

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**LABOR ASSOCIATION OF WISCONSIN, INC.
MENOMINEE COUNTY EMERGENCY COMMUNICATIONS CENTER
EMPLOYEES ASSOCIATION, LOCAL 530**

and

MENOMINEE COUNTY

Case 66
No. 67394
MA-13864

(Thomas Tousey Discharge Grievance)

Appearances:

Thomas A. Bauer, Labor Consultant, 206 South Arlington Street, Appleton, Wisconsin 54915, appearing on behalf of Local 530.

Andrew T. Phillips, Attorney, Centofanti Phillips, S.C. 10140 North Port Washington Road, Mequon, Wisconsin 53092, appearing on behalf of Menominee County.

ARBITRATION AWARD

Local No. 530 Menominee County Emergency Communications Center Employees Association, hereinafter referred to as the Union, and Menominee County, hereinafter referred to as the County or the Employer, are parties to a collective bargaining agreement (agreement or contract) which provides for final and binding arbitration of certain disputes, which agreement was in full force and effect at all times mentioned herein. On October 26, 2007, the Union filed a Request to Initiate Grievance Arbitration and asked the Wisconsin Employment Relations Commission to assign a staff arbitrator to hear and resolve the Union's grievance regarding the discharge of Thomas Tousey (Grievant or Tousey). The undersigned was appointed as the arbitrator. Hearing was held on the matter on May 5, 2008 in Keshena, Wisconsin, at which time the parties were given the opportunity to present evidence and arguments. The hearing was not transcribed. The parties filed post-hearing briefs by June 18, 2008 at which time the record was closed. Based upon the evidence and the arguments of the parties, I issue the following Decision and Award.

ISSUES

The parties were able to stipulate to a statement of the issues to be decided by the Arbitrator as follows:

1. Did the Employer have just cause to discharge the Grievant on July 25, 2007?
2. If not, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 3 - MANAGEMENT RIGHT

3.1 - Exclusive Rights. The Association recognizes the right of the Employer to operate and manage its affairs and the exclusive right of the Sheriff, or his designee, to operate his department consistent with the terms of this Agreement and applicable County, State and Federal laws:

- a) To direct the operations of the Menominee County Emergency Communications Center;
- b) To establish reasonable work rules;
- . . .
- e) To suspend, demote, discharge, and take any other disciplinary action against employees for just cause;
- f) To take whatever action is necessary to comply with an emergency;

. . .

ARTICLE 18 - DISCIPLINARY PROCEDURE

18.1 - Policy. Disciplinary procedures are a legitimate Management function to inform employees of poor work habits, absenteeism, etc., which are not consistent with the obligation of the Employer's public function and to correct these deficiencies.

18.2 - Penalties. Any suspended or discharged employee may appeal such action through the Grievance Procedure and shall initiate grievance action directly to the Department Head for immediate recourse to Step 2 within ten (10) working days of notice of suspension or discharge.

A written warning shall, without any intervening disciplinary action, remain in the employee's record for no longer than a twelve (12) month period, except for suspensions, which shall, without any intervening disciplinary action, remain in any employee's personnel record for two (2) years.

Any suspended or discharged employee may appeal such action through the Grievance Procedure and shall initiate grievance action by immediate recourse to Step 2 within ten (10) working days of notice of suspension or discharge.

Suspension shall not be for less than two (2) days, but for serious offenses or repeated violations, suspensions may be given up to ten (10) working days.

18.3 - Notice of Discipline. Notice of discharge or suspension shall be in writing and a copy shall be provided to the employee and the Association.

BACKGROUND

Grievant, at the time of his discharge, was employed as a Dispatcher with the Menominee County Emergency Communications Center. He had been so employed since 2005. His duties as a Dispatcher included the dispatching of County Sheriff's Deputies and Menominee Indian Tribal police to the scene of various emergency situations following calls received by the Center via the 911 emergency system, and the maintenance of various logs and other information relating to those calls. In the event of a serious emergency requiring the need for air ambulance service (medivac) he was charged with the responsibility of notifying medivac of the need for them.

On July 25, 2007, the Grievant received notice of his termination from employment from the Center's Director, Shelley Williams. The notice set forth the following:

Dear Tom:

It is with deep regret that I must inform you that, effective immediately, your employment with Menominee Emergency Communications Center is being terminated. You have been counseled and documented many times for deficiencies, yet you have been unable to raise your performance to the level that is necessary when working in a 911 center. On 2/20/07, you were suspended for tardiness, after multiple warnings. In spite of the suspension, and the many times your deficiencies were addressed, your performance and attendance has not improved to standards.

On July 7, 2007, you handled a call for an ATV accident, with a severely injured person. You made multiple mistakes in the call, including failure to keep the reporting party on the line, failure to obtain caller information, failure to ask key questions regarding the injured party, and failure to contact the correct helicopter. You were unclear as to which helicopter the EMT was asking for, but instead of asking for clarification, you guessed, and were incorrect. This resulted in a delay of 19 minutes before the correct helicopter was contacted.

On July 10th, you were advised, via memo, that there was a mandatory meeting for dispatchers and deputies being held on July 16th, 2007. You failed to attend the meeting.

On July 17th, 2007, I received a report from a Sheriff's Dept. Supervisor that several of the Deputies working the night shift have observed you leave dispatch unattended, with both doors open, to go outside for a cigarette break. You were observed on numerous occasions, by multiple people. In a memo dated June 21, 2007, I specifically addressed this issue, stating that you must have someone relieve you for breaks, that dispatch is not to be left unattended, and that the doors must remain secure at all times.

On July 18th, you received a call at 7:21 am from a subject from Legend Lake, reporting multiple boats that were broken into. According to voice print, there was no other phone or radio traffic for 25 minutes after the call came in. There was a Deputy available, yet you failed to dispatch the call. You did not enter anything into the computer, nor did you pass on anything about it to a Deputy, or to the on coming dispatcher. This resulted in a complaint being filed with the Sheriff. The Deputy that was dispatched upon receipt of the complaint was subjected to severe criticism from the reporting party because of the delay.

These recent incidents, combined with the multiple issues that have arisen and been documented in the past, have resulted in the decision to terminate your employment with Menominee Emergency Communications Center. You will be paid for the vacation time that you have accrued.

Sincerely,

(Signed by Shelley Williams, MECC & Menominee County Emergency Management Director)

This grievance followed the termination.

THE PARTIES' POSITIONS

The Union

Tousey's job performance was not below the standards of a MECC Center Dispatcher. For instance, Williams was critical of Tousey's submission of an Excel Spreadsheet which he had failed to complete. But Tousey testified that entries made into the spreadsheet at times did not always save and that occasionally the system would go down and all the information would be lost. When this occurred the dispatcher on the next shift would have to re-enter the information from the prior shift. Tousey testified that he had brought this problem to Williams attention and that she disregarded it.

Tousey's disciplinary record which shows "There were only seven entries related to incomplete/incorrect documentation: one verbal warning in 2005 (7/20/05); four verbal warnings in 2006 (5/04/06; 9/01/06; 10/23/06; 12/01/06); and three warnings (1 verbal; 2 written) in 2007 (2/15/07; 4/0/07 (sic); 6/05/07). Also, Williams testified that she did not offer any remedial training because she did not believe there was any remedial training she could offer the Grievant.

Regarding the ATV accident on July 7, 2007, Tousey testified that when he received that call the caller was surprisingly calm which led him to believe that it was not an emergency. When he finally received information from the caller that there was an injury involved he radioed that he was switching to EMS frequency and immediately dispatched EMS. The caller then hung up and Tousey was not able to get further information on the condition of the injured person. He testified that he followed proper protocol which states in pertinent part:

1. Take Call (Obtaining all pertinent information)
2. Immediately dispatch the call to EMS, giving the time of call over the radio at the end of the dispatch and every subsequent transmission that denotes a status check. Also dispatch police or fire if they are needed.

The responding EMS was able to make contact with an officer who had monitored the call and responded to the scene. Regarding the helicopter portion of the incident, although the EMS MED 1 requested a helicopter out of Wausau, Tousey testified that all he heard was the word "Wausau" and upon checking the call sheet that listed the helicopters Wausau was not on the list, so he called Marshfield. Tousey testified that at the time of the call he was busy dispatching a second EMS call and with radio traffic from the Menominee Tribal Police and two County Deputies.

Regarding the vandalism of boats at the Council Hill Beach Club on July 18, 2007, Tousey testified that Sergeant Ninham with the Sheriff's Department was present at the time and she told him she would send someone to the scene and further instructed him not to generate a complaint until there were owners present with names and information to enter into the complaint. Tousey was simply following the orders of the Officer in charge, Sergeant Ninham.

Tousey performed his duties in a competent manner and within the standards of the Employer. The County never gave him the opportunity to receive remedial training to correct any of the deficiencies alleged by the County.

With regard to the allegation that Tousey falsified documents, this allegation is without merit or just cause. He testified that it was common for the dispatchers to use “flex” time to make up time by offsetting the late time by coming in early for the dispatcher that had to stay late for him. He was not aware that the other dispatcher had put in for overtime (thus resulting in an overpayment to him) until he was informed he was being discharged. He testified “that he felt the other dispatcher had stayed late, without authorization, on the second day that he was supposed to have been late and made the claim that Tousey was late to justify her overtime.” He did not intentionally falsify his time sheets.

Regarding the mandatory meeting on July 16, 2007, Tousey failed to attend the meeting because he had erroneously thought that the meeting was on a different day. He “testified that he had spoken to the Sheriff prior to the date of the meeting and was informed by the Sheriff about the reason and content of the meeting.

Tousey does not refute the fact that he left the dispatch center unattended during a smoke break and admitted that he had been informed through department memos that this was not proper procedure. He would stay by the doorway during these breaks so he could hear calls that might come in.

The discipline in this case is not appropriate because it is not progressive. Article 18 - Disciplinary Procedure, Section 18.1 - Policy, states in pertinent part:

Disciplinary procedures are a legitimate Management function to inform employees of poor work habits, absenteeism, etc., which are not consistent with the obligation of the Employer’s public function and to correct these deficiencies.

This language implies that discipline should be informative, i.e. clearly informing the employee that his/her conduct is not consistent with the Employer’s objectives. Discipline should be to correct the deficiencies and termination usurps the intent of Article 18.

Williams testified that over the past three years she had been lax in her supervision of the Grievant and could have been more forceful regarding his tardiness and job performance. When an employer establishes a rule but is lax in its enforcement, the implication is that the employer condones the conduct of the employee and he or she is lulled into a false sense of security. Williams became more aggressive on February 20, 2007 when she gave Tousey a two-day suspension without pay for reporting late for his shifts. Grievant was not adequately informed of his violations because, as he testified at hearing, he did not believe he was falsifying his time sheets due to the “flex” time issue.

The helicopter incident was not his fault because the helicopter call sheet was not up to date. The lack of adequate training resulted in his failure to understand that Wausau helicopter service was available and that he was to use that service.

Finally, termination for failing to dispatch a deputy to the scene of the boat vandalism and the smoke break incident was overkill and should be reduced.

The County

This grievance is about public safety. Preserving it is clearly a management prerogative within the scope of the management rights contained in the contract. Given the safety concerns raised by the Grievant's long history of discipline and the severity of the most recent conduct giving rise to the termination, the County is well within its rights to terminate the Grievant under the just cause standard. That standard has been well-established. Many arbitrators utilize the DAUGHERTY standard for determining whether just cause exists in a given case. The Arbitrator must examine the following questions in light of that standard and the facts:

- Did the County give to the employee forewarning or foreknowledge of the possible or probable consequences of the employee's conduct?
- Was the County's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the County's business and (b) the performance that the County might properly expect of the employee?
- Did the County, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?
- Was the County's investigation conducted fairly and objectively?
- At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?
- Has the County applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?
- Was the degree of discipline administered by the County in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the County?

There is no dispute that the County has the right to institute protocol to ensure the efficient and effective delivery of emergency services to the County. It advised the Grievant of that

protocol and so the issue really is whether the Grievant had notice of his failing performance and whether the County's discipline was reasonable. The Grievant had notice of his inadequacies. His disciplinary record contains eight entries, and each time he was disciplined he was advised to conform his conduct to the appropriate standards. He was aware that his further failure to conform would result in further discipline. The County's decision to terminate the Grievant was reasonable in light of his conduct and poor record. It is imperative to note that the County's actions were borne out of a concern for public safety. The actions of the Emergency Communications Center may, in many cases, mean the difference between life and death.

The Grievant's actions clearly posed a danger to members of the public and to his fellow employees. Each incident resulting in the Grievant's discipline involved public safety, especially the incident involving the medivac helicopter resulting in a 19 minute delay. In another incident the Grievant simply failed to dispatch assistance to the scene of several break-ins at the Council Hill Beach Club.

The Grievant's repeated tardiness, un-excused absences and incorrect or incomplete documentation impairs the ability of the Department to function efficiently. When dispatchers arrive late it forces other employees, some of whom have worked long hours, to work additional hours to cover for the tardy employee.

The Grievant was not terminated after one or two rule violations. Here, there were seven violations which led to the termination. The County's prior discipline was an attempt to rehabilitate the Grievant but the Grievant would not correct his behavior. He was thoroughly trained in all aspects of his job duties. The County had no choice but to terminate the Grievant. Just cause exists in cases like this. Citing WALWORTH COUNTY, NO. 66713 (Mawhinney, 11/6/07):

The Grievant's prior discipline weighs heavily in this case, particularly the ten day suspension in October of 2006. Within one month of coming back from that suspension, the Grievant made the same error by giving a resident a thin liquid instead of a thickened liquid. This is astounding. The County correctly states that progressive discipline is not working, and it no longer wants to take a chance on the safety of residents by having the Grievant continue to work there. The Grievant had other disciplinary actions regarding resident safety issues. But here, there is an identical error within a month of a ten day suspension. Certainly, there is just cause for discipline. Given the Grievant's record, there is just cause for termination. The County's decision is neither excessive nor unreasonable.

The facts presented here are parallel. The nature of Grievant's sensitive position, fielding emergency calls and dispatching law enforcement to critical incidents, dictates that the County cannot jeopardize the safety of its "clients", the citizens of Menominee County, or County employees by continuing to employ the Grievant. Consequently, the County clearly had just cause to terminate him.

DISCUSSION

The Union argues that the Grievant's his job performance did not fall below the standards required by the County. The standards required of a dispatcher included dispatching law enforcement to the scene of potential crimes reported by citizens via the 911 emergency system; dispatching emergency medical personnel, including proper helicopter medivac services, if required; maintaining proper logs of calls received through the 911 system; maintaining a secure facility; staying at the dispatcher's station to receive emergency 911 calls; arriving at his duty station on time; and generally providing the safety net to County citizens established by the 911 system. The dispatcher is the key link to the successful operation of that system. If the dispatcher fails to do his duties properly, the system is worthless. The evidence falls far short of supporting the Union's position that the Grievant performed up to the standards referenced above. The evidence does support the conclusion that the Grievant failed, throughout his tenure of employment with the County, to meet the standards required by the County.

The sole evidence presented at the hearing relating to the defense or explanation of the allegations against the Grievant came from the Grievant himself. Without beleaguering the point, suffice it to say that his testimony was completely incredible.

The Grievant failed to dispatch law enforcement to the scene of a crime at the Council Hill Beach Club on July 18, 2007. His defense to this allegation consisted of his testimony that after receiving the call for assistance from a private citizen he talked to Sergeant Ninham, a Deputy with the County Sheriff's Department, who told him not to file a complaint pending the identification of a victim. The Grievant's testimony in this regard is incredible. Sergeant Ninham did not testify at the hearing, but the record contains a memo (Joint Exhibit 14) from the Sergeant to Sheriff Robert Summers dated 7/18/07. Its content relative to this incident is instructive and is set forth below:

MEMO

To: Sheriff Robert Summers

From: Sgt. Jami L. Ninham #1204

CC: file

Date: 07/18/2007

Re: complaint not being dispatched

I wanted to bring an issue to your attention that occurred on 7/18/07. At approximately 0819 hours, Amanda dispatched me to the Council Hill Beach Club for a complaint. When I asked her what the complaint was about, she stated she did not know. She stated you had received a telephone call in the sheriff's department and then called her. She stated you received a call from a male stating he had called about an hour ago for a Deputy to respond to the Council Hill Beach Club, but no one had responded yet.

I arrived at the Beach Club at approximately 0826 hours. I met with Jean Hirt. She stated her husband had called because several boats had been broken into. She stated their boat was one of them, but nothing was taken from it. She then went to get her husband, Donald Hirt.

As I was checking some of the boats for registration, Donald approached me. I advised him that I would make contact with the owners to see when they will be here. He stated, "I bet their response time will be better than yours." I apologized to him and told him that I had just gotten the call about five minutes before I arrived. He told me he had called about an hour ago, at approximately 0725 hours. I again apologized to him. He was extremely upset with the fact that I did not respond earlier when he had called. He shook his head and stated, "huh." I continued on with my investigation.

Amanda later advised me that she had not taken any complaints from Hirt on today's date. She stated that nothing had been passed on from the previous shift. There were no complaints started in the county computer in reference to the Council Hill Beach Club.

Thank you for your time in this matter.

On July 7, 2007, the Grievant failed to dispatch emergency medical personnel and a medivac helicopter properly, resulting in a delay of services of about 19 minutes to a critically injured citizen. The Grievant's excuse for this failure was confusing and disjointed. He testified that there was a lot of radio traffic causing him to be busy, but the credible evidence suggests that the traffic did not pick up until *after* this incident had transpired. He also testified that he didn't hear the emergency responder's request for him to dispatch the helicopter from Aspirus in Wausau. The audio tape of that transmission (Jt. Ex. 15) is clear enough and he should have heard it. Even though the Aspirus helicopter was closer to the accident scene and could have responded faster, he decided to send one from Marshfield. He further testified that the call sheet containing the names of the helicopter services available did not contain the name of the Aspirus service. But the evidence, through the credible testimony of Director Williams, was that the Aspirus helicopter information had been hand-written on the call sheet *weeks* before this incident, certainly enough time for the Grievant to have become familiar with it. The evidence suggests that the Grievant was the one who made the decision to use the Marshfield service. That is not a decision which rests within his authority. The emergency responder, according to the credible evidence, is the

person authorized to make that decision. In this case, the Marshfield helicopter was mustered at the request of the Grievant and flew toward the accident scene. When the Grievant's mistake was discovered, Aspirus was alerted and dispatched to the scene and the Marshfield helicopter was sent home, thus resulting in the unacceptable delay. In addition to the delay, which is, in itself, bad enough, this mistake caused the expenditure of additional funds and exposed an additional flight crew to the dangers of flying a medivac mission. Further, the Grievant failed to hold the caller on the line after the 911 call was received; failed to determine the true nature of the injury; and failed to obtain caller information, all things required of him as a dispatcher. Instead, according to the testimony of the Grievant himself, the caller seemed calm and the Grievant concluded from this that the injury was not serious. This was not his conclusion to draw.

The record supports the County's allegation that the Grievant failed to properly complete his required logs and that another dispatcher was forced to complete them for him. His explanation, that it was the software's fault, is likewise unbelievable.

Regarding the allegation of his failure to maintain a secure facility, the Grievant admitted that he had left the building for smoke breaks leaving the door to the Center open in spite of having been counseled not to do so by Director Williams in three separate written memorandums. This action resulted in leaving the Center un-secure contrary to the Director's specific directions, and supports the allegation that he vacated his post. His testimony, that he left the door open so he could hear the 911 call if one came in, fails to impress the undersigned in a positive way.

This record is replete with evidence that the Grievant had an annoying history of tardiness. He was suspended for tardiness offenses on February 5, 2007 and his explanation in mitigation, that he was using "flex" time, is not supported by the record. What the record does support though, is that the Grievant had a significant problem getting to work on time. On July 16, 2007 he failed to get to work at all. He missed a mandatory meeting with the Sheriff. His excuse was two-fold: he had already talked to the Sheriff and knew what the meeting was about, and he thought the meeting was on a different day. Once again, his testimony was not credible. Even if it were, it's not an excuse.

All of these things resulted in the Grievant's failure to provide the key link to the successful operation of the County's 911 emergency system. His actions adversely effected public safety.

The Grievant had no less than seven incidents resulting in warnings and a suspension leading to his termination. The fact that many, if not most employees serve their employers for entire careers with no such difficulties, renders the Grievant's disciplinary record abysmal. The events leading to his termination contain a remarkable seven such incidents between February 20, 2007 and July 18, 2007. It would have been clear to the most casual observer that progressive discipline was futile in this case. That is clear to the undersigned and it is also clear that the actions, and inactions, of the Grievant constituted a threat to the safety of the public. Under such situations it may not reasonably be argued that just cause for termination does not exist. It most certainly does. Further, the County had the contractual right, if not the duty, to terminate the

Grievant and to protect itself and its citizenry from his future employment. This record does not contain any evidence that the termination of the Grievant was discriminatory or unreasonable.

The undersigned cannot imagine what “remedial” training could have been afforded the Grievant in an effort to “rehabilitate” him, as the Union argues. Director Williams testified that the Grievant had been properly trained to perform his duties and the Grievant presented no credible evidence in contradiction to that testimony. As for tardiness and the issues relating to Grievant’s inability to maintain a secure Center, the undersigned is at a loss to understand how remedial training could possibility cure those deficiencies. The only training the Grievant failed to receive, based upon the evidence contained in this record, was training he may have received had he bothered to attend the mandatory meeting on February 5, 2007.

Based upon the above and foregoing and the record as a whole, the undersigned issues the following

AWARD

1. The Employer had just cause to discharge the Grievant on July 25, 2007.
2. The grievance is dismissed in its entirety.

Dated at Wausau, Wisconsin, this 18th day of August, 2008.

Steve Morrison /s/

Steve Morrison, Arbitrator