

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SAWYER COUNTY

and

**LOCAL 261, WISCONSIN PROFESSIONAL
POLICE ASSOCIATION/LEER DIVISION**

Case 170
No. 70468
MA-14968

(Termination of S.A.)

Appearances:

Ms. Mindy K. Dale, Attorney at Law, Weld, Riley, Prenn & Ricci, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030 appeared on behalf of the County

Mr. Gordon E. McQuillen, Attorney at Law, 822 South Gammon Road #2, Madison, Wisconsin 53719 appeared on behalf of the Association. **Mr. Andrew D. Schauer**, Staff Attorney, Wisconsin Professional Police Association, 660 John Nolen Drive, Suite 300, Madison, Wisconsin 53718, filed post-hearing briefs.

ARBITRATION AWARD

On December 27, 2010 Sawyer County and the Wisconsin Professional Police Association 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 pending grievance. Following appointment, a hearing was conducted on April 12, 2011 in Hayward, Wisconsin. A record of the proceedings was taken and distributed on April 26, 2011. Post-hearing briefs and reply briefs were filed and exchanged by July 18, 2011.

This dispute involves the termination of Jail employee S.A.

BACKGROUND AND FACTS

S.A., the grievant, has been employed by Sawyer County as a Jailer and part-time Deputy since October, 2005. Sawyer County operates a jail which has 92 beds. 52 of those beds are in the secure wing. 40 of the jail beds are in the Huber wing. The jail is staffed 24 hours a day, 7 days a week. The grievant worked 3rd shift, 10:00 p.m. to 6:00 a.m. The 3rd shift is staffed by three employees. The control officer works from the control booth and answers the phone and controls the secure doors. The jailer is responsible for the inmates, providing food, medication and doing periodic checks of the inmates. The booking officer staffs the booking room, takes receipt of prisoners who are brought to the facility, and readmits Huber inmates who are returning to the jail. The assignments are rotated periodically to give jail employees a rounded experience.

The events giving rise to the grievant's termination began on, or about, October 11, 2010. Jill Henson, the senior jailer and co-worker of the grievant, complained to Kurt Barthel, Jail Administrator, that the grievant was sleeping on the job, spending a lot of time in the control area, and was disappearing from work for extended periods of time. The grievant was assigned as the booking officer at the time of the complaint.

The complaint caused Barthel to conduct an investigation, which consisted of Barthel reviewing the various recording and monitoring devices that exist in the jail. The process consumed a good deal of time in that it included the review of the video tapes of the jail which run continuously.

The record establishes that Henson has complained about the work of co-workers on a number of prior occasions, and that Barthel has followed up on those complaints when provided sufficient detail to review.

Barthel reviewed the record of the October 10-11 shift, and recorded his findings with comments:

S.A., Booking Officer
10/10/2010 22 hrs. – 10/11/2010 0600 hrs.

While reviewing various records from the above shift times, I observed the following:

1. Deputy A. did not conduct an inspection of the Booking Room as required by Post Orders. I verified this by reviewing the video on the Digital Video Recorder (DVR) and noticed that there was no entry in the Jail Log indicating that the inspection had been done.
2. While reviewing the stored video from the Central Control camera throughout this shift, I observed Deputy A. sitting at the Jailers workstation for the majority of his shift (6 hours and 41 minutes). While he did scan mail for 24 minutes of this time, the majority of the time he was sitting and talking to the Control Officer with his feet propped up on the desk. Deputy A. has been warned on several occasions about loitering in various areas and a Pass on of Information was put out to the entire Jail Staff on 3-26-2009 that addressed loitering.
3. On two occasions (0135 hrs and 0312 hrs) during his shift, Deputy A. can be seen using his cell phone while at the Jailers workstation in Central Control. Policy and Procedure #J-46 (Standards of Conduct) prohibits Jail Staff from carrying personal cell phones while on duty and restricts their use to the break room and outside in the break area.
4. At 2352 hrs, a male Huber Inmate entered the Huber Waiting Area and placed an intercom call to Central Control notifying them that he arrived. Since Deputy A. was the only male Jailer on duty during this shift, it was his responsibility to search the Huber inmate and return him to his Dorm. Deputy A. did not leave Central Control until 0009 hrs. Unless they are busy with other duties, the Jail Staff is required to bring Huber Inmates into the Jail as quickly as possible and return them to their Dorm. In this case, Deputy A. waited 17 minutes before leaving to bring the Huber Inmate in.
5. There were no inmates booked in during Deputy A.'s shift on this day. On 3-26-2009, I put out a Pass on of Information that addressed the issue of Jail Staff loitering

during their shift. Additionally, the printed version of the Post Orders requires the Booking Officer to assist the Jailer if the Booking Officer is not busy. I printed out the Cell Check logs for this shift and Deputy Henson is the only one who conducted any cell checks or security checks during this shift.

6. Deputy A. has been warned numerous times about the above referenced items: On 01/25/07 he was talked to about spending too much time in the pre-booking area. On 03/19/07 he was late relieving the prior Booking Officer because he was in Central Control talking. On 08/06/08 he was talked to about spending excessive time in the Administrative and Reception area's. On 11/26/08, he was talked to about spending excessive amounts of time in Central Control. On 03/04/09 he received a formal written warning for spending excessive time in the Dispatch Center and the Reception Area. On 11/13/09 he received a 3 day suspension for spending excessive time in the Dispatch Center.

As the investigation was proceeding, i.e. Barthel was reviewing the recordings, Henson complained again about the workplace conduct of S.A. The second complaint caused Barthel to review the records of the October 18-19 work shift. As before, he recorded his observations:

S.A., Booking Officer
10/18/2010 22 hrs. – 10/19/2010 0600 hrs.

While reviewing various records from the above shift times, I observed the following:

1. Deputy A. did not conduct an inspection of the Booking Room as required by Post Orders. I verified this by reviewing the video on the Digital Video Recorder (DVR) and noticed that there was no entry in the Jail Log indicating that the inspection had been done.
2. At 2245 hours, I observed Deputy A. leaving the secure perimeter of the Jail through Door #36. When he went

through Door #36, he propped the door open against the bench in the waiting area and went out into the Sallyport where he put some laundry away. He returned through Door #36 at 2254 hours and closed Door #36 at that time. For the 9 minute period that Deputy A. was out in the Sallyport, Door #36 was propped open which is a serious breach in security because Door #36 is one of the perimeter doors of the Jail. This is in violation of Sawyer County Jail Policy and Procedure J-41 (General Security).

3. At 2322 hours, I observed Deputy A. leaving the secure perimeter of the Jail through Door #36. When he went through Door #36, he again propped the door open against the bench and went out into the Sallyport. Deputy A. then went outside through Door #3 and was unaccounted for until he returned through Door #3 at 2344 hours. He then returned through Door #36 and closed it at 2345 hours. Deputy A. was outside of the secure perimeter of the Jail for a period of 22 minutes. During this time, Door #36 was again unsecure resulting in a serious breach of security. Additionally, Deputy A. was outside of the secure perimeter of the Jail for 22 minutes in violation of Sawyer County Jail Policy and Procedure #J-46 (Standards of Conduct).
4. At 0214 hours, I observed Deputy A. leaving the secure perimeter of the Jail through Door #36. Deputy A. went into the Sallyport with a bag of garbage and placed it on the garbage pickup area. Deputy A. then spent the next 41 minutes in the Sallyport talking to two Patrol Deputies who were washing a squad car. At 0255 hrs, Deputy A. went out Door #3 and entered the building through the Lobby Door at 0257 hours. This is once again a violation of Sawyer County Jail Policy and Procedure J-46 (Standards of Conduct).
5. At 0306 hours, Deputy A. went through the Reception area and down the stairway. At 0312 hours, Deputy A. entered the Dispatch Center and sat down in the chair at the secondary Dispatch console. He remained in the

Dispatch Center until 0334 hours at which time he left and reentered the secure portion of the Jail at 0337 hours through Door #4. This is once again a violation of Sawyer County Jail Policy and Procedure #J-46 (Standards of Conduct) which allows for a Booking Officer to go to the Dispatch Center only to relieve the Dispatcher for a maximum 15 minute break. In this case, the Dispatcher did not take a break at any time while Deputy A. was in the Dispatch Center and he was there for 22 minutes.

6. There were no inmates booked in during Deputy A.'s shift on this day. On 03-26-2009, I put out a Pass on of Information that addressed the issue of Jail Staff loitering during their shift. Additionally, the printed version of the Post Orders requires the Booking Officer to assist the Jailer if the Booking Officer is not busy. I printed out the Cell Check logs for this shift and Deputy Henson is the only one who conducted any cell checks or security checks during this shift.
7. Deputy A. has been warned numerous times about the above referenced items: On 01/25/07 he was talked to about spending too much time in the pre-booking area. On 2/28/07 he was talked to about leaving the secure perimeter to fill up a squad that he used for a transport with fuel. On 03/19/07 he was late relieving the prior Booking Officer because he was in Central Control talking. On 08/06/08 he was talked to about spending excessive time in the Administrative and Reception area's. On 11/26/08, he was talked to about spending excessive amounts of time in Central Control. On 03/04/09 he received a formal written warning for spending excessive time in the Dispatch Center and the Reception Area. On 11/13/09 he received a 3 day suspension for spending excessive time in the Dispatch Center.

As a result of the investigations, Barthel placed S.A. on administrative leave and scheduled an internal investigation meeting for November 5, 2010. On the morning of November 5, 2010, the Public Safety Committee met to conduct normally

scheduled business. In a closed session of that meeting Barthel met with the committee members. The minutes of that meeting provide the following:

Barthel informed the Committee that he had not yet completed a personnel-related investigation, but that he anticipated that the termination of a jailer may be warranted. He explained that the jailer eligibility list was created exactly one year ago today. The eligibility list normally expires after 12 months.

The Committee voted to extend the eligibility list. Later in the afternoon of November 5, Barthel and the Chief Deputy met with A. and his Union Representative to review the observations of the two work shifts, to permit A. to react to the observations, and to respond.

A. was subsequently terminated by the following letter:

To: S. A.

Subject: Termination of Employment

Between 19 October 2010 and 04 November 2010, I conducted an Internal Investigation into allegations of misconduct by you during your shifts on 10-11 October and 18-19 October 2010. During this investigation, I reviewed video recordings from the Digital Video Recorders and documentation from several sources in the Jail to include: Identipass records, Guard One Plus downloads, Jail Logs, and Jail Radio traffic recordings.

On 05 November 2010, I conducted an Internal Investigation Interview with you, Chief Deputy Brigette Kornbroke and Investigator Dan Ross (Union Representative) present. During this interview, I outlined the violations noted below and provided you with the opportunity to present information.

As a result of the investigation, the following violations are noted:

1. On two occasions on 18 October 2010, you were observed propping open Door #36 and leaving the door unattended. These observations were made while reviewing the Digital Video Recordings of the public waiting area between Door #36 and

Door #35. On the first occasion, you propped the door open at 2245 hrs and went out into the Sallyport with a cart of laundry. You returned through the door 9 minutes later and secured the door. On the second occasion, you propped the door open at 2322 hrs and went out into the Sallyport with a laundry cart. You then left the Sallyport through Door #3 and were outside at an unknown location for the next 22 minutes. You returned through Door #36 and secured it after having it propped open for a total of 23 minutes. Sawyer County Jail Policy and Procedure #J-41 (General Security) and Section III. B. 11 states: ***No door will be left ajar or propped open unless a Deputy or Maintenance person is attending the door.*** Door #36 is a door that is part of the secure perimeter of the Jail. As such, this door is a highly critical door and leaving this door open and unattended for even a short period of time is a serious security breach and threatens the safety and security of the Jail and your fellow employees. Door #36 is interlocked with Door #39 to prevent both doors from being opened at the same time. This interlock is an integral part of Jail Security and exists to prevent a single door from being the only barrier to the outside. Because of this, in order to open Door #39 if Door #36 is propped open, the Central Control Officer must override the interlock which, in the event of an emergency could cause undue delay.

2. On two occasions during your shift on 18-19 October 2010, you left the secure perimeter of the Jail for an extended period of time without notifying your co-workers of your whereabouts. On the first occasion, you left through Door #3 at 2322 hrs on 18 October 2010. You were somewhere outside of the Jail for a period of 22 minutes until you returned through Door #3. These times were verified by viewing the Digital Video Recordings of the Sallyport and the Identipass records showing the times that your ID Card swiped open Door #3. Also, the absence of any video or card swipes showing entry through any other doors verifies that you were outside during the entire period of time. On the second occasion, you left the secure perimeter and went down to the Dispatch Center at 0312 hrs on 19 October 2010. You remained in the Dispatch Center for a period of 22 minutes during which time you sat at the secondary Dispatch Console and appeared to be talking to the Dispatcher who was working at the

primary Dispatch Console. The on Duty Dispatcher remained at her console and did not take a break while you were in the Dispatch Center. These times were verified by viewing the Digital Video Recordings of the Dispatch Center and the Identipass records showing the times that your ID Card opened the Reception Door, Stairway Door, Dispatch Door, and Door #4. You received a written reprimand on 04 March 2009 and a three day suspension on 13 November 2009 for spending excessive time in the Dispatch Center and not notifying Central Control of your whereabouts. A check of the Jail Logs and a review of the Jail Radio traffic indicated that you did not notify the Central Control Officer that you had left the secure perimeter of the Jail and where you would be on either of the two occasions. If there had been an emergency in the Jail, you would not have been able to respond in a timely manner which could endanger the Jailer on duty. Sawyer County Jail Policy and Procedure #J-46 (Standards of Conduct) Section III. L. states:

3. *Employees will not leave the secure perimeter of the Jail while on duty except for the following reasons:*
 - a. *Security Check per Post orders.*
 - b. *To relieve Dispatcher for 2 each maximum 15 minute breaks.*
 - c. *To use the designated smoking area outside Door #33 for 2 each maximum 15 minute breaks and lunch.*
 - d. *To conduct business with individuals in the lobby.*
 - e. *Emergency situations that may require Jail Staff to respond outside the perimeter.*
 - f. *If directed by a Supervisor and only if minimum required staffing levels are maintained in the Jail.*
4. *Only one security staff member at a time is allowed outside the secure perimeter of the Jail at a time.*
5. *Any time a security staff member leaves the secure perimeter of the Jail, Central Control will be notified and a log entry will be made.*

3. During your Booking Officer's shift on 10-11 October 2010, you spent a total of 6 hours and 41 minutes in Central Control sitting at the Jailers workstation, much of the time with your feet propped up on the desk and your hands interlocked behind your head. This was verified by a review of the Digital Video Recordings of the Central Control Camera. During this time, the Jailer was out on the floor completing all of her duties. I also checked the Guard One Plus records for this night and the only entry for your reader was when you tagged in at the beginning of your shift. A Pass On of Information was put out on 26 March 2009 which stated: ***LOITERING: I have no problem with Jail Staff taking a break now and then during their shift. What I do have a problem with, however, is someone sitting in Central Control, Booking, Reception, or Dispatch for an extended amount of time during their shift. If you are all caught up on your duties and need something to do, there are historical files that need to be scanned. There are instructions for this in the "Information" folder in the computer. Otherwise, I am sure that I can find something to keep you occupied.***
4. On 10 October 2010 and 18 October 2010, you failed to conduct an inspection of the Booking Room as required in the Booking Officer's Post Orders. The Post Order calendar for the Booking Officer requires the Booking Officer to "***Inspect Booking Room***" at 2205 hrs. each night. As part of this inspection, the Post Order required the Booking Officer to: ***Inspect all holding cells. Flush all toilets and run all sinks. Make sure there is an adequate supply of PBT Tubes. Make sure Booking Room is clean and organized.*** There were no inspections of the Booking Room logged in the Jail Log for these nights and a review of Digital Video Recordings for the Booking Room Camera confirmed that an inspection was not done on either of these nights.
5. On 11 October 2010, you used your personal cell phone while in Central Control on two separate occasions. While reviewing the Digital Video Recordings of Central Control, you can be seen using your cell phone at 0135 hrs and 0312 hrs. Sawyer County Jail Policy and Procedure #J-46 (Standards of Conduct)

Section III. D. 2. a. states: *Personal cell phones will not be carried while on duty.* Section III. D. 2. c. states: *Employees may use their personal cell phones while on break in the break room or designated smoking area only.*

6. During your Booking Officer shifts on 10-11 and 18-19 October, 2010, you failed to assist the Jailer in the performance of her duties. I reviewed the Guard Plus One records for these shifts and the only tag that you touched was your name button when you began your shift. The Jailer on duty that night conducted every cell check, security check, and all other required duties. The notation at the bottom of the printed Post Orders requires the Booking Officer to *Assist Jailer if no one is in booking or holding areas.* I checked the booking records and the Jail Log and there were no bookings during your shift on these two nights.

Article 9, Section B, of the parties' collective bargaining agreement, in relevant part, provides:

“The sequence of disciplinary action shall be oral reprimands, written reprimands, suspension, demotion, and discharge.”

You have previously been warned and received a three day suspension without pay for infractions that were similar to some of those outlined in this letter. Additionally, because the violations outlined in this letter involve the safety and security of the Jail and your fellow employees and illustrate your wanton disregard for Departmental Policy and Procedure, I have no choice but to immediately terminate your employment with the Sawyer County Sheriff's Department.

You will turn in all equipment, keys, ID cards, and uniforms that have been issued to you and a time card indicating what hours have been worked since the beginning of the current pay period. Upon receipt of these items, you will be mailed your final paycheck which will include a payout of any accrued Compensatory Time, Vacation and Floating Holidays. Your County provided health insurance will be effective

through December 31, 2010. The insurance carrier will contact you regarding your rights to continue the health insurance after that date at your cost.

Kurt C. Barthel /s/
Kurt C. Barthel
Lieutenant
Jail Administrator

cc: WPPA Representative Gary Gravesen [via facsimile]
Dan Ross
Carol Larson
Mindy Dale

The termination letter makes reference to prior discipline. The grievant's discipline history has a number of entries. There are a number of references to counseling sessions or informal notifications relating to relatively minor matters. They are not intended as disciplinary steps. However, a number of these informal communications advise the grievant that the employer has concerns that the grievant is spending too much time away from his assignment. At times the grievant was provided a note, confirming the conversations. At times he was not.

On March 4, 2009 the grievant was given the following written warning:

Employer Remarks

On 03 March 2009, I was reviewing the Identipass door entry records when I discovered that Deputy A. had left the secure perimeter of the Jail and went to the Dispatch Center from 03:15 to 04:05 (50 minutes). There were no entries in the Jail Log indicating that Deputy A. was leaving the secure perimeter. I also checked the radio traffic and there was no traffic from Deputy A. letting the Central Control Officer know that he was leaving the secure perimeter. I also noticed that Deputy A. was in the Reception area from 04:23 to 05:09 (46 minutes). Sawyer County Jail Policy and Procedure #J-46 (Standards of Conduct) specifically limits the reasons and length of time that a Jailer can be outside of the secure perimeter of the Jail. It also requires that the Jailer notify the Central Control Officer any time they leave the secure

perimeter of the Jail. I have discussed loitering with Deputy A. on 06 August 2008 and 26 November 2008.

Action to be Taken

I explained to Deputy A. that he was only allowed to go down to the Dispatch Center to relieve the Dispatcher and then only for a maximum 15 minute break. I also told him that he was required to radio the Central Control Officer to let them know where he would be. I explained that if an incident were to occur in the Jail and the Control Officer did not know where he was, it could be very serious. I also reminded Deputy A. that I had recently talked to him about being in the Reception area for an extended period of time. In this case, both he and Deputy W. were both in Reception for 46 minutes leaving the Control Officer as the only person in the Secure Wing of the Jail. Further violations may result in more severe disciplinary action which may include dismissal.

On November 18, 2009 the grievant was given the following 3 day suspension:

Employer Remarks

On 13 November 2009, I was advised by the 911 Coordinator that there was an issue with the night shift Jailers being in the Dispatch Center for long periods of time. This issue had been addressed several times in the past. I printed out a list of card swipes entering the Dispatch Center and used these to search the digital video recorder to verify time(s) entered and left the Dispatch Center. The dates that I chose to narrow my search were 01 November 2009 to 13 November 2009. Between these dates, I found that Deputy A. spent 1 hr. 17 minutes, 52 minutes, 51 minutes, and 1 hr. 16 minutes in the Dispatch Center. Deputy A. did not relieve the Dispatcher any of these times for a break. Sawyer County Jail Policy and Procedure #J-46 (Standards of Conduct) specifically limits the reasons and length of time that a Jailer can be outside of the secure perimeter of the Jail. It also requires that the Jailer notify the Central Control Officer any time they leave the secure perimeter of the Jail. I have discussed loitering with Deputy A. on 06 August 2008 and 26 November 2008 and Deputy A. was issued a Written Reprimand on 04 March 2009 for loitering in the Dispatch Center and the Reception Office.

Action to be Taken

I explained to Deputy A. that he was only allowed to go down to the Dispatch Center to relieve the Dispatcher and then only for a maximum 15 minute break. I also told him that he was required to radio the Central Control Officer to let them know where he would be. I explained that if an incident were to occur in the Jail and the Control Officer did not know where he was, it could be very serious. I also reminded Deputy A. that he recently received a Written Reprimand for being in the Dispatch Center for an extended period of time. Further violations may result in more severe disciplinary action which may include dismissal.

Neither the written warning nor the 3 day suspension were grieved. During the hearing, the parties escorted the Arbitrator to the jail in order to observe the work site. The bench which had been used to prop open the door had been removed. The grievant testified that the bench had a marking on it from when the door was propped open.

ISSUE

The parties stipulated to the following issue:

Did the County have just cause to terminate the employment of S.A.?

If not, what is the appropriate remedy?

**RELEVANT PROVISIONS OF THE
COLLECTIVE BARGAINING AGREEMENT**

ARTICLE 2 - MANAGEMENT RIGHTS

The County possesses the sole right to operate the Law Enforcement Department and all management rights repose in it, subject to the provisions of this contract and applicable laws. These rights include the following:

. . .

- B. To establish reasonable work rules and regulations. The County shall confer with the Union either before the rules and regulations

become effective or within a reasonable time thereafter, but the right to establish such rules or regulations resides with the County, subject to the terms of this Agreement;

...

- F. To take whatever reasonable action is necessary to comply with state or federal law;

...

- L. To suspend, demote, discharge or take other disciplinary action against the employees for just cause.

The reasonableness of County action taken pursuant to this Article is subject to the grievance procedure.

...

ARTICLE 9 – DISCIPLINARY PROCEDURE

- A. Purpose. The following disciplinary procedure is intended as a legitimate management device to inform employees of work habits, etc., which are not consistent with the aims of the Employer’s public function, and thereby to correct those deficiencies.
- B. Disciplinary Action. An employee may be demoted, suspended or discharged or otherwise disciplined for just cause. The sequence of disciplinary action shall be oral reprimands, written reprimands, suspension, demotion, and discharge. A written reprimand or other disciplinary action sustained in the grievance procedure or not contested shall be considered a valid warning. Any disciplinary action shall be grievable. For grievances involving the review of a suspension, a demotion, or a dismissal, the affected employee shall have the option of having the disciplinary action reviewed under the grievance procedure set forth in this agreement or under the procedures set forth in §59.26, Wis. Stat., but not both.

...

ARTICLE 10 – GRIEVANCE PROCEDURE

...

F. Arbitration.

...

3. Hearing Decision. The arbitrator shall meet with the parties on a mutually agreeable date to review the evidence and hear testimony relating to the grievance. Upon completion of the review and hearing, the arbitrator shall render a written decision to both the County and the Union which shall be final and binding on both parties. The arbitrator shall not modify, add to or delete from the express terms of this Agreement.

POSITIONS OF THE PARTIES

It is the position of the County that it has met its burden in establishing that the grievant knowingly failed to comply with departmental policies and procedures. The County argues that it disciplined the grievant for violations of jail procedure and nothing in the record suggests that other employees were not treated the same. It is the view of the County that the grievant was sufficiently trained to do the job, and whatever training shortcomings existed the grievant was put on notice of departmental expectations by the written warning and text of the suspension.

The County contends that the door interlock system is mandated by state law, and any claim that propping it open allows the grievant quicker entry back into the jail is inconsistent with that requirement, and constitutes a breach of jail security.

The County reviews Arbitrator Daugherty’s seven question test for just cause, set forth in ENTERPRISE WIRE CO., 46 LA 359 (1966) and concludes that the County has satisfied each of the required tests. The County notes that it has written policies underlying the various violations, and that the grievant has been disciplined for similar behavior in the past. The County contends that leaving the secure perimeter has potentially serious consequences as the grievant was the only backup had trouble arisen. The County notes that the grievant was observed on camera not engaged in work for a

period of 6 hours and 41 minutes. The County contends that the grievant was observed doing a total of 14 minutes work.

It is the view of the County that its rule against propping open a secure door is reasonable in light of state law which requires double interlocking doors.

The County conducted an exhaustive review of the grievant's work performance. It further contends that the investigation was fairly conducted, in that the grievant was provided the opportunity to review and respond to the findings prior to the imposition of discipline. The County argues that there was evidence that the violations occurred, and occurred repeatedly. There is little dispute as to the underlying facts. The County argues that the rule was applied uniformly and consistently. Others were investigated and disciplined for like conduct. There is no evidence that the grievant was treated differently.

It is the view of the County that termination is the appropriate discipline given the nature of the offenses and the grievant's disciplinary history.

It is the view of the Association that the grievant propped the jail door open so as not to constantly bug the control operator. It was his testimony that other jailers propped the door open at times, and that had the County not removed the bench from the work site it would have been able to observe the markings on the bench, made by the regularly propped door. It is the view of the Association that the grievant was never put on notice of the County policy in this regard.

The Association does not dispute that the grievant went outside the jail for periods of time. It is the view of the Association that the door alarm and the camera stationed outside the door would have told the control room operator that the officer had exited the building. During the time he was outside, there was no radio traffic. The Association acknowledges that the grievant spends time in the dispatch center. It is the testimony of the grievant that he asked the dispatcher if she needed a break and checked his mailbox to see if there was paperwork for his patrol duties. There is no evidence of misconduct, except that the grievant was not at his assigned post.

The Association contends that the record establishes that the grievant did check the computer programs and paperwork he needed to complete his shift, but acknowledges that he did not flush the toilets nor run the sinks. The grievant was not previously warned about such conduct, and the Association regards it as a penny ante violation, added to bulk up the charges.

The Association disputes the claim that the grievant was inactive or loitering during his work shift. It contends that there was no evidence offered that the grievant ever denied a request for help or denied an order to do any assigned task.

It is the view of the Association that most jailers violated the rule relating to cell phone use, which appears to be largely unenforced.

The Association complains that the investigation consisted of talking to the grievant and Henson. If the County was looking for a complete picture it should have interviewed more employees, who could have corroborated the grievant's claims regarding the propped open door, cell phones and work habits.

The Association notes that Barthel advised the Public Safety committee that he anticipated the termination of the grievant before he ever met with the grievant. The Association regards this as a rush to judgment and believes it compromised the practical ability of the grievant to explain his side of the story.

It is the view of the Association that the County chose not to investigate other employees for their cell phone use. It is the view of the Association that the County did not employ progressive discipline for a number of the offenses charged. Additionally, it is the view of the Association that the County skipped the verbal warning step of Article 9.

It is the view of the Association that termination is far too great a penalty for the level of offense that occurred. It is the view of the Association that the penalty exceeds the crime, and that the penalty should be reduced.

DISCUSSION

The facts relating to the grievant's actions and observed work practices are not in dispute. The grievant did prop open the jail door. It appears that others likely did so too. Propping open the secured door of a jail is a breach of security. The grievant knew that because he is a jailer. His actions circumvent the security system which is designed to prevent prisoners from escaping. I believe it is fair to hold a jailer to the knowledge that compromising the security system of the jail would be a matter of concern to jail administration.

Standing alone, I do not believe this would sustain a discharge. It appears that he was not the only one to prop open the door. He was given no prior warning that this

practice was not to be tolerated. However, it does not stand alone. It is merely one aspect of the grievant's overall workplace demeanor.

The grievant spent time outside and significant time in the dispatch center. Both are outside the secured area to which the grievant is assigned. The Association says there was no actionable misconduct involved. However, during the periods when the grievant is away from the secured area of the jail, he is away from his post and less available as a backup in the event trouble breaks out. As the County notes there exists the potential for harm should an emergency arise.

The purpose of a jail is to hold prisoners. It is the nature of the facility, and those incarcerated, that causes the system to deploy jailers and to ensure a backup. I don't think the County needs to experience a crisis before it can address its concern that the grievant is regularly away from his post.

In fact, the County has addressed this concern with the grievant on a number of occasions. The March 4, 2009 written warning addresses the very conduct that contributed to the termination. At that time, the grievant left the secure perimeter and spent time in the Dispatch Center. He did so without notifying the central control office. He was warned not to do so again, and that he would be subject to discipline if he persisted. The warning letter details the behavior expected and points out the possible adverse consequences of the grievant being away from his assigned area.

The grievant was served with a three day suspension on November 18, 2009. That discipline cites a number of incidents of the grievant spending what the County regarded as excessive amounts of time in the Dispatch Center. As with the written warning, the letter of discipline notes the objectionable conduct, explains the potential for serious consequences, and warns the grievant that if the behavior continues there may follow more severe discipline including dismissal.

I believe the County made it clear to the grievant that it expected him to remain in the secure area. He was told in writing at least twice that the County had a concern that an incident could arise and have serious consequences in the absence of backup for the jailer. I do not believe that the grievant intended harm or engaged in a deliberate and willful act of insubordination. However, I do believe he was fairly warned about staying at his post, told why that was important, and warned that he would be fired if he didn't.

The Association points out that the door alarm and camera would have advised the control room operator that the grievant had exited. Certainly the dispatcher knew

where the grievant was while he was in the Dispatch Center. I agree that this is true, and that the grievant could be found by someone who sought him out. That does not diminish the fact that the grievant had placed himself in a potentially compromised position in the event he was needed. It does not alter the fact that he was told to stay at his assigned post.

I agree with the Association relative to the charges which address flushing the toilets and running the water. On its face this is not conduct so egregious as to warrant discharge. It does not appear the grievant was given prior warning. Similarly, I agree with the Association relative to the charges which address cell phone use in the jail. It appears to be a rule that is not much enforced.

Barthel's review of the tape revealed the grievant sitting in a chair with his feet up for a period of 6 hours, 41 minutes. No employer would react well to such a discovery. The Association contends that the grievant cannot be shown to have refused to help or to have denied an order to do work. The record is unclear as to the duties expected of a booking officer in the absence of new or returning prisoners. It is clear that the booking officer is expected to help the jail officer. The grievant was previously told, in writing, to keep active. For example he was directed to do scanning work, if his other assignments were completed.

The grievant did no cell checks. Assisting the jail officer with cell checks was considered a part of the jail protocol. It was the grievant's testimony that he did not help Hanson because she did not help others. Barthel's review of the jail records concluded to the contrary. I find it difficult to conclude that the jail operation is well served with one jailer sitting with his feet up for over 6 hours while the other does the work.

It is my sense that the grievant was frequently detached from the work of the jail. Many of his behaviors lacked an awareness of the operational needs of the jail. Propping open the secure jail door for a brief period, while doing laundry, is a seemingly minor matter. Doing so and then leaving the facility to go outside cannot be reconciled with the basic security needs of the jail. The record reflects a number of instances where the grievant was away from the secure area for extended periods of time. Much of that time was spent visiting. I think this reflects boredom with the routine of the job that led to the grievant being easily distractible. The same is true of the grievant sitting with his feet up for 6 + hours while a co-worker did all of the cell checks. The grievant appears not to have been engaged in the job.

The Association complains that Barthel should have conducted a broader investigation, interviewing more people. While it is always preferable to have the most thorough investigation possible, it is not apparent what that would have added to the record. The underlying facts are not in dispute. There is no indication that such an investigation would have revealed that the actions for which the grievant was fired were commonly practiced by others. The Association produced no witnesses who indicated that the secure doors were routinely propped open. There was an indication that a bench near the door was marked through use as a door stop. That fact was considered as a part of this award. There is no indication that other jailers left the physical area around the door with the door propped open. The grievant testified that he did not assist Hanson with cell checks because she did not assist others. Aside from the testimony of the grievant there was no other evidence to that effect. Barthel testified that he reviewed the cell check records and that they did not bear out that claim. No witnesses were produced who testified that they observed jailers who spent considerable time away from the secure area visiting. The County produced evidence it directed employees not to do so when it became aware of circumstances in which that occurred.

The essence of this matter is that the County fired the grievant because it felt he was not attentive to his job. I think the record supports that conclusion.

Barthel did advise the Law Enforcement Committee that there may be a jailer vacancy. On the day in question he had no doubt concluded that the grievant's job was in jeopardy. He explained his comments to the committee by indicating that the certification list was about to expire, and that the committee was not scheduled to meet again before the list expired. In his comment to the committee he used the term "may" in describing the possibility of the termination. He was scheduled to meet with the grievant that same day. Had he terminated the grievant that afternoon, and the list subsequently expired, he would have faced an awkward conversation with his committee as to the subsequent delay in filling the jailer position.

The Association complains that the comment shows a predisposition to terminate on the part of Barthel, which compromised the ability of the grievant to explain his actions or lend meaningful perspective to how the workplace operates. I think this fantasizes how the termination process works. Barthel had received a complaint about the grievant. He had spent considerable time reviewing tapes and records of the grievant's workplace performance, and he had concluded that the conduct he reviewed and observed constituted dischargeable behavior. He had issued prior discipline addressing some of the same conduct. The meeting was convened as a pre termination meeting to confront the grievant, present him with the evidence collected and allow him to address the charges and explain himself. I do not believe that Barthel, or many other employers in similar circumstances, come to the meeting *tabula rosa*. The reason the

meeting was arranged was because Barthel believed the conduct he had observed warranted termination. He hedged his bets with the committee, indicating that there “may” be a vacancy, which allowed for the possibility that the pre termination meeting could lead to a result other than termination. Under the circumstances I think that is all the grievant could reasonably hope for.

The Association accurately notes that the County did not use progressive discipline relative to a number of the charges. Those charges have been given little weight in this award. The Association contends that the County skipped the verbal warning step of the progressive discipline sequence. I think the time to raise such an objection is at the time the County issued a written warning. If the grievant believed the County was proceeding to invoke discipline in a sequence at odds with the provisions of the contract he should have raised that concern. His claim would have been that the County was creating a formal record without giving him the less formal warning required by contract. Such a claim would have a certain appeal under the terms of Article 9, B. The claim loses much of its attraction following the issuance of a three day suspension. The grievant cannot be heard to say that he was unaware that the criticisms found in the discharge letter consisted of matters he never knew were of concern. Article 9, B. provides:

A written reprimand or other disciplinary action sustained in the grievance procedure or not contested shall be considered a valid warning.

Under the terms of the contract the three day suspension must be considered a valid warning.

In light of the above, I believe the County had just cause to terminate the grievant.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 15th day of September, 2011.

William C. Houlihan /s/

William C. Houlihan, Arbitrator

WCH/gjc

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