BEFORE THE ARBITRATOR

In the Matter of a Dispute Between

MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION

and

MILWAUKEE COUNTY

Case 817
No. 73105
MA-15289

(Robert Pekar Suspension Appeal)

AWARD NO. 7905

Appearances:

Ryan MacGillis, MacGillis Wiemer, LLC, 11040 W. Bluemound Road, Suite 100, Wauwatosa, Wisconsin, 53226, appearing on behalf of Milwaukee Deputy Sheriffs' Association.

Lee Jones, Assistant Corporation Counsel, Milwaukee County, 901 N. 9th Street, Suite 303, 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 Employer) were parties to a collective bargaining agreement which provided 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 Robert Pekar's suspension. The undersigned was so designated. A hearing was held in Milwaukee, Wisconsin, on August 8, 2014. The hearing was not transcribed. The parties filed briefs, and the Association filed a reply brief, whereupon the record was closed on September 23, 2014. Having considered the evidence, the arguments of the parties and the record as a whole, the undersigned issues the following Award.

ISSUE

At the hearing, the parties stipulated to the following issue:

> Was there just cause to suspend Deputy Robert Pekar? If not, what is the appropriate remedy?

In their brief though, the County framed the issue differently from that just noted. I'm going to hold the County to the issue which they stipulated to at the hearing. Thus, I'm going to decide the issue referenced above.

BACKGROUND

The County operates a Sheriff's Department. The Association is the exclusive collective bargaining representative for the Department's deputy sheriffs. Another group of employees in the Department are corrections officers. The corrections officers are considered civilians and are not represented by the Association.

Deputy Robert Pekar is a 23-year veteran of the Department. He currently works in the Department's Courts Division as a bailiff and did so throughout all of 2013. Prior to the discipline being reviewed herein, Pekar had received no formal discipline (meaning he had previously never been suspended or received a written reprimand).

In 2013, Pekar had a number of health issues which, in turn, caused him to use a lot of sick leave. This case involves Pekar's 2013 sick leave usage.

In 2013, Pekar called in sick for three days in February, three days in March, five days in June, two days in October and one day in December. Specifically, he was absent on February 11, 12 and 13; March 19, 20 and 21; June 12, 13, 14, 17 and 18; October 25 and 28; and December 5, 2013. On these fourteen days, he missed his scheduled assigned shift and took sick leave. Given the way these absences were clumped together and occurred in five separate months, the Department counted these fourteen absences as being five separate "incidents."

After his absence on October 25, 2013, Pekar received an Employee Activity Documentation (EAD) from his supervisor. EADs are used to "recognized an employee's performance or to document counseling." EADs are not considered discipline. The EAD provided thus:

> Deputy Robert Pekar called in sick from duty on October 25, 2013. This is Pekar's 4th incident within a one-year time frame. Per MCSO policy 202.04(D) Sick Abuse, Directive 16-08, dated August 21, 2008, and (sic) employee's fourth incident shall be noted on an Employee Activity Documentation form.
>
> Deputy Pekar has had the following incidents:
>
> 1. February 11, 2013 – February 13, 2013

2. March 19, 2013 – March 21, 2013
3. June 12, 2013 – June 18, 2013
4. **October 25, 2013**

Deputy Pekar has been advised that addition (sic) incidents will result in a referral to the Internal Affairs Division for appropriate disposition.

The policy referenced in the EAD (i.e. 202.04D Sick Leave/Absenteeism, also known as Directive 16-08) provides thus:

202.04D SICK LEAVE/ABSENTEEISM

202.04.1D PURPOSE

Absenteeism and tardiness, by a relatively few employees, can cause staffing problems. Absenteeism causes employees to be "held over" to work forced overtime after working their assigned shifts.

Some employees may not understand the basic reasons for a paid absence plan and the cost of absenteeism in general. A paid absence plan is meant to insure that employees' pay will continue when they are ill. The plan is not intended to be an additional off-duty fringe benefit.

Supervisors will:

1. Maintain written records of all absences and the reason given for the absences
2. Identify the chronic absentee or potential abuser
3. Identify the immediate causes of the absence and any possible underlying causes
4. Assist the absentee to correct the basic and immediate causes.

> **202.04.2D POLICY**
>
> The following actions will be taken with any employee who is absent within a one year time frame (year is defined as a calendar year – January through December):
>
> 1st through 3rd Absence: Absence recorded by supervisor
>
> 4th Absence: Noted on Employee Activity Documentation record
>
> 5th and Subsequent Absence: Refer documentation to Office of Professional Standards for appropriate disposition. Based on the disposition, appropriate disciplinary action, if necessary, will be decided by the Sheriff and may require a doctor's excuse and increment denial.

Pekar's absence on December 5, 2013 was considered his fifth sick leave incident within a one-year period. Per Directive 16-08 (i.e. the 202.04D Sick Leave/Absenteeism policy quoted above), Pekar's sick leave usage was "referred" to the Department's "Office of Professional Standards for appropriate disposition." That office – also known as Internal Affairs – in turn, tasked Sgt. James Novotny with "investigating" Pekar's 2013 sick leave usage. Novotny did so and afterwards wrote a one-page report called an "Investigative Summary." It provided in pertinent part:

> Deputy Sheriff Robert Pekar called in on December 5, 2013, making this his 5th incident of sick/absence usage in a one-year time frame. Deputy Pekar violated Milwaukee County Sheriff Office rules and regulations and Civil Service rules relative to sick/absence and unexcused, unauthorized or excessive absence.
>
> Deputy Pekar has the <u>following</u> incidents of sick leave/absenteeism within a one-year timeframe:
>
> 1. February 11 – February 13, 2013 Supervisor Interview
> 2. March 19 – March 21, 2013 Supervisor Interview
> 3. June 12 – June 18, 2013 Supervisor Interview
> 4. October 25 – October 28, 2013 EAD signed October 29, 2013
> 5. December 5, 2013 IAD referral
>
> The above listed incidents were not approved under FMLA or Civil Service. Copies of Ceridian timesheets accompany this report.

The "rules and regulations" which Novotny referenced above were Department Rule 202.04D Sick Leave/Absenteeism and County Civil Service Rules VII(4)(l) and (o). The latter two rules provide thus:

> (l) Refusing or failing to comply with departmental work rules, policies or procedures.
>
> * * *
>
> (o) Unexcused, unauthorized, or excessive absenteeism.

Novotny's findings were subsequently reviewed by Inspector Richard Schmidt. On March 6, 2014, Inspector Schmidt issued a Notice of Suspension which indicated that Pekar was suspended for two days for violating the three rules referenced above. The wording in the Notice of Suspension was identical to Novotny's "Investigative Summary," so it is apparent that Inspector Schmidt adopted Novotny's findings as his own and disciplined Pekar for the reason set forth in Novotny's "Investigative Summary."

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

* * *

Prior to being suspended, Pekar was not interviewed by anyone regarding his five sick leave occurrences in 2013 or why he took sick leave on those occasions.

* * *

The Department has two policies for sick leave usage; one for deputies and one for corrections officers and civilians in the Department. The two policies are similar in this respect: both end with language saying: "refer documentation to … for appropriate disposition. Based on the disposition, appropriate disciplinary action, if necessary, will be decided by the Sheriff …." The two policies are different in this respect: the policy for the civilians and corrections officers requires that this happen "after the 3rd and subsequent incident." In contrast, the policy for the deputies requires that this happen "after the 5th and subsequent absence." Thus, the policy that applies to the deputies is more lenient than the policy for civilians and corrections officers in the Department. Said another way, the sick leave policy for civilians and corrections officers is more restrictive than the sick leave policy for deputies.

The record shows that it is uncommon for deputies to be disciplined for their sick leave usage. Insofar as the record shows, it has happened just twice in recent years (with the instant case being one of the two). In both those cases, the deputy received a two-day suspension. Both of those suspensions are being challenged before this arbitrator.

It is much more common for civilians and corrections officers in the Department to be disciplined for their sick leave usage. The record shows that in the two-year period from 2012 to 2014, 43 civilians and corrections officers were suspended for violation of the Department's sick leave policy. The discipline imposed on those employees varied. Six employees received a 1-day suspension, seven employees received a 2-day suspension, eleven employees received a 3-day suspension; thirteen employees received a 5-day suspension; one employee received a 7-day suspension; five employees received a 10-day suspension; and three employees were discharged.

POSITIONS OF THE PARTIES

Association

The Association's position is that Deputy Pekar's 2013 absences did not require discipline under the Employer's absenteeism policy. Thus, it's the Association's view that no misconduct was shown. In the alternative, the Association argues that even if Pekar's 2013 absences did violate the Employer's absenteeism policy, his conduct did not warrant a two-day suspension. According to the Association, that discipline was excessive. It elaborates as follows.

The Association submits at the outset that, based on the facts and circumstances of this case, it was not necessary to discipline Pekar for his 2013 absences. The Association characterizes Pekar as an "unlucky individual who had several health issues in 2013." Be that as it may, the Association notes that Pekar testified without contradiction that he only used sick leave when he was sick. Also, according to the Association, there is no evidence that Pekar lied about being sick on the days in question. The Association also maintains that there is no evidence that Pekar abused sick leave or was a chronic absentee.

Next, the Association focuses more specifically on the Employer's absenteeism policy. First, it contends that that policy does not require an employee to be disciplined for a fifth or subsequent sick occurrence. It notes that the policy states that "appropriate disciplinary action, if necessary, will be decided by the Sheriff. …" The Association defines the word "necessary" as something "that is needed for a purpose or reason." Putting that definition in context, the Association avers that under this policy, "disciplinary action is discretionary and should be issued when needed for a purpose or reason." Said another way, discipline under this policy is not automatic or mandatory after five occurrences. Second, the Association disputes the Employer's contention that the absenteeism policy is a no-fault policy. According to the Association, the County's argument that the policy is a no-fault policy "is not adequately supported by the evidence and contradicts the plain language of the Policy." The Association avers that the County's contention that the absenteeism policy is a no-fault policy is based on the testimony of Lieutenant Jason Hodel, who testified that "no intent is required to violate the policy; the only fact that must be established is whether or not the deputy called in sick and missed work." The Association argues that Lieutenant Hodel's testimony is unpersuasive because his interpretation of the policy conflicts with the policy's "if necessary" provision. The Association also maintains that "the principles of statutory interpretation" support the Association's interpretation of the policy that discipline is not automatic or mandatory after the

fifth occurrence. Third, the Association points out that the Employer provided no warning to Pekar that a fifth sick occurrence would automatically result in discipline. The EAD Pekar received after his fourth sick occurrence only states "additional incidents will result in a referral to the Internal Affairs Division for appropriate disposition." Also, it points out that the EAD does not indicate discipline for a fifth occurrence is mandatory. Fourth, the Association maintains that it is contrary to the purpose of the paid absenteeism policy to discipline Pekar for using sick time five times. That policy states that the purpose of the County's paid absence plan is to "insure that employees' pay will continue when they are ill." The Association submits that Pekar had earned the sick time he used. Thus, it was available to Pekar to use when he got sick or had a medical issue. The Association argues that, as long as Pekar was not abusing his sick time, he should not be disciplined for his 2013 absences.

The Association argues in the alternative that even if five absences constitutes misconduct under the Employer's absenteeism policy warranting discipline, there was still not just cause to support a two-day suspension. Here's why. First, it repeats the contentions that it made above that there was no evidence presented that Pekar used sick time inappropriately, lied about being sick, abused sick leave, or was a chronic absentee. Second, the Association addresses Pekar's disciplinary history. It notes that before this discipline was imposed, Pekar had never been disciplined in his 23 years with the Department. The Association sees that as significant. Third, the Association addresses the matter of comparables. It notes that only two of the employees listed on Joint Exhibit 11 were deputies (and they were Deputies Pekar and Metz). It points out that Metz' disciplinary appeal hearing is still pending before this arbitrator. The other 43 employees disciplined for absenteeism were corrections officers or other civilian Department staff. The Association points out that it only represents deputies; it does not represent corrections officers or other civilian Department staff. As the Association sees it, that makes them easily distinguishable from the deputies. The Association also notes that corrections officers and other Department staff are governed by a different sick leave/absenteeism policy that does not apply to deputy sheriffs. The Association also avers that the County provided no other specifics regarding the corrections officers' length of service, discipline history, or the facts and circumstances surrounding the disciplines. According to the Association, "this information is crucial to the just cause analysis" (citing a previous arbitration award between the parties). The Association also notes that the suspensions referenced in Joint Exhibit 11 run the gamut from one-day to ten-day suspensions. Finally, the Association submits that, at the hearing, the County offered no explanation as to why it decided a two-day suspension was warranted here. The Association sees that as a fatal flaw in the Employer's case.

The Association therefore asks the arbitrator to reduce Pekar's discipline to a level more fitting his past disciplinary history. According to the Association, a written reprimand would likely remedy any further sick leave usage problems Pekar might have.

County

The County's position is that just cause existed for Pekar's two-day suspension. In its view, Pekar committed workplace misconduct when he had five occurrences/absences in calendar year 2013. Building on the premise that Pekar committed workplace misconduct by that

conduct, the County maintains that the discipline which was imposed on him for that misconduct was warranted under the circumstances. It elaborates as follows.

Before delving into the absenteeism policy involved here, the County gives some background about what it calls "the impact of calling in sick" to the Department. It notes that the Sheriff's Department is a 24-hour per day / 7-day a week operation that is responsible for maintaining order and control in the County jail, the County mental health hospital, parks and roadways. It further notes that when a deputy calls in sick, another deputy has to cover that shift. To do that, someone who was previously not scheduled to work has to either come in to work early or stay longer at work to cover for the missing deputy.

Having given that background, the County next gives an overview of the absenteeism policy involved in this discipline case. According to the County, the Department's sick leave policy covering deputies – 202.04D – is a "no fault" policy which means that no intent is required to violate that policy. The County maintains that under that policy, if an employee has five occurrences (i.e. absences) within a calendar year, they are referred to the Internal Affairs Division for what the policy calls "appropriate disposition" and "appropriate disciplinary action." The County implies that per the policy, five occurrences (i.e. absences) in a calendar year qualify as "excessive absenteeism." The Employer characterizes the deputies' policy as a "very forgiving" and "lenient" policy in that it allows deputies to have five sick leave occurrences (i.e. absences) in a calendar year before a case is forwarded to the Internal Affairs Division for investigation. Also, the Employer notes that when a deputy calls in sick, the Department assumes they are legitimately sick. Finally, the Employer cites the testimony of Lieutenant Hodel of the Internal Affairs Division for the proposition that "most deputies have no problem adhering to this policy."

Next, the County submits that there's no question that Pekar called in sick and missed work on all the days in question in 2013. Building on that, the County makes the following three assumptions: 1) that there's no question that Pekar had five occurrences (i.e. absences) in 2013; 2) that having that number of occurrences (i.e. absences) in one calendar year automatically constitutes workplace misconduct; and 3) that discipline was warranted for that misconduct.

Turning now to the level of discipline which was imposed, the Employer argues that a two-day suspension was reasonable under the circumstances. Here's why. The Employer relies exclusively on Joint Exhibit 11. According to the County, that exhibit demonstrates that from January 2012 through the time of the hearing, the "average suspension for employees who violated [Department] sick leave policies was 4.27 days." The Employer extrapolates from this document that "the 2-day suspension given in this case is well within the parameters of reasonableness and is consistent with the punishment others have received."

Building on the foregoing, the County asks the arbitrator to give deference to the discipline imposed on Pekar and uphold his two-day suspension.

DISCUSSION

The parties stipulated that the issue to be decided here is whether there was just cause to suspend Deputy Pekar. My answer to that question is split as follows. I find that the Employer did have just cause to discipline Pekar for violating Rule 202.04D. I'll explain why later. However, I further find that the discipline which the Employer imposed on Pekar for that rule violation (i.e. a two-day suspension) is excessive for the reasons noted later. Accordingly, I reduce Pekar's discipline from a two-day suspension to a one-day suspension. My rationale follows.

The threshold question is what standard is going to be used to determine just cause. The phrase "just cause" is not defined in the parties' 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 analyzing what "just cause" means, one commonly accepted approach – and the approach the undersigned has applied in hundreds of discipline cases - 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 it imposed on the employee was commensurate with the offense given 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. Attention is now turned to making that call.

I'm going to start by reviewing the following facts. There's no question that Pekar used a lot of sick leave in 2013. That's because he called in sick on 3 days in February, 3 days in March, 5 days in June, 2 days in October and 1 day in December. On those 14 days, he missed his scheduled assigned shift and took sick leave.

I'm first going to comment on how those absences were counted. The traditional way of counting absences is to treat each day of missed work as an independent and separate absence. That's not how the Employer counted them here, though. What the Employer did here, because of the way these absences were clumped together and occurred in five separate months, was to count the fourteen absences noted above as being just five separate occurrences. Thus, by the Employer's count, Pekar's fifth occurrence was his December 5 absence. In this case, I'm going to defer to the Employer's counting method. Thus, in this case, it is assumed for the sake of discussion that Pekar had five sick leave occurrences in 2013.

The next question to be answered is whether having five sick leave occurrences in a calendar year constitutes workplace misconduct.

In answering that question, I've decided to note at the outset that in some misconduct cases, there's some subjective discretion involved in deciding whether the conduct is, or is not,

misconduct. Take, for example, a routine theft case. In that type of case, the arbitrator has to decide – among other things – whether the employee's conduct actually constituted theft.

In this case though, there's no subjective discretion involved in deciding whether the employee's conduct is, or is not, misconduct. That's because the Employer has adopted a work policy that essentially eliminates the subjective discretion referenced above. I'm referring, of course, to Policy 202.04D. That's the sick leave policy that applies to the deputies. The portion of that policy that is applicable here is the part in subsection 2D that provides thus:

> 5th and Subsequent Absence: Refer documentation to Office of Professional Standards for appropriate disposition. Based on the disposition, appropriate disciplinary action, if necessary, will be decided by the Sheriff and may require a doctor's excuse and increment denial.

What's at issue in this case is whether this language means that having five absences/occurrences in a calendar year automatically constitutes workplace misconduct. The Employer submits that that's what it means. The Association disagrees, noting that this language doesn't explicitly say that discipline automatically follow a fifth absence/occurrence. On that point, I agree with the Association. When language is mandatory, there's usually no question that something will automatically occur. However, when one reads the language just quoted, I don't think it makes it crystal clear what happens after an employee has five absences/occurrences in a calendar year. That's because all the language says is that if there's a fifth absence in a calendar year, "appropriate disciplinary action, if necessary, will be decided by the Sheriff … ." The phrase "if necessary" implies that discipline is discretionary and not automatic. That being so, if all I had to decide this case was just the language quoted above, I'd interpret that language to mean that having five absences/occurrences in one calendar year does not automatically constitute misconduct per se; instead, it's discretionary with the Sheriff what happens after an employee has five absences/occurrences in a calendar year.

However, I've got more to work with in this case than just the language quoted above. Specifically, there's also the absenteeism policy for the corrections officers and civilians in the Department to consider. As noted in the BACKGROUND section, the absenteeism policy for the corrections officers and civilians is similar to the deputies' policy in this respect: both end with language saying: "refer documentation to … for appropriate disposition. Based on the disposition, appropriate disciplinary action, if necessary, will be decided by the Sheriff …." Thus, the absenteeism policy for the corrections officers and civilians contains the same "if necessary" language that's in the deputies' absenteeism policy. Given the similarity in language, it's reasonable to look at how the absenteeism policy for the corrections officers and civilians has been applied. When that's done, it's very telling. Here's what it shows. Joint Exhibit 11 shows that in the two-year period of 2012 to 2014, 43 corrections officers and civilians were disciplined for violating the absenteeism policy that applied to them. In those 43 instances, after the employee hit the number of absences specified in their policy (i.e. three absences), they were automatically disciplined. In other words, although their absenteeism policy doesn't expressly say that discipline automatically follows when they hit their third absence, that's what happened

to 43 corrections officers and civilians in the Department in a recent two-year period. Insofar as the record shows, there were no corrections officers and civilians who were not disciplined when they hit their third absence/occurrence in a calendar year. That evidence satisfies me that the absenteeism policy for the corrections officers and civilians has historically been applied to mean that if an employee has three absences/occurrences in a calendar year, that constitutes misconduct per se and some level of discipline is imposed.

Since the absenteeism policy for the deputies contains the same nebulous "if necessary" language that is contained in the absenteeism policy for the corrections officers and civilians, it just makes sense to give both policies the same meaning in terms of what happens after an employee hits a certain number of absences/occurrences in a calendar year (i.e. three for the corrections officers and civilians and five for the deputies). I therefore find that even though the deputies' absenteeism policy doesn't expressly say that the number five is a maximum, and that if a deputy has five absences/occurrences in a calendar year that discipline automatically follows, that's what the policy nonetheless means. That's because that's the way the same language has been interpreted and applied in the Department to dozens of corrections officers and civilians (albeit, with their maximum number being three). That being so, I've decided to give deference to the Department's historical interpretation and application of their policy, rather than impose my own interpretation of same on the parties. Thus, I find that while subsection 2D of the deputies' absenteeism policy doesn't expressly say that having five absences/occurrences in a calendar year constitutes workplace misconduct per se, that's the way that language has come to be interpreted and applied in the Sheriff's Department.

This finding yields the following results: Pekar had five absences/occurrences in 2013. Once he hit absence/occurrence number five in that calendar year, he committed misconduct per se for which he could be disciplined.

* * *

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 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 did not meet that burden for the following reasons.

First, as noted in the BACKGROUND section, prior to this matter, Pekar had a clean disciplinary record with no written warnings or suspensions. Thus, he had not been disciplined previously. That's significant, given that Pekar has been with the Department for 23 years.

Second, when an employer decides to discipline an employee with a clean disciplinary history for misconduct that is not a co-called cardinal offense, they usually start with a one-day

suspension. That didn't happen here. Instead, Inspector Schmidt decided that a suspension of that length was not long enough and he imposed a two-day suspension. The crux of this case is whether that discipline was warranted.

Inspector Schmidt did not testify at the hearing about why he selected the number he selected. Instead, the Employer offered an exhibit (i.e. Joint Exhibit 11) to try to justify Inspector Schmidt's selection of a two-day suspension. That exhibit purports to show what discipline was imposed on 43 corrections officers and civilians who violated their absenteeism policy in the two-year period from 2012 to 2014. As was noted in the BACKGROUND section, the discipline imposed on those employees varied. Six employees received a 1-day suspension, seven employees received a 2-day suspension, eleven employees received a 3-day suspension; thirteen employees received a 5-day suspension; one employee received a 7-day suspension; five employees received a 10-day suspension; and three employees were discharged. The basic question to be answered here is whether the data just noted is sufficient to satisfy the Employer's burden of showing that the punishment it meted out to Pekar was not excessive. Certainly if all I looked at was the data itself, it would indeed stand for the proposition that these 43 employees were suspended – on average – for over four days each for violation of their absenteeism policy. However, all I've got in the record is that data; no other specifics are provided about those 43 employees. Specifically, I don't know anything about their length of service, their disciplinary history, or the facts and circumstances surrounding the disciplines. As I've noted in other arbitrations with these parties, that information – which is lacking here – is crucial to the just cause analysis. Thus, while I looked at the absenteeism policy for the corrections officers and civilians for guidance in interpreting the meaning of the deputies' absenteeism policy, I'm not going to look at the corrections officers and civilians to determine what level of discipline is appropriate here. That's because the corrections officers and civilians are not represented by the Association and are, in fact, unrepresented employees.

In my view, the foregoing points militate against a two-day suspension. I therefore conclude that a two-day suspension was excessive under the circumstances.

Given that finding, the final question to be answered is what discipline is appropriate under the circumstances. The Association asks me to reduce the discipline to a written warning. I decline to do that. Here's why. While there are some labor agreements that require that an employee must receive a written warning before a suspension can be issued, there's nothing in this collective bargaining agreement that requires that. That being so, the Employer was not contractually obligated to impose a written warning – rather than a suspension – for Pekar's misconduct herein. I find that since this was Pekar's first offense warranting discipline, a one-day suspension suffices as the appropriate level of discipline. Accordingly, I reduce Pekar's discipline from a two-day suspension to a one-day suspension. The Employer shall make Pekar whole for one day's pay.

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

AWARD

1. That there was just cause to discipline Deputy Pekar for violating the deputies' absenteeism policy in 2013; and

2. That just cause does not support a two-day suspension for that misconduct. That punishment was excessive and is therefore reduced to one-day suspension. The County is directed to make Pekar whole for one day's pay.

Dated at Madison, Wisconsin, this 29th day of January 2015.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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Raleigh Jones, Arbitrator