

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**MILWAUKEE COUNTY**

and

**MILWAUKEE DEPUTY SHERIFF'S ASSOCIATION**

Case 625

No. 67051

MA-13730

(Michalski Grievance)

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**Appearances:**

**Timothy R. Schoewe**, Deputy Corporation Counsel, 901 North 9<sup>th</sup> Street, Room 303, Milwaukee, Wisconsin, 53233, on behalf of Milwaukee County.

**Mathew L. Granitz**, Attorney at Law, Cermele & Associates, S.C., 6310 West Bluemound Road, Suite 200, Milwaukee, Wisconsin, 53213, on behalf of Milwaukee Deputy Sheriff's Association and Sarah Michalski.

**ARBITRATION AWARD**

Milwaukee County and the Milwaukee County Deputy Sheriff's Association are parties to a collective bargaining agreement which provides for the final and binding arbitration of certain disputes. The Association filed a request to initiate grievance arbitration with the Wisconsin Employment Relations Commission for arbitration of a grievance file by the Association concerning the discipline of one of its members, Sarah Michalski, herein Michalski or the Grievant. The Commission designated Paul Gordon, Commissioner, to serve as arbitrator. Hearing was held on the matter on October 11, 2007, in Milwaukee, Wisconsin. No transcript was prepared. The Parties filed written briefs and the record was closed on December 7, 2007.

**ISSUES**

The Parties did not stipulate to a statement of the issues. The Association states the issues as:

1. Did just cause support the rule violations as charged?
2. If yes, did just cause support a five day suspension? And if not, what is the appropriate remedy?

The County states the issues as:

Was there just cause to find a violation of the rules governing the conduct of members of the Milwaukee County Sheriff's Department?

If so, was there just cause to suspend Deputy Michalski for five (5) days?

If not, what is the appropriate remedy?

The Parties' statements of the issues are essentially the same. The County's statement is adopted as it is broad enough to address the issues in the record.

### **BACKGROUND AND FACTS**

The Milwaukee County Sheriff's Department has established rules and regulations which govern the conduct of its employees. Milwaukee County has civil service rules which also govern its employees. The management rights clause in the Parties' agreement reserves in the County the right to make reasonable rules and regulations relating to personnel policy, procedures and practices and matters relating to working conditions, giving due regard to the obligations imposed by the Parties' collective bargaining agreement. Among those are the following:

#### Milwaukee County Sheriff's Department Rules

- 1.05.10 Obedience to Orders. Members of the department shall obey all lawful orders or directives, whether written or oral.
- 1.05.11 Insubordination. Members of the department shall exhibit respect and courtesy toward all supervisory personnel.

#### Milwaukee County Civil Service Rule VII, 4(1)

- (k) Refusing/failing to obey orders of supervisor whether written or oral
- (t) Failure/inability to perform the duties of assigned position

These rules and regulations were in effect at all material times herein.

Grievant is a Deputy and member of the bargaining unit. She has been a County employee for approximately ten years and works in the jail. Sometimes there is voluntary overtime available to be worked at the jail. Overtime at the jail is offered on a seniority basis. If no one on a given shift has signed up for overtime, then it is offered to those who signed up on a seniority basis. Usually deputies are asked if they want to work overtime. Specific assignments to be worked on the overtime are sometimes not discussed until the assignment of duties is made at the jail at the beginning of the work period. Supervisors and schedulers often attempt to accommodate deputy preferences for where those working overtime would like to work but, such preferences are not always honored. Grievant understands this. Supervisors assign duties and tasks as they deem appropriate.

On February 10, 2007 overtime was available on second shift. Grievant had signed the voluntary overtime list and was contacted by phone at her home by Sergeant Janet Haass, who asked her if she wanted to work second shift overtime. She said she did, and would come in. There was no discussion between her and Haass as to where the assignment would be in the jail or what the duties would be. Grievant then went to the jail for the beginning of the second shift.

Lieutenant Richard Gellendin was responsible for scheduling and personnel assignments at the jail on February 10<sup>th</sup>. When Grievant arrived at the jail to work the overtime, Gellendin had decided to assign her to Booking Security. When Grievant came in she went to Gellendin's office area shortly before the start of the shift, where he was talking with Corrections Officer Robert Worzalla. Gellendin was moving Worzalla's assignment for second shift from Booking Security to Pod 5D because Gellendin wanted a correctional officer to work in the Pod. Gellendin was then going to have an overtime Deputy, Grievant, work Booking Security. Gellendin then advised Grievant, in Worzalla's presence, that she would be working Booking Security. Grievant responded by asking if she could have Floor Control, explaining that she hadn't worked Booking Security in about two years. Gellendin said no, he told her he was confident she would be able to handle it, and he was not moving deputies that he had on Floor Control. Grievant started to walk away and then asked about working Photo/Id, and Gellendin told her no, that the position was Booking Security. Grievant asked if she would have a partner, and was told she would not. Grievant then told Gellendin that if that was the assignment then she was going home. Gellendin told her that if she did he would write her up. Grievant said "fine", walked away and left the jail. She thought a write up would be a type of counseling. She did not work the overtime shift. She was calm. Neither raised their voice or swore during the conversation. Neither was rude. Gellendin told Worzalla to write a report on what he had heard and observed. Worzalla did so within minutes.

Booking Security is generally a two person spot and is done in the Booking Room, which has a search area, pre-book area, Photo/Id, and a Sergeant podium. Booking Security involves rounds in the booking room, logging people in and out, escorting them, and assisting other jail personnel. There are usually at least six or seven employees working in the area at any given time. Grievant is familiar with the duties for Booking Security, although different shifts do have some variation in duties. She has worked in the booking room on a regular basis in various capacities. She worked Booking Security third shift approximately a year or year and a half before the incident at issue.

When Grievant left Gellendin, he asked Haass to find someone else to work the overtime. Minutes later as he walked to roll call he noticed another Corrections Officer was there who happened to be the next person on the overtime list. Gellendin asked him if he was still interested in the overtime, which he was, and assigned an overtime Pod shift to him, leaving Wrozalla to work Booking Security.

Gellendin then prepared a request for an internal affairs investigation into the matter as a rules violation, which eventually led to discipline of Grievant.

Grievant testified at the hearing in this matter that before she left Gellendin he had asked her if she wanted the overtime or not. Gellendin testified that he did not say this. Worzalla was about two feet from Gellendin during the conversation between Gellendin and Grievant and heard the entire conversation. Worzalla testified that he did not recall Gellendin asking this, and his written report does not contain that question. The testimony of Gellendin and Worzalla is credited as the most accurate version of what Gellendin said, which does not contain the question.

On June 5, 2007 the Sheriff issued a five day unpaid disciplinary suspension of Grievant for the events of February 10, 2007 as violations of the four rules identified above. Grievant had been disciplined recently with a suspension for a different type of conduct, an improper release. Previous performance reviews indicate she has exceeded expectations in some areas of performance and accepts assignments without complaints. The Notice of Suspension included the following:

**ATTACHMENT TO COUNTY OF MILWAUKEE**  
**NOTICE OF SUSPENSION**

On Monday, February 19, 2007, Internal Affairs received an Authorization for Investigation request written by Lieutenant Richard Gellendin and approved by Inspector Richard Schmidt relative to Deputy Sarah M. Michalski.

Overtime was available on second shift in the CJF on Saturday, February 10, 2007. On this date, Sergeant Haas contacted Deputy Michalski at home and asked if she wanted to work second shift overtime. Deputy Michalski stated that she did, and would come in. There was no discussion between Sergeant Haas and Deputy Michalski regarding where the overtime assignment would be.

Lieutenant Gellendin was on duty on February 10<sup>th</sup> and was responsible for the scheduling of personnel. The overtime position available was for Pod 5D. Lieutenant Gellendin does not assign deputy sheriff's to pod positions and thus, decided to move CO Worzalla from Booking Security to Pod 5D, assigning Deputy Michalski to Booking Security.

Upon arrival, Deputy Michalski had conversation with Lieutenant Gellendin in the presence of CO Worzalla. After being advised that she would be working Booking Security, she asked if she could work a Floor Control. Lieutenant Gellendin denied this request. She then asked if she could work Photo/ID; again the request was denied. She then informed Lieutenant Gellendin that she had not worked Booking Security in over two years, however she has worked in the Booking area. Lieutenant Gellendin stated that he was confident she

could handle it. Deputy Michalski states that Lieutenant Gellendin asked her “Do you want the overtime or not?” She stated that she told him no, and left. Lieutenant Gellendin states that he never asked her if she wanted the overtime or not; he stated that he told her, her assignment was Booking Security and that was it. He states she then said she was leaving and he advised her if she did so, he would write her up.

CO Worzalla states that he overheard the entire conversation between Lieutenant Gellendin and Deputy Michalski and he did not recall Lieutenant Gellendin ever ask Deputy Michalski if she wanted the overtime or not. Lieutenant Gellendin ordered CO Worzalla to write a report as to what he heard, which he did immediately. There is no mention of this statement in the report.

Deputy Michalski stated that she understands that overtime assignments are given on a seniority basis, however the actual assignment position is not given based on seniority. It is the supervisor’s prerogative as to where they place their personnel.

All charges in this case are SUSTAINED. Deputy Michalski failed to obey the orders of Lieutenant Gellendin and was insubordinate when she reported for her overtime assignments, then refused to work the area he assigned her to. By leaving the workplace after being ordered to report to Booking Security for her shift, she failed to perform the duties of her assigned position.

The Association filed a grievance over the June 5<sup>th</sup> discipline which was denied. This Arbitration followed. Further facts appear as are in the discussion.

### **POSITIONS OF THE PARTIES**

#### **County**

In summary, the County argues that Lieutenant Gellendin, who was responsible for scheduling, assigned Grievant to Booking Security and she was ordered to work that assignment. When she threatened to leave she was advised she would be written up. She left without permission, abandoning her assignment and her job. This left the Department shorthanded and required administrative scrambling to allocate scarce manpower. There is no corroboration of Grievant’s contention that she was accorded the option of leaving. The contention of the Sheriff is corroborated. Gellendin stated he never asked Grievant if she wanted overtime or not. He is consistent. This comports with the very specific recollection of a disinterested witness. Corrections Officer Worzalla was present for the entire conversation and wrote a report. In the report, internal affairs investigation and hearing his account was consistent that Grievant’s contention of being given an option to leave just did not happen.

The County argues that Grievant understood that while overtime itself is assigned by seniority, the actual assignment is not. It is the supervisor’s prerogative as to where to assign in order to mobilize the workforce in a manner designed to execute the Sheriff’s immemorial

duty of running the jail. Grievant failed to obey the order to fulfill her assignment in Booking Security. She refused to perform her assignment. This makes her insubordinate. She abandoned her work and assignment. By leaving the jail she failed to perform the duties of her assigned position. At a minimum the imposition of discipline by the Sheriff should be sustained. Given that this is the second suspension of Grievant in a very limited timeframe should lead to a consideration of increasing the penalty imposed.

### Association

The Association argues, in summary, that just cause does not support the rule violations as charged. The record does not sufficiently link Grievant's conduct to any of the charged rules. She did not violate any rules and the County had not met its burden of proof. The County mistakenly suggests Grievant was insubordinate. Grievant exhibited respect and courtesy toward Lieutenant Gellendin. Gellendin and Worzalla admitted that Grievant never swore, raised her voice, acted in a rude manner, or was disrespectful. The record lacks any reference that she was disrespectful. The record confirms she was respectful. Therefore, this supposed violation must be dismissed because no credible evidence exists. Grievant was never given an order. For one to violate the department rule on obedience to orders, an order must be given. Contrary to the County's suggestion that Grievant violated this rule, an order was never given, thus no rule violation occurred. Gellendin admitted that he never ordered Grievant to work the Booking Security position. When a supervisor readily admits an order was not given, a subordinate cannot be held accountable for such a rule infraction.

The Association argues that just cause does not support a five day unpaid suspension. Alternatively, if just cause supports one or more rule violations, just cause does not support the level of disciplinary penalty imposed. Progressive discipline does not support the suspension. It is undisputed that Grievant has never been charged with or alleged to have violated either the rule on insubordination or the rule on obedience to orders. Thus, a five day unpaid suspension is not warranted for a first time violation. Her prior discipline can be easily distinguished. That arose from an improper release of an inmate. The conduct is not similar. The rule violated is not the same. The prior discipline has no direct bearing on the incident. And mitigating factors exist. A replacement was found almost immediately. There was no need to call another employee and wait until he/she arrived. The jail was properly staffed when it needed to be.

The Association further argues that Gellendin never gave Grievant an order. The County relies upon an inaccurate fact. Gellendin admitted during cross examination that he never gave Grievant an order. If he never gave an order, Grievant cannot violate the corresponding rule. And, the County has failed to prove the disputed colloquy did not occur. Gellendin is not disinterested, as the County argued. He was involved from the outset. He requested the internal affairs investigation and instructed Worzalla to write the report. Gellendin is interested and his representation of what occurred is questionable. Worzalla's statement cast doubt on his recollection. As to whether or not Gellendin offered Grievant the overtime assignment he responded that he could not recall whether this was said or not. He

testified that his internal affairs statement is ambiguous on whether the disputed colloquy actually occurred. Grievant would not have left had Gellendin not given her the choice. The only other witness lacks certainty on what transpired. The County is responsible for demonstrating the event occurred as Gellendin suggests, and the County has not done this. And, the County misinterprets the rule on insubordination. The rule requires members to exhibit respect and courtesy toward supervisors. Grievant did this. Gellendin and Worzalla's testimony confirms this. The conversation was civil with no raised voices or swearing. There is no evidence Grievant was insubordinate. To be insubordinate one must be disrespectful. Here, that did not occur.

The Association requests that there be a finding that Grievant did not violate the rules charged and that they be rescinded. Alternatively, the level of punishment be reduced to appropriately fit the type of action and behavior displayed.

### DISCUSSION

Grievant was disciplined for allegedly violating four work rules. She contests each application of the rules. The case also contains a dispute of fact which has bearing on whether some or all the rules were violated. The issues require a determination of whether there was just cause to find violations of the rules and if so was there just cause for the five day suspension.

A just cause standard has two elements. The first is that the employer must establish conduct by the Grievant in which it has a disciplinary interest. The second is that the employer must establish that the discipline imposed reasonably reflects its disciplinary interest.

The factual dispute is whether Lieutenant Gellendin made the statement "Do you want the overtime or not?" Grievant contends he said that, and it gave her the option of whether or not to work the Booking Security assignment. With her having the option of working Booking Security, she could not have violated any of the rules if she chose not to take that assignment.

As the Background and Facts portion of this Award show, the undersigned is convinced that Gellendin did not make that statement. Contrary to the arguments of Grievant, Gellendin has been consistent in his statements to Internal Affairs and in his testimony that the statement was not made. This is, again contrary to the arguments of Grievant, consistent with the statements of Worzalla. Worzalla was in a position to observe, remember and relate what he saw and heard. That Worzalla testified and stated to Internal Affairs that he did not recall hearing the statement does not support any conclusion that the statement was made. It does support a conclusion that it was not made. Worzalla also stated that if he would have heard a statement like that he would have put it in his report. He also made a written report immediately after the incident when his memory was fresh and the statement is not in the report. The report is otherwise entirely accurate with respect to the remaining testimony of both Gellendin and Grievant. Worzalla is a disinterested person. Additionally, Grievant's testimony was that she had not worked Booking Security in a year or year and a half. This is inconsistent with her statement to Gellendin that she had not worked it in two years. The undersigned is convinced by the record evidence that Gellendin's version is more accurate than Grievant's, and the statement was not made.

The resolution of this factual dispute in the County's favor does not end the inquiry. Just cause requires that the County have a disciplinary interest in the conduct it alleges. Here there are two Sheriff's Department rules and two County rules that are alleged to have been violated by the conduct. The County clearly has an interest in all four of the rules in the administration of its Sheriff's Department. The issues raised by Grievant are whether her conduct amounted to a violation of those rules.

One of the Sheriff's Department Rules alleged to have been violated is 1.05.10 which states:

1.05.10 Obedience to Orders

Members of the department shall obey all lawful orders or directives, whether written or oral.

A companion County Civil Service rule also alleged to have been violated is VII, Section 4(1) which states:

- (k) Refusing/failing to obey orders of supervisor whether written or oral.

Grievant reported for duty after she had agreed on the telephone to accept the overtime. Although the matter of accepting voluntary overtime is based on seniority, the actual assignment of duties during the overtime is a matter within the discretion of the supervisor. Gellendin as a supervisor and scheduler has the authority to assign shifts and duties. Grievant knew this when she told Haas she would take the overtime and when she reported to work. When she reported for work at the start of the shift Gellendin told her she was assigned to Booking Security and he explained his reason to her, even though he needn't have. She had in fact worked that assignment before, and there were people there to help her, even though there would be no partner on the shift. She was familiar with the area, having worked other duties there. After she questioned him about other positions, he specifically told her that the position was Booking Security. In doing so Gellendin was directing Grievant as to what her assignment and duties were. This is underscored by his statement to her that he would write her up if she went home. Grievant's understanding that this only referred to counseling does not make her assignment to Booking Security any less of a directive. Under these circumstances there is no practical difference between a directive and an order. The fact that Gellendin did not use the word "order" is to draw a distinction without a difference. Grievant reported to work a shift she had agreed to work and when given a lawful directive by Gellendin she did not obey the directive. She refused to obey the order. By doing so she violated Sheriff's Department rule 1.05.10. By the same conduct she also violated County Civil Service rule VII, Section 4(1).

Another County rule alleged to have been violated is also under VII, Section 4(1), which is:

- (2) Failure/ inability to perform the duties of assigned position.

As noted just above, Grievant was assigned the position of Booking Security. She left the jail after being directed to perform that assigned position. She did not work that shift. By that conduct she failed to perform the duties of assigned position in violation of the rule.



The remaining rule violation alleged is Sheriff's rule 1.05.11, which states:

1.05.11 Insubordination

Members of the department shall exhibit respect and courtesy toward all supervisory personnel.

The County alleged that Grievant's conduct was insubordinate when she did not perform the Booking Security assignment. Grievant contends that she did not violate this rule because she was at all times calm, did not raise her voice and did not swear, did not act in a rude manner and was not disrespectful. However, despite however calm she might have been, refusing to take a legal directive and failing to perform an order cannot be seen as being respectful and courteous. She did not exhibit respect and courtesy when she refused to follow Gellendin's legal directive. She did not exhibit respect and courtesy when she said "fine" after Gellendin warned her that he would write her up if she went home. Her conduct was insubordinate in violation of the rule.

The County has established conduct in which it has a disciplinary interest. The four rules were violated by Grievant. The rules do overlap to a large extent. Essentially, Grievant did not obey orders and directives, she did not exhibit respect and courtesy, and she did not perform the duties of the assigned position. Just cause requires that the discipline imposed reasonably reflect the County's disciplinary interest in these rule violations.

This assignment involved working in the booking area of a jail. People accused of crimes are processed and held in that area. There is the potential for harm to the people who work there as well as to persons being processed there. The assignment of Booking Security carries with it an obvious safety element for that officer and everyone in the area. Additionally, by the very need to have Deputies and Corrections Officers work overtime there is an administrative strain and need to have people working the various assignments in the jail. There is a system set up to sign up for voluntary overtime so that these assignments can be filled in an orderly and timely manner. When Grievant refused to perform her assignment and left the jail, she left the jail and the other employees shorthanded. This is potentially dangerous. This also required the Supervisor to seek another person to take an assignment. Even though this did not take much time or effort to do on that particular occasion, it did unnecessarily add to the administrative things needed to be done with limited personnel. Grievant contends that the fact that a replacement was found right away so that the shift was not short staffed is a mitigating factor. However, Grievant herself did nothing to mitigate the circumstances and the fact that someone else was there to take the assignment is not Grievant's doing. Grievant left the jail right at the start of the shift when there would not be time to call in another person had the other not been there. The jail operation should not have to rely on good fortune to be staffed. Grievant's conduct is not inconsequential.

It is appropriate to consider Grievant's work history in a just cause determination. She has been an employee for approximately ten years. In that time she has had some positive performance evaluations which even included readily accepting assignments. That weighs in her favor. However, she also has had a recent suspension that involved the improper release

of a prisoner. Other employees were involved. The record does not reflect how long that suspension was. But it is clear that this is not the first time Grievant has been disciplined. Under a progressive discipline system, where the goal is to improve performance, it can be expected that a suspension would follow other levels of discipline or other lengths of suspension. Here, although the length of the prior suspension is not known, Grievant's employment is not being terminated despite a recent prior suspension. A prior, recent suspension supports the imposition of a suspension.

Grievant argues that the prior suspension was for a different kind of conduct and involved different rule violations. Grievant contends that this is her first violation of this sort and the prior suspension has no direct bearing in this incident. Grievant's argument goes too far. Taken to its logical conclusion, an employee could violate numerous rules by various types of conduct and never face the prospect of having those violations have any cumulative effect. That is not progressive discipline. In the absence of a contractual limit on what prior conduct can be considered, it is not inappropriate to consider the prior disciplinary record. Grievant points to no such contractual provision in the collective bargaining agreement. The prior suspension is properly considered.

Considering the potential for danger in the particular workplace, the giving of a warning that she would be written up if she left, the short time involved for administration to react to the rule violations, the conduct that violates four different rules, and the prior work and disciplinary history of Grievant, the County has established just cause for a five day unpaid suspension as a reasonable reflection of the disciplinary interests involved. While there is a difference in arbitral opinion as to how much, if any, an arbitrator should modify a penalty deemed improper or too severe, the County has met its burden to show that the discipline here is reasonable. Grievant has not shown otherwise. The County has established just cause to find a violation of the rules governing the members and just cause for a five day suspension.

Accordingly, based on the evidence and arguments of the parties I issue the following

**AWARD**

The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 10<sup>th</sup> day of March, 2008.

Paul Gordon /s/

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Paul Gordon, Arbitrator