

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION
and
MILWAUKEE COUNTY

Case 787
No. 77160
MA-15174

(Daniel Katona Suspension Appeal)

Appearances:

Ryan MacGillis, MacGillis Wiemer, Attorneys at Law, 2360 North 124th Street, Suite 200, Wauwatosa, Wisconsin 53226, appearing on behalf of Milwaukee Deputy Sheriffs' Association.

Roy Williams, Principal Assistant Corporation Counsel, Milwaukee County, Room 303, 901 North Ninth Street, Milwaukee, Wisconsin 53233, appearing on behalf of Milwaukee County.

ARBITRATION AWARD

The Milwaukee Deputy Sheriffs' Association, hereinafter referred to as the Association, and Milwaukee County, hereinafter referred to as the County or the Employer, are parties to a collective bargaining agreement which provides for final and binding arbitration of all disputes arising thereunder. The Association made a request, with the concurrence of the County, that the Wisconsin Employment Relations Commission designate a member of its staff to hear and decide the appeal of Deputy Daniel Katona's suspension. The undersigned was so designated. A hearing was held in Milwaukee, Wisconsin on August 9, 2012. The hearing was not transcribed. The parties filed briefs, and the Association filed a reply brief, whereupon the record was closed on October 1, 2012. Having considered the evidence, the arguments of the parties and the record as a whole, the undersigned issues the following Award.

ISSUE

The parties stipulated to the following issue:

Was there just cause to suspend Deputy Daniel Katona for three days? If not, what is the appropriate remedy?

BACKGROUND

The County operates a Sheriff's Department and a jail. The Association is the exclusive collective bargaining representative for the Department's deputy sheriffs. Daniel Katona is a deputy sheriff who has been with the Department for 15 years.

The record reflects that prior to receiving the three-day suspension involved herein, Katona had the following disciplinary history: he received a one-day suspension in 2010.

At the time of the incident involved herein, Katona had been assigned to the Courts Division as a bailiff for three years.

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Inmates at the County jail who have completed their sentences are supposed to be released on their proper release date; they are not supposed to be released either prior to, or later than, their proper release date. When either of those events occurs, the situation is referred to as an improper release. Another type of improper release occurs when an inmate's release does not comport with a judge's order. For example, a judge can order that an inmate be released into someone else's custody. If that does not happen and an inmate is released, say, unconditionally, that is also a type of improper release.

This case involves the latter type of improper release just noted.

Obviously, the Employer tries to ensure that inmates are not improperly released. To that end, the Employer has an interest in keeping accurate records. Employees use and rely on those records to carry out their work duties and release inmates correctly.

FACTS

On February 3, 2012, Katona was assigned to Judge Dennis Cimpl's courtroom as a bailiff. One job duty of a bailiff is to process paperwork. In the context of this case, the phrase "process paperwork" refers to the following two tasks: a bailiff is to accurately record a judge's orders and accurately complete a report known as a 10-47 Report. A 10-47 Report provides the Sheriff's Office with information regarding what happened at a defendant's court hearing. A completed 10-47 Report contains the date and time of the defendant's next hearing, bail requirements set by the judge, and orders issued by the judge. The completed 10-47

Reports are turned into the Sheriff's Office and retained as part of the defendant's Arrest Detention Report Packet (known as an ADR Packet).

During the morning courtroom session, Quolisha Thompson appeared with her attorney before Judge Cimpl for a Scheduling Conference. Thompson was before Judge Cimpl on two separate felony cases. Judge Cimpl ordered Thompson to remain in custody until she posted bail in the amount of \$500 and \$200 for her two respective cases. Thompson was taken into custody. Katona then completed a 10-47 Report for each of Thompson's two felony cases. These reports were completed accurately and were turned over to the appropriate jail personnel.

That afternoon, Judge Cimpl recalled Thompson's two cases at the request of Thompson's attorney. During the afternoon hearing, Judge Cimpl ordered that in addition to the previously established bail amounts, Thompson was to be turned over to Justice 2000 (a community supervision program) for a mental health/alcohol and other drug abuse assessment. Judge Cimpl added the Justice 2000 requirement at the request of Thompson's attorney. Thompson was again taken into custody after the afternoon hearing was completed. This time, for reasons unknown, Katona did not complete a 10-47 Report for each of Thompson's two felony cases. As a result, Katona did not make an entry in either of Thompson's 10-47 Reports that documented the additional Justice 2000 requirement imposed by the judge.

Thompson was in custody at the Milwaukee County Jail for five days. While she was in custody, Thompson was screened by Justice 2000 to ensure she was an appropriate candidate for pretrial supervision upon her release. Her meeting with Justice 2000 was annotated on her tier card. A tier card tracks an inmate's activity in the jail.

On February 8, 2012, Thompson was released from custody after making bail. Here's how it unfolded. Before she was released, the jail records (release) officer and the releasing captain (Lieutenant Ryan Mullarky) reviewed her ADR Packet. When they did so, there was no record on Thompson's 10-47 Reports that said she was supposed to be released to Justice 2000 personnel. As a result, neither officer knew that Thompson was supposed to be released to Justice 2000 personnel. Thompson was therefore released unconditionally (instead of being turned over to Justice 2000 personnel as she should have been).

After Thompson was released from the Jail, she went to her grandmother's house. Thompson's grandmother apparently persuaded Thompson to turn herself into Justice 2000. Later that day, Thompson did that and turned herself into Justice 2000.

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The Employer then opened an investigation into Thompson's release. The investigation was conducted by Lt. Jason Hodel of the Employer's Internal Affairs Division. Initially, Hodel's investigation focused just on Katona's conduct in Thompson's release. Later, Hodel expanded his investigation to include Lt. Mullarky's conduct in Thompson's release. Hodel

ultimately interviewed five people as part of his investigation. The five were Katona, Thompson, Mullarky, Fiscal Assistant Wanda Keyes and a case manager for Justice 2000. Hodel interviewed Katona two times and Thompson three times. Afterwards, Hodel wrote a report known as an “Investigative Summary”. In that report, he reached the following conclusions about Katona’s actions:

. . .

Deputy Daniel Katona completed 10-47 documents relating to the morning session, prior to the imposition of the Justice 2000 stipulation. Deputy Katona acknowledged that he failed to generate the new 10-47 documents when the cases were recalled during the afternoon session. He stated that he recorded the stipulation on his copy of the court calendar, but never created or completed updated 10-47 documents. As a result, the Justice 2000 stipulation was not relayed to the CCFC and Ms. Thompson’s CJIS information was not updated to indicate a Justice 2000 turnover mandate.

On Wednesday, February 8th, 2012, bail was paid on Ms. Thompson’s cases. As a result of Deputy Katona’s failure to complete the 10-47 documents indicating the Justice 2000 release stipulation, Ms. Thompson was unconditionally released. Ms. Thompson reported to Justice 2000 later the same day.

Deputy Katona takes responsibility for failing to generate 10-47 documents and for failing to accurately reporting (sic) Judge Cimpl’s orders during the afternoon hearing.

. . .

Based on those conclusions, Hodel found that Katona committed one departmental rule violation and two county civil service violations. The department rule he was accused of violating was 202.20 (Efficiency and Competence). It provides thus:

202.20 Efficiency and Competence

Members shall adequately perform the duties of their assigned position. In addition, sworn members shall adequately perform reasonable aspects of police work. “Adequately perform” shall mean performance consistent with the ability of equivalently trained members.

The County civil service rules he was accused of violating are part of Rule VII, Section 4(l). He allegedly violated subparagraph (l) which prohibits “Refusing or failing to comply with departmental work, policies or procedures” and subparagraph (u) which prohibits “Substandard or careless job performance”.

In his "Investigative Brief" that accompanied his summary, Hodel found that Lt. Mullarky committed no misconduct in this matter. The portion of Hodel's "Investigative Brief" that pertains to Mullarky provides thus:

Lieutenant Mullarky processed Ms. Thompson's release, which included no indicators that a Justice 2000 stipulation had been ordered relative to Ms. Thompson's cases. Lieutenant Mullarky stated that Ms. Thompson did not tell him that she was to be turned over to Justice 2000. He stated that had Ms. Thompson made such a statement, he would have investigated further. Lieutenant Mullarky acknowledged that if an inmate had told him that his/her restrictions were greater than the release documents indicated, it would be cause for investigation. He stated that he would suspend the release process and investigate the matter.

No indicators of a Justice 2000 turnover stipulation were presented to Lieutenant Mullarky at the time of the release. He processed Ms. Thompson's release according to the information that was provided to him. Lieutenant Mullarky states that Ms. Thompson did not tell him that she was to be turned over to Justice 2000.

...

Fiscal Assistant Wanda Keyes, who was working as the Jail Cashier at the time of the incident, had no recollection of the alleged interaction between Lieutenant Mullarky and Ms. Thompson. Ms. Thompson's claim that she informed Lieutenant Mullarky of the stipulation cannot be substantiated.

...

Lieutenant Hodel's findings were subsequently reviewed by the Sheriff. On April 12, 2012, Sheriff Clarke issued Order No. 2508 which indicated that Deputy Katona was suspended for three days for violating the three rules referenced above. Since the three rule violations referenced in Order No. 2508 are the same as the three rules referenced in Lieutenant Hodel's "Investigative Summary", it is apparent that the Sheriff adopted Lieutenant Hodel's findings as his own and disciplined Katona for the reasons set forth in Hodel's "Investigative Summary".

Based on the parties' collective bargaining agreement, Katona's suspension was appealed to arbitration.

...

The record shows that in the last decade or so, there have been about a dozen deputies in the department who have been disciplined for their role in an inmate's improper release.

The discipline which was imposed on these deputies varied. In two or three of the instances, the deputy received either a written warning or an EAD (Employee Activity Documentation) counseling. In six instances, the deputy received a one-day suspension. In three instances, the deputy received a three-day suspension. The three deputies in the last category all failed to accurately complete a 10-47 Report.

POSITIONS OF THE PARTIES

Association

The Association's position is that just cause did not exist for Deputy Katona's three-day suspension. The Association asks that the discipline be rescinded or reduced. It elaborates as follows.

The Association first addresses these basic facts. It acknowledges that during the Employer's internal investigation, Katona wrote in a report that he admitted "responsibility for not recreating the 10-47 Reports after Thompson's afternoon hearing." The Association also acknowledges that Thompson was later improperly released.

Having made those admissions, the Association contends that what the Employer did, though, was place all the blame for Thompson's improper release on Katona. As the Association sees it, that's unfair when one considers that three members of the jail staff could have discovered the Justice 2000 requirement. However, they all failed to do so.

First, the Association avers that the releasing captain (Mullarky) could have discovered the Justice 2000 requirement but failed to do so. To support that premise, the Association relies on the statement in Lt. Hodel's "Investigative Brief" that Thompson said "she told the releasing officer that she was to be turned over to Justice 2000." It also relies on Thompson's statement in that same document that the releasing officer (Mullarky) "checked the computer and told her that no Justice 2000 stipulation was indicated." As the Association sees it, these statements should have caused Mullarky to suspend Thompson's release until he could conduct a further investigation into the matter. The Association avers that if Mullarky had checked the Wisconsin Circuit Court Access Page (known as CCAP) webpage, he would have discovered the additional release conditions ordered by Judge Cimpl. The Association also submits that Mullarky could have reviewed Thompson's tier card. Had he done so, he would have discovered that Thompson had met with Justice 2000 personnel. Instead, Mullarky did neither of those things and released Thompson unconditionally. The Association argues that the Employer's reason for failing to discipline Mullarky for his conduct in this matter is unconvincing. While Lt. Hodel testified that he did not sustain the charges against Mullarky because he did not believe that Thompson was truthful, the Association maintains there was no incentive for Thompson to be untruthful regarding her improper release. Simply put, the Association disagrees with Hodel's conclusion that Thompson was untruthful in her statements relative to Mullarky. The Association contends that "had Mullarky done his job", Thompson's improper release would have been avoided.

Second, the Association contends that the (unnamed) POD officer could have discovered the Justice 2000 requirement, but also failed to do so. To support that premise, once again the Association relies on a statement in Lt. Hodel's "Investigative Brief" that Thompson said "she told her POD officer about the requirement that she be released to Justice 2000." As the Association sees it, this statement should have caused the POD officer to investigate Thompson's claim. Specifically, he could have investigated Thompson's claim by checking CCAP or her tier card. He did neither. The Association opines that "Shockingly, no attempt was made by the Sheriff's Office to investigate the POD officer to ascertain whether the non-action violated Sheriff's Office policy."

Third, the Association contends that the (unnamed) jail records (release) officer also could have discovered the Justice 2000 requirement, but failed to do so. According to the Association, that officer should have checked CCAP to ensure that the bail information was current. Had he done so, he would have discovered the Justice 2000 requirement. However, that officer, like the other two, also failed to catch the incorrect release information. The Association again notes that like the POD officer, the jail records (release) officer was not investigated and received no discipline for his failure to investigate Thompson's release.

In sum then, the Association submits that the Employer's disciplinary response in this case was inconsistent because Katona was not solely responsible for Thompson's improper release. According to the Association, the three people referenced above were too. The Association submits that if Mullarky, the POD officer, or the jail records (release) officer had done their jobs properly and conducted an investigation into the conditions of Thompson's release, they would have caught Katona's mistake, and Thompson's unconditional release would have been avoided. It further points out that only Katona was disciplined; the three employees referenced above were not. The Association notes that the County's brief is silent on why those three employees were not disciplined. As the Association sees it, if Katona was disciplined for his mistake, the other three employees should be too.

The Association argues in the alternative that even if Katona did commit workplace misconduct and violate one or more of the Employer's rules, there was still not just cause for the level of discipline imposed on him. Here's why. First, the Association addresses Katona's disciplinary history. It notes that before this incident occurred, Katona had only been suspended once in his entire 15-year career. It also points out that Katona had never been counseled or disciplined about anything related to completing 10-47 Reports. The Association further notes that when Katona was interviewed by Lt. Hodel as part of this case, Katona told Hodel that he has since become even more thorough in his review of 10-47 Reports, "double [and] triple check[ing] them when [he's] done." The Association contends that under these circumstances, a three-day suspension for his mistake was excessive. Second, the Association addresses the discipline handed out in other improper release cases. It contends that the discipline imposed in similar cases has varied. Sometimes it has been a counseling, sometimes a written warning, sometimes a one-day suspension and sometimes a three-day suspension. Notwithstanding that variety, the Association maintains that the "going rate" for an improper release is a one-day suspension. To support that claim, it cites Association President Felber's

testimony that six different deputies have received a one-day suspension for their role in improper release cases. As for the three cases which the Employer relies on where the employee received a three-day suspension for their role in an improper release case, the Association points out that the record does not contain any evidence regarding the disciplinary history of those three employees. The Association sees that as significant. Building on the foregoing, the Association submits that Katona was subjected to disparate (disciplinary) treatment. Accordingly, the Association asks the arbitrator to either rescind the suspension or reduce Katona's punishment to a level more fitting his past disciplinary history. According to the Association, a written reprimand or a counseling would likely eliminate any further problems with Katona in this area, especially given that Katona is now "double and triple checking" his 10-47 Reports.

County

The County's position is that just cause existed for Katona's three-day suspension. In its view, Katona committed workplace misconduct when he failed to properly complete Thompson's 10-47 Reports. That omission, in turn, resulted in Thompson being unconditionally released from custody (rather than being turned over to Justice 2000 as the judge ordered). Next, building on the premise that Katona committed workplace misconduct, the County maintains that the discipline which was imposed on Katona for that misconduct was warranted under the circumstances. It elaborates as follows.

First, although Katona did not testify at the hearing, the County notes at the outset that there's no question that Katona did what he is charged with doing. The County points out in this regard that during the course of the Employer's internal investigation, Katona admitted as much when he wrote the following in a report: "I do take responsibility for not putting TOT J2K on the 10-47's. . ." (Note: The initials "TOT J2K" stand for "turn over to Justice 2000").

Second, the County contends that the reason Katona's failure to properly record that information on the 10-47 Reports was workplace misconduct was this: one of Katona's job duties as a bailiff is to accurately complete the 10-47 Reports. Building on that premise, the County avers that the reason bailiffs need to accurately and thoroughly complete those reports is because others in the Department rely on those completed documents to do their job. In the context of this case, the County is referring to those employees at the jail who later review those 10-47 Reports and use them to decide whether or not an inmate can properly be released from custody. The County opines in its brief that "for that reason, the Office of the Sheriff takes a dim view of deputies who fail to accurately complete paperwork regarding the release of an inmate."

Third, as already noted, what happened here is that Katona failed to properly record that information on that report. Specifically, he failed to record on Thompson's two 10-47 Reports that she was to be turned over to Justice 2000. The County contends that this omission resulted in Thompson being unconditionally released from custody. The County

emphasizes that the problem with that, of course, was that Thompson was not supposed to be unconditionally released from custody; rather, she was to be turned over to Justice 2000 (as the judge ordered). The County opines that while Thompson later turned herself into Justice 2000 on her own volition, “the community should not have to rely on a hope that an improperly released inmate” would do that (i.e. turn themselves in).

Turning now to the level of discipline which was imposed, the Employer argues that a three-day suspension was reasonable under the circumstances. Here’s why. First, the Employer points out that Katona had previously received a one-day suspension in 2010. According to the Employer, it could – and did – take that suspension into account when it decided on the appropriate level of discipline here. Second, the County asserts that while the Association made a disparate treatment argument, it failed to prove that the disparate (disciplinary) treatment occurred here. In making that argument, the Employer acknowledges that other employees have received less discipline for their involvement in improper releases than Katona did. Specifically, six of them got a one-day suspension. However, as the Employer sees it, there was a logical non-discriminatory reason for that, namely that Association President Felber – who testified about that matter – was not aware of their past disciplinary histories. According to the County, that means that the Association did not prove that the six employees who each received a one-day suspension for their involvement in an improper release had disciplinary histories “that were similar or dissimilar to Deputy Katona’s.” The County therefore requests that the arbitrator give deference to the discipline imposed by the Sheriff, and uphold Katona’s three-day suspension.

DISCUSSION

The parties stipulated that the issue to be decided here is whether there was just cause to suspend Deputy Katona for three days. I answer that question in the affirmative, meaning that I find the Employer did have just cause to impose a three-day suspension on Katona. My rationale follows.

The threshold question is what standard or criteria is going to be used to determine just cause. The phrase “just cause” is not defined in the collective bargaining agreement, nor is there contract language therein which identifies what the Employer must show to justify the discipline imposed. Given that contractual silence, those decisions have been left to the arbitrator. Arbitrators differ on their manner of analyzing just cause. While there are many formulations of “just cause”, one commonly accepted approach consists of addressing these two elements: first, did the employer prove the employee’s misconduct, and second, assuming the showing of wrongdoing is made, did the employer establish that the discipline which it imposed was justified under all the relevant facts and circumstances. That’s the approach I’m going to apply here.

As just noted, the first part of the just cause analysis being used here requires a determination of whether the employer proved the employee's misconduct. In making that call, I'm first going to address what Katona did. After that, I'll address what happened as a result of Katona's action.

Although Katona did not testify at the hearing, there's no question about what he did. What he did was this: he did not record on Thompson's 10-47 Reports that she was to be turned over to Justice 2000. The problem with that, of course, is that he should have (recorded that information). That is one of his basic job duties, and he failed to perform it. He therefore dropped the proverbial ball when he failed to write down that information on Thompson's 10-47 Reports.

I have no trouble finding that Katona's failure to make the entries on Thompson's 10-47 Reports constituted misconduct warranting discipline. Here's why. Employers have a legitimate and justifiable interest in ensuring that employees perform their work competently, completely and accurately. Employers that tolerate incompetent and sloppy work by their employees can, under certain circumstances, expose themselves to legal and financial risks for doing so. That is why the County has adopted a civil service rule which prohibits "substandard or careless job performance" by employees and why the Sheriff's Department has adopted a work rule requiring department members to "adequately perform" their job duties. As the County sees it, Katona's failure to accurately complete Thompson's 10-47 Reports fits into both categories of prohibited behavior. I concur, and find that on that day, Katona failed to "adequately perform" his job duty of accurately filling out 10-47 Reports. That conduct also constituted "substandard or careless job performance." Since Katona violated those two rules, he committed misconduct for which he could be disciplined. Given that finding, it's my view that I need not address the remaining alleged rule violation.

The focus now turns to what happened as a result of Katona's action. What happened, of course, was that Thompson was later unconditionally released from jail. That wasn't supposed to happen. Thompson was supposed to be released to the custody of Justice 2000 (as the judge ordered).

The Employer assigned fault for Thompson's improper release to Katona. The Association objects to that, and contends that fault should be assigned elsewhere. Specifically, the Association points the proverbial finger of blame at three employees who work in the jail (i.e. Mullarky, the POD officer and the jail records (release) officer). According to the Association, they should have caught Katona's mistake on Thompson's 10-47 Reports.

First, the Association contends that the releasing captain (Mullarky) could have discovered the Justice 2000 requirement, but failed to do so. To support that premise, the Association relies on the statement in Lt. Hodel's "Investigative Brief" that Thompson said "she told the releasing officer [Mullarky] that she was to be turned over to Justice 2000." It also relies on Thompson's statement in that same document that the releasing officer (Mullarky) "checked the computer and told her that no Justice 2000 stipulation was indicated."

If these two statements were indeed made, I could easily accept the Association's contention that Mullarky should have suspended Thompson's release (meaning kept her in custody and not released her) until he could investigate the matter further. The key word in the previous sentence is the first word (i.e. "if"). The reason that word is key is because Lt. Hodel found – in his "Investigative Brief" – that he did not believe that Thompson was truthful (in making those statements). In light of Hodel's credibility finding, it was incumbent upon the Association to successfully challenge his finding in that regard. It could have done that by calling either Thompson or Mullarky as a witness at this hearing. That would have allowed me to make my own credibility call concerning whether Thompson did, or did not, make those statements. However, neither was called as a witness at the instant arbitration hearing. Since I didn't hear testimony from either Thompson or Mullarky, I'm hard pressed to reach a credibility determination at variance from Lt. Hodel's finding. Said another way, for me to find differently than Lt. Hodel did, I need a factual basis to do so. That is lacking here. That being so, I accept Lt. Hodel's finding that Thompson was untruthful in her statements concerning what she said to Mullarky and what he said back to her. The Association also faults Mullarky for not checking the CCAP webpage and Thompson's tier card before he released Thompson. The problem with that contention is that the department does not rely on either of the foregoing to identify the orders issued by a judge; rather, it relies on what is listed on the 10-47 Report. That means that when Mullarky checked Thompson's 10-47 Reports, they didn't say that she was to be released to Justice 2000 because Katona hadn't written that information on the Reports. Under these circumstances, fault for Thompson's improper release cannot fairly be attributed to Mullarky.

Second, the Association contends that the (unnamed) POD officer could have discovered the Justice 2000 requirement, but failed to do so. To support that premise, the Association again relies on a statement in Lt. Hodel's "Investigative Brief" that Thompson said "she told her POD officer about the requirement that she be released to Justice 2000." Once again, if this statement was indeed made, I could easily accept the Association's contention that the POD officer should have investigated Thompson's claim (assuming for the sake of discussion that that was part of his job). However, Lt. Hodel's finding – in his "Investigative Brief" – that he did not believe Thompson was truthful is applicable here as well. In light of Hodel's credibility finding, it was incumbent upon the Association to successfully challenge his finding in that regard. It could have done that by calling either Thompson or the (unnamed) POD officer as a witness at this hearing. That would have allowed me to make my own credibility call concerning whether Thompson did, or did not, make the statement just referenced. However, neither was called as a witness at the instant arbitration hearing. Since I didn't hear testimony from either Thompson or the (unnamed) POD officer, I'm hard pressed to reach a credibility determination at variance from Lt. Hodel's finding. I therefore find that the Association did not prove that Thompson made the statement attributed to her. Thus, fault for Thompson's improper release cannot fairly be attributed to the (unnamed) POD officer.

Third, the Association contends that the (unnamed) jail records (release) officer also could have discovered the Justice 2000 requirement, but failed to do so. According to the Association, that officer should have checked CCAP to ensure that the bail information was

current. However, as previously noted, the department does not rely on CCAP to identify the orders issued by a judge; rather, it relies on what's listed on the 10-47 Report. That means that when the (unnamed) jail records (release) officer checked Thompson's 10-47 Reports they didn't say that Thompson was to be released to Justice 2000 because Katona hadn't written that information on the Reports. Under these circumstances, fault for Thompson's improper release cannot fairly be attributed to the (unnamed) jail records (release) officer.

Based on the foregoing, I find that fault for Thompson's improper release cannot fairly be attributed to any of the three jail employees just referenced. Instead, fault for that improper release lies with Katona alone. Had Katona done what he was supposed to do (i.e. written down on Thompson's 10-47 Reports that she was to be released to Justice 2000), then Thompson would not have subsequently been unconditionally released.

. . .

The second part of the just cause analysis being used here requires a determination of whether the penalty which the Employer imposed for this misconduct (i.e. a three-day suspension) was appropriate under all the relevant facts and circumstances.

When an employer imposes a multi-day suspension on an employee that is subject to review under a just cause standard, it has to base the length of the suspension on some objective factors which can withstand arbitral scrutiny. Said another way, the Employer has the burden of showing that the punishment it meted out was not excessive. I find that the Employer met that burden for the following reasons.

First, when an employer decides that an employee's misconduct warrants advancing him/her to the suspension part of the progressive disciplinary sequence, they usually start with a one-day suspension (as opposed to a multiple-day suspension). The record shows that the Employer had already done that for Katona. Specifically, he received a one-day suspension in 2010. When an employee has already been suspended – as was the case here – the Employer can obviously take that into account when it decides on the appropriate level of discipline for subsequent misconduct. The rationale for this is that an employee who has already been suspended for misconduct is rightly exposed to more severe consequences for his action than, say, an employee with a clean record.

Second, the suspension just referenced didn't have anything to do with completing 10-47 Reports. Building on that point, the Association notes that Katona had not previously been counseled or disciplined for anything related to completing 10-47 Reports. As the Association sees it, that means that the Employer should have given Katona a warning – rather than a suspension – for the problem 10-47 Reports involved here. While there are some labor agreements that require that before an employee can be suspended the employee must first receive a warning for the exact same type of offense, there's nothing in this collective bargaining agreement that requires that. That being so, the Employer was not contractually obligated to impose a warning – rather than a suspension – for Katona's misconduct herein.

Third, the Association made a disparate treatment argument that attempted to show that other employees engaged in the same type of misconduct, but received lesser discipline (than was imposed on Katona). The record shows in this regard that in the last decade or so, about a dozen deputies have been disciplined for their role in improper release cases. The discipline imposed on these deputies varied. A couple of deputies received a counseling or a written warning, six deputies received a one-day suspension, and three deputies received a three-day suspension. Not surprisingly, the Association extrapolates from this data that the “going rate” for an improper release is a one-day suspension and urges me to find accordingly. I could have accepted the Association’s premise (i.e. that a one-day suspension was the appropriate penalty here) if the facts in those six cases were similar to the facts of this case and the employees in those six cases had similar disciplinary histories to Katona. However, the record does not identify any of the facts in those six cases or the employees’ disciplinary histories. Simply put, that’s problematic, and precludes me from accepting the Association’s premise that the Employer had to impose a one-day suspension (or less) on Katona. Given that finding, the question becomes which of the remaining cases – if any - are the most comparable. I find that the three cases most directly on point are the Wheeler, McKenzie and Arredondo cases. In those three cases, the deputy failed to accurately complete a 10-47 Report. Since their misconduct mirrors Katona’s misconduct, I consider those three cases to factually be the most directly on point with this case. Additionally, in those three cases, the deputies received a three-day suspension (for failing to accurately complete a 10-47 Report). Since that’s the same discipline that the Employer imposed on Katona (for the same misconduct), I find that Katona was not subjected to disparate treatment in terms of the punishment imposed.

Accordingly, then, I find that Katona’s three-day suspension was not excessive, disproportionate to his misconduct, or an abuse of management discretion, but rather was reasonably related to his proven misconduct. The County therefore had just cause to suspend Katona for three days.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

That there was just cause to suspend Deputy Daniel Katona for three days. Therefore, the appeal is denied.

Dated at Madison, Wisconsin, this 1st day of November, 2012.

Raleigh Jones /s/

Raleigh Jones, Arbitrator

REJ/gjc
7834