

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MILWAUKEE COUNTY

and

MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION

Case 770
No. 70892
MA-15077

(Grievance of James Novotny)

Appearances:

Mr. Roy L. Williams, Principal Assistant Corporation Counsel, 901 North 9th Street, Room 303, Courthouse, Milwaukee, Wisconsin 53233, appeared on behalf of the County.

Mr. Graham P. Wiemer, MacGillis Wiemer, LLC, 2360 North 124th Street, Suite 200, Wauwatosa, Wisconsin 53226, appeared on behalf of the Association.

ARBITRATION AWARD

On August 2, 2011 the Milwaukee Deputy Sheriffs' Association filed a request with the Wisconsin Employment Relations Commission, seeking to have the Commission appoint a member of its staff to hear and decide a grievance pending between the Association and Milwaukee County. Following jurisdictional concurrence from the County, the Commission appointed William C. Houlihan, a member of its staff, to hear and decide the matter. A hearing was conducted on January 4, 2012 in Milwaukee, Wisconsin. No formal record of the proceedings was made. Post-hearing briefs and reply briefs were filed and exchanged by February 1, 2012.

This award addresses the 10 day suspension of Sergeant James Novotny.

BACKGROUND AND FACTS

Milwaukee County operates a jail, which includes a short term facility, the Milwaukee County Correctional Facility, (CCF-C). The CCF-C houses approximately 900 inmates. On

any given shift 30 or more inmates are subject to release. This dispute arises over the discipline of James Novotny, the grievant, for his role in the improper release of inmate Alexis McGregor.

The County has a protocol for the release of prisoners. The release of any prisoner is subject to separate review by three individuals. The initial review is performed by a Corrections Officer stationed in the Jail Records Department. That employee is charged with reviewing the prisoners release file. Once the file is reviewed, it is passed to a second Corrections Officer within the Jail Records Department, for an independent review. Before a prisoner can be released, Departmental protocol requires that a Captain sign off on the release. As a practical matter, this involves a third independent review. Some Captains have delegated that task to certain Sergeants. Not all Sergeants have been designated to sign off on releases. Novotny has been so designated.

On May 24, 2011 the paperwork for the release of prisoner Alexis McGregor was presented. Corrections Officer Tamara Rohr performed the first review. She discovered a "hit" for an outstanding warrant for McGregor emanating from Brown County. Rohr sent an administrative message to Brown County. The administrative message is a non-urgent communication. There was no immediate response from Brown County. Rohr did not follow up on her message.

Jail protocol required that Rohr send Brown County a warrant confirmation check and not an administrative message, upon discovery that there was an outstanding warrant for McGregor. A warrant confirmation check is an urgent message that requires a response from a law enforcement agency within 10 minutes. Jail protocol also required that Rohr place a hold on McGregor's release. Such a hold acts as a fail safe device in that it prevents the warrant information from being lost or overlooked, and prevents a release. Rohr did not place a hold on McGregor's release.

Rohr did not follow up with Brown County, and notwithstanding the fact that her review was not complete, passed the file along for a second review. Rohr was given a 7 day suspension, which was not challenged.

Corrections Officer Kristie Kendrix performed the second review. The following summary of Kendrix Internal Affairs interview sums up the record relative to the scope of the second review:

CO Kendrix recalled processing inmate Alexis McGregor for release on May 24, 2011. She stated that she was made aware sometime after May 24th that on May 26, 2011 it was determined that inmate McGregor had been released improperly.

CO Kendrix acknowledged that on May 24, 2011, she received the ADR packet for inmate McGregor and began to review it. She found that one of the 1047's

for a dismissed case in Milwaukee County Circuit Court was not in the packet, so she returned the packet to jail records. Sometime after that the ADR packet was returned to her with the missing 1047 now included. CO Kendrix stated she took the packet to Sgt. James Novotny for final review. CO Kendrix stated that on May 24, 2011, Sgt. Matthew Paradise was originally assigned to review release packets, but at the time inmate McGregor's release was being processed Sgt. Paradise was busy and Sgt. Novotny took over the reviews.

CO Kendrix stated that she dropped off the packet on Sgt. Novotny's desk along with several other release packets. Subsequently, Sgt. Novotny notified her that the release packets were approved and CO Kendrix retrieved them and processed and released the inmates, including McGregor.

CO Kendrix stated that in hindsight, she could not remember with certainty whether or not she completely reviewed the ADR packet, which included the warrant "hit" from Brown County Sheriff's Office for inmate McGregor. CO Kendrix stated that if the copies of the teletype "hit" was included in the packet and she thoroughly reviewed the packet, she would have seen the "hit" and acted on it. CO Kendrix did claim there was not a "hold" placed on inmate McGregor and she might have only done a partial review of the packet and did not continue the review when she noticed the missing 1047 and returned the packet to jail records for the missing 1047. When the packet returned to her with the 1047 that was missing now included, CO Kendrix stated that she might have believed that she had reviewed the packet completely, when in fact she cannot remember those details.

CO Kendrix stated that had she had done a complete review of the ADR packet, she would have seen the copies of the warrant "hit" from BRSO, if they were included in the packet at that time, and would have stopped the release process. She then would have notified jail records to update inmate McGregor's CJIS information and place the "hold" for BRSO. CO Kendrix acknowledged that CO Rohr had been the jail records officer who processed the ADR packet, because she recognized her name entered on the ADR tracking form on the line designated for jail records.

Kendrix was given a 1 day suspension, which was not challenged.

Kendrix passed the file along to Novotny for the final review. The following summary of Novotny's internal affairs interview constitutes the summary of his review of the McGregor file relied upon by the employer in the decision to discipline:

Sgt. Novotny acknowledged that he was the Operations Supervisor on May 24, 2011 when inmate McGregor was released. Sgt. Novotny recalled that on

May 26, 2011, Captain Jaskulski advised him of the improper release of inmate McGregor. Sgt. Novotny stated that he did not remember the particulars of the release, but acknowledged that his signature appeared on the ADR Tracking form as the supervisor who approved inmate McGregor for release. Sgt. Novotny then stated that on May 29, 2011 he was transferred from the CCFC to the Patrol Division.

Sgt. Novotny stated that he received several ADR packets to review on May 24, 2011, as he was filling in for Sgt. Matthew Paradise, who was assigned to review releases, but was on another assignment. Sgt. Novotny acknowledged that CO Kristie Kendrix was assigned to release inmates that night. He stated that CO Kendrix is one of the better officers who handled releases and he was confident that the ADR release packet was in proper order.

Sgt. Novotny acknowledged that because of the confidence he had in CO Kendrix, he did not check every document in the packet to make certain everything was proper. He stated he could not remember what he did or did not check relative to the ADR packet for inmate McGregor, because every release has different documents included in it's packet. Sgt. Novotny stated that as long as CO Kendrix signed the ADR tracking form, he usually did not check any further before he signed the approval for release. Sgt. Novotny stated that with some other officers he would conduct a more thorough review of the ADR packet, but with CO Kendrix he had full confidence that ADR packet was in proper order.

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Sgt. Novotny acknowledged that he did not thoroughly check the ADR packet for inmate McGregor prior to approving it for release.

Additionally, Novotny testified at hearing. He indicated that the C.O.'s who handle the files before him work in the Jail Records department. It was his testimony that the main function of Jail Records is to keep track of inmates. Novotny further testified that the Sheriff has directed that releases are to occur within one hour.

Sgt. Novotny received a written reprimand on June 21, 2006 for failure to review paperwork in an inmate release. He met with the Sheriff and told the Sheriff that he cannot read every single piece of paper in a prisoner release file. It was Novotny's testimony that the Sheriff responded that he didn't expect him to read every piece of paper: rather, he was expected to develop a reasonable system to check to see if others had done their jobs.

Novotny's system of review includes comparing the arrest detention report with the inmates release packet. The purpose is to insure the documents refer to the same inmate. He reviews the documents to ensure that all charges listed have been disposed of. He checks to be

sure that the name, date of birth and charge match the individual. He reviews the packet for any holds. He checks for signatures indicating that lower reviews have occurred and then signs the form.

It was his testimony that he does not do a document by document review of the file because that would serve only to replicate the work already done, and would leave him no time for the more global review that he performs. He testified that his review reflects his conversation with the sheriff, and is the system he has used since 2006.

The cited portions of Novotny's testimony were unrebutted.

Novotny was given a 10 day suspension. That suspension provided the following:

**RE: SUSPENSION
INTERNAL AFFAIRS CASE NO. 11-175**

Effective August 22, 23, 24, 25, 27, 28, 30, 31, and September 1, and 2, 2011, Sergeant James Novotny, Patrol, is suspended from duty without pay, for ten (10) working day(s), for violation of:

MILWAUKEE COUNTY SHERIFF'S OFFICE RULES AND REGULATIONS

202.15	Knowledge of Duties, Rules, and Regulations
202.20	Efficiency and Competence.

MILWAUKEE COUNTY CIVIL SERVICE RULE VII, SECTION 4(1)

- (l) Refusing or failing to comply with departmental work rules, policies or procedures.
- (t) Failure or inability to perform the duties of assigned position.
- (u) Substandard or careless job performance.

Approved:

David A. Clarke, Jr. /s/
David A. Clarke, Jr., Sheriff
Milwaukee County

The Association offered two instances of discipline issued on April 13, 2011 for incidents of improper inmate release. They were both issued against the same Sergeant, for incidents occurring on March 21, 2011 and December 23, 2009. Both were written warnings.

Deputy Roy Felber, president of the Association testified that no other Sergeant has ever been suspended for these rule violations.

Lieutenant David Rugaber testified on behalf of the County. It was his testimony that the Sergeant is the last line of defense in a prisoner release, and is held to a higher standard of conduct and responsibility.

ISSUE

The parties stipulated the following issue:

Was there just cause to suspend Sgt. James Novotny for 10 days?

If not, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

5.04 DISCIPLINARY SUSPENSIONS NOT APPEALABLE UNDER WISCONSIN STATE STATUTE 63.10

In cases where an employee is suspended for a period of ten (10) days or less by his department head, pursuant to the provisions of s. 63.10, Stats., the Association shall have the right to refer such disciplinary suspension to arbitration. Such reference shall in all cases be made within 10 working days from the effective date of such suspension. The decision of the Arbitrator shall be served upon the Department of Labor Relations and the Association. In such proceedings, the provisions of s. 5.02(2)(c) shall apply.

POSITIONS OF THE PARTIES

It is the position of the Association that the best definition of just cause comes from Elkouri & Elkouri, *How Arbitration Works*, 6th Ed., p.949

- (1) Did the employer prove the employee's misconduct; and (2) assuming the showing of wrongdoing has been made by the employer, did the employer establish that the specific discipline it imposed on the employee was justified under all the relevant facts and circumstances.

It is the view of the Association that Sgt. Novotny did not engage in misconduct. The Association argues that Novotny did nothing wrong. The County pointed to a number of work rule violations in the discipline document. The Association contends that those rules were not made a part of the record. It is the view of the Association that Novotny has used the system of review of release packets he developed after his session with the Sheriff. That system has never been challenged or questioned.

The Association contends that on the day in question Novotny performed the duties of Sergeant as well as the review of the work of release officers, a task that falls within the job description of Captain. It is the view of the Association that the County never produced any evidence showing that his review did not comport with any rule or policy of the employer.

The Association argues that the County cannot have a standing order to release inmates within one hour, while at the same time expect three different people to review every single page of a release packet.

The Association argues that a 10 day suspension is not appropriate under the circumstances. It points to the testimony of Felber and the two written warnings issued in April of 2011 and contends that improper prisoner release has never led to a suspension of a Sergeant. The Association points to the conduct of the two C.O.'s and contends that the lapses on their parts were more egregious. It is the view of the Association that there is no rational basis for Novotny to suffer a suspension longer than the two combined.

It is the position of the County that Novotny constituted the last line of defense for the County. He was the last one who could have prevented the improper release. Unlike the others involved in this matter, he did not accept responsibility for his actions. The County points out that the Sergeant involved in the April 2011 incidents took full responsibility for her actions.

It is the view of the County that the Sheriff imposed a 10 day suspension on the grievant because his failings in this case are more glaring than the failings of others because he is a supervisor.

DISCUSSION

The fact that a prisoner was erroneously released following review by three separate individuals is indicative of a problem. Rohr was given a seven day suspension for a number of serious lapses in performance. Kendrix was given a one day suspension for a substandard review of Rohr's work. The question posed in this proceeding is whether or not a 10 day suspension is warranted for Novotny.

It is the view of the Association that Novotny did nothing wrong. It was his testimony that he did the overview of the file that he understood to be appropriate following his conversation with the Sheriff. His testimony with respect to the scope of review expected at the Captain (Sergeant) level is the only testimony in the record on that subject. McGregor was released due to a failure to follow up on the outstanding warrant. For the County to prevail in its disciplinary efforts, it must demonstrate in some fashion that the grievant's responsibilities included a review of the file in such a manner that he should have detected the warrant. There is no evidence in the record to support such a conclusion.

The grievant testified that his review was not to be a document by document review. Lieutenant Rugaber testified that he had personally reviewed 300-400 packets in his career.

However, he did not elaborate on the scope of review expected at that level. Rather, Rugaber pointed to the IAD interview summary that indicated that Novotny said that he did not conduct a more thorough review of the file because of his confidence in Kendrix. Rugaber pointed to the "...usually did not check any further..." comment as support for the discipline.

Novotny's testimony at hearing was more expansive than the notes of his IAD interview. At hearing, Novotny described a system and process of review that he does with files and implied that he likely did that in the McGregor case. The IAD interview notes paint a picture of a cursory review. I credit the hearing room testimony. Novotny's testimony was subject to cross examination. The interview notes were not. Rugaber had no role in the investigation or the interview of Novotny. It is possible that the testimony and the interview can be harmonized. Both occurred in the context of Novotny indicating that he could not remember exactly what he looked at with respect to the McGregor file. The IAD interview occurred on July 2, 2011, 5½ weeks after the May 24 release. There is no explanation as to why a fact finding interview was delayed so long. There was no reason for Novotny to regard McGregor's release papers as noteworthy at the time. They were one of 30 -50 that evening. I do not find it suspect that Novotny could not recall the detail of that review several weeks later.

From the IAD notes it appears that Kendrix could not recall the detail of her review of the McGregor packet. It also appears that whatever the scope of that review, she did not uncover or flag the warrant. It was Novotny's testimony that the Jail Records employees have a higher degree of responsibility for the review of documents. Neither Kendrix nor Novotny had good recall of the review they did that day. Neither did a thorough review of the file. Kendrix was given a one day suspension. Novotny was given a 10 day suspension.

There are two explanations offered as to the difference in discipline. Rugaber testified that Novotny is held to a higher standard because he is a Sergeant and because he is the last line of defense. While that has some facial appeal, it is not supported by the record. Another Sergeant was given a written warning for the improper release of two prisoners in April, 2011. That Sergeant is also a supervisor and the last line of defense. That Sergeant discovered the error and took full responsibility for the mistake. That is certainly a distinction, but does little to explain the difference between no time off and the maximum suspension not subject to the County Civil Service (see Sec. 63.10 (1) Wis. Stats.)

Neither Rohr nor Kendrix discovered the McGregor release. Both did acknowledge their responsibility. Rohr's errors were far and away the most egregious. Kendrix and Novotny are roughly similarly situated. Nothing explains the disparity in their disciplinary treatment.

There is no indication in the record that the County has successfully imposed vastly greater discipline on those who have denied culpability in the erroneous release of prisoners or any other matter. Felber's testimony suggests the contrary.

AWARD

The grievance is sustained.

REMEDY

The County is directed to rescind the 10 day suspension it issued James Novotny, and to restore the lost wages and benefits, if any. Additionally, the County is directed to expunge Novotny's personnel file of any reference to the discipline.

Dated at Madison, Wisconsin, this 11th day of May, 2012.

William C. Houlihan /s/

William C. Houlihan, Arbitrator