedure) that says that a certain type of discipline cannot be grieved, such an exclusion is contained elsewhere in the agreement. Specifically, the parties negotiated language that says that probationary employees who are terminated cannot grieve their termination. Similarly, while there is nothing in Article 7 (the discipline-discharge article) that excludes a particular classification of employee from receiving protection under the just cause standard, such an exclusion is found elsewhere in the agreement. Specifically, the parties negotiated an exception for probationary employees. These exceptions, which are found in Article 3, are addressed next.

An overview of Article 3 follows. Article 3 is entitled "Probationary Period". As the name implies, that article specifies that new employees are to serve a probationary period. It is common for employers to have new employees serve a probationary period. The duration for probationary periods can vary. The duration which the parties agreed to here, and put in the first part of the first sentence of Section 1, is one year. The latter part of that same sentence then goes on to provide that the purpose of this probationary period is "to determine whether or not they are suited and qualified for the job. . ." That language is somewhat unique because many contractual probationary period provisions don't specify a purpose for the probationary period. This one does though, namely to determine whether the probationary employee is "suited and qualified for the job." The second sentence of Section 1 then goes on to say that "a probationary employee terminated during a probationary period. . .shall not have recourse through the grievance procedure set forth in this Agreement." That language means that probationary employees who are terminated cannot grieve their termination. As was noted earlier, this language creates an exception to the right granted to employees in Article 8 to grieve their discipline because it says that a certain type of discipline – namely terminations of probationary employees – cannot be grieved. The next section, Section 2, provides as follows: "During the probationary period, the employee may be discharged at the option of the Employer without recourse through the Union and/or grievance procedure." In discerning what Section 2 means when it says that probationary employees "may be discharged at the option of the Employer", it is helpful to consider that language in conjunction with Article 7 which, as previously noted, sets a just cause standard for employee discipline. Article 3, Section 2 creates an exception to that Article 7 right and excludes a particular classification of employee – namely probationary employees – from receiving protection under the Article 7 just cause standard. Since probationary employees are not protected by the just cause provision, the Employer does not have to prove just cause when it terminates them (i.e. probationary employees). Said another way, Article 3, Section 2 relieves the Employer from proving just cause when it terminates a probationary employee.

Application of Article 3, Section 2 here yields the following results. Lotzer was a probationary employee when she was terminated – whether the date of her termination was when she was told of it (August 3, 2006) or her last day on the payroll (August 13, 2006). Given Lotzer's probationary status, the Employer did not have to prove just cause for her discharge.

Since the just cause standard does not apply to the discharge of a probationary employee, what standard does apply? According to the Association, the standard is this: a probationary employee can only be discharged for being unqualified for the job.

Before I address the contractual basis of that claim, I'm first going to review the facts which the Association relies on in making this claim. They are as follows. When the Sheriff met with Lotzer on August 3, 2006 and told her that she was being terminated, he made it clear that her termination was not related to her work performance. In fact, the Sheriff told Lotzer there were no defects in her work performance and he would recommend her for hire in a law enforcement capacity anywhere. The Association maintains that these statements show

that Lotzer was qualified to perform her job as a jailer/dispatcher. For the purpose of discussion herein, I agree. Insofar as the record shows, Lotzer's termination had nothing to do with her job performance, or that she was somehow unqualified to perform her job as a jailer/dispatcher.

The focus now turns to whether there is a contractual basis for the Association's claim that a probationary employee can only be discharged for being unqualified for their job. I find that the Association's contention lacks a contractual basis. Here's why. As previously noted, Article 3, Section 1 says in pertinent part that the purpose of the probationary period is to determine if the probationary employee is "suited and qualified for the job." The Association essentially takes that language (i.e. the part of Section 1 that references that the purpose of the probationary period is to determine if the probationary employee is qualified), and imposes it as a restriction into Section 2 (which is the language which gives the Employer the right to discharge probationary employees "at the option of the Employer"). The problem with this contention is that there is nothing in Section 2 that limits the Employer's right to terminate probationary employees to just those factual situations where a probationary employee is found to be unqualified. While the language in Section 2 certainly covers that type of factual scenario (i.e. where a probationary employee is found to be unqualified), it is not limited to just that one factual scenario. The language in Section 2 is broader than that. Specifically, there are no stated limitations on why the Employer can discharge a probationary employee.

While there are no stated limitations on why the Employer can discharge a probationary employee, I find it to be implicit that when the Employer terminates a probationary employee, it does have to meet an arbitrary and capricious standard. In the context of this case, that means that the Employer has to show that their decision to terminate Lotzer was not arbitrary or capricious. I find that it met that burden because of the following record evidence. The Department of Corrections had found the jail in violation of the gender-specific law because both of the jail's jailers were female. The Sheriff ultimately determined that the only effective means of complying with the gender-specific law was to eliminate a female jailer and replace her with a male jailer. The management rights clause gave the Employer the right to make that call and take that action. The Sheriff selected Lotzer for termination because she was a probationary employee. The Sheriff knew that pursuant to the collective bargaining agreement, probationary employees can be terminated at the Employer's option. The Employer chose to avail itself of that contractual right in this instance. It could do that. The Employer's act of availing itself of its contractual right to terminate probationary employee Lotzer was not arbitrary or capricious. That being so, Lotzer's termination comported with Article 3, Section 2.

In reaching that decision, I am well aware of its impact on Lotzer. I am truly empathetic with her plight. Usually, when I sign an arbitration award that sustains an employee's termination, the employee did something that warranted that outcome. However, Lotzer did not do anything that caused her discharge. By all accounts, she was good at her job. That makes what happened here hard to stomach, so to speak: she was called into a meeting shortly before her probationary period was set to end and without any advance official

notice, told she was losing her job due to circumstances beyond her control. That does not strike me as being fair. Be that as it may, the parties did not empower me, via their arbitration clause, to impose fairness. Instead, they empowered me, via their arbitration clause, to interpret and enforce the collective bargaining agreement as currently written. I've concluded that the County could do what it did (i.e. terminate probationary employee Lotzer) because Article 3, Section 2 expressly allows that to occur.

As a practical matter, that finding disposes of the Association's contention that what happened here is covered by the layoff clause. I find that Lotzer's termination was not a layoff and thus was not covered by the layoff language. Given that finding, no other comments need be made about the facts which the Association relies on in making this claim, the layoff language itself, and its application herein.

In sum then, the contract language which is dispositive of Lotzer's termination is Article 3, Section 2. That language allowed the County to terminate probationary employee Lotzer. Accordingly, no contract violation has been found.

Those arguments not addressed in my discussion were considered, but were deemed unnecessary to decide this matter.

In light of the above, it is my

AWARD

That the County did not violate the collective bargaining agreement when it terminated the employment of probationary employee Denise Lotzer. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 25th day of October, 2007.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

REJ/gjc
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