

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**LINCOLN COUNTY**

and

**LINCOLN COUNTY COURTHOUSE EMPLOYEES LOCAL 332-A,  
AFSCME, AFL-CIO**

Case 268  
No. 69516  
MA-14634

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Appearances:

**Christopher M. Toner**, Attorney at Law, Ruder Ware, L.L.S.C., 500 First Street, Suite 8000, P.O. Box 8050, Wausau, Wisconsin 54402-8050, appearing on behalf of Lincoln County.

**John Spiegelhoff**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1105 East Ninth Street, Merrill, Wisconsin 54452, appearing on behalf of Lincoln County Courthouse Employees Local 332-A, AFSCME, AFL-CIO.

**ARBITRATION AWARD**

Lincoln County (County) and Lincoln County Courthouse Employees Local 332-A, AFSCME, AFL-CIO (Union) are parties to a collective bargaining agreement dated January 1, 2008 through December 31, 2009 (Contract). The Contract provides for final and binding arbitration of grievances arising under the Contract. On January 25, 2010, the Union filed a Request to Initiate Grievance Arbitration with the Wisconsin Employment Relations Commission (Commission) regarding discipline issued to the Grievant and asked the Commission to appoint a commissioner or a member of the Commission's staff to serve as sole arbitrator over the grievance. The undersigned was appointed. Hearing was held on the grievance on March 24, 2010 in Merrill, Wisconsin. A transcript of the hearing was prepared and was received by the arbitrator on April 16, 2010. The parties then submitted post-hearing written arguments in support of their positions, the last of which was received on July 13, 2010, closing the record in the matter.

Now, having considered the record as a whole, the undersigned makes and issues the following award.

**ISSUE**

At the hearing, the Parties stipulated to the following issue to be decided by the arbitrator:

Did the employer violate the Contract by suspending the Grievant and, if so, what will be the appropriate remedy?

**RELEVANT CONTRACT PROVISIONS**

**ARTICLE 2 – MANAGEMENT RIGHTS**

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

- A. To direct all operations of the County;
- B. To establish reasonable work rules;
- C. To hire, train, promote, transfer, assign and retain employees;
- D. To suspend, demote, discharge, and take other disciplinary action against employees for just cause;
- E. To lay off employees from their duties because of lack of work or any other legitimate cause;
- F. To maintain efficiency of department operations entrusted to it;
- G. To take whatever actions as necessary to comply with state or federal law;
- H. To introduce new or improved methods or facilities;
- I. To change existing methods or facilities;
- J. To manage and direct the working force, to make assignments of jobs, to determine the size and composition of the work force, and to determine the work to be performed by employees;

- K. To utilize temporary, part-time or seasonal employees when deemed necessary; provided such employees shall not be used for the purpose of eliminating existing positions;
- L. To determine the methods, means and personnel by which operations are to be conducted.

Any unreasonable exercise or application of the above-mentioned management rights which are mandatorily bargainable shall be appealable through the grievance and arbitration procedure; however, the pendency of any grievance or arbitration shall not restrict the right of the County to continue to exercise these management rights until the issue is resolved.

#### ARTICLE 7 - DISCIPLINE

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

7.02 Except as provided in Article 6.02 [discharge of probationary employees], employees shall be entitled to appeal any disciplinary action taken through the grievance and arbitration procedure.

7.03 If any disciplinary action is taken against an employee, both the employee and the Union will receive copies of this disciplinary action before the end of the next working day.

#### LINCOLN COUNTY WORK RULES

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The work rules are listed below. Failure to obey any of the rules listed shall be sufficient grounds for disciplinary action, ranging from verbal reprimand to immediate dismissal, depending on the seriousness of the offense and/or the number of infractions.

Employees are prohibited from committing any of the following:

I. WORK PERFORMANCE

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2. Failure to perform duties

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10. Sleeping on the job

## **BACKGROUND**

Grievant is employed by the Lincoln County Sheriff's Department (Department) as a correctional officer assigned to the County's jail facility. At the time of the incidents that are the basis of this grievance, October 2nd and 3rd of 2009, he had worked in the Department for more than five years.

The Lincoln County Jail is a new facility having opened in April 2009, less than one year before the incidents at issue in the matter occurred. In October 2009, there were three 8-hour shifts worked by correctional officers, known as first, second, and third shifts. The Grievant normally worked the second shift, which ran from 3:00 PM to 11:00 PM. There is more activity on the first and second shifts than on third shift. On the first and second shift, meals are served, medications are dispensed, visitors are received, and inmates are transported to doctor and court appointments. For much of the third shift, the inmates are asleep and there is less activity for the officers to observe and coordinate.

When working a shift, correctional officers are assigned to various positions within the jail. One of the positions is located in the "pod," an elevated, glassed-walled room in the center of the jail.<sup>1</sup> Another position is the "roaming" officer that physically walks around the facility and on the third shift, among other tasks, performs cell checks. On the third shift, there are at least two roaming officers and one pod officer on duty. The third shift pod officer normally logs in the mail for the day and generally observes activity in the facility, but otherwise has few duties to perform. Because of the lack of activity on third shift, officers assigned to the pod sometimes listen to radios and watch movies.

The pod serves as the control center for the jail's security system. When sitting in the pod, officers are situated approximately three feet above the surrounding jail and are able to directly observe much of the activity that occurs in the cell areas, as well as view video feeds from surveillance cameras located throughout the jail on a video monitor. The video feed from the cameras appear on the monitor in 3 inch by 3 inch squares. The video monitor, computers, and other equipment are situated on a long desk. When sitting at the desk in the pod, the officer's back is to the entrance vestibule where there are two doors that lead to the cell areas. The doors are commonly referred to as VA and VN. To the pod officer's right when seated at the desk is a pass through door where officers outside the pod can pass through items to the officer inside the pod. From outside the pod, an officer can look up through the pass through window to see the side of the pod nearest the window, including the desk.

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<sup>1</sup> A tour of the pod facility and surrounding areas was conducted at the hearing. Although not transcribed by the court reporter, the Parties each had an opportunity to point out the relevant portions of the facility. The description of the pod facility that follows is based on my observations during the tour as supplemented by further witness testimony and arguments by the Parties.

On October 2, 2009, the Grievant reported for work for his usual second shift – from 3:00 PM through 11:00 PM. He was informed that one of the third shift employees requested that night’s shift off and that there was an overtime opportunity on the third shift. The Grievant then worked the first half of the third shift in the pod, starting from 11:00 PM on October 2, 2009 through 3:00 AM on October 3, 2009.<sup>2</sup> As will be discussed in more detail below, while working this overtime shift, the County alleges that the Grievant fell asleep and failed to perform work duties. The County issued a six-day suspension as discipline.

### DISCUSSION

The disciplinary report that led to the decision to impose a six-day suspension on the Grievant contains the following:

On October 3, 2009, Correctional Officer Jason Meister was observed sleeping at his post and failed to log pertinent information in the jail log while working as a correctional Officer in Pod Control at Lincoln County Jail. This is a violation of Work Rules Section I Number 2. Failure to perform duties, and Number 10. Sleeping on the Job. This is also a violation of Lincoln County Core Values Integrity and professionalism.

In this case, the County disciplined the Grievant for sleeping on the job during the overtime assignment on October 2nd and October 3rd of 2009 and failing to log cell checks. Although not specifically mentioned in the disciplinary report, it was also alleged that he twice delayed opening the doors for roaming officers who were performing cell checks, causing one of them to feel unsafe.

The Contract contains a just cause standard for disciplinary action. Therefore, the issue in this matter boils down to whether there was just cause for the County to suspend the Grievant for six days without pay. The first step of the just cause analysis is to determine whether the Grievant actually engaged in the conduct that is alleged by the County to have violated a work rule. The Union argues that the County must establish this conduct by presenting “clear and convincing” evidence because the accusations of sleeping on the job are “stigmatizing.” The County argues that the appropriate standard is one of “preponderance of the evidence” because the allegations of violations of work rules do not allege criminal or immoral conduct and are not

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<sup>2</sup> The record contains contradictory evidence as to whether the overtime was assigned to Grievant on a voluntary or involuntary basis. The Union argues that Grievant was forced to work the overtime while the County contends that Grievant voluntarily accepted the assignment. I find it unnecessary to draw a conclusion on this point. Regardless of how the Grievant came to work the overtime, he would be equally culpable if he fell asleep while on the job and failed to perform work duties.

particularly stigmatizing. I do not find it necessary to decide this issue as my conclusion on the merits of the grievance would remain the same regardless of which standard is applied.

To establish that the Grievant was asleep on the job, the County offered the eyewitness testimony of a correctional officer who regularly works the third shift and who physically viewed the Grievant on the night in question. The eyewitness testified that the normal practice on the third shift is for the pod officer to automatically open the VA and VN doors for the roaming officers to perform hourly cell checks. On the night in question, there were two occasions where the doors were not opened immediately and the roaming officers had to make a radio call into the pod for the doors to be opened. On the second occasion, at approximately 2:24 AM, the eyewitness and another officer were preparing to perform one of the hourly cell checks. After walking to the VA and VN doors and waiting for a few seconds for the Grievant to open the doors from the pod, the eyewitness walked to the pass through door and looked into the pod. The eyewitness testified that he saw the Grievant with his legs up on the desk, leaned back in a chair with his eyes closed. The eyewitness reported this observation to a supervisor the following day, telling the supervisor that he had seen the Grievant sleeping. This report led to the investigation that ultimately resulted in the imposition of the six-day suspension.

I find the eyewitness' testimony that the Grievant was sleeping unconvincing for several reasons. First, there is evidence that the area around the pod was dark in the early morning hours when the incidents occurred. The only light came from a dim nightlight and the glow from the monitors on the pod desk. Based on this evidence, I find that the visual observation made by the eyewitness would be obscured by the darkness of the environment. Further, the Grievant credibly testified that the position he was sitting in at the desk on the evening in question would have resulted in him facing away from the pass through door. The computer monitors were arranged at the end of the desk nearest the pass through door. If at least one of his legs were resting on the pod desk, a fact which is undisputed, then he would have been sitting in a position where the eyewitness could have seen, at most, the Grievant's profile. Finally, the eyewitness admitted that he was not certain that the Grievant was actually sleeping. Although he reported to his supervisor that the Grievant was sleeping, in his written statement, he reported that the Grievant "appeared" to be sleeping or was "unaware" of the roaming officers' presence at the VA and VN doors of the pass through door. From this, it seems that the eyewitness was not certain that the Grievant was actually sleeping.

The County also focuses on the delay in the Grievant opening the doors for the two roaming officers when they were conducting their hourly cell checks as further evidence that he was sleeping. There was testimony that on third shift, on average, the VA and VN doors are opened from the pod within 10 seconds of the officers arriving at

the doors. The County produced video surveillance recording to establish the delay in the doors opening. The video demonstrates that during the 1:04 AM cell check, there was a lapse of approximately 30 seconds between the time the roaming officers approached the VA and VN doors and when the doors were opened. At the 2:24 AM cell check, the video shows a lapse of approximately 40 seconds.

After carefully viewing the video recording of the security tape for both the 1:04 AM and 2:24 AM incidents, I do not find the delay to be convincing evidence that the Grievant was sleeping. The County focuses on the total time lapse between when the roaming officers arrive at the VA and VN doors and when the Grievant opened the doors. As to whether the Grievant was sleeping, I think it is more relevant to evaluate the time from when the radio call was made (and presumably, from the County's perspective, woke up the Grievant) to when the door was opened. Unfortunately, due to the darkness of the video, it is difficult to determine the exact time when the radio call was made. However, the testimony of the roaming officers as well as my observations of the video lead me to conclude that the time lapse between the radio call being made and the door being opened was no more than 15 seconds for the 1:04 AM incident and no more than 5 seconds for the 2:24 AM incident.

During the 2:24 AM incident, the roaming officers approached the VA and VN doors, waited approximately four seconds, then the eyewitness walked to the pod to make the observation described above for approximately 29 seconds before returning to the doors. The doors were opened almost instantly after the eyewitness returned to them. Based on the eyewitness' testimony that he radioed for the doors after returning to the VA and VN doors, I conclude that the Grievant must have opened the doors almost immediately after the radio call. During the 1:04 AM incident, it is more difficult to determine the lapse because the video does not clearly establish when the radio call was made. However, the eyewitness testified that the delay was momentary in nature. This evidence is more consistent with the fact that the Grievant was reclined in his chair with his feet up on the desk which would require him to take a few seconds to sit up to verify that the officers were at the doors and then opening the doors. It is not strong evidence that the Grievant was sleeping.

Also weakening the strength of the delay in the doors being opened as evidence that the Grievant was sleeping is the fact that the pod officer's back is to the VA and VN doors. When sitting at the pod desk, the only way that the pod officer can see the activity at the VA and VN doors is through the camera feed. The video surveillance monitor in the pod contains a grid of 3 inch by 3 inch feeds from the various cameras in the facility. The feed from the camera that displays activity at the VA and VN doors is in a section of the monitor that is obscured by a word that is superimposed on the monitor. These facts add credence to the conclusion that the delays in question are not evidence that the Grievant was sleeping.

In addition, I note that although the cell checks on third shift are conducted hourly, for security reasons the timing of cell checks is sporadic. The roaming officers do not inform the pod officer of the cell check schedule. The third shift pod officer is therefore unaware of when the roaming officer will start the cell check. In order to ensure that the VA and VN doors are opened immediately when the roaming officers approach, the pod officer would be required to focus solely on the video feed from that camera. One of the County's witnesses, a sergeant, testified that when it is slow he watches movies while assigned to the pod. No evidence was presented that the County disapproves of this activity, demonstrating that the County does not require the pod officer to constantly view the surveillance monitor. Further, the sergeant testified that doors are opened automatically if the pod officer is monitoring the cameras, but that the doors are also opened through requests over the radio and that it is more common for the doors in the pod area to be opened by radio.

The County produced "shift log reports" that reflect activity in the jail on the third shift for October 2nd, 3rd, and 4th of 2009. The log report indicates, and the Grievant admits, that no entries were made during the overtime shift in question. The County offers the documents as evidence that the Grievant was sleeping and that his failure to make entries on the log shows that he failed to perform required duties. The Grievant testified that he was unfamiliar with the events on third shift that needed to be logged. He did make log entries while working second shift, but did not make the entries while working overtime on third shift because nothing occurred during the time he was in the pod that he thought was appropriate for logging. On second shift, he testified that he routinely logged events such as inmates heading out to work, out to see attorneys, medication distribution, and meals. Since the inmates sleep for much of the third shift, such information is not logged. The log reports presented as evidence indicate that cell checks are the predominate entry made from midnight to 3:00 AM. The County argues that the Grievant was never instructed not to make log entries of nightly cell checks and that his failure to do so violated County directives.

While it seems reasonable that logging cell check activity would be a required duty of the pod officer, based on the record before me I am not able to conclude that the policy was written or that correctional officers were informed of the requirement. The County did not produce any written policy or directive regarding the sorts of events that were required to be logged or the manner in which they should be logged.<sup>3</sup> Therefore, even though the Grievant admits that he did not make cell check entries on the log during the overtime shift in question, I am not able to conclude that his failure to do so was a failure to perform a duty. The events that he was use to logging on second shift are substantially different than the more routine nature of the cell checks logged on third shift. Without having a firm policy in place regarding logging, I find it

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<sup>3</sup> The Grievant testified that following these incidents, the County did issue specific directives regarding events that are to be included in the log.



credible that the Grievant would not find it obvious that the cell checks should be logged, particularly because the two roaming officers were using a separate electronic monitoring system while performing the checks.

The County argues that the Grievant was “literally doing nothing while in the pod.” Indeed, the evidence shows that if all is going well there is little for the pod officer to do on third shift – so much so that it is permissible for pod officers to watch movies. Presumably, if the eyewitness had gone up to the pod and saw that the delay in the doors being opened was due to the Grievant watching a movie, there would not have been a report, investigation, or discipline.

Although I find that the County did not have just cause to suspend the Grievant in this matter, it is apparent that the Grievant’s reputation for honesty and trustworthiness amongst his supervisors and many of his co-workers has been impaired by his behavior in other matters. The County produced substantial evidence of counseling statements, warnings, and other discipline, including a suspension that was upheld in arbitration, casting doubts on the Grievant’s character and work ethic. Given that context, it is not surprising that the County asked me to make inferences from the available evidence against the Grievant. However, other than to cast doubts on the Grievant’s credibility, those issues have been resolved and are not relevant in this matter given my finding that the evidence does not support a finding that the Grievant engaged in the conduct as alleged.

I conclude that the evidence presented does not establish that the Grievant was asleep on the job on October 2nd and 3rd, 2009. I also find that the Grievant did not fail to perform duties on those dates.

### AWARD

The County violated the Contract when it suspended the Grievant. As a remedy, the County shall remove the discipline from the Grievant’s file and make the Grievant whole for wages and benefits lost during the six-day suspension.

Dated at Madison, Wisconsin, this 7th day of October, 2010.

Matthew Greer /s/  
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Matthew Greer, Arbitrator

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