BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

BAYFIELD COUNTY EMPLOYEES, LOCAL 1731
AFSCME, AFL-CIO and DENISE BAILEY

and

BAYFIELD COUNTY

Case 88
No. 70585
MA-14995

Appearances:

Dempsey Law Firm LLP, by **Attorney Charles J. Hertel,** One Pearl Ave., Suite 302, Oshkosh, Wisconsin 54901 for the Grievant.

Weld, Riley, Prenn & Ricci, S.C., by **Attorney Mindy K. Dale**, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030 for the County.

ARBITRATION AWARD

Bayfield County Employees Local 1731, AFSCME, AFL-CIO (herein the Union) and Bayfield County (herein the County) are parties to a collective bargaining relationship. At the time of the events that are the subject of the grievance herein the parties were operating under a collective bargaining agreement covering the period from January 1, 2010 through December 31, 2012, which provides for final and binding arbitration of disputes arising thereunder. On January 31, 2011, the Union filed a request with the Wisconsin Employment Relations Commission (herein the WERC) to arbitrate a grievance concerning the termination of bargaining unit member Denise Bailey, the Grievant herein. The undersigned was jointly requested by the parties to arbitrate the matter. Subsequently, the Grievant indicated her wish to retain private counsel to represent her in the arbitration, to which the Union agreed. A hearing was held on August 25 and 26, 2011, in Washburn, Wisconsin. The hearing was not transcribed. The parties filed initial briefs by September 26, 2011 and replies by October 19, 2011, whereupon the record was closed.

ISSUES

The parties stipulated to the following statement of the issues in this matter:

Did the County have just cause to discharge the Grievant?

If not, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

ARTICLE 3
Discipline, Dismissal, or Suspension

A. The parties recognize the authority of the Employer to discipline, discharge, or take other appropriate disciplinary action against employees for just cause.

B. The following shall be the sequence of disciplinary action:

1. Oral Reprimands;

2. Written Reprimands;

3. Suspension;

4. Discharge.

The above sequence of disciplinary action need not apply in cases where the infraction is considered just cause for immediate suspension or discharge.

C. If any disciplinary action is taken against an employee, both the employee and the Union Steward will receive copies of this disciplinary action.

D. Should the Union present a grievance in connection with the dismissal or suspension of an employee within ten (10) working days of such dismissal or suspension to the Personnel Committee, the dismissal or

suspension shall be reviewed under the terms of the grievance procedure as specified in Article 4. This provision does not apply to probationary employees.

. . .

ARTICLE 5
Union Management Relations

Section 1 – Vested Rights of Management. The right to employ, to promote, to transfer, discipline and discharge employees and the management of the property and equipment of the Employer are reserved y and shall be vested exclusively in the Bayfield County Board of Supervisors. The County Board and its committees shall have the right to determine the number of employees and job classifications in each department covered by this Agreement. The County Board and its Committees shall have the sole right to contract for any work it chooses and direct the employees to perform such work wherever located in its jurisdiction The County shall have the exclusive right to make changes in the details of employment of the various employees from time to time as it deems necessary for the efficient operation of the departments and the union and members agree to cooperate with the board and/or its representatives in all respects to promote the efficient operation of the County departments covered by this Agreement.

BACKGROUND

Denise Bailey, the Grievant herein, was employed by the Bayfield County Department of Human Services from 2000 until November 8, 2010, at which time she was terminated. At the time of her termination she was employed as a Juvenile Court Intake Worker in the Family Services Unit of the Department, under the direct supervision of the Unit Manager, Anita Haukaas. In that capacity, Bailey was responsible for handling the cases of juveniles who were referred to the Department for potential delinquency issues. She also was responsible for handling daycare certifications and Kinship applications.

Prior to 2008, Bailey's supervisor was Jan Karlen, and during this period Bailey received uniformly positive evaluations. Karlen retired in 2008, at which time Haukaas became Family Services Manager. After Haukaas became Bailey's supervisor she began having problems at work. In particular, her performance evaluations were not as positive and she

began to have disciplinary problems. In December 2008, she received a written reprimand and two-day suspension for involving herself personally in a case which involved a personal acquaintance and which was assigned to another worker, in violation of a number of work rules and policies. In March 2009, she received an oral reprimand for failure to comply with an unwritten Department procedure regarding making entries in the electronic calendar. In December 2009, she received a written reprimand for offering to backdate an official record and for disclosing confidential information without first obtaining a release. The allegations of improperly disclosing confidential information were withdrawn after the circuit court judge intervened and stated that he had authorized the disclosure. The reprimand for the offer to backdate an official record was grieved and the discipline was upheld in arbitration. See: BAYFIELD COUNTY, MA-14791 (Millot, 3/31/11) She also received performance evaluations from Haukaas in June 2009 and July 2010 which showed needed improvement in the areas of attendance, job knowledge, productivity, decision making and discretion and communication. On August 9, 2010, Bailey filed a rebuttal in which she took issue with a number of the negative comments in the July evaluation. During the time that she worked under Haukaas, the relationship between the two deteriorated, to the point that Bailey was communicating with Haukaas only as needed and would document their conversations.

The immediate cause for Bailey's termination arose from an alleged lack of timeliness in handling her intake files. Under §938.24(5), Wis. Stats., when a citation has been issued regarding a juvenile and the case is assigned to an intake worker, such as the Grievant, the intake worker has 40 days to either request that a petition for delinquency be filed, enter into a deferred prosecution agreement, or close the case. The request for the filing of a petition is to be filed with the district attorney, who is also to be notified if the intake worker enters into a deferred prosecution agreement or closes the case. If the 40 day deadline is missed, the case is subject to potential dismissal, with or without prejudice, under §938.315(3). In 2008, District Attorney Craig Haukaas determined that intake workers should refer files to his office in all cases where the intake worker has been unable to schedule an intake within 30 days. He memorialized this in a letter to Anita Haukaas, who also happens to be his wife, on October 13, 2008, as follows:

> Dear Anita,
>
> Please advise all juvenile intake workers that if thirty (30) days have expired since the Department receives an intake referral and the worker has either been unsuccessful in contacting the family or the family does not appear to be cooperative in scheduling an intake, the matter should be referred to me. In the

> event contact is made after thirty (30) days the matter can be referred back to the intake worker for an informal disposition if that is suggested by the facts of the case.
>
> Please advise all workers that the target date should now be thirty (30) days from the date of receipt rather than forty (40) days.
>
> Also, please advise all social workers to refer consent decrees and deferred prosecution agreements to me 30 days prior to their expiration unless all terms have been completed by that time. There have recently been several consent decrees and deferred prosecution agreements which have expired with uncompleted requirements.
>
> Should you have any questions or comments or anyone has further discussion they wish to have on this issue, please do not hesitate to contact me.
>
> Sincerely,
> Craig Haukaas
> District Attorney

Anita Haukaas placed a copy of the letter in the mail boxes of the intake workers and social workers and discussed the topic at unit meetings. Two months later, on December 16, 2008, she also attached a copy of the letter in an email to Bailey, as follows:

> Denise,
>
> Here is the letter from the D.A.'s office.
>
> Please note this requests for referrals within 30 days rather than the 40 days. If you have any concerns we can sit down with the D.A. to discuss. However, all referrals should be processed with in the 30 days at this time.
>
> Thank you!
>
> Anita

On April 9, 2009, Haukaas issued a memo to Bailey, entitled "Work Expectations and Clarifications," addressing a number of performance issues. Among them was the following note regarding a meeting that took place on April 8:

> You, Nikki Revak and I met to discuss changes to the Juvenile Court Intake Process. During the meeting you expressed your dissatisfaction with the proposed changes and pointed out some errors in the document I presented. You agreed to update the document so that it better reflects the process and I explained that although I understand your concern about how this change will affect your current job duties, however, it is in the best interest of DHS to make changes that allow for a natural back up of job duties. This is the direction I want to follow. In addition, it is management's right to assign tasks.
>
> You also stated at the meeting that you are unhappy and do not intend to honor a request from the District Attorney's office to submit Juvenile Court Intake documents prior to the 40 day timeline provided by State Statute. Because the request is not unreasonable and honoring it will allow Bayfield County to better meet the needs of children, it is my expectation that you will submit your paperwork to the District Attorney within 30 days as discussed. If you do not, this will become a performance issue.

Haukaas concluded the memo with specific performance directives, including one to "meet the timelines for submitting documents as requested to the DA's office."

Bailey responded to Haukaas' memo on April 21, 2009, addressing the various issues that Haukaas had raised. She specifically addressed the issue of the intake timelines, as follows:

> The last paragraph of your memo mentions my being unhappy about the request from the District Attorney's office to submit Juvenile Court Intake documents prior to the 40 day time line provided in State Statute 938.24(5). My comments relating to this issue were simply regarding who or what am I supposed to follow? Should this ever be questioned by the state or attorney of a juvenile it is my social work certification that is at stake. I would hope you could understand the situation I would be faced with. At no time did I ever say I would NOT honor this request. I simply needed to know what the legal ramifications could be by not following the State Statute. Also, if I had no intention of dishonoring this request I would not have taken the time to go to the District Attorney and give him an explanation of why some documents have taken longer to get to his office and apologized. I did this prior to our meeting on April 13, 2009 without any knowledge that it would become such an issue.

As to Haukaas' list of expectations, and specifically the matter of the Juvenile Intake timelines, Bailey stated:

> 1. I will do my best to get documents to the District Attorney's office when possible. As I explained this is not always going to be possible because of circumstances beyond my control such as no shows causing rescheduling and juveniles who do not appear at the initial intake inquiry request or rescheduled intake.

Haukaas responded on April 22, and with respect to the timelines policy, stated, as follows:

> 4.) Frankly, I do not understand your concern about submitting Juvenile Court Intake documents to the District Attorney within a 30 day timeline. By doing so, you will certainly be in compliance with **State Statute 938.24(5)** which reads "**The intake worker shall request that a petition be filed, enter into a deferred prosecution agreement, or close the case within 40 days after receipt of referral information."** Consequently, I fail to see how complying with the Statute could jeopardize your certification or have any negative legal ramification. I would encourage you to seek independent legal counsel for advice if this continues to concern you.
>
> 5.) Since you have been informed that failure to submit documents to the District Attorney within the 30 day timeline will be a performance issue, I am glad to see that you intend to comply with this requirement. Should you be unable to submit the documents within 30 days, please notify me rather than the District Attorney. This will allow me to help you problem solve, it will allow me to help you identify strategies for completing the task in a timely manner, and it will ensure that I do not rate your performance poorly if it is not warranted.

Despite her assurances, Bailey continued to have difficulty meeting the Juvenile Court Intake document timelines. Department records reveal that Bailey handled 33 juvenile intake files in 2009-2010. Of these, 22 resulted in deferred prosecution agreements (DPAs), 7 resulted in the filing of delinquency petitions and 4 were closed. 12 of the DPAs were completed within 30 days and 10 were not. Furthermore, 17 of the DPAs were not reported to the District Attorney within the requested 30 days.

The issue finally came to a head in September 2010. On August 9, 2010, Bailey had been assigned an intake file for a 16 year old juvenile who had been arrested for criminal damage to property in Ashland. On August 25, Bailey entered into a DPA with the youth, but did not forward the agreement to the District Attorney until September 22. Meanwhile, on August 22 the youth turned 17, which deprived the juvenile court of jurisdiction over his case. When the District Attorney received the agreement he initially intended to reject it and file a petition. However, when he discovered that 42 days had passed since the intake was opened he felt the potential jurisdictional problems, and the fact that a referral for criminal prosecution would have to go to Ashland County, created too many difficulties, so the case was closed. This situation was reported to Anita Haukaas, who reported the matter to Department Head Elizabeth Skulan and County Administrator Mark Abeles-Allison. An investigation was opened and on October 25 Bailey was placed on administrative leave. On November 8, 2010, Abeles-Allison issued Bailey a termination letter, as follows:

To: Denise Bailey
From: Mark Abeles-Allison
Date: November 8, 2010
Re: TERMINATION OF EMPLOYMENT

This letter is in regard to a violation of county intake and referral procedures. At meetings held on Thursday, October 7th we gave you the opportunity to provide information in a fact finding session. A follow-up meeting was held November 5, 2010. After the meetings I have concluded the following:

1) You were aware of the Department's expectation that you submit information regarding Juvenile Court Intakes to the District Attorney's office within 30 calendar days. (Memo dated April 9, 2009 from Anita Haukaas to Denise Bailey; memo dated April 21, 2009 from Denise Bailey to Anita Haukaas; memo dated April 22, 2009 from Anita Haukaas to Denise Bailey; and Bayfield County Evaluation Form Denise Bailey, dated June 16, 2009.)

2) You were aware that should you fail to meet this timeline, it would become a performance issue. (Memo dated April 2, 2009 from Anita Haukaas to Denise Bailey and memo dated April 21, 2009 from Anita Haukaas to Denise Bailey.) This has gone beyond a performance issue to a disciplinary issue.

3) The Department's goal in getting documents to the District Attorney's office within a 30 day timeline, was to allow Bayfield County to better meet the needs of children. (Please see attached memo dated April 9, 2009 from Anita Haukaas to Denise Bailey.)

4) You neglected to follow local policy by failing to submit documents to the District Attorney's office within 30 days.

5) During the fact finding, you made it clear that you feel that you do not need to follow local policy when there is State Law to rely on. Even when the reasons for the local policy have been provided to you and your supervisor's expectations are clear that you must follow local policy or communicate to her why you are unable to do so.

After reviewing submittals to the District Attorney's office since November of 2009 I noted that you have submitted five of the past seven referrals late, after the 30 day time period. Of the original seven, four were submitted after 40 days. In none of these cases did you contact your supervisor as directed if you missed the 30 day deadline.

Over the past two weeks I have become aware of additional actions of yours that reflect poorly on Bayfield County. In June you entered information into the State database, on multiple occasions noting disagreements with your supervisor. This is inappropriate, unprofessional and disrespectful.

This letter shall serve as notice that your employment is terminated with Bayfield County effective today, November 8, 2010.

Sincerely,
Mark Abeles-Allison
Bayfield County Administrator

On November18, 2010, Local 1731 filed a grievance on Bailey's behalf. The grievance was properly advanced through the contractual procedure. In the spring of 2011, upon the retirement of the local Union representative, the arbitration was postponed and Bailey was ultimately permitted to retain her own counsel to handle the arbitration. The matter then proceeded to hearing on August 25 and 26, 2011. Additional facts will be referenced, as necessary, in the **DISCUSSION** section of this award.

PARTIES' POSITIONS

The County

The County asserts that there was just cause for Bailey's termination. In so doing, it relies on the seven questions articulated by Arbitrator Carroll Daugherty in ENTERPRISE WIRE CO., 46 LA 359 (1966) to establish the existence of just cause. Those questions are: 1) did the employee have reasonable notice of the rule or conduct violated, 2) was the rule reasonable, 3) was an investigation conducted, 4) was the investigation fairly conducted, 5) was there reasonable proof that the violations occurred, 6) was the rule or order applied uniformly and consistently and 7) was the penalty in keeping with the seriousness of the violation.

Reasonable notice of the 30 day timeline for filing Juvenile Court Intake document is established by the numerous memos exchanged between Bailey and Anita Haukaas between October 13, 2008 and April 22, 2009, as well as Bailey's performance evaluation in June 2009, which all stress the 30 day filing requirement and Bailey's need to improve her compliance. Nevertheless, Bailey continued to resist following the rule and consistently failed to meet the deadlines up to the time of her termination.

The rule was reasonable. The Grievant's counsel stressed the 40 day statutory time limits, but what is alleged here is that Bailey repeatedly violated a local rule establishing a 30-day turnaround on Juvenile Intake filings. The District Attorney's rationale was that a 30-day deadline would permit the D.A. to properly assess cases and return them to the case worker, if necessary, for further action, while still staying within the statutory timelines. There is nothing inherently unreasonable about such a rule and it was within management's rights to establish it. Bailey argued that other factors made it impossible for her to meet the timeline, but did not explain what those factors were. Further, the timeline does not seem to have been a problem for the other workers, who managed to complete their cases within it. Also, another social worker, called as a witness for the Grievant, testified that he would not have advised trainees to violate a local 30-day rule in lieu of the 40-day statutory deadline.

An investigation was conducted by the County after the September 22 incident and the Grievant was placed on a paid leave of absence on October 25, 2010, pending the outcome of the investigation. The Grievant and Union representatives participated in a fact finding meeting and the Grievant was given an opportunity to respond to the issued raised. Further, the investigation was conducted fairly and there is no evidence that the Grievant's performance problems were the result of management animus. Although the Grievant made claims of unfair treatment at the hearing, there is no objective evidence of such in the record.

There is no dispute that the Grievant failed to comply with the County's 30-day submission rule. The Grievant does not dispute the County's record of late submissions nor deny that she did not inform her supervisor of her failure to meet deadlines. There is also no record of any analogous case, so there is no claim that the rule was not enforced uniformly and consistently.

Finally, the penalty imposed was in keeping with the seriousness of the offense. The Grievant was unable to provide any extenuating circumstances for her failure to meet deadlines and was not getting her work done. She had time to research state statutes and engage her supervisor in email exchanges about their proper interpretation, but could not file her reports on time. Her performance issues were ongoing and were not transitory in nature. Further, her failure to meet deadlines could potentially cause jurisdictional problems or raise due process issues regarding the rights of a juvenile. The record also documents a number of performance issues going back over the entirety of her career with the County, which negates any claim that she was the target of a "witch hunt" by her current supervisor. Throughout her employment, she had difficulties with relationships, communication, conflict resolution, ability to accept change and caseload management. Her conduct was ongoing and willful, making it unlikely that she would respond successfully to corrective action. Thus, the County had just cause for discipline and was within its rights to terminate the Grievant.

The Grievant

The Grievant asserts that it is the Employer's burden to establish misconduct in order to justify her termination. Further, misconduct has been defined by the courts. It involves "an intentional and substantial disregard of the employer's interests or the employee's duties," and it is not enough to merely establish inefficiency, unsatisfactory performance, negligence or good faith errors in judgment or discretion. CHEESE V. INDUSTRIAL COMMISSION, 21 WIS. 2D 8, 17 (1963); BOYNTON CAB CO. V. NEUBECK, 237 WIS. 249 (1941). The Grievant further asserts that the basis for the termination must be limited to the reasons given to the employee at the time and that any evidence of other factors outside the termination letter given to the Grievant should not be considered.

The implementation of the requested 30 day timeline was based on a fundamental misunderstanding of the applicable statutes by the District Attorney. Bailey's job involved processing juvenile intake matters, which, under §938.24(5), Stats., required her to make a referral within 40 days of the date of referral. Upon receipt of the referral, the District Attorney has another 20 days to act. District Attorney Haukaas testified that the statutory timelines are "jurisdictional," that is, if they aren't met the County loses jurisdiction over the

case, which his clearly incorrect under §938.315(3). Further, Haukaas could not cite any case where a juvenile case had been dismissed for a failure to meet the 40 day deadline. The County's claims of misconduct rely on its understanding of the effect of §938.315(3), which led it to request that referrals should be filed within 30 days, rather than 40. Since the County's underlying rationale was faulty, Bailey's failure to follow the request was not unreasonable and a finding of misconduct was improper.

It should also be noted that the termination was based on a "requested" procedure, which the District Attorney did not have the ability to implement. It is asserted that the 30 day "policy" that resulted in Bailey's termination was adopted by the District Attorney, however, it is clear under §938.06(2) that only the circuit judges of the county can establish written policies governing the work of intake workers. Thus, only the circuit judge of Bayfield County had authority to adopt a policy that altered the 40 day requirement of §938.24(5) and there is no evidence that he did so. It cannot be misconduct, therefore, to fail to meet a recommended deadline that was contrary to statute and that was recommended by someone without authority to do so.

Also, the letter requesting that juvenile referrals be completed within 30 days did not state that the request was mandatory and did not put Bailey on notice of the potential consequences for violating it, nor did she receive any warning prior to her termination. The letter from the District Attorney to Anita Haukaas on October 13, 2008 indicates that 30 days was considered a "target date," not a hard and fast rule. This information was passed on to Bailey in an email from Haukaas on December 16, 2008 wherein she characterizes the District Attorney's letter as a "request." It was never identified as an absolute policy or rule. Her termination arose from a referral that was made on July 21, 2010. She conducted the intake on August 9 and entered into a deferred prosecution agreement on August 25, within the 40 days set forth by statute. The District Attorney did not receive the agreement until September 21, and claimed that this denied the County jurisdiction in the matter, although he did not advise the juvenile, his parents, or his counsel of the fact. He did not dismiss or rescind the agreement and it appears from the record that it was fulfilled in all respects. The County also introduced a spreadsheet indicating that Bailey had missed the 30 day timeline on five occasions since April 2009, but in each case sheet met the 40 day statutory deadline. Further, no mention was made of these deficiencies at the time of her dismissal. Nor was any action taken against other employees who violated this rule. Also, these deficiencies were not mentioned in Bailey's performance evaluations for 2009 and 2010, even though Bailey had been told that failure to meet the expectation would constitute a "performance issue." Bailey was never warned about the consequences of not meeting the 30 day request before she was terminated and Haukaas admitted it was because it wasn't on the top of the priority list. Bailey

has been a social worker for 10 years and the only time she missed the 40 day deadline was in the instance for which she was terminated. It is acknowledged that she did not meet the target date, but the State did not lose any right to act in the matter due to her actions, nor was the District Attorney required to act any differently than usual. This all reflects the fact that the 30 day expectation was never a policy of Bayfield County and compliance was never a priority of Bayfield County. No notice was ever given that the policy was mandatory and Bailey was never reprimanded for failing to meet it prior to her termination. There is no evidence that Bailey ever intended to violate the 30 day timeline. In fact, the only evidence in the record is to the opposite effect. There is no basis, therefore, for a finding of misconduct.

As a remedy, the Grievant asserts that the proper remedy for wrongful discharge is back pay, plus lost benefits, plus the expenses of securing other employment. It is clear from the record that the relationship of Bailey to Anita Haukaas and Elizabeth Skulan is irreparable and that they were looking for a reason to terminate her. While Bailey would accept reinstatement, therefore, it is asserted that front pay through the reasonable date of her retirement would be appropriate.

County Reply

The County asserts that the Grievant applies the wrong legal standard. In his brief, Grievant's counsel refers to cases applying unemployment compensation law to establish a definition of misconduct justifying discharge, but these case do not address the just cause standard for discipline that applies under the contract and that the parties stipulated to in their statement of the issues.

As to remedy, the arbitrator is confined to the language of the contract and cannot make a decision that amends, changes, subtracts from, or adds to the contract. The employer sees no relevance to the cases cited by the Grievant supporting a claim for back pay fringe benefits, or the costs of securing other employment and asserts that the cases finding a basis for front pay are extremely limited and, again, do not involve cases applying a just cause standard under a collective bargaining agreement.

The 30 day rule was consistent with, not contrary to, the 40 day statutory standard. The District Attorney wanted case workers to work ahead of the 40 day standard to make sure that the 40 day deadline was met. Working ahead insured that there was a safety factor of 10 days to make sure that appropriate action could be taken or that difficulties could be avoided before the time ran out. At the time of her termination, the Grievant had missed the 30 day timeline in 5 of 7 cases and missed the 40 day timeline in 4 of 7 cases. Although she had 8 months to

prepare for the arbitration, she could not come up with an adequate explanation for her deficiencies. There is no evidence of any other employee having missed the deadline more than twice, so there is no evidence of disparate treatment. In the case resulting in her termination, the Grievant missed the 40 day deadline and did not act before the juvenile's 17th birthday, causing the County to lose juvenile jurisdiction. This was a serious, and totally avoidable, consequence.

Regardless of how the 30 day timeline is characterized, the Grievant was a repeat offender, as was also a repeat offender with respect to notifying her supervisor. There is an extensive document trail showing that the Grievant was fully aware of the rule. The Grievant claims she was exonerated with respect to an earlier disciplinary proceeding, but there is no record of such. The proposed decision in the hearing before the Wisconsin Department of Regulation and Licensing found a violation of an administrative rule relating to unprofessional conduct. A previous discipline was also upheld by an arbitrator, even though it was partially withdrawn by the County.

The Grievant argues that the basis for the 30 day rule was erroneous as a justification for violating it. It is asserted that this is a basis for exoneration, but the rule in arbitration is that employees who disagree with work rules may not take matters into their own hands. Rather, the rule is "obey now, grieve later." There was no legitimate basis for violating the rule, such as a health or safety hazard, so the Grievant's obligation was to obey the rule and challenge it through the grievance process. The grievance should be denied.

Grievant Reply

The Grievant notes that the Daugherty tests for just cause are not mandated under Wisconsin law, but that they are considered a standard basis for determining just cause. If the Daugherty tested are to be applied here, however, it should be done in accordance with the principles of Wisconsin law cited in the Grievant's initial brief.

In the first place, the Daugherty tests ask whether the employee was forewarned about the possible disciplinary consequences of her conduct. This requires actual oral or written communication of the rules and penalties to the employee. That did not happen here. The record and briefs clearly laid out the exchange of communications about the 30 day timeline. At most, Bailey was told on one occasion that failure to meet the timeline could become a "performance issue," but at no time was she warned of any consequences or penalties attaching to missing the deadline. The 30 day expectation is not found in any County policy or procedure

handbook and Haukaas testified that it was not really a policy or procedure. Haukaas also admitted that she did not monitor adherence to the rule because she had more important priorities. Only in the termination letter did the County state that the performance issue had become a discipline issue.

The second test is whether the rule was reasonably related to the orderly, efficient and safe operation of the employer's business and the performance the employer had a right to expect from the employee. As shown in the Grievant's initial brief, the District Attorney did not have authority to promulgate a target deadline other than that specified by statute. Further, the 30 rule had no practical effect on the District Attorney, because by statute he had 20 days to act after receiving the notice from the intake worker and the 30 day rule did not change this.

The County did not conduct an adequate investigation. It did inquire into whether the rule was broken, but not whether the Grievant had an adequate justification for her actions. Further, it was clear that the investigation was not fair or objective. It is clear that two of the three persons who conducted the investigation, Anita Haukaas and Elizabeth Skulan, had personal issues with the Grievant. It is submitted that this investigation was conducted in the same way as previous investigations of disciplinary matters. That is, in the case where the Grievant was reprimanded for revealing confidential information, the County ignored her protestations that she had been authorized to release the information by the circuit judge and reprimanded her without even talking to the judge. Later, the reprimand was "withdrawn" when the judge personally intervened. County Supervisor Kenneth Jardine testified that he believed Bailey was railroaded in that case. It is submitted that Haukaas and Skulan wanted to get rid of Bailey and directed the investigation to that end. Abeles-Allison, who should have acted as an impartial and detached manner, merely looked for evidence that justified the decision to terminate.

Bailey concedes that she did not always meet the 30 day timeline, but asserts that this rule was not evenly or fairly applied. No other employee has been disciplined, much less terminated, for failing to meet the timeline and Haukaas admitted she was not monitoring compliance because it wasn't a priority. The County was, at least, lax in enforcing the expectation and if it intended to become more rigorous in enforcement it had an obligation to inform the employees. It did not do so.

Finally, the penalty of termination was not justified in light of the seriousness of the offense. Bailey was a 10 year employee, with 8 years of positive performance reviews before Haukaas became manager of the Department. In fact, she had never had a disciplinary event before Haukaas became her supervisor. The exchange of communications about the 30 day

timeline was initiated by Bailey seeking clarification about the relationship between the timeline and the statute. But for that, Haukaas probably would have done nothing other than disseminate her husband's original letter. Clearly, it was not a priority for her and it only became important when the District Attorney wrongly concluded that he had lost jurisdiction over the case in issue when the deferred prosecution agreement was filed late, even though it resulted in no negative consequences for anyone involved. Termination was not justified and the Grievant should be reinstated.

DISCUSSION

In this case, the Grievant, Denise Bailey, was terminated from her position as a Juvenile Court Intake Worker on November 8, 2010 after she failed to file a deferred prosecution agreement with the Bayfield County District Attorney in a timely fashion after the intake referral was received. The termination letter makes it clear that the basis for her firing was a repeated failure to file Juvenile Intake documents with the District Attorney within 30 days after referral, pursuant to a request to do so by the District Attorney in October 2008. The parties have agreed that the issue is whether the County had just cause to terminate the Grievant, and have further agreed that the seven prong test formulated by Arbitrator Carroll Daugherty in ENTERPRISE WIRE CO., 46 LA 359 (Daugherty, 1966) provides a proper framework for determining the existence of just cause. In ENTERPRISE WIRE CO., Arbitrator Daugherty adopted an analysis for the existence of just cause for discipline based on seven questions: 1) Did the company give the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?, 2) Was the company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business and (b) the performance that the company might properly expect of the employee?, 3) Did the company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?, 4) Was the company's investigation conducted fairly and objectively?, 5) At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?, 6) Has the company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?, and 7) Was the degree of discipline administered by the company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the company? I will apply these questions to the record before me.

First of all, however, it is necessary to determine the nature of the rule allegedly violated, because the Grievant has asserted that there was no "rule" *per se,* but that what is in issue is actually only a request from the District Attorney, which the Grievant had discretion to comply with or not. The District Attorney's October 2008 letter to Family Services Manager

Anita Haukaas instructs her to "advise all juvenile intake workers that if thirty (30) days have expired since the Department receives an intake referral and the worker has either been unsuccessful in contacting the family or the family does not appear to be cooperative in scheduling an intake, the matter should be referred to me." When Haukaas passed the letter on to Bailey, the cover email stated, "this requests for referrals with in 30 days rather than the 40 days. If you have any concerns we can sit down with the D.A. to discuss. However, all referrals should be processed with in the 30 days at this time." While Haukaas did use the word "requests," it is clear from the totality of the message that the 30 day referral timeline was actually a directive. Later communications from Haukaas confirm this interpretation. In her April 9 memo to Bailey, Haukaas stated, "…it is my expectation that you will submit your paperwork to the District Attorney within 30 days as discussed. If you do not, this will become a performance issue." Again, in a memo to Bailey on April 22, Haukaas stated, "Since you have been informed that failure to submit documents to the District Attorney within the 30 day timeline will be a performance issue, I am glad to see that you intend to comply with this requirement." It is clear to me, therefore, that Haukaas intended the 30 day timeline to be a directive and that Bailey did not have discretion to ignore it.

Having determined that the 30 day timeline was a directive that was not discretionary, I turn to the Daugherty analysis. Some of the questions may be dispensed with without a great deal of difficulty. There is no serious question in my mind that the 30 day timeline was reasonably related to the orderly and efficient operation of the Juvenile Intake system and that the County could reasonably expect Bailey to comply with it. The District Attorney explained that the purpose of the requirement was to identify any problems with juvenile referrals and address them before the 40 day statutory deadline was reached. There is no evidence that the 30 day requirement was general unworkable and it appears a reasonable approach to insuring that filings are completed properly within the statutory time frame of 40 days. The Grievant argues that this requirement was unnecessary, but the question merely asks whether there was a reasonable relationship between the rule and the efficient operation of the department. I find that there was. There is also ample evidence that the employer conducted an adequate investigation of the matter to determine whether, in fact, Bailey violated the rule and that the evidence obtained established that she did violate the rule on several occasions, including the incident that immediately precipitated her termination. Indeed, Bailey does not dispute that she missed the 30 day timelines on several occasions, including the one in September 2010, but merely argued, without citing specifics, that she was delayed by unspecified intervening factors. Further, there is no evidence that County Administrator Mark Abeles-Allison did not conduct a fair and impartial investigation. The Grievant asserts with some force that Haukaas

and Human Services Director Elizabeth Skulan had a vendetta against her, and Abeles-Allison admitted that he consulted them in making his decision, but the Grievant has failed to adduce compelling evidence of bias on his part. Indeed, the facts of the case are primarily established by incontrovertible documentary evidence.

I am, however, most concerned with the issue of notice. The County characterizes the question as whether the employee had reasonable notice of the rule or conduct violated. Put in this way, the answer is clearly "yes" based on the voluminous correspondence between Haukaas and Bailey on the subject. In ENTERPRISE WIRE CO., however, Daugherty asks whether the employer gave the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of her conduct, which goes beyond mere knowledge of the rule and requires that the employee be aware what the consequences are of violating it. According to Daugherty, there must have been actual oral or written communication of the rule and the consequences to the employee. The only exception to this requirement is in the event of what might be characterized as a "capital offense," that is, one so serious that any employee might reasonably be expected to know would result in discipline (i.e., theft, violence, drug use, etc.). The 30 day timeline here would not constitute such an offense. Haukaas certainly advised Bailey that she was expected to meet the timeline. In the April 9 and April 22 memos she even went so far as to say that non-compliance would be considered a "performance issue." She never clarified what she meant by that, however, or specifically equated it with discipline. There is a telling reference in the termination letter, however, where Abeles-Allison states, "You were aware that should you fail to meet this timeline, it would become a performance issue. (Memo dated April 2, 2009 from Anita Haukaas to Denise Bailey and memo dated April 21, 2009 from Anita Haukaas to Denise Bailey.) This has gone beyond a performance issue to a disciplinary issue." This makes it clear that, at least in Abeles-Allison's mind, a performance issue and a disciplinary issue were not the same thing. Thus, the first notice that Bailey apparently received that she could be disciplined for failing to meet the 30 day timeline was in the termination letter. In my view this record does not meet the standard of notice contemplated in the Daugherty test.

The record does contain an excerpt from the County Employee Handbook, which sets forth the rules and standards for employees, and states that violations will be "considered potential employee misconduct and will subject the employee to disciplinary action up to and including discharge from employment." Under the category of conduct it states:

"It is expected that employees will:

a. Obey all supervisory written and/or oral directions.
b. Comply with the departmental work rules and expectations."

To that extent, insofar as the 30 day timeline could be characterized as a "direction, work rule, or expectation," it may be asserted that Bailey was on notice that non-compliance could result in discipline. The fact is, however, for over a year prior to her discharge Bailey received no feedback about her repeated failure to meet the timelines, even so much as a comment in her 2010 performance evaluation, and then was, in effect, summarily terminated. Furthermore, during the written exchanges between Haukaas and Bailey specifically about the timelines, Haukaas never went beyond saying non-compliance would be a "performance issue," which as we have seen, was markedly different in management's view from a disciplinary issue. In my view, therefore, management failed to give Bailey adequate notice of the potential disciplinary consequences of her conduct under the Daugherty tests, such that she could have, or should have, contemplated that non-compliance would get her fired.

I am also concerned about the sixth factor, which addresses whether the rule was applied and enforced evenhandedly and without discrimination among all the employees. The record does not indicate whether other employees were held to the same standard as the Grievant as to the 30 day rule, so it is hard to make a case for discrimination on that basis, but that is not the only consideration. In ENTERPRISE WIRE CO., Arbitrator Daugherty explains that in considering this factor it is also necessary to determine whether the rule has been subject to lax enforcement in the past. If so, the employer must put all employees on notice if it intends to strictly enforce the rule going forward. In April 2009, Haukaas told Bailey that if she did not meet the 30 day timeline it would become a performance issue. Accordingly, it was noted in Bailey's June 2009 performance evaluation that she needed to improve in this area, but nothing more was done. Certainly, and by her own admission, Haukaas did not monitor Bailey's performance with respect to the timelines. Between her 2009 and 2010 evaluations, Bailey missed the 30 day timeline on seven intake referrals, but no mention was made of the timelines being an issue in her 2010 evaluation. Indeed, Haukaas claimed to be unaware that Bailey was not meeting the timelines until she received the District Attorney's letter on September 22, 2010. At hearing, it was not clear whether Haukaas' failure to follow up was because she did not consider the timelines to be a priority or if she was afraid Bailey would accuse her of picking on her. One would expect, however, that if a particular performance standard was considered to be a priority, and if an employee was having difficulty meeting it, that a manager would not ignore the employee's performance merely to avoid being accused of disparate treatment, if the treatment was not, in fact, disparate. In any event, for over a year Bailey missed the timeline frequently and was given no reason to believe it was a problem by either Haukaas or the District Attorney, who had requested the 30 day timeline in the first place. After the District Attorney's September 2010 letter, however, the County apparently decided that failure to meet the timelines was a dischargeable offense, but gave no advance notice of this change in policy prior to imposing it on Bailey. Here, again, this does not meet the requirement of fair and even-handed administration of the rule under the Daugherty analysis.

This brings me to the seventh test, which is whether the degree of discipline was reasonably related to the seriousness of the offense and the employee's history of service to the employer? I have already indicated that to my mind missing the 30 day timeline was not a "capital offense" warranting summary discharge. If the timeline was that important, management should have emphasized and documented the consequences of non-compliance and been more vigilant in monitoring the performance of the intake workers and enforcing the rule. The failure to warn employees of the consequences of non-compliance and the laxity of oversight and enforcement noted above not only fail to meet the Daugherty tests, but also give insight into how serious a matter, or not, the timeline was considered by management, at least before September 2010. There was not, therefore, just cause for summary discharge under these circumstances.

Having determined that Bailey's misconduct did not warrant summary discharge, I look to see whether discharge was appropriate under principle of progressive discipline, which is utilized in most discipline contexts because the purpose of discipline is principally to correct unacceptable behavior, not punish it. Rehabilitating an employee, where possible, is usually preferable to replacing one. Article 3, Section B. of the contract indicates that the parties adopt the principles of progressive discipline and lists the progression as 1) oral reprimands, 2) written reprimands, 3) suspension and 4) discharge. The record reveals that Bailey has had a number of disciplines in recent years, none of which related to departmental filing timelines. The most recent was a written reprimand received in December 2009 for offering to backdate an official document regarding a client contact with a juvenile from another county. Given that her most recent discipline was a written reprimand 11 months prior to her discharge for an unrelated offense, that she had no disciplinary history for missing timelines in the past and that the County did not inform her of the disciplinary consequences of missing the timeline, I find that there was not just cause for discharge under principles of progressive discipline. I do find, however, that some discipline is appropriate because Bailey certainly knew or should have known that the 30 day timeline was a job expectation and, likewise, knew or should have known that failure to meet job expectations generally could result in discipline within the ordinary progression. Indeed, her history of discipline over the previous two years shows that she should have had ample exposure to the concept. Under the circumstances, and given her disciplinary history, I deem a two-day suspension to have been an appropriate level of discipline for her infraction. This reinforces the need to be diligent in following supervisory directives, as well as the requirement to follow directives with which one may disagree, while allowing the Grievant to remediate her conduct. It also puts her on notice, however, that future non-compliance may be dealt with more severely.

For the reasons set forth above, therefore, and based upon the record as a whole, I hereby issue the following

AWARD

The County did not have just cause to discharge the Grievant. Accordingly, the Grievant shall be reinstated and the discharge shall be reduced to a two-day suspension, which will be noted in her personnel record. The County shall also make the Grievant whole for pecuniary losses resulting from the discharge by paying her back pay from November 8, 2010 to September 27, 2011, at her wage rate in place at the time of discharge, reduced by two-days' pay due to suspension and offset by any income received in the interim, including unemployment compensation, and any fringe benefits to which she would otherwise have been entitled. I have limited the back pay award to September 27 because the case was originally set to be heard on May 5, 2011, but was postponed until August 25, 2011 after the retirement of the former Union representative, at which point the Grievant elected to retain separate counsel. I have determined, therefore, that it would be unjust to assess the employer for the additional 112 days until hearing.

The arbitrator will retain jurisdiction over the award for a period of thirty days after issuance to resolve any issues that may arise in its implementation.

Dated at Fond du Lac, Wisconsin, this 17th day of January, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/
John R. Emery, Arbitrator

JRE/gjc
7786