

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**LINCOLN COUNTY COURTHOUSE EMPLOYEES
LOCAL 33-A, AFSCME, AFL-CIO**

and

LINCOLN COUNTY

Case 249
No. 67320
MA-13832

(Dinges Grievance)

Appearances:

Mr. John Spiegelhoff, Staff Representative, AFSCME, Wisconsin Council 40, AFL-CIO, 1105 E. 9th Street, Merrill, Wisconsin, appearing on behalf of Local No. 33-A.

Mr. John Mulder, Administrative Coordinator, Lincoln County, 1104 East First Street, Merrill, Wisconsin, appearing on behalf of Lincoln County.

ARBITRATION AWARD

Lincoln County Courthouse Employees Local 33-A hereinafter "Union," and Lincoln County, hereinafter "County," requested that the Wisconsin Employment Relations Commission assign a staff arbitrator to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. Lauri A. Millot, of the Commission's staff, was designated to arbitrate the dispute. The hearing was held before the undersigned on November 28, 2007, in Merrill, Wisconsin. The hearing was not transcribed. The parties submitted post-hearing briefs on or about January 18, 2008 and reserved the right to file reply briefs. Having not received any supplemental brief from either party, the record was closed on February 20, 2008. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated that there were no procedural issues in dispute, but were unable to agree as to the substantive issues.

The Union framed the issues as:

Did the County violate the collective bargaining agreement when it issued a written warning to the Grievant when it did not have just cause to do so? If not, what is the appropriate remedy?

The County framed the issues as:

Did the County have just cause for issuing on May 23, 2007 a written warning for lying regarding his availability for overtime on May 24, 2007? If so, what is the appropriate remedy?

Having considered the evidence and arguments of the parties, I frame the issues as:

Did the County have just cause to discipline the Grievant on May 23, 2007? If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

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ARTICLE 2 – MANAGEMENT RIGHTS

2.01 The County possesses the sole right to operate County Government and all management rights repose in it, subject only to the provisions of this Agreement and applicable law. These rights include, but are not limited to the following:

A. To direct all operations of the County;

...

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

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

...

ARTICLE 7 - DISCIPLINE

7.01 The parties recognize the authority of the Employer to initiate disciplinary action against employees for just cause.

- 7.02 Except as provided in Article 6.02, employees shall be entitled to appeal any disciplinary action taken through the grievance and arbitration procedure.
- 7.03 If any disciplinary action is taken against an employee, both the employee and the Union will receive copies of this disciplinary action before the end of the next working day.

...

BACKGROUND AND FACTS

The Grievant is a 10 year Correctional Officer working in the County Jail with no prior disciplinary record.

On Wednesday, May 23, 2007, the Grievant worked his regular day shift from 7 a.m. to 3 p.m. At the end of his shift, he went home and he and his family traveled to a high school friend's residence for a social get-together. The Grievant arrived at his friend's home between 4 p.m. and 4:30 p.m. and brought with him a cooler and a twelve pack of twelve ounce cans of beer. During the course of the evening, the Grievant consumed eight cans of beer.

The Grievant returned home at approximately 9 p.m. at which time he listened to his answering machine and heard a message from Sgt. Fitzke requesting that he call the jail. The Grievant telephoned the Sheriff's Department and spoke to Fitzke who asked him to report early for his shift the next day and cover a vacant shift. The Grievant informed Fitzke that he had been drinking and he would not be able to report to work at 3 a.m. due to his consuming alcohol.

Fitzke was unable to cover the 3 a.m. shift. She telephoned Sheriff Jaeger and informed him of her difficulties in filling the vacant shift. Fitzke told Jaeger that the Grievant had told her that he could not report for work due to his having consumed alcohol. Jaeger asked Fitzke whether the Grievant sounded intoxicated. Fitzke responded that she did not believe the Grievant was intoxicated. As a result of Fitzke's conclusion that the Grievant was not intoxicated and the department's need for someone to work the 3 a.m. shift, Jaeger directed Fitzke to send an officer to the Grievant's home to administer a breath test.

Lt. Grant Peterson arrived at the Grievant's home at approximately 9:30 p.m. Peterson and the Grievant conversed in the porch/entry area of the Grievant's home for approximately five minutes. Peterson asked the Grievant if he would voluntarily submit to Preliminary Breath Test (PBT) test at his home. The Grievant declined. The Grievant volunteered to Peterson that he had consumed a "couple" beers earlier in the day. Peterson did not observe any indicators to suggest the Grievant was intoxicated. At the conclusion of their discussion, the Grievant informed Peterson that he would work the vacant shift.

The Grievant arrived on time for the 3 a.m. overtime shift and was asked to complete a PBT test which resulted in a .00 blood alcohol level.

Sgt. Fetzke and Lt. Peterson completed reports following their interactions with the Grievant on May 23.

On May 25, 2007, Sheriff Jaeger issued the following letter to the Grievant:

Garret:

This letter serves as a written warning regarding your behavior on 23 may, 2007.

The circumstances are that on May 23, shortly after 2100 hours, you returned a phone call to Corrections Sergeant Jodie Fitzke regarding the need for you to come in for unscheduled overtime at 0300 the next morning. During that conversation you stated to her that you had consumed a twelve pack of beer and would not be sober for duty at 0300. Sergeant Fitzke's opinion, which is based on her training and experience, was that you were not intoxicated and sounded quite normal.

At about 2130 hours on that same day, Lt. Peterson arrived at your home in order to assess the situation and requested that you submit to a preliminary breath test, which you refused. At that time, you stated to Lt. Peterson that you had consumed a couple of drinks earlier in the evening and that you should be fine for duty at 0300. Lt. Peterson's opinion, which is based on his training and experience, was that you were not intoxicated. In fact, he did not detect any odor of intoxicants on your breath. Upon arrival for duty at 0300, you agreed to a preliminary breath test, the result of which was .00.

The issue here is that you lied to either Sgt. Fitzke or Lt. Peterson, or both. Lack of candor is unprofessional, not in keeping with our core values and cannot and will not be tolerated, nor will shirking from duty. It is paramount to the operation of this agency that our employees are absolutely honest in their dealings regarding any and all aspects of employment here. This issue has taken a total of 5.5 hours of sergeants', supervisors' and administrators' time.

A copy of this letter will placed in your personnel file. Any future behavior of this type will result in further disciplinary action up to and including suspension and dismissal. I hope, instead, that your future actions reflect honesty and cooperative adherence to our values so we can begin to rebuild lost trust.

Sincerely,

/s/
Sheriff Jeff Jaeger

Additional facts, as relevant, are contained in the DISCUSSION, below.

ARGUMENTS OF THE PARTIES

Union

The County's decision to discipline the Grievant defied logic and lacked just cause. Not only do the facts not support a conclusion that the Grievant engaged in the conduct for which he was disciplined, but the County failed to conduct a fair investigation into the alleged misconduct.

The Union maintains that there is no proof of misconduct. Rather, the County relied on inference to convict the Grievant. Had the County conducted a proper investigation, it would have learned that there were extenuating factors which led the Grievant to have tested .00 on the PBT. Specifically, the Grievant drank eight cans of beer over a four hour period and ate food. Both of these facts led to the absorption of alcohol and had the County, asked a series of reasonable questions, it would have learned that it was entirely possible for the Grievant to have tested .00 at 3 a.m. on May 24. Instead, the County concluded that the Grievant was not intoxicated because of his telephone conversation with Fitzke and Peterson's observations in a dark breezeway at the Grievant's home.

The County's conclusion that the Grievant's decision to report to work constituted an admission that he had been lying is erroneous. The County did not ask the Grievant why he agreed in the dark of night to report for work, nor did they appear to care. Rather, they inferred based on their own view of the facts that his "jig was up".

As to the County's conclusion that the Grievant had lied, the Union remains unclear as to what the Grievant lied about. Possible scenarios include the Grievant never drank alcohol and lied to avoid overtime or the Grievant lied about the amount of alcohol he drank or the Grievant lied about being intoxicated and therefore unable to report for work. These are all possible scenarios given the County's documentation, but all are speculative and are not supported by any proof.

The evidence establishes that Grievant drank alcohol on May 23. When he was called in to work for the early morning of May 24, he erred on the side of caution and declined the work. The County believed he was lying and disciplined him. The Union requests that the written reprimand be removed and/or expunged from any and all files made by the employer.

County

The County disciplined the Grievant for just cause.

The Grievant was not truthful with regard to his ability to come to work. The County expects employees to be honest and report to work when required and able. The Grievant was purposefully vague in the hopes of getting out of a shift assignment he did not want. The Grievant was attempting to shirk his responsibilities for an overtime shift by claiming he had been drinking too much. When confronted about his intoxication, the Grievant was caught in a lie. It was necessary and appropriate for the County to discipline the Grievant for his lies.

The Grievance should be denied.

DISCUSSION

The Union challenges the Grievant's discipline on the basis that it lacked just cause.

Article 7 of the labor agreement provides the Grievant just cause protections in the context of discipline and discharge. The Union asserts violations of two of Arbitrator Carroll Daugherty seven tests of just cause. *GRIEF BROS. COOPERAGE CORP.*, 42 LA 555, 557-59 (Daugherty, 1964). The Union's specific challenges relate to the lack of an investigation and the failure of the County to speak to the Grievant before imposing discipline. The first two complaints are essentially due process challenges, while the third challenges the County's conclusion that misconduct occurred.

The Grievant was issued a letter of discipline for lying "to either Lt. Fitzke or Lt. Peterson or both." The County's disciplinary letter does not state what lie it was that the Grievant voiced, but the record establishes that the County determined the Grievant lied based on discrepancies in the recitation of events by two sheriff's department employees that gave it cause for suspicion.

Sgt. Fitzke and Lt. Peterson both encountered the Grievant on the evening of May 23. ¹ Both prepared a report regarding their interactions. Those reports conflict as to the amount of alcohol the Grievant consumed which resulted in the County believing that the Grievant was attempting to get out of working the overtime shift. Acting simply upon the difference in the two reports, without investigating further and without speaking to the Grievant, the County disciplined the Grievant.

¹ The Union characterizes Fitzke's recording of her conversation with the Grievant as "misconstrued". I disagree. At the time that she prepared her report, she had no reason to believe that what developed thereafter would result. While, I can only conclude that she believed the Grievant told her that he had consumed a twelve-pack of beer since she wrote it in her report, that does not mean she did not comprehend what the Grievant had said.

The County violated the fairness tenet when it failed to provide the Grievant the opportunity to tell his side of the story. As stated by Arbitrator Nelson:

A just cause proviso, standing alone, demands that certain minimal essentials of due process be observed. One of the least of those minimum essentials is that the accused have the opportunity, before sentence is carried out, to be heard in his own defense...

It is the *process*, not the *result*, which is at issue.

Elkouri & Elkouri, *How Arbitration Works, 6th Ed.* (2006) P. 968 citing, *MCCARTNEY'S, INC.*, 84 LA 799, 804 (Nelson, 1985) (emphasis in original).

The County's disciplinary letter does not state what lie it was that the Grievant voiced. At the very least, the County was obligated to determine what lie it was that the Grievant uttered. Alternately, what statement exactly was it that the County had proven that constituted a lie by the Grievant? It is very possible that this case could have evolved into a "he said/she said" situation, but the County never afforded the Grievant the opportunity to respond. It is also possible that I would have found the County's witnesses more credible, but the fact that the Grievant was never required to respond to the allegations eliminates such a possibility.

The County failed to comport with the due process and procedural requirements. Compliance with these requirement helps to prevent the imposition of discipline where there is little or no evidence to support disciplinary action. In this instance, that is exactly what has occurred. As such, I must sustain the grievance

Even if I do address the substantive "lies" the County concluded that the Grievant uttered, the evidence is insufficient to support disciplinary action. At hearing, Sheriff Jaeger testified that the Grievant voiced three lies: 1) that he had been drinking since 5:30 p.m.; 2) that he had consumed a 12 pack of beer; and 3) that he was unable to report for work.

As to lie number 1, Fetzke's report states the Grievant started drinking at 5:30 p.m. The Grievant testified he arrived at his friends house between 4:00 p.m. and 4:30 p.m. and started drinking thereafter. There is no evidence, especially evidence available to the County at the time it issued the discipline, to conclude that the Grievant lied.

Moving to lie number 2, the Grievant did not consume 12 beers. He testified that he drank eight beers. Fetzke, who did not testify at hearing, wrote in her report that he had a twelve pack. Peterson's report and testimony establishes that the Grievant said he drank a couple. It is possible that the County could have held the Grievant accountable for offering different responses, but lacking Fetzke's testimony and any pre-arbitration hearing statement from the Grievant, I cannot find that he engaged in the activity for which he was discipline.

As to whether he was unable to report for work, the Grievant made a judgment call. He concluded he was under the influence of alcohol and therefore physically unable to report for work. The record establishes that he had been drinking alcohol on May 23 and it is entirely possible and reasonable for him to reflect on the amount of alcohol he had consumed and make a decision as to whether he should report for work. To find otherwise contravenes public policy.

I recognize the County's need for employees to cover shifts. I also acknowledge that claiming to be intoxicated is a "good" excuse for an employee to offer when the employee does not want to work an extra shift but, this record establishes that another correction officer had already refused to work the 3 a.m. overtime shift. Given that the County apparently had no problem with that officer refusing to report for work,² I find it incredulous that the County disciplined the Grievant under these circumstances.

AWARD

The County did not have to discipline the Grievant on May 23, 2007. The appropriate remedy is to expunge the Grievant's personnel file of any and all references to the written discipline and make the Grievant whole.

Dated at Rhinelander, Wisconsin, this 1st day of July, 2008.

Lauri A. Millot /s/

Lauri A. Millot, Arbitrator

² Sgt. Fitzke's report indicates that she contacted Sgt. Sessler and he/she refused the overtime shift.

