

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**MANITOWOC COUNTY HIGHWAY EMPLOYEES,
LOCAL UNION 986, AFSCME, AFL-CIO**

and

MANITOWOC COUNTY

Case 418
No. 67175
MA-13791

(Schultz Grievance)

Appearances:

Mr. Michael J. Wilson, Staff Representative, 8033 Excelsior Drive, Suite “B”, Madison, Wisconsin joined on the brief by **Mr. Bruce F. Ehlke**, Attorney, Hawks, Quindel, Ehlke & Perry, S.C., P.O. Box 2155, 222 West Washington Avenue, Suite 450, Madison, Wisconsin appearing on behalf of Manitowoc County Highway Employees, Local Union 986, Wisconsin Council 40, AFSCME, AFL-CIO.

Mr. James R. Korom, Attorney, von Briesen & Roper, S.C., 411 East Wisconsin Avenue, Suite 700, P.O. Box 3262, Milwaukee, Wisconsin, appearing on behalf of Manitowoc County.

ARBITRATION AWARD

Manitowoc County Highway Employees, Local Union 986, AFSCME, AFL-CIO hereinafter “Union” and Manitowoc County, hereinafter “County,” requested that the Wisconsin Employment Relations Commission assign Lauri A. Millot, staff arbitrator, to hear and decide the instant dispute in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The hearing was held before the undersigned on July 9 and September 9-10, 2008 in Manitowoc, Wisconsin. The hearing was transcribed. The parties submitted post-hearing briefs, the last of which was received by April 20, 2009 at which time the record was closed. 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 and framed the substantive issues as:

Whether the discharge of the Grievant, James Schultz, was for just cause? If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

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ARTICLE 3 – MANAGEMENT RIGHTS RESERVED

Unless otherwise herein provided, management of the work and direction of the working force, including the right to hire, promote, transfer, demote, or suspend, or otherwise discharge for just cause, and the right to relieve employees from duty because of lack of work or other legitimate reason, is vested exclusively in the Employer. If any action taken by the Employer is proven not to be justified, the employee shall receive all wages and benefits due him or her for such period of time involved in the matter.

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ARTICLE 5 – DISCIPLINARY PROCEDURES

- A. Employees may be disciplined for just cause. It is understood and agreed that just progressive discipline shall be followed. The Employer shall provide the employee and Union with a letter setting forth the reason(s) for the disciplinary action.
- B. Discharge: When an employee is discharged or terminated by the Employer, a written discharge or termination report shall be prepared stating the effective date and the reason(s) for the discharge or termination. One (1) copy of the report shall be retained by the Employer, one (1) copy shall be given to the employee, and one (1) copy shall be filed with the Union.

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ARTICLE 8 GRIEVANCE PROCEDURE

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Step 4: Arbitration

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- e. Decision of the Arbitrator: The Arbitrator shall not modify, add to or delete from the terms of the Agreement.

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BACKGROUND AND FACTS

The Grievant was hired by the County in November 2001 to work in the Highway Department. The Grievant's supervisors were Brian Glaeser and Greg Peterson. The Grievant had no prior discipline.

The County administers a Community Service Program which allows inmates, approved for participation, to be volunteer workers in approved community service sites. The program is administered by Linda Dueno-Dufek, Trustee Coordinator. Inmates are released to site supervisors, or their designees, to perform approved projects in the County. Hours worked as a trustee are deducted from the inmate's sentence on a proportional basis. Inmate/trustees released to work with a community organization are expected to follow the terms of a Trustee Agreement. There are also specific rules for inmates that leave the jail facility:

1. You may not deviate from the assigned route, change our method of transportation, or leave your authorized destination without prior approval from Jail Staff.
2. You have been authorized to be away from the jail during specified times. Any changes or modifications of days/must be reported to the Jail Staff by your employer, school staff, etc. prior to that change being made.
3. You may not make unauthorized telephone calls or visit unauthorized persons while away from jail.
4. You may not use, or possess, controlled substances or alcoholic beverages while away from jail.
5. All monies received by you while an inmate of the County Jail shall be sent or presented to the Jail Staff for distribution according to Wisconsin Statute 303.05.

On Wednesday, April 25, 2007 the Grievant was working his regular duties for the County Highway Department. As a part of his duties, he was directed to report to the County jail and pick up two inmate/trustees to perform garbage pick up work on the interstate highway. One of the inmates was Christopher Porodish. This was the third consecutive day that the Grievant worked with Porodish.

During the day, Porodish and the Grievant discussed Porodish working with the Grievant on Saturday. When the Grievant returned Porodish to the jail, he spoke to Corrections Officer Joe Corsi who was working in the Jail Control Center. The Grievant was wearing his highway department safety vest. The Grievant indicated to Corsi that he would need Porodish the following Saturday to work.

On Saturday, April 28 the Grievant arrived at the jail between 6:30 a.m. and 7 a.m. with the intent to obtain the release of Porodish to perform various work for the Grievant and/or his family. Corrections Officer Zack Stanull was working in the Jail Control Center. Porodish was not available to leave the facility because he was assigned to kitchen duty. Stanull asked the Grievant if he desired another inmate and the Grievant responded in the affirmative. Stanull telephoned Sergeant Keith Bonde on the second floor, informed him that a County Highway worker was in need of an inmate, and asked if there were any inmates interested in working for the day. Bonde asked James Sanchez if he wanted to work that day doing County Highway work. Sanchez was agreeable. Sgt. Bonde accessed the County computer program which records and monitors jail inmates' activities and recorded inmate Sanchez as "Outside trusty at highway department unloading a trailer" for April 28, 2007.

Sanchez left the jail facility with the Grievant and traveled in the Grievant's personal car to the Grievant's cousin's home. The Grievant and Sanchez unloaded a semi-pod of personal belongings. The Grievant's cousin provided the Grievant and Porodish lunch. After lunch, the Grievant and Sanchez traveled to the Grievant's personal land and cut and hauled wood until 3:30 p.m. Sanchez operated a small tractor on the Grievant's property. The Grievant left Sanchez unsupervised for a period of approximately 10 to 15 minutes during the afternoon during which time Sanchez operated a chainsaw. The Grievant purchased a couple packs of cigarettes and sodas for Sanchez. The Grievant returned Sanchez to the jail facility between 4 p.m. and 4:30 p.m.

On April 30, Trustee Coordinator Dueno-Dufek became aware that Sanchez was removed from the jail facility on April 28 to perform personal work for the Grievant. Dueno-Dufek telephoned the Highway Department and spoke to Glaeser who informed Commissioner Gary Kennedy. Kennedy was out of the County. Glaeser contacted the Grievant via the County radio system and directed him to return to the Highway Shop where they informed him that a concern had arisen regarding his taking a prisoner from the jail over the weekend.

At some point between April 30 and May 9, the Grievant was suspended with pay pending the outcome of the County investigation.

The Grievant was interviewed by Detective Remiker on May 7 at the County Sheriff's Department. The Grievant arrived for the interview with a prepared statement.

On May 9 the Grievant was called to County Personnel Director, Sharon Cornils', office to discuss the April 28 event. Union President Kevin Johnson, Peterson, Glaeser, and Kennedy were also present. The Grievant was asked various questions regarding April 25 and April 28 and specifically, whether he took a prisoner home to do personal work. Cornils explained to the Grievant that it was a very serious offense, that he had put the County in a very serious liability position, and that the use of Sanchez was tantamount to slavery. The Grievant was offended by Cornils' referral to slavery.

On May 17, 2007 Remiker initiated a telephone conversation with the Grievant. The Grievant did not want to talk to Remiker and terminated the conversation.

On May 18, 2007 the Grievant was arrested by the Manitowoc County Sheriff's Department and charged with two offenses including Misconduct in Public Office and Obstructing an Officer.

On May 23, 2007, Cornils met with Grievant, his wife, Neil Rainford, AFSCME Representative, Peterson, Glaeser, and Kennedy. The County offered the Grievant the option to resign in lieu of discharge. The Grievant declined and later that day was given the following letter:

Dear Jim,

This letter serves as notice of your termination from employment with Manitowoc County effective at 4:00 p.m. today. This termination is the result of your actions on April 25, 2007 and April 28, 2007 in which you used your position as a Manitowoc County Highway Department employee to secure a trustee from the Manitowoc County Jail for your own personal use.

I met with you on May 9, 2007 to give you an opportunity to explain your actions of April 25 and April 28. You did not accept responsibility for your actions, and you showed no sign of remorse.

All of your remaining paychecks will be sent to your home address. The June 8, 2007 paycheck will include payment for all hours worked in the current pay period as well as all accrued and unused vacation. You will receive one final paycheck on June 22, 2007 that will cover the back pay due to the recent contract settlement.

Information on the status of your health insurance and other benefits will be sent to you shortly. Please feel free to contact me with any other questions.

Sincerely,

/s/

Sharon N. Cornils
Personnel Director

The Union grieved the discharge asserting that the County did not have just cause.

On June 23, 2008, the Grievant entered an Alford Plea to the charge of misconduct in public office. He further stipulated to a Deferred Conviction Agreement.

The following individuals testified at hearing, some of which offered extensive testimony. Included below is relevant background and content from their testimony:

Joseph Corsi

Corsi is employed by the County Sheriff's Department as a part-time Corrections Officer. Corsi works approximately 40 hours per week although the shifts are irregular.

Corsi was working in Central Control on April 25, 2007. Corsi had no recollection of a conversation with the Grievant and did not recall anyone asking him if they could take an inmate out of the jail to perform personal work. Corsi testified that he believed that he would recall such a conversation because it would have been out of the ordinary. Corsi does not carry a notebook in his pocket. Corsi was not disciplined for the incidents giving rise to this grievance.

Zack Stanull

Stanull is a 3½-year veteran of the County Sheriff's Department employed in the capacity of Corrections Officer.

Stanull was working the 12:00 a.m. to 8:00 a.m. shift on Saturday, April 28, 2007. At approximately 7:00 a.m., the Grievant approached Stanull in Central Control and identified himself as being from the Highway Department and stated that he was there to pick up Chris. Stanull testified that he asked the Grievant what Chris' last name was, but that the Grievant responded that he did not know. The Grievant offered that he had worked with Chris the prior week with the Highway Department. Stanull looked at the computer system to see what trustee had the name "Chris," located Christopher Porodish, but noticed that neither he nor was anyone scheduled for the Highway Department that day. Porodish was working in the kitchen. Stanull informed the Grievant that Porodish was unavailable due to inside work, but offered to get another inmate to go out to work. Stanull testified that the Grievant said "yes" to another inmate.

Stanull called up to the second floor of the jail and told Officer Bonde that he had someone from the Highway Department at the desk who needed an inmate to go out an work. Bonde called Stanull back a couple minutes later and told him that he had Sanchez ready to go and asked what Sanchez would be doing. Stanull asked the Grievant what they were going to be doing and the Grievant said “something to the effect of unloading a semi trailer.” Tr. 16. Stanull told the Grievant an inmate would be in the lobby area shortly.

A couple minutes later, the Grievant approached Stanull and asked if an inmate would be available for work on Sunday. Stanull testified that he again asked what the trustee would be doing and the Grievant responded that he would be doing something with wood. Stanull asked if it was for the Highway Department and the Grievant “stated no, this is for personal business.” Tr. 17. Stanull asked Sergeant Wardman, who was in Central Control, if he was allowed to release trustees for personal use. Stanull testified Wardman responded, “absolutely not!” Stanull relayed this message to the Grievant. Stanull testified that the Grievant responded that it was fine and then explained to Stanull that this was new to him and he hadn’t done anything like this with inmates before.

The Grievant approached Stanull a third time and asked what he was supposed to do if the trustee misbehaved or did something wrong. Stanull provided the Grievant with the telephone number to the jail facility and explained that if the trustee was not listening or doing something illegal or if the Grievant was having problems, he should call or return the trustee to the jail.

Sanchez and the Grievant left the facility a short time later.

Christopher Wardman

Wardman is employed by the County Sheriff’s Department as a third shift Sergeant. Wardman was working on April 28, 2007. Wardman was in the Central Control area of the jail and was asked by Corrections Officer Stanull whether “it would be all right for a person who works for the County Highway Department ot take out a trustee to use for, to do some work around his home.” Tr. 166. Wardman responded, “absolutely not.” Id. Wardman observed Stanull communicate this to the person at the jail window.

Keith Bonde

Bonde is a 17-year veteran of the County Sheriff’s Department employed as a Correctional Officer.

Bonde was working on April 28, 2007, assigned to the second floor for the midnight to 8:00 a.m. shift. Bonde testified that shortly after 7 a.m., Stanull telephoned him and said, “I have a gentlemen here from the Highway Department that is looking for Christopher Porodish to come out again and do trustee duties.” Tr 185. Bonde was aware that Porodish was assigned to kitchen duty and informed Stanull. Bonde testified he overheard Stanull conversing

with a male and then was asked for another trustee. Bonde offered “work at the Highway Department” to James Sanchez. Id. Bonde inquired the nature of the work and was told, “working at the Highway Department unloading a trailer.” Id. Bonde accessed the County jail inmate activity program and entered the work event and time for Sanchez.

David Remiker

Remiker is employed by the County Sheriff’s Department with 16 years law enforcement experience. Remiker has held the position of detective since 2003. Remiker conducted the Grievant’s criminal investigation. Remiker interviewed the Grievant, Stanull, Bonde, Corsi, Wardman, Sanchez, Porodish, and four other individuals in the course of his investigation. Remiker concluded that there was probable cause to charge the Grievant with two counts of Misconduct in Public Office and two counts of Obstructing an Officer and recommended same to the District Attorney.

Remiker interviewed the Grievant in person on May 7 and by telephone on May 11.

Brian Glaeser

Glaser is a 20 year veteran of the County Highway Department currently employed as a Road Superintendent.

Glaser testified that he became aware of the events leading to the Grievant’s termination on April 30 when he received a telephone call from Linda Duono-Dufek who Glaeser concluded was upset.

Glaeser testified that he had a conversation with the Grievant where the Grievant told him that the use of inmate/trustees was very efficient and a lot of work was getting done. The Grievant told Glaeser that he had bought an inmate a cheeseburger and a pack of cigarettes. Glaeser reminded the Grievant that he was working with inmates and that there were reasons that the inmates were in jail.

Glaeser met with the Grievant on April 30. The Grievant admitted to Glaeser that he had brought an inmate out for the weekend to do personal work. Glaeser was not involved in the discussions leading to the Grievant’s termination.

Chris Porodish

Chris Porodish was an inmate in the County jail at the time of this incident. Porodish participated in the Community Trustee program. Porodish was released from the County jail in November, 2007.

Porodish worked with the Grievant on April 23-25, 2007 picking up garbage on County roadways. During the time that Porodish worked with the Greivant, the Grievant purchased him lunch, gave him \$2.00 for cigarettes, and bought him sodas.

Porodish testified that during the return trip to the jail on April 25, the Grievant asked him if he wanted to work during the weekend. The tasks that the Grievant described included cutting wood, hauling wood, and doing some recreational fishing. In exchange for the work, the Grievant offered to buy him lunch, cigarettes and to pay \$20.00. The Grievant expressed his concern to Porodish asking what would happen if corrections officers became aware of him entering the jail facility with \$20.00 when he did not leave the facility with \$20.00. Porodish stated that they discussed putting the twenty dollar bill in his shoe.

Porodish testified to the he encountered the Grievant a few days after April 28 at the Landfill. Porodish initiated a conversation and asked the Grievant how things were going.. Porodish testified that in the course of their conversation, the Grievant made the comment that they needed to "get their stories straight." At the time, Porodish was suspicious of the Grievant. Porodish understood the Grievant wanted him to lie to law enforcement and County officials about the Grievant's conversation with Corsi on April 25 and the Grievant's conversations with Porodish on that same date. Porodish testified that on reflection, he no longer believes that the Grievant was asking him to lie.

Porodish testified to his interactions with the Grievant's criminal attorney and private investigator. Porodish believed that the investigator was "kissing his ass" in order to make money and make the Grievant look good. The investigator offered to purchase Porodish dinner and offered him a job. He also brought a document to Porodish's home which Porodish understood to be a subpoena, but it was actually an affidavit. Porodish signed the affidavit without reading it.

James Schultz

Schultz submitted the following prepared statement to the County:

I went to the jail on Weds to drop off Kris (sic). I asked the guy in the glass room if I could get Kris for personal use. He said yes.

I asked the deputy if he wanted my name and phone number. He said no. I said I'll see you on Sat @ 7:00 a.m.

On Sat when I went to get Kris he said he had to do dishes & would be done at 10:30 a.m. The deputy asked if I wanted someone else. I said sure. I again asked if he needed my name or phone number. I also asked for a phone number to contact the deputy because I never took someone out of jail like this before & what would happen if there was trouble.

I left and said I would be back before 4:00 p.m.

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

ARGUMENTS OF THE PARTIES

County

The Grievant was discharged for using his position as a Highway Department employee to secure the release of a jail inmate for his own personal use on April 28 despite being specifically told the use of inmates for personal use was not allowed.

The testimony of Mr. Stanull, Mr. Wardman, Mr. Bonde and written documentation establish the facts in this case. These facts lead to the inescapable conclusion that the Grievant lied about identifying himself as a County employee, lied about Stanull telling him he could not use inmates for personal use, lied about telling Stanull they would be stacking firewood, and lied about his overall wrongdoing in the case. This is not a case of “he said, she said.” Rather, this is a case of an employee lying.

The Grievant’s unsupported and uncorroborated testimony is self serving. He offered excuse after excuse to explain his behavior. If the Grievant’s version is believed, then it must be concluded that the County Sheriff’s Department perpetrated a fraud through the coordinated false testimony of multiple witnesses. The Grievant accused Stanull, Porodish, and Corsi of perjury. He attacked Cornils and accused her of denying him the opportunity tell his side of the story. The Grievant had every reason to lie; he was facing criminal prosecution and the possibility of losing his job. The Grievant’s credibility is further challenged by his dialog with Mr. Porodish at the landfill. The Grievant would have no reason to speak to Porodish in private at the landfill.

Common sense dictates that the removal of inmates to perform personal services without pay is ridiculous. Porodish testified that when he told fellow inmates the Grievant was going to get him out on Saturday to do some fishing and other recreational activities, they laughed. Porodish also testified that the Grievant’s own co-workers laughed after this incident became known.

The County relies on the traditional seven tests or standards of just cause. Using this method of analysis, there is no question the County has met the standard. The first test asks whether the Grievant knew his conduct was wrong. Based on the testimony of Stanull, Wardman and supported by Bonde and exhibits 9 and 10, the Grievant knew he could not take an inmate from the jail for personal use. He did so anyway.

Moving to the second test, it is reasonable to expect employees to not use their positions as County highway workers to obtain the release of an inmate under the guise of claiming the inmate would be doing work for the County. This is so not only due the liability

concerns as testified to by Cornils and Kennedy, but also civil rights liability, wage and hour liability and the adverse impact on the County's public image.

The third and fourth tests require a fair and thorough investigation. This occurred. There can be no serious challenge to the investigation. Detective Remiker left no stone unturned in his effort to determine exactly what happened in this case. The Grievant was interviewed as were inmates and Sheriff's Department employees. The Grievant was offered multiple opportunities to tell his side of the story. Not only did Remiker conduct an investigation, but Cornils also performed an investigation.

The fifth test was met in that there was more than adequate proof of the Grievant's wrongdoing.

The sixth test requires that the County enforce its rules and policies in an equal and fair manner. The County has not been presented with a parallel case. While there was an airport director that took home a plow, that was to plow out his driveway so that he could timely return to the airport the following morning in a snowstorm. There were two other employees that admitted to taking sand and received two weeks suspension. The final Union comparative was an assertion that gasoline was being pilfered. The County investigated and found no evidence that theft was occurring. The Grievant denied culpability and perpetuated untruthfulness.

The final test relates to the proper penalty. The Grievant made this an "all or nothing" case. Before the decision to discharge was made, the public became aware of the Grievant's actions. Thereafter criminal charges were filed. The Grievant's conduct harmed the reputation of the County. Given the seriousness of the misconduct, the lack of remorse, the false accusations during the hearing and the public's reaction, discharge was the necessary and appropriate penalty.

Union in Reply

The Union maintains that the County did not have "just cause" to terminate the Grievant's employment.

The primary dispute relevant to the Grievant's termination is whether the County jail staff expressly gave the Grievant permission to take inmate Sanchez to help him perform personal tasks unrelated to his employment with the County Highway Department. The Grievant had little to no knowledge of the County inmate work release program. He had only just recently worked with the program and as a result, he probably misunderstood or did not understand the significance of the jail officer's direction to him.

The Grievant's conversations with the jail staff are critical to understanding this case; two conversations in particular. The first was the Grievant's dialogue with Officer Corsi on Wednesday, April 25. The Grievant was wearing his highway department vest and introduced

himself to Corsi noting that he was a highway department employee. Although Corsi has no recollection of a conversation with the Grievant, the Grievant left the discussion convinced that it was permissible for him to obtain the release of an inmate to help him with personal tasks. The Union maintains that both men offered truthful testimony. Corsi could have understood, given the Grievant's County employee status, that the work the Grievant asked about for the weekend was County work. The Grievant, given his ignorance of the work release program, could have assumed that Corsi knew the work he wanted done was personal and further assumed that Corsi's response was confirmation that he could use the inmate to help him.

The second conversation of significant was the Grievant's April 28 exchange with Officer Stanull. This talk contained a similar basis of misunderstanding. When asked about using an inmate on Sunday for personal use, the jail staff responded "absolutely not". The Grievant could reasonably have concluded that this denial was based on an unavailability of inmate staff to perform Sunday work and not a general denial against using inmates for personal work.

Circuit Judge Daryl Deets reached the conclusion that the conflicting testimony reflected the witnesses' limited recollections of ambiguous conversations and that their misperceptions and misunderstandings were not intentional or perjury. It was based on this conclusion that he accepted the Grievant's *Alford Plea* and stated as such in accepting the deferred conviction agreement because this was a "case of impressions and possibly misimpressions".

The Grievant did not intentionally mislead the jail staff by falsely informing them that he was seeking an inmate to perform work for the County highway department. The Grievant's use of an inmate for personal work was readily ascertainable and quickly became known to the public. The work that the inmate performed that Saturday could easily have been completed by the Grievant and his family. The Grievant made no effort to hide the fact that Sanchez completed work personal to the Grievant. The only conclusion that can be drawn is the Grievant had no clue that what he was doing on April 28 was not proper.

The events of April 28 were the result of the Grievant misunderstanding the inmate release program and the jail officers failing to effectively communicate the requirements of the work release program. These failures do not constitute "just cause" to terminate the Grievant. The Union seeks the reinstatement of the Grievant and asks that he be made whole for any losses resulting from his termination.

County in Reply

The Union's characterization that this is all just a "big misunderstanding" and thus, the discipline was not warranted selectively relies on the record. This selective reliance must fail.

Although Porodish testified that "everything was just a big mix up," he also contradicted the Grievant's version of his conversation with Corsi. Porodish recalled that the

Grievant never used the term “personal use” when speaking to Corsi. The Grievant testified that he did not know anything about the jail inmate program. Porodish recalled that he and the Grievant discussed how he would be paid by the Grievant and he further recounted his conversation with the Grievant at the landfill during the investigation by Remiker. The Union relies on portions of Porodish’s testimony, yet claims that Porodish is lying about those matters which cast the Grievant in a negative light.

The Union next divides Stanull’s testimony. The Grievant first claims that he asked Stanull if he could use an inmate for personal use. This never occurred. Stanull had to ask the Grievant if it was for personal use. The Grievant admitted to same and Stanull responded, “absolutely not.” Yet, the Union then ignores the remainder of Stanull’s testimony where he stated that the Grievant specifically identified himself as a County highway employee. And, there is there is no credible explanation to the Grievant’s belief that prohibition on use of inmates for personal services for members of the general public only applied to Sundays.

The Union’s claim that the “jailers where never on the same page” is not true. Every jailer confirmed that they knew personal use of inmates was not allowed and never had been allowed.

The Union next asks the Arbitrator to give weight to portions of Judge Deets’ comments. Judge Deets did not hear testimony in this case. Rather, Judge Deets responded to the *Alford* line of cases and no weight should be given to those proceedings.

The Grievant has a history of claiming an “innocent” misunderstanding. He was cited for illegal dumping even though he worked in the landfill and therefore knew the rules. He again claimed that “someone” else said it was okay when he was caught, but paid the fine and turned around and did it again. The Grievant does not accept responsibility for his decisions.

The Grievant lied during Detective Remiker’s investigation. He denied having identified himself as a County highway worker. He claimed he asked Corsi about personal use of an inmate. He told Remiker that he never asked Stanull about the possibility of work on Sunday. He recanted all of these lies during the arbitration hearing. This record shows that there was never an “innocent” misunderstanding. The Grievant did everything he could to get out of trouble for his actions and the County’s investigations exposed his duplicity.

The County made a reasonable and appropriate decision to terminate the Grievant based on a serious act of misconduct and requests that the Arbitrator uphold the County’s judgment to do so.

DISCUSSION

This is a discharge case which rises and falls on the credibility of the witnesses and the factual conclusions reached. Ultimately, I am asked to determine whether the Grievant’s actions were reasonable, given the circumstances.

The County utilizes Professor Carroll R. Daugherty's seven test questions to analyze whether the discharge meets the just cause standard. See, ENTERPRISE WIRE CO., 46 LA 359 (Daugherty, 1966). The Union does not take a position as to what methodology of the just cause standard, but does challenge the County's conclusions. Harmonizing the Union's arguments within the framework of Daugherty's seven tests would prove to be unduly lengthy and repetitive, and as a result, I will consider the Union's argument's in concert with the two element just cause analysis. First, did the employer prove that the employee committed the conduct for which he or she is being disciplined. Second, if the conduct has been proven, was the discipline imposed commensurate with the offense under all the circumstances. GREAT LAKES CALCIUM CORPORATION, A-6289, (Jones, 1/22/08).

The County disciplined the Grievant for using his "position as a Manitowoc County Highway Department employee to secure a trustee from the Manitowoc County Jail for your own personal use." It is undisputed that the Grievant removed trustee Sanchez on April 28 and that Sanchez performed personal work for the Grievant. The Union does not challenge these conclusions, but maintains that there are mitigating circumstances that absolve the Grievant from guilt. The Union argues that there was a misunderstanding between the Grievant and the County Jail personnel and that that misunderstanding led to not only the jail personnel believing the Grievant was taking the trustee out to perform County Highway work, but also led the Grievant to believe that he had permission to use trustee Sanchez for personal work.

In addressing the Union's argument, I look to the circumstances and events that would have given rise to the misunderstanding. The first instance would have been the Grievant's conversation with Corsi when the Grievant believed he had permission to use an inmate for personal work. The second event was the Grievant's interrupted conversation with Stanull on April 28 from which the Grievant again believed he had permission to use an inmate for personal use. This event also led to the County concluding that the Grievant used his position as a County employee to obtain Sanchez's release. Finally, there are the various investigative conversations and tangential events including the Grievant's conversation with Porodish during the investigation, the Grievant's private investigator's conversations with Porodish, the failure of the Sheriff's Department to monitor the location of its inmates, and the Grievant's assertions that he was not allowed to offer his side of the story to the County before it decided to terminate his employment, which will be referred to as they relate to the ultimate question of whether just cause existed to discipline.

Did the Grievant specifically request permission to get an inmate out of the jail on Saturday, April 28 for the purpose of performing personal work? And if so, did Corsi extend permission to the Grievant?

I start with the Grievant's conversation with Corsi on April 25. This occurred at the conclusion of the Grievant's workday when he was returning Porodish to the jail. Present were Corsi, the Grievant, and Porodish, although Porodish's attention was divided between a conversation with another inmate and observing the Corsi/Grievant conversation.

The Grievant testified that when he entered the jail facility, he first looked to see if Dueno-Dufek's office door was open and when it was not, he asked the jailer if he could "get him out Saturday for personal use" and that the jail officer responded in the affirmative. The Grievant then asked Corsi if he wanted his name and number and was told that he did not. The conversation continued with the Grievant asking if there was anything else he needed to do other than show up on Saturday and collect Porodish to which Corsi responded "yes," meaning that he need only show up and he could take Porodish out of jail.

The Grievant's testimony is very similar to his statement prepared shortly after the event. The Grievant timely prepared the statement at the request of the Highway Department. It provides that he "asked the guy in the glass room if I could get Kris for personal use. He said yes." And he further wrote, "I asked the deputy if he wanted my name and phone number. He said no. I said I'll see you on Saturday @ 7:00 a.m." The Grievant's statement is more detailed in that it contains the time in which he would arrive to pick up Porodish, but that is understandable since the event would have been fresh in his mind.

Moving to Corsi's testimony, he had no recollection of any conversation regarding personal use of inmates with the Grievant or anyone. This was so not only at hearing, but also on May 16 when he was interviewed by Remiker and documented in the Department Summary Investigative Report. While it's possible that Corsi had reason to forget that he offered the Grievant permission, he would likely have done that by acknowledging that the Grievant had asked to use inmates for personal work and that that he had denied the Grievant's request. Corsi had no motive to lie, but I do not find his statement that no conversation took place to be accurate. Both the Grievant and Porodish recall a conversation between the Grievant and Corsi and the work schedule for April 25 confirms that Corsi was present. I therefore find that a conversation did take place between Corsi and the Grievant, but that it was not memorable or remarkable.

Porodish described the Grievant's conversation with Corsi as:

Like when Mr. Corsi said you're from the County Highway, Mr. Schultz said yes. Well right then and there that's when the mix up got, you got misunderstood" and "Everybody just assumes that it was for County Highway because County Highway Department was brought up in the conversation." Tr. 118, 119.

and

He came to the window with his vest on. He said I need this individual out for work on Saturday, and then Corsi, right out of Corsi's mouth said you're for the County Highway Department, he never said it's for the County Highway or its for personal. Corsi said its for or you're with the County Highway Department, he said yes. And then that's when Corsi said I'll take care of it, wrote it in his

notebook, and that was that. But nobody in the sense at all said it was for personal. Tr. 121

In assessing credibility when there is conflicting testimony, it is necessary for the arbitrator to “sift and evaluate the testimony to the best of his ability, and reach the best conclusion he can as to the actual fact situation.” Elkouri and Elkouri, *How Arbitration Works*, 6th Ed. (2006) p. 415 citing TEXAS ELEC. STEEL CASTING CO. 28 LA 757, 758 (Abernethy, 1957). And, “by piecing together the parts, the broad outlines of the whole picture emerge.” Id. citing SAMPSEL TIME CONTROL, 18 LA 453, 456 (Gilden, 1951).

The record establishes that the Grievant entered the facility with the intent to remove Porodish on Saturday and had been prepared by Porodish to make the request. Porodish and the Grievant had already discussed the nature of the work to be performed – cutting wood, hauling wood, and fishing – and the process which the Grievant needed to follow in order to remove Porodish from the jail.

Once inside the facility, Corsi observed the Grievant in his highway garb and was presented with the Grievant’s request to remove Porodish on Saturday. Porodish’s testimony in this regard is relevant and reliable. I do not believe the Grievant stated that he wanted Porodish for “personal use” nor do I believe he stated he wanted him for County Highway work. Rather, I believe he asked for Porodish and since he was a County Highway employee, returning with Porodish after doing County Highway work, Corsi assumed that Porodish would be performing County Highway work on Saturday. At no time did the Grievant correct Corsi’s assumption, although he clearly should have been clued into Corsi’s false conclusion when Corsi turned down the Grievant’s offer of his name and number, and instead, made a notation.¹

The Grievant testified that he told Corsi that he wanted Porodish for personal use and that Corsi responded “yes.” I do not find the Grievant believable. Corsi has little to gain or lose by lying, while the Grievant has motive to lie. Although Corsi testified that he did not remember anyone asking to schedule an inmate for personal use, he also testified that had that occurred, he would have remembered because it was out of the ordinary. He further testified that he knew the use of inmates for personal use was not acceptable. Therefore, taken in totality, had the Grievant asked for Porodish for personal use as he asserts, I do not believe Corsi would have responded, “yes” and further, I believe that Corsi would have recalled the conversation.

¹ Both the Grievant and Porodish testified that Corsi made a notation about the Grievant collecting Porodish on Saturday. Corsi testified that he did not carry a notebook and that he did not write anything down about Porodish leaving the facility on April 28. Corsi also testified that he did not have any recollection of any conversation with the Grievant. I find that Corsi did have a conversation with the Grievant on April 25 and further, that he made a notation on that date.

I further disbelieve the Grievant when he stated he never discussed compensation with Porodish. Instead, I find that the Grievant and Porodish did discuss remuneration and that the Grievant was not being truthful when he claimed that he never offered Porodish \$20 for his services. Porodish had no reason to claim that the Grievant was going to give him money if he didn't. It is both insightful and significant that the Grievant was conspiring with an inmate to defy the jail facility rules relating to bringing money into the facility.

Porodish was neither honest with the Grievant on April 25 nor is his testimony beyond reproach. Porodish knew that inmates are not removed from the jail facility to perform work for citizens of the community, but he did not inform the Grievant of this. Instead, he seized upon an opportunity and took advantage of the Grievant. Porodish offered conflicting testimony and signed a suspect affidavit. There is no question that Porodish's reliability is suspect, but he also has no motive or vested interest in the outcome and therefore, his testimony will be considered recognizing its dubiousness.

Finally, it was naïve for the Grievant to leave the jail facility believing that all he needed to do was to pick up Porodish on Saturday. The Grievant admitted that it was "too easy" when he made arrangements to remove Porodish on Saturday and therefore he should have been on guard and/or asking additional questions when he arrived at the jail three days later.

Did the Grievant use his position as a highway department employee and intentionally mislead the officers into believing that the trustee would be performing County highway work?

The Grievant denies identifying himself as a County employee when he picked up Sanchez on Saturday. In looking to the surrounding circumstances, I conclude that by both his actions and intentional omissions, he represented himself as a County employee when he removed Sanchez from the County jail.

Starting with the communications of April 28, the Grievant arrived at the jail to pick up Porodish. He approached Central Control and Stanull was nearing the end of his shift. Stanull testified that the Grievant identified himself as a County Highway employee. At hearing, the Grievant denied that he identified himself as a County Highway employee when he arrived to pick up Porodish. But, that testimony is contradicted by his statement to Remiker on May 7 wherein he stated that he "may" have identified himself as a County Highway worker. Ex. 11 p.6. There is no question that the May 7 response is not definitive, but this inconsistency is focal to the issue of whether the Grievant used his position as a County employee to obtain the release of Sanchez.

The Grievant next asked for "Chris" and indicated that he had worked with him the prior week, although he did not know his last name. Stanull checked the County's computer system for trustee release and identified Porodish as the trustee that had worked for the Highway Department the prior week. Stanull informed the Grievant that Porodish was not available. Stanull then asked whether another inmate would work and inquired what the

inmate would be doing. The Grievant agreed to another inmate, but his responses as to what the inmate would be doing are not consistent.

The Grievant told Remiker on May 7 that he told Stanull that the inmate would be helping him stack wood. Exh. 11. Stanull recalled that he said they would be “unloading a semi” or “unloading a semi-trailer”. At hearing, the Grievant testified:

We’re going to be unloading a truck box. I said there has been a change in the plans because of a truck box my cousin, who I talked to prior this asked if I would help unload a truck box, and then I said and we’re going to be stacking firewood. Tr. 375-376.

It is amazing that the Grievant is now recalling that he explained with this level of specificity the content of his statement to Stanull, especially since he never offered this extensive explanation in the past. I do not believe that the Grievant made any statement beyond some form of “unload a semi.” I also note that the Grievant reminded the officer of his employment with the County Highway Department. Stanull’s version is more believable. Stanull was told by a Highway Department employee that he was there to pick up the same trustee that had worked for the Highway Department days earlier and that they were going to be unloading a semi, which could be viewed as Highway Department work. I do not believe the Grievant made any reference to his cousin or firewood. If the Grievant had expounded to Stanull as he describes, it is more likely than not that Stanull would have deduced that the work the Grievant intended Sanchez to perform was personal and not highway work.

Minutes later, the Grievant approached Stanull again while he was waiting for Sanchez to be released. The Grievant asked Stanull whether an inmate would be available the following day, Sunday. In response, Stanull asked the Grievant what the trustee would be doing. The Grievant responded that the prisoner would be doing personal work for the Grievant. While the Grievant has maintained throughout the investigation and hearing that he repeatedly stated to the officers that he was seeking the services of the trustee for personal use, I find that this was the first time that the Grievant informed the officer.

The Grievant’s prepared statement does not mention that the trustee was going to be doing personal work and it does not make any request for work on a Sunday. The Grievant was questioned during his interview with Remiker and Remiker documented the exchange as follows:

I further question SCHULTZ about the conversation he had with C.O. STANULL on 04/28/07 in which C.O. STANULL informed him that he could not use inmates for personal use. SCHULTZ indicated he was not given that information. SCHULTZ stated, if that was the conversation, he did not understand that inmates could not be use for personal use. He indicated he would not have taken the inmate out if he had known that information.

The Grievant testified at hearing that after he informed Stanull that he wanted the inmate for personal use on Sunday, that Stanull told him, “said no, I gave you a guy today, ... in the future you should get it checked out through Linda, and I said okay.” Tr. 377. The fact that the Grievant denies ever being told that personal use of trustees is improper is troublesome.

Stanull’s version of events is significantly different. Stanull’s statement and testimony describe the Grievant asking for an inmate for personal use on Sunday and Stanull turning to Wardman in the Control Center and asking Wardman if inmates are available for personal use. Stanull recalled and Wardman’s statement and testimony provide that Wardman responded, “absolutely not” which Stanull then repeated to the Grievant. Stanull then described how the Grievant responded – by raising both his arms and stating, “that’s fine.” Stanull’s integrity is suspect simply because if there is any truth to the Grievant’s assertions, then Stanull released an inmate without proper authorization. The fact that Wardman and Bonde corroborate Stanull’s testimony establish its credibility.

The Union argues that the Grievant was mistaken in that he believed Stanull’s denial was for Sunday only and that he just didn’t understand that he could not use an inmate for personal use. I am unwilling to splice the conversation to that degree. I accept Stanull’s testimony. Stanull, clearly and fully, informed the Grievant that the use inmates for personal use was unacceptable. Given the proximity of the Central Control, it is possible that the Grievant heard Wardman state, “absolutely not” when Stanull asked him whether a citizen could check out an inmate for personal use. Once the Grievant was told “absolutely not”, he knew or should have know that removing an inmate to perform personal work was not approved, and yet, he chose to remain silent and removed inmate Sanchez from the jail to perform non-highway work.

I am unwilling to accept the Union’s position that the Grievant is absolved from guilt simply because he was ignorant of the County work release program. The Grievant testified that he was not knowledgeable or educated on the various work release programs, although he alluded to the existence of many programs that were “out there” that allowed citizens to obtain the personal services of inmates. Yet, in the face of not knowing specific programs, rules, procedures, and obligations, he chose to proceed and remove an inmate lacking this knowledge. A reasoned approach would have been to ask further questions or speak to Dueno-Dufek who he knew was the Trustee Coordinator.

This was not a hasty or impulsive action by the Grievant. The idea came to him on Wednesday. He initiated a conversation with Corsi on that same day, deluded Corsi and Stanull into believing that the work was for the Highway Department and then, after he asked and informed that inmates are not available to the citizenry for personal services, removed Sanchez to perform personal service on Saturday. The Grievant’s removal of Sanchez was a calculated effort to obtain free labor.

Finally, I concur with the County that common sense must prevail and a reasonable person would not believe that inmates are available to the citizenry to “check out” for a day to

perform personal services. The record establishes that inmates, correctional officers and the public at large understood that using inmates for personal services was inappropriate. The Grievant's actions were inconsistent with the behavior of rationale persons and quite frankly, incredulous.

The Grievant maintained that he was not allowed to tell his side of the story. The Grievant spoke to Remiker on May 7, spoke to Cornils on May 9, and spoke to Remiker a second time by phone. There is no question that the Grievant attempted to speak to Cornils a second time, but that conversation was cut short by Cornils' belief that the Grievant's intent when calling was to learn information from her rather than voluntarily provide additional information to assist in his case and she did not have any new information. The County afforded the Grievant sufficient opportunities to respond to the charges against him. It is more likely that the Grievant's belief that his communication was hindered was due to advice from his criminal attorney to refrain from speaking to the County rather than the County's unwillingness to allow him to provide an explanation.

A fair amount of testimony was offered regarding the lack of accountability and/or inadequate Sheriff's Department procedures in place at the time of the incident. The Grievant described that he was never trained, briefed or educated about how to work with inmates or how the Community Service Program was designed to work. This record makes it brutally clear that the program was leniently managed, to the point of being mismanaged. And, while these deficiencies are notable, they do not discount the Grievant's misconduct. The Grievant made the decision to go forward on Saturday, April 28 after he had sufficient information to know the use of inmates for personal services was not allowed. He chose to take a risk and it was a poor decision.

Having found that the Grievant committed the conduct for which he was disciplined, I move to the issue of determining whether the level of discipline imposed was commensurate with the offense under all the circumstances. Cornils testified that the County opted for the most punitive form of discipline, based on the severity of the incident, citing dishonestly, liability concerns and the Grievant's lack of remorse. I am unwilling to substitute my judgment for that of an employer when the evidence establishes that the employer has, in good faith, exercised its management right and the penalty is not arbitrary, capricious, or constitutes an abuse of management discretion. The discharge stands.

AWARD

1. The Grievant, James Schultz, was discharged for just cause.
2. The grievance is dismissed.

Dated at Rhinelander, Wisconsin, this 17th day of July, 2009.

Lauri A. Millot /s/

Lauri A. Millot, Arbitrator