

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

KENOSHA COUNTY

and

AFSCME COUNCIL 40, LOCAL 990 J

Case 278
No. 68719
MA-14326

Appearances:

Ms. Lorette Pionke, Senior Assistant Corporation Counsel, Kenosha County, 912 - 56th Street, Kenosha, Wisconsin 53140, appeared on behalf of the County.

Mr. Nick Kasmer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8450 82nd Street, #308, Pleasant Prairie, Wisconsin 53158, appeared on behalf of the Union.

ARBITRATION AWARD

On March 12, 2009 AFSCME Council 40, Local 990J and Kenosha County filed a request with the Wisconsin Employment Relations Commission seeking to have the Commission appoint William C. Houlihan, a member of its staff, to hear and decide a grievance pending between the parties. A hearing was conducted on May 5, 2009 in Kenosha, Wisconsin. A transcript of the proceeding was taken and distributed on May 19, 2009. Post-hearing briefs were filed and exchanged by July 14, 2009. Reply briefs were waived on July 20, 2009.

This Award addresses the termination of M.T., for tardiness.

BACKGROUND AND FACTS

M.T., the grievant, was employed by the Kenosha County Sheriff's Department from June 1998 until his termination in June, 2008. The grievant was employed as a Direct Supervision Officer in the County Jail. As such, he worked with jail inmates in a facility that operates 24 hours a day, 7 days a week. The Jail is staffed continuously, with shifts which have a 30 minute overlap. If someone comes to work 30 minutes late or is absent, the absence is covered, typically with overtime and commonly by forcing someone to hold over.

Through much of his tenure with the Sheriffs' Department, the grievant had a tardiness problem. As a result he was given a series of discipline. In 1999 the grievant was tardy five times. Those incidents ranged from 7 to 45 minutes late. In 2000 the grievant was late to work four times, ranging from 17 to 30 minutes late. He was given two written verbal warnings in 2000, one of which was for his tardiness. In 2001 the grievant was late to work 6 times, most of which were less than 5 minutes. He was given two written warnings that year, one of which was for his tardiness. In 2002 the grievant was late to work twice. He was 1 hour late and 2 minutes late. In 2002 the grievant was given a written verbal warning.

In 2003 the grievant was late to work 4 times. That year he was given 2 written verbal warnings, one for tardiness, and a 1 day suspension, unrelated to tardiness. In 2004 the grievant was late to work 5 times. He was twice late by one hour. The grievant was given a written verbal warning for tardiness in 2004. In 2005 the grievant was late to work 3 times, two of which were one hour or more. He was given a written verbal warning for tardiness in 2005.

In 2006 the grievant was tardy 11 times. 10 of those incidents exceeded one hour. One time the grievant was two and one half hours late to work. In 2006 the grievant was given a written verbal warning for tardiness, a one-day suspension for tardiness, and a two-day suspension for tardiness. The two-day suspension was originally issued as a three-day suspension, and was reduced to a two-day by the following agreement between the Union and the County:

LETTER OF UNDERSTANDING
BETWEEN
KENOSHA COUNTY
AND
AFSCME LOCAL 990 JAIL

The following constitutes the full and complete understanding between the parties regarding the discipline of Direct Supervision Officer M.T.;

1. DSO T. will serve a two (2) day unpaid suspension for reporting to duty late on 10/05/06.
2. In accordance with Sheriff's Department policy number 175.1, paragraph E., any continual or repetitive pattern of tardiness by DSO T. will result in either a minimum 5 day suspension without pay, or termination."
3. This understanding is non-precedential.

There were two tardies following the October 5 date referred to in the memo. The grievant was tardy on November 30 and December 17, 2006. The county reports no tardies in

2007. However on January 21, 2008 the grievant reported to work 1 hour 18 minutes late. On March 9, 2008 the grievant reported to work 1 hour 3 minutes late. This led to further discipline. The grievant was given Notice of the charge against him. The substance of the Notice provided the following:

Incident Summary

On October 5, 2006, DSO T. received a 2-day suspension without pay in lieu of a 3-day suspension at the agreement of the Union and Management. That agreement stated that any continual or repetitive pattern of tardiness by DSO T. will result in a 5-day suspension without pay, or termination.

Following the signing of the agreement DSO T. was Tardy:

November 30, 2006 1 hour 12 minutes
December 17, 2006 1 hour
January 21, 2008 1 hour 18 minutes
March 9, 2008 1 hour 3 minutes

After serving a 2-day suspension without pay and with knowledge that continuing to show up to work late will result in a minimum 5-day suspension, DSO T. continues to show up to work late.

Following notice and a Hearing, Chief Deputy Charles Smith made the following findings, and issued the following discipline:

Date: April 16, 2008

...

Findings

- DSO T. has compiled an extremely poor attendance record since the end of his probationary period in June of 1999 being marked tardy 39 times.
- KCDC supervision appears to have taken a loose interpretation of KSD Policy 175.1 during from 1999 through 2002. This was also a transition period from operating as the House of Corrections to the Detention Center. As a result DSO T amassed numerous violations without being assessed and penalized properly.
- DSO T continues to come to work late just one month after his 2 day suspension in 2006.

- DSO T's violations, although pared down, taken in context still establishes a pattern of continuous tardiness and irresponsibility.

Conclusion

As Hearing Officer, I believe the violations of DSO T. are serious enough to warrant a minimum of a 5 day suspension. We, as a Public Safety Agency are required to operate on a 24/7 basis with fixed post positions. It is the responsibility of **all** that they report to duty in a timely fashion to assume their duties.

When an employee is as late as DSO T. on a continual basis it is disrespectful to his fellow Direct Supervision Officers as they suffer the burden of his absence and to Department supervision who must force an employee to work DSO T.'s position until he arrives. There is enough overtime without having to make another employee pick up the slack of a fellow DSO who cannot get to work on time. Therefore, I am ordering the following:

- DSO T. will be given a 5 working day suspension with a start date to be determined by Detentions Administration. In addition DSO T must meet the following stipulation:
 1. DSO T. must remain **tardy** free for a period of two years from April 17, 2008 to April 17, 2010.
- A violation of this stipulation will result in the termination of DSO T. from the Sheriff's Department.

Charles R. Smith /s/
Charles R. Smith
Chief Deputy

The discipline was grieved. Testimony indicates that before the grievance on this matter was processed through the grievance procedure, the grievant was terminated.

The grievant was terminated when he reported late for a forced overtime shift assignment on May 21, 2008. Following Notice and a Hearing, Chief Deputy Smith made the following findings and conclusions:

June 13, 2008

...

Findings

- DSO T. received a 5 working day suspension on April 16, 2008 for excessive tardiness.
- DSO T. was put on notice that one more violation in the next two years for tardiness would result in his termination of employment from the Kenosha County Sheriff's Department.
- DSO T. was 30 minutes late to work only 21 days after he was put on notice.
- DSO T. did not work a 16 hour shift the day before he was late.
- DSO T.'s tardiness was not a single instance but a part of his continual pattern of lateness since the day he was hired.

Conclusion

We, as a Public Safety Agency are required to operate on a 24/7 basis with fixed post positions. It is the responsibility of **all** that they report to duty in a timely fashion ready to assume their duties.

When an employee is as late as DSO T. on a continual basis, it is not only irresponsible but disrespectful to his fellow Direct Supervision Officers as they suffer both the burden of his absence and to Department supervision who must force an employee to work DSO T.'s position until he arrives. Therefore, I am ordering the following:

- DSO M. T. is hereby terminated from his employment with the Kenosha County Sheriff's Department and Kenosha County effective Friday, June 13th, 2008.

The bi-weekly pay period that included Wednesday, May 21, 2008 ran from Sunday, 5/11 to Saturday, 5/24. During that pay period the grievant worked 80 regular hours and 32 overtime hours. Much, if not all, of the overtime was forced, due to the fact that the jail was not fully staffed. The grievant traded off Sunday (5/11) and Monday (5/12) so that he did not work those days when he was scheduled to work. He traded on Friday (5/16), Saturday (5/17) and Sunday (5/18) so that he did work on those days he would have otherwise been scheduled off. The record does not indicate whether those trades were at the initiation of the grievant or others.

As a result of the schedule and trades the grievant worked 11 consecutive days. He worked a double shift on Monday, May 19. On Wednesday, May 21 he worked his normal shift from 6:00 a.m. to 2:30 p.m. He was forced in for a shift starting at 10:00 p.m. It was his testimony that he went home and slept for approximately four or five hours. He testified that he was late due to a lack of sleep.

ISSUE

The parties could not stipulate as to the issue. The County believes the issue to be:

Did the County have just cause to terminate the grievant from his position with the Kenosha County Detention Center?

If not, what is the appropriate remedy?

The Union believes the issues to be:

Did the County violate the collective bargaining agreement between itself and the Union when it issued a last chance order to Direct Supervision Officer M.T.?

If so, what is the appropriate remedy?

Did the County violate the collective bargaining agreement between itself and the Union when it terminated Direct Supervision Officer M.T.?

If so, what is the appropriate remedy?

The County objected to the challenge to the last chance order on the basis that it was entered into before the termination, and questioned whether or not it had been grieved.

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE I - RECOGNITION

...

Section 1.2. Management Rights: Except as otherwise provided in this Agreement, the County retains all the normal rights and functions of management and those that it has by law. Without limiting the generality of the foregoing, this includes the right to hire, promote, transfer, demote or suspend or otherwise discharge or discipline for proper cause. . .The County shall have the right to adopt reasonable rules and regulations.

...

Section 3.5. Work Rules and Discipline: Employees shall comply with all provisions of this Agreement and all reasonable work rules. Employees may be disciplined for violation thereof under the terms of this Agreement, but only for just cause and in a fair and impartial manner. . .

The foregoing procedure shall govern any claim by an employee that he/she has been disciplined or discharged without just cause. Should any action on the part of the County become the subject of arbitration, such described action may be affirmed, revoked or modified in any manner not inconsistent with the terms of this Agreement.

**RELEVANT PROVISIONS OF THE KENOSHA COUNTY
PROGRESSIVE DISCIPLINE POLICY, Report 139**

1. Policy

The art of discipline is intended to be positive in nature and attempts to correct unacceptable employee actions. This attempt includes counseling sessions, suggested referrals to outside agencies, and other help with the purpose of improving the behavior of an employee that may be detrimental and disruptive to the effective operations of a department and/or work program.

...

Progressive discipline is basically a series of disciplinary actions, corrective in nature, starting with a verbal or written reprimand. Each time the same or similar infractions occur, more stringent disciplinary action takes place.

...

When there is a series of minor infractions and where there have been several verbal reprimands, written reprimands or suspensions occurring over a period of time, and the employee's general behavior pattern is such that the previous disciplinary actions can be included, they may be used in determining the next level of progressive discipline, if any, in determining the proper action to be taken. If past behavior relates to the present problem, past action should be taken into consideration. If the relationship is unclear, consult with the Director of Personnel.

...

PURPOSE:

To identify expected standards of conduct, and to establish guidelines for dealing with employee tardiness.

POLICY:

All employees are expected to report for work on time. All employees are expected to be at their assigned duty station, in full uniform, and prepared to start work at their designated starting time.

Management and supervisors are allowed latitude in dealing with this issue, however it is important that all supervisors are consistent in the application of corrective disciplinary measures.

Excessive tardiness will result in disciplinary action after an effort is made to correct the undesirable behavior. Disciplinary action will be consistent with the guidelines listed below.

1. GUIDELINES

The following guidelines are listed as the standard for supervisors to measure against the action they take:

- A. Any employee who is late 4 times within any 1-year period shall be issued a (written) “verbal warning.”
- B. Any employee who is late 3 additional times within a 6-month period following a (written) verbal warning shall be issued a “written warning.”
- C. Any employee who is late 3 additional times within a 1-year period following a written warning shall receive a “1-day suspension without pay.”
- D. Any employee who is late 3 additional times within any 1-year period following a 1-day suspension without pay shall receive a “3-day suspension without pay.”
- E. Any continual or repetitive pattern of tardiness will result in either a “minimum 5-day suspension without pay,” or “termination.”

POSITIONS OF THE PARTIES

It is the view of the County that it had cause to discharge the grievant due to his excessive tardiness. The County points out that the grievant had been warned and subjected to progressive discipline. The County proceeded in accordance with its rules and regulations relative to progressive discipline.

The grievant and the Union offered numerous excuses for the tardiness. It is the view of the employer that the working conditions for the grievant were no different than those of his co-workers, who managed to arrive at work on time. It is the view of the County that progressive discipline failed to remedy the grievant's chronic problem in getting to work on time. At some point the progression of discipline has to either be effective or to end. Under the rules, the County had the right to terminate the grievant and did so.

It is the view of the Union that the County lacked just cause to issue the last chance order or to terminate the grievant. The Union contends that one tardy does not amount to a pattern under the tardiness policy. The Union cites arbitral authority for the proposition that discharge is the most extreme penalty an employer can impose on an employee.

The Union contends that its grievance on the last chance order was timely and is arbitrable. It is the view of the Union that the last chance order took the grievant outside the tardiness policy. It is the view of the Union that the tardiness policy allows under all steps for multiple occurrences of tardiness prior to any form of discipline. The order mandated that the grievant be tardy free for a period of two years. Even under Sec. E, the Union contends that multiple incidents of tardiness are required for discipline. The Section uses the terms "any continual or repetitive pattern" to describe the behavior which will prompt discipline. It is the view of the Union that you cannot establish a pattern without multiple incidents.

The Union acknowledges that the grievant had a poor attendance record. It is the view of the Union that his attendance had improved. It is not the view of the Union that the grievant should not be subject to discipline for continued discipline, but rather that any such discipline should follow the rubrics of the tardiness policy and not the last chance order.

It is the view of the Union that the County's reliance on past incidents of tardiness amounts to double jeopardy. The grievant was disciplined for his previous tardy days. There was but one tardy which followed the 5 day suspension. To the extent the County relies on the previous tardy events it is alleged to punish the grievant for those prior tardies a second time.

The Union points to testimony that the staffing level of the jail had resulted in a significant amount of forced overtime. The grievant was forced to work a substantial amount of overtime in the period surrounding May 21. This fact should serve to mitigate the grievant's tardiness.

DISCUSSION

The parties disagree as to the scope of the issue to be decided. It is the view of the Union that the 5 day suspension and last chance order are under review in this proceeding. The County does not. Both parties agree that the termination is properly raised in this proceeding.

I believe the record supports a finding that the 5-day suspension was grieved, and should be considered in this proceeding. Union witness Frederick Storz, an officer in the local, testified that the Union grieved the 5-day suspension. That testimony was corroborated by the testimony of Chief Deputy Charles Smith, who indicated that there was a grievance filed over the last chance order which had been denied by the employer's administration committee when the last absence occurred. As to the last chance grievance, Smith testified:

Q: Did that grievance die at that point?

A: I don't know where it went. This happened so fast after it that we went forward with this one. I don't know where that was in the process after that.

When the grievant was 30 minutes late on May 21, his shift Lieutenant forwarded certain documents to his Captain as a part of the record to be considered in the disciplinary process. The cover letter to those documents, dated May 27, 2008 included the following paragraph:

M.T. was 30 minutes late for an overtime shift on May 21, 2008. Given that DSO T.'s 5 day suspension is currently pending a step 4 grievance before the County's Administrative Committee, it was requested that I forward this matter to the Administration for review and disposition.

It appears to me that all parties were aware that the 5-day suspension had been grieved. The events prompting the termination arose while the suspension grievance was pending. That grievance evidently challenges the 5-day suspension. The second grievance challenges the termination. It appears that the events leading to termination did arise so quickly that the two grievances were blurred. There is nothing in the record to suggest that the Union acquiesced in the suspension. Similarly, the record supports a conclusion that the employer was very conscious of the grievance pending relative to the 5-day suspension, as it considered termination.

The County gave the grievant a 5 day suspension, because the County believed the grievant had passed from step D to step E of the Departmental Tardiness Guideline. To move from step D to step E requires "Any continual or repetitive pattern of tardiness...". The events that prompted the 5-day suspension were tardies on November 30, and December 17, 2006 and on January 21 and March 9, 2008. The grievant went 13 months without a tardy. This is by far the longest stretch he had gone without being tardy.

The grievant had a bad 2006. From April to December, 2006 he was tardy virtually every month. I believe there was a demonstrable pattern of tardy behavior exhibited in 2006. He was consistently late to work on a fairly predictable basis. He was disciplined in 2006. He received a verbal warning, a one day suspension and a two day suspension. Following the two day suspension, in October, he was late again in November (1 hr., 12 minutes) and December (1 hr.) It appears no further discipline was forthcoming at the time. In the context of the grievant's tardiness record in 2006 it is at least arguable that the November and December tardies represented a "...continual or repetitive pattern..."

The same cannot be said of 2007. The grievant had no tardies. His tardy-free year stands in stark contrast to his entire prior record. It appears that the grievant found a way to get to work on time. Whether it was a product of the progressive discipline, or some other factor, the grievant came to work on time in 2007. Whatever pattern previously existed had been broken, at least for a 13 month period. That 13-month period would have satisfied the timelines set out in paragraphs A-D of the Departmental Guidelines For Dealing With Employee Tardiness.

Paragraph E is not written like paragraphs A-C nor like Par.D. The prior paragraphs set up a schedule of discipline tied to a very specific number of tardies over a defined period of time. Par. E follows the progression. Par. E is the paragraph leading to termination. It uses the terms "continual" and "repetitive" in reference to tardiness. Used as they are, the terms refer to the preceding paragraphs. What is continued is the tardiness that has propelled the employee through Par.s A-D. What is being repeated is the tardiness that the employee has exhibited which has placed him at Par. E. The pattern is the predictable sequence of behavior that has caused the prior imposition of discipline.

I do not believe that there was a continual or repetitive pattern of behavior leading to the 5-day suspension. The County points to two incidents in 2006, and two more in 2008 as evidencing that "continual or repetitive pattern of tardiness". There was a 13-month break between those two sets of events. How long must pass before a pattern is broken within the meaning of Par. E? While Par. E is silent on that question, Paragraphs A-D provide a context for Par. E. I do not believe the County is free to mark time indefinitely between Paragraphs D and E. With the passage of time an incident of tardiness is no longer continual or part of a repetitive pattern.

2008 appears to be a relapse on the part of the grievant. He began to exhibit signs of the tardy behavior characteristic of his employment. The 5-day suspension treats the 2008 tardies as a continuation of the tardies that led to the prior disciplines. Paragraphs A-C provide increased discipline for tardiness that falls within a 6 month or 1 year period of disciplinary measures. This is consistent with the County's progressive discipline policy which seeks to correct behavior. At each lower step of the procedure the employee is given a time frame (6 months or one year) to respond to the discipline. If the response is lacking the discipline increases. If the response is satisfactory, the disciplinary sequence ends. This is the essence of progressive discipline. The grievant's 2007 attendance should have ended the automatic progression of discipline.

This raises the question as to how an employee who relapses is to be treated under the policy. I believe Par. D addresses that question. Par. D is worded differently than Par.'s A-C. Once an employee has progressed to the 1 day suspension his status under the Tardiness Policy is different. It is my reading of Par.'s A-C that if the employee satisfies the attendance standards set forth in those paragraphs he or she would return to the start of the progression. And so, if an employee was the recipient of a written warning under Par. B, and thereafter came to work on time for a 1 year period (2 or fewer tardies) he would return to the beginning of the disciplinary process. If, however, an employee had made it to step C, and had received a 1 day suspension, he would be subject to Par. D for any year he was late 3 additional times. Par. D, unlike the previous paragraphs refers to any year as opposed to the 6 months or 1 year following the imposition of discipline.

In light of the passage of over one year without a tardy, I regard the 5-day suspension as inconsistent with the just cause provision of the collective bargaining agreement.

The 5-day suspension was accompanied by a two-year tardy free directive. The two-year marking period has no authority in the Departmental Guideline, or the County Progressive Discipline Policy. On its face it directs the grievant to be absolutely tardy free, regardless of circumstances. It is effectively a unilaterally imposed last chance agreement. The collective bargaining agreement has a just cause provision. The directive cannot repeal that contractual provision, nor may it repeal the Departmental Guideline. The Departmental Policy provides that "disciplinary action will be consistent with the guidelines listed below."

Par. E requires "...continual or repetitive pattern of tardiness." to bring about a discharge. The absolute standard set forth in the last chance agreement offends Par.'s D and E. The pattern that exists is the one in 2008. The grievant was tardy on January 21, 2008, March 9, 2008 and May 21, 2008. Those tardies constitute coming to work "...late 3 additional times within any 1-year period following a 1 day suspension without pay." On its face, Par. D appears to anticipate the circumstance presented in this proceeding. The grievant had a grievance history which progressed through and beyond a 1-day suspension. He thereafter came to work timely. Unlike Par.'s A-C, where the referenced months follow the warning, Par. D refers to "...any 1-year period...". Par. D, unlike the paragraphs which precede it, extends beyond the period which immediately follows the progressive discipline. It allows the progressive discipline to renew, without a return to the beginning. I believe the employer was free to apply Par. D once the grievant was late 3 additional times within a 1 year period.

AWARD

The grievance is sustained.

REMEDY

The County is directed to reinstate the grievant with backpay and benefits, and to clear the record of reference to the termination. The employer is free to offset the backpay directed in the Award with Unemployment Compensation, if any and with interim earnings, if any. The Employer is also free to direct a 3 day suspension arising from the May 21 tardy, and to make that a part of the grievant's record.

JURISDICTION

I will retain jurisdiction for a period of 60 days, from the date of this Award, to resolve any dispute relative to the remedy directed.

Dated at Madison, Wisconsin, this 16th day of September, 2009.

William C. Houlihan /s/

William C. Houlihan, Arbitrator