BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION

and

MILWAUKEE COUNTY

Case ID: 161.0029
Case Type: MA

(Elizabeth Freuck Suspension)

AWARD NO. 7942

Appearances:

Sean Lees, MacGillis Wiemer, LLC, Attorneys at Law, 11040 West Bluemound Road, Suite 100, Wauwatosa, Wisconsin, appearing on behalf of Milwaukee Deputy Sheriffs' Association.

Carrie Theis, Assistant Corporation Counsel, Milwaukee County, 901 North Ninth Street, Room 303, Milwaukee, Wisconsin, 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, 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 Elizabeth Freuck's suspension. The undersigned was so designated. A hearing was held in Milwaukee, Wisconsin on April 27, 2017. The hearing was not transcribed. Afterwards, the parties filed briefs whereupon the record was closed on May 17, 2017. 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 Elizabeth Freuck for 10 days, with 20 days stayed for 1 year? If not, what is the appropriate remedy?

FACTS

The County operates a Sherriff's Department, hereinafter referred to as the department. The Association is the exclusive collective bargaining representative for the department's deputy sheriffs.

Elizabeth Freuck is a deputy sheriff and has been with the department for 21 years. In 2012, she received a written warning. Prior to the incident involved here, she had never been suspended before. Freuck is currently assigned to the Courts Division, first shift.

Jail inmates are sometimes hospitalized for one reason or another. When this happens, a deputy is assigned to guard the inmate at the hospital. This assignment is formally known in the department as a Hospital Intensive Security Directed Mission. Informally, it is known as a hospital watch. Hospital watches pose special security risks because the inmate is away from the security of the jail. In short, there is a heightened risk of inmate escape. The record reflects that there have been Milwaukee County jail inmates who escaped custody while being treated in hospitals.

Prior to the incident involved here, Freuck had performed over 100 hospital watches without incident. Thus, she had no history of problems performing that work (i.e. watching inmates in the hospital).

Every inmate on a hospital watch has a background packet that accompanies them. This packet includes (1) the inmate's criminal record; (2) the department's CR – 215 and Arrest and Detention Report; (3) the Criminal Complaint; and (4) other documents.

On May 7, 2016, Freuck was assigned to a hospital watch at St. Luke's Hospital in Milwaukee. On this particular date, Freuck was assigned to watch a female inmate named Shutia Bernard. Bernard had recently given birth and had complications, including seizures.

Freuck arrived at the hospital about 9:00 a.m. to relieve the deputy who had been watching Bernard (Deputy Donna Scalise). When Freuck arrived in the room, Freuck thought that Bernard looked weak and frail. Freuck saw that numerous medical devices, including a catheter, were attached to Bernard's body. Bernard did not speak to Freuck when she entered the room.

When Freuck arrived, Bernard was restrained to the bed by two sets of shackles, with one shackle on each ankle. Using two sets of shackles is the norm in the department for restraining inmates to a hospital bed; usually one restraint is placed on an ankle with the other restraint on a wrist. There are circumstances though where restraints cannot be placed on ankles and/or wrists

because medical devices prevent it. While it is unclear from the record why Scalise placed both restraints on Bernard's ankles, presumably it was because there were medical devices connected to her wrists and arms. Freuck did not talk with Scalise about how Bernard was restrained, but Scalise did tell Freuck that Bernard had been bedridden throughout the entire time that Scalise had watched her. Scalise then left the room.

After Scalise left, Freuck was the only deputy in the hospital room watching Bernard. Per department policy, Freuck then reviewed Bernard's inmate packet which, as previously noted, identifies the inmate's specific criminal history. That document showed that Bernard's criminal record included battery to a law enforcement officer, substantial battery, resisting an officer, and bail jumping. It also showed that the charges Bernard was currently incarcerated for included battery to a hospital nurse that occurred during a trip by Bernard to the bathroom.

For the next five hours, Freuck stayed in the hospital room with Bernard. During that time period, Bernard just watched television and never spoke to Freuck.

About 2:30 p.m., Bernard said she needed to use the toilet. Freuck responded that she would call a nurse to help Bernard use the toilet.

While toilets in many hospital rooms are located in bathrooms that are separated from the main room, that was not the situation here. In this ICU room, the toilet was attached to the wall two feet from the bed. There were no privacy screens or drapes surrounding the toilet.

Department policy requires that an inmate who gets out of a hospital bed for any reason is to be restrained at all times. Specifically, the inmate who gets out of a hospital bed is to be restrained with a belly chain restraint system and ankle restraints.

Freuck was aware of this policy – but for reasons that will be noted in the next paragraph – decided on her own volition to let Bernard go to the toilet without restraints of any kind.

Freuck then unshackled the restraints that were on each of Bernard's ankles. After she did that, Bernard was completely unrestrained. Freuck testified that the reason she took this action was because Bernard looked physically weak and she (Freuck) was concerned that Bernard might fall and injure herself (if she was shackled while walking to the toilet). Additionally, Freuck testified that Bernard still had numerous medical devices attached to her body and Bernard had exhibited no behaviors thus far that indicated she might become resistive (if she was unshackled).

Freuck and a nurse who had arrived then helped Bernard get out of the bed and escorted her to the toilet. Bernard then used the toilet and afterwards washed her hands in a nearby sink. Freuck and the nurse then escorted Bernard back to the bed. After getting back to it, Bernard sat down on the edge of the bed but would not place her feet back in the bed. Freuck directed her to put her feet back into bed but Bernard failed to comply.

Freuck then leaned down to pull Bernard's legs onto the bed. When she did that, Bernard lunged out of the bed and grabbed at Freuck's utility belt which held her firearm (a pistol). A struggle then ensued between them for control of the firearm. During the course of that struggle – which lasted about a minute – Bernard repeatedly tried to get Freuck's firearm out of its holster. Bernard made clear that that was her intent when she repeatedly shouted "give me the gun." Freuck estimated that Bernard said this phrase 8 to 12 times. While the struggle was ongoing, the nurse called security. The struggle ended when Freuck twisted away from Bernard and Bernard fell to the floor on her back. Once Bernard was on the floor, Freuck rolled her over and handcuffed her arms behind her back.

About that time, hospital security officers arrived in the room. They helped Bernard get off the floor and back into bed. Then they helped Freuck put shackles on both Bernard's ankles and restraints on both wrists.

Freuck was not injured in the struggle but Bernard got a cut on her nose. At no point during the struggle did Bernard get Freuck's firearm out of its holster.

Freuck then reported this incident to her supervisor.

* * *

The Employer deemed this a "major incident" and opened an internal investigation. The investigation was conducted by Lieutenant Jason Hodel of the Employer's Internal Affairs Division. As part of his investigation, he interviewed Freuck. Afterwards, Hodel wrote a report known as an Investigative Brief. That report contains a section entitled "Summary as to Allegations." It said:

> On Sunday, May 7th, 2016, Deputy Elizabeth Freuck was assigned to a High Intensity Security Directed Mission or "Hospital Watch", at St. Luke's Hospital, located at 2900 W. Oklahoma Ave., Milwaukee. Deputy Freuck was assigned to guard inmate Shutia Q. Bernard (F/B 11/219/85) *sic.*
>
> At approximately 1450 hours, Deputy Freuck reported that she had been involved in an incident during which Inmate Bernard attempted to disarm her of her duty weapon. Deputy Freuck reported that she was able to gain control of Inmate Bernard and secure her in restraints to the hospital bed.
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> Sergeant Eric Worden responded to the scene and learned that Inmate Bernard had been completely unrestrained during the incident. Deputy Freuck removed the ankle restraints and allowed Inmate Bernard to move from the hospital bed to use the toilet and Inmate Bernard suddenly attempted to disarm Deputy Freuck.

Inmate Bernard had a significant documented arrest history, including *Resisting or Obstructing Officer, Substantial Battery, and Battery to Law Enforcement Officer* arrests.

Deputy Elizabeth Freuck was interviewed relative to this internal investigation.

Deputy Freuck was hired by Milwaukee County as a deputy sheriff on April 19th, 1996. She is currently assigned to the Court Division on first shift. She stated that on May 7th, 2016, she was assigned to the Shutia Bernard hospital watch from 0700 – 1500 hours.

Deputy Freuck stated that she is familiar with MCSO policies and procedures and knows where to reference them. She estimated that she has been assigned to one hundred (100) hospital watches during her career.

She said that when she relieved Deputy Donna Scalise on the hospital watch, she found that Inmate Bernard was restrained by two (2) sets of leg shackles, from each ankle to the hospital bed. She said that she found this restraint system unusual, but could not recall if she discussed the restraint technique with Deputy Scalise.

Deputy Freuck acknowledged that MCSO policy requires that an inmate is restrained with a belly chain restraint system and ankle restraints if he / she is allowed to move from the hospital bed where he / she is typically restrained with two (2) sets of restraints (one ankle and one wrist).

Deputy Freuck said that Inmate Bernard was hospitalized due to seizures following childbirth and appeared weak and frail.

Deputy Freuck stated that she reviewed the custody packet that accompanied the inmate, but could not recall if the criminal history that is typically contained in the packet was present or if she reviewed it. She said that she knew that Inmate Bernard was in custody relating to a *Battery* offense.

Deputy Freuck said that she released Inmate Bernard from the ankle restraints to use the toilet in the room and when Inmate Bernard finished using the toilet, she (Bernard) hesitated while getting back into the bed and suddenly grasped her duty belt near her firearm. She said that Inmate Bernard said “Give me the gun” repeatedly.

> Deputy Freuck said that she twisted away from Inmate Bernard, who fell to the floor. She said that Inmate Bernard was physically resistive, but she was eventually able to place her in handcuffs behind her back.
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> She said that St. Luke's Hospital security officers arrived and Inmate Bernard was secured to the hospital bed using the leg shackles and existing soft restraints on her wrists.
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> Deputy Freuck said that she made the decision to allow Inmate Bernard to use the toilet unrestrained because she appeared weakened and she was concerned that Inmate Bernard might fall. She said that Inmate Bernard had exhibited no behaviors that indicated that she might become resistive and that she still had medical apparatus attached to her body.
>
> She acknowledged that there was nothing preventing her from applying a belly chain restraint system with one (1) hand restrained, along with leg shackles while Inmate Bernard was off the bed, other than her concern that Inmate Bernard might fall.
>
> She said that she is aware that MCSO policy requires that an inmate is to be restrained at all times when out of the bed and that she made a "judgement call, I guess".

Based on that summary, Hodel found that Freuck committed three departmental rule violations and four County civil service rule violations. The department rules she was accused of violating were: 202.14 (Violation of Policy, to wit: 409 MMHS 13.7 Restraints); 202.20 (Efficiency and Competence): and 202.44 (Attending Prisoners).

Rule 202.14 provides thus:

> Members shall not commit any act, or omit any act, which is contrary to their training or constitutes a violation of any Milwaukee County Sheriff's Office policy, procedure, rule, regulation, order, or directive, whether stated in this section or elsewhere.
>
> *To Wit*:
>
> <u>MMHS 13.7 Restraints</u>
>
> Inmates in the hospital will be restrained by a handcuff and leg iron attached to the side rail of the bed.

Prior to the inmate being removed from the bed for any reason, leg irons shall be applied to both ankles. Once the legs are secure, the unsecured hand is placed in a belly chain cuff. The secured hand is removed from the cuff securing the hand to the bed rail and placed in the remaining belly chain cuff. All cuffs are double locked.

A second officer must be present anytime an inmate is removed from the bed until the inmate is re-secured to their hospital bed.

<u>MMHS 13.7.1 Restraints on Pregnant Inmates</u> (Effective February 5, 2017)

Restraints will not be used on inmates who are known to be pregnant unless based on an individualized determination that such restraints are reasonably necessary for the legitimate safety and security needs of the inmate, the staff or the public.

Should restraints be necessary, the restraints shall be the least restrictive available and the most reasonable under the circumstances.

Inmates who are known to be pregnant will not be handcuffed behind their backs or placed in waist restraints while being transported.

<u>MMHS 13.7.2 Restraints on Pregnant Inmates in Labor</u> (Effective February 5, 2017)

No inmate who is in active labor, delivery or recovering from a birth shall be retrained except when all of the following exist:

- There is a substantial flight risk or some other extraordinary medical or security circumstance that dictates restraints be used to ensure the safety and security of the inmate, the staff of MCJ or the medical facility, other inmates or the public.
- A supervisor* has made an individualized determination that such restraints are necessary to prevent escape or injury.
- There is no objection from the treating medical care provider.
- The restraints used are the least restrictive type and are used in the least restrictive manner.

> *In such circumstances, the supervisor shall, within 5 days, make written findings specifically describing the type of restraints used, the justification and the underlying extraordinary circumstances.

Rule 202.20 provides thus:

> 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.

Rule 202.44 provides thus:

> Members who have an in-custody prisoner(s) who is (are) not confined to a cell, shall keep said prisoner(s) under control, and shall use all reasonable precautions to prevent escape.

The County civil service rules she was accused of violating are part of Rule VII, Section 4(1). She allegedly violated subparagraph (i) which prohibits "[v]iolation of rules or practices relating to safety"; subparagraph (l) which prohibits "[r]efusing or failing to comply with departmental work policies or procedures"; subparagraph (t) which prohibits "[f]ailure or inability to perform the assigned duties of the assigned position"; and subparagraph (u) which prohibits "[s]ubstandard or careless job performance."

Hodel's findings were subsequently reviewed by Inspector Richard Schmidt. On November 15, 2016, Schmidt issued Order No. 3676 which suspended Freuck for 10 working days.[1] A notice of suspension document accompanied the order. In an attachment thereto, the text already quoted from Hodel's summary section was copied verbatim. The attachment also copied verbatim the work rules that were referenced in Hodel's Investigative Brief. Since the wording in the attachment document is verbatim to that contained in Hodel's document, it is apparent that the inspector adopted Hodel's findings as his own and disciplined Freuck for the reasons set forth in Hodel's Investigative Brief.

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

* * *

[1] While Order No. 3676 identified the length of Freuck's suspension as 10 days, there apparently was a second part to the discipline which was 20 days stayed for 1 year. The reason I used the word "apparently" in the previous sentence is because there is no reference to the stayed portion of the discipline in any of the exhibits in the record, including Order No. 3676 and the suspension notice. That means that the only reference to the stayed 20 days part of the discipline is contained in the stipulated issue.

In February, 2017, the department instituted a new policy entitled "Restraints on Pregnant Inmates." This new policy was added to MMHS 13.7 which is entitled "Restraints."

* * *

Some additional facts will be referenced in the DISCUSSION.

DISCUSSION

The parties stipulated that the issue to be decided here is whether there was just cause to suspend Freuck for 10 days, with 20 days stayed for 1 year. I answer that question in the affirmative, meaning that I find the Employer did have just cause to impose a 10-day suspension on Freuck, with 20 days stayed for 1 year. 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 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 "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. Attention is now turned to making that call.

Before I address what happened on the day in question, I've decided to review the following background to give context to what happened. On that day, Freuck was assigned to do a hospital watch. As the name implies, she was supposed to watch a jail inmate who was a patient at the hospital and ensure that the inmate did not escape from the hospital or cause an incident of some kind. This was not a new work task for Freuck; she's an experienced deputy who had performed hospital watches 100 times before without incident.

Freuck's hospital watch of Bernard started out uneventful. When Freuck arrived in the hospital room, Bernard was shackled to her bed. Specifically, she had restraints on both her ankles. For the next five hours, the inmate was either sleeping or said nothing to Freuck. Bernard broke her silence when she asked to go to the toilet.

What Freuck did in response to that request is what she got disciplined for. I'm referring, of course, to her decision to remove the restraints on Bernard's ankles so that Bernard could walk unshackled to the toilet.

Even though Freuck had good intentions in deciding to do that (i.e. to remove the restraints on Bernard's ankles), Freuck's actions caused a dangerous situation to unfold. That's because while she was unshackled, Bernard attacked Freuck and attempted to get Freuck's firearm during the struggle. While fortunately Freuck was able to keep Bernard from getting her firearm, the outcome could have turned out differently. If it had, and Bernard had gotten Freuck's firearm, the outcome could have been disastrous.

The Employer asserts that Freuck violated numerous work rules when she failed to restrain the inmate she was tasked with guarding during the hospital watch. Thus, Freuck is charged with workplace misconduct.

Sometimes when an employee is charged with workplace misconduct, they successfully argue that their conduct was not misconduct because the Employer did not have a work rule proscribing the conduct they engaged in. That is not the case here. In this instance, the Employer has adopted a very detailed policy that says that an inmate in a hospital bed who gets out of bed for any reason is to be restrained at all times. Specifically, MMHS Policy 13.7 provides as follows:

> Prior to the inmate being removed from the bed for any reason, leg irons shall be applied to both ankles. Once the legs are secure, the unsecured hand is placed in a belly chain cuff. The secured hand is removed from the cuff securing the hand to the bed rail and placed in the remaining belly chain cuff. All cuffs are double locked.
>
> A second officer must be present anytime an inmate is removed from the bed until the inmate is re-secured to their hospital bed.

This policy specifies that any inmate who gets out of a hospital bed is to be restrained with a belly chain restraint system and ankle restraints. Freuck failed to comply with this policy when she removed Bernard's restraints. Freuck was aware of this policy but nonetheless decided on her own volition to let Bernard go to the toilet without restraints of any kind.

Sometimes, employers have policies that exist on paper but are not actually followed in practice. That is not the situation here. Insofar as the record shows, the Employer's restraint policy is followed by employees and those who deviate from it are disciplined. There are no instances in the record showing that exceptions to the restraint policy are tolerated by management and/or allowed.

The Association argues that Freuck's unshackling of Bernard in this instance was an acceptable and reasonable response under the circumstances. I find otherwise for the following reasons.

First, the record shows that every inmate on a hospital watch has a packet that accompanies them that identifies the inmate's criminal history. Freuck indicated that she

familiarized herself with Bernard's criminal history at the start of her shift. In doing that, she would have learned that Bernard's criminal record included battery to a law enforcement officer, substantial battery, resisting an officer, and bail jumping. Additionally, the charges Bernard was currently incarcerated for included assaulting a nurse during a trip to the bathroom. Given that criminal history and the existing pending charges, it was simply unreasonable for Freuck to have removed Bernard's restraints because it put Bernard in the same situation where she could again assault hospital staff while she went to the toilet.

Second, while Freuck thought that Bernard appeared weak, frail, and not dangerous, Freuck's medical assessment of Bernard and her condition turned out to be just plain wrong. No matter what her appearance was, Bernard was able to attack Freuck while she was unshackled and engage in a struggle with her that lasted about a minute. Freuck's task that day – in the words of Rule 202.44 – was to keep the inmate "under control." However, during the minute that the two struggled for control of Freuck's firearm, Freuck did not have the inmate "under control."

Third, while Freuck testified that she removed Bernard's restraints because she didn't want Bernard to fall (while walking to the toilet), there were other options available to Freuck that did not involve violating the previously identified restraint policy. For example, there was a nurse in the room who could have helped steady Bernard in her walk to the toilet. Additionally, Freuck acknowledged that she could have called another officer to assist her if she was going to unrestrain Bernard. Had she done that, Freuck would have been in compliance with the hospital watch restraint policy.

Fourth, the Association points out that Bernard could have attacked Freuck even when she was shackled to the bed because her hands were free. That's true; that could have happened. Had that happened, Freuck could not be faulted for her actions though because Bernard was still shackled, albeit just at the ankles. Here, though, Freuck exposed herself to second guessing when she removed Bernard's restraints. That's because doing that made it easier for Bernard to attack her.

Finally, the Association points to the new restraint policy which the Employer implemented in February, 2017, for pregnant inmates. According to the Association, this new policy shows that Freuck's actions in leaving Bernard unrestrained were reasonable. I disagree for these reasons. First, this new policy did not exist at the time of the incident with Bernard; it was implemented months later. Second, on its face, the new policy applies to "Pregnant Inmates" and "Pregnant Inmates in Labor." Bernard was not pregnant or in labor when she was in the hospital on the day in question. She had already given birth and been transported to a new hospital following birth because she was dealing with seizures that occurred after she gave birth. Given these circumstances, it does not appear that the new policy applies to Bernard's situation. Third, even if the new policy did apply to Bernard's situation, it is likely that Bernard would be restrained under the new rule, and Freuck cannot prove that she would not. That's because the restraint decision would have been made by Freuck's supervisor and medical provider, not by Freuck. Additionally, the new rule allows restraints when the supervisor and medical provider agree that restraints are the least restrictive mode to protect against "a substantial flight risk or some other extraordinary medical or security circumstance." Since Bernard was in custody for

assaulting a nurse while using the restroom in a hospital, that security circumstance would likely dictate the use of restraints under the new policy. The Association's suggestion that Bernard would not have been restrained under the new policy is speculation and does not change her violation of the restraint policy as it existed at the time.

The foregoing persuades me that Freuck's "judgment call" to remove Bernard's restraints was ill-advised. It violated numerous work rules and constituted workplace misconduct for which she 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 (i.e. a 10-day suspension, with 20 days stayed for 1 year) was appropriate under all the relevant facts and circumstances. I find that it was for the following reasons.

First, the arbitrator is well aware that until this matter arose, Freuck had a relatively clean disciplinary history with the Employer (just a written warning and no suspensions). The Association contends that under these circumstances, the Employer should have given Freuck a substantially shorter suspension. While employers oftentimes do start the suspension part of the progressive disciplinary sequence with a short suspension (as opposed to a long one), this collective bargaining agreement does not require that result. In other words, there is nothing in this collective bargaining agreement that says that the Employer has to impose a short suspension (on an employee) before it imposes a long suspension. That being so, the Employer has retained the right to impose a long suspension – as opposed to a short one – when an employee hits the suspension part of the progressive disciplinary sequence.

Next, in many disciplinary cases, the union makes a disparate treatment argument that attempts to show that other employees engaged in the same type of misconduct, but received lesser discipline (than was imposed here). In this case, the Association tried to show that via former Association President Roy Felber's testimony about a disciplinary situation involving Deputy Brian Fox. However, I find that Fox's disciplinary situation is insufficient to prove disparate treatment. The following shows why.

In 2014, Fox was assigned to a hospital watch. Before the inmate was released from the hospital, arrangements were made to transport the inmate from the hospital to the jail in a transit express van. This transit van was supposed to be accompanied by security personnel provided by the jail. However, for unknown reasons, that didn't happen and the van that showed up at the hospital to transport the inmate back to the jail was not accompanied by any security personnel. Instead, just a civilian transport driver was in the van. Fox then turned the inmate – who was in restraints – over to the (unarmed) civilian transport driver. After doing that, Fox left the hospital. Fox did not accompany the inmate and civilian driver out of the hospital or ride with them in the van back to the jail. The civilian driver then transported the inmate back to the jail. Fox was ultimately charged with improperly discontinuing his custody of an inmate "without turning the inmate over to any security detail." He was suspended for 15 days.

While the Association sees the Fox case as a comparable here, I don't see it that way. I find that each case can be distinguished from the other on these grounds. As just noted, Fox was charged with discontinuing custody of an inmate without turning the inmate over to any security detail. That's not what Freuck was charged with. Freuck was charged with violating the Employer's restraint policy and failing to keep an inmate restrained at all times. That's not what Fox was charged with. This dissimilarity in charges makes it inappropriate to use the Fox case as a comparable here.

Another part of the Association's disparate treatment argument concerns the length of Fox's suspension. Specifically, the Association maintains that Fox's 15-day suspension was "less severe" than the suspension imposed on Freuck. That contention is based, of course, on the premise that Freuck's 10-day suspension, with 20 days stayed for 1 year, can potentially total 30 days (twice as much as Fox's suspension).

Normally, it's relatively easy to compare the length of disciplinary suspensions and make objective comparisons about them. In this case though, the stayed part of Freuck's discipline makes this comparison harder. Quite frankly, I don't know what to make of the stayed part of Freuck's discipline. For example, are the numbers of 10 and 20 supposed to be added together so that the understanding is that, in reality, Freuck got a 30-day suspension of which she has only served 10 days? Also, under what circumstances will the stayed discipline be activated? The record does not say. Additionally, as was noted in Footnote 1, there is no reference to the stayed 20 days part of Freuck's discipline in any of the exhibits in the record, including Order No. 3676 and the suspension notice. That means that the only reference to the stayed 20 days part of her discipline is contained in the stipulated issue. Given the questions I just posed about the stayed portion of Freuck's discipline, I'm going to give primary emphasis to the discipline that Freuck has actually served. What she's served so far is a 10-day suspension. When that number is compared to Fox's 15-day suspension, it results in a finding that Fox's suspension was not "less severe" than the suspension imposed on Freuck. Consequently, I find that Fox's suspension is insufficient to prove that Freuck was subjected to disparate treatment.

Next, the Employer cites the discipline imposed on Deputies David Mezwinski and James Ford and Corrections Officer Diane Blue as comparables. All three cases involved hospital watches where inmates were unrestrained and a problem arose. In the Mezwinski case, Mezwinski let an unrestrained inmate use a closed bathroom for 40 minutes unattended, and also permitted the inmate to obtain a metal fork. The deputy who relieved Mezwinski at the hospital watch subsequently discovered a fork on the bathroom floor. This fork posed a threat both as a weapon and a tool for escape. The Employer imposed a 60-day suspension on Mezwinski, but he did not serve that suspension. He resigned before he could serve it. The record indicates that prior to this incident, he had received 1- and 2-day suspensions. In the Ford case, Ford took restraints off an inmate so that the inmate could walk to the bathroom without restraints. The inmate then ran out into the hallway and down two flights of stairs before Ford recaptured him. The Employer imposed a 25-day suspension on Ford which was stayed for 1 year. Ford resigned from the department before the County Personnel Review Board (PRB) could review the case. The record indicates that prior to this incident, Ford had not been suspended for 17 years. In the

Blue case, Blue took restraints off an inmate so that the inmate could use the bathroom without restraints. After using the bathroom, the inmate pushed Blue down and ran out of the room. The inmate escaped the hospital and ran to a building across the street. The inmate was recaptured in that building. The Employer imposed a 30-day suspension on Blue which she challenged before the PRB. That body reduced her suspension to 20 days. The record indicates that prior to this incident, Blue had no prior discipline.

Insofar as the record shows, the three cases just noted are the only cases in the past six years or so that involved hospital watches where inmates were unrestrained and a problem arose. While the facts in those three cases are dissimilar in some respects to what happened to Freuck, there is nonetheless one common factual similarity. It's this: in each case, the inmate being watched in a hospital was supposed to be restrained but the employee took the restraints off so that the inmate could go to the bathroom. Then, a problem ensued.

All three employees received lengthy suspensions for their actions. While the length of their suspensions varied significantly – and in one case was stayed entirely – the discipline was severe enough that it did not qualify for review via grievance arbitration. Instead, since each suspension was over the contractual cutoff point of 10 days, the employees appealed their suspensions to the PRB.

In contrast though, Freuck's suspension still qualified for review via grievance arbitration. In order for that to have happened, the second part of Freuck's suspension (i.e. the 20 days stayed) was not counted. If it had been counted, Freuck's disciplinary appeal would have gone to the PRB like the other three cases. The fact that that did not happen here – and Freuck's appeal went instead to grievance arbitration – establishes that Freuck's punishment was more lenient than what was imposed on the other three employees. Put conversely, it also establishes that Freuck was not treated more harshly than the other three employees. Accordingly, the suspension meted out to Freuck passes arbitral muster.

I therefore find that Freuck's 10-day suspension, with 20 days stayed for 1 year, was not excessive, disproportionate to her misconduct, or an abuse of management discretion, but rather was reasonably related to her proven misconduct. The County had just cause for the discipline imposed.

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

AWARD

That there was just cause to suspend Deputy Elizabeth Freuck for 10 days, with 20 days stayed for 1 year. Therefore, the appeal is denied.

Dated at Madison, Wisconsin, this 8th day of August, 2017.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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Raleigh Jones, Arbitrator