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In the Matter of the Grievance of  
**MARINETTE COUNTY COURTHOUSE EMPLOYEES UNION,  
LOCAL 1752, AFSCME, AFL-CIO**

Under the Grievance Procedure of

**MARINETTE COUNTY**

Case 208  
No. 71857  
(Behrendt Grievance)

DECISION NO. 37458

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**Appearances:**

**Mr. John Spiegelhoff**, Staff Representative, 1105 East 9<sup>th</sup> Street, Merrill, Wisconsin, appearing on behalf of Marinette County Courthouse Employees Union, Local 1752, AFSCME, AFL-CIO.

**Ms. Gale Mattison**, Corporation Counsel, Marinette County, 1926 Hall Avenue, Marinette, Wisconsin, appearing on behalf of Marinette County.

**DECISION OF THE IMPARTIAL HEARING OFFICER**

The Grievant, Nancy Behrendt, represented by Marinette County Courthouse Employees Union, Local 1752, AFSCME, AFL-CIO, hereinafter "Union," and Marinette County, hereinafter "County," requested that the Wisconsin Employment Relations Commission appoint Lauri A. Millot of the Commission's staff as the Independent Hearing Officer to hear and decide the instant dispute in accordance with the County Policies and Procedures. The hearing was held before the undersigned on March 5, 2013 in Marinette, Wisconsin. The hearing was recorded by the County and a copy of said recording provided to the undersigned by March 7, 2013 whereupon the record was closed. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Final Decision and Order.

**ISSUE**

Whether the Grievant was terminated for just cause?

**RELEVANT COUNTY POLICY**

- (g) Impartial Hearing.
- (1) An employee may request a hearing before an impartial hearing officer by following Step Three of the grievance procedure and submitting fifty (50) percent of the applicable Wisconsin Employment Relations Commission fee payable to Marinette County with the written request. In the event the employee prevails in his/her case, the employee will be reimbursed the fee paid by the employee.
  - (2) The employee has the right to be represented in the hearing, at the employee's expense, by a person of the employee's choosing. The employee's representative may not be a material witness to the dispute.
  - (3) The Human Resources Director shall, upon receipt of both a written hearing request and the filing fee, select and appoint a hearing officer within ten (10) workdays. In grievable cases, a hearing officer will be selected from a list of arbitrators/hearing officers maintained by the Wisconsin Employment Relations Commission. In workplace safety cases, the hearing officer shall be a person skilled in loss prevention and risk management selected by the County.
  - (4) The appointed hearing officer shall be impartial and may not have any prior knowledge of the grievance.
  - (5) A hearing will be scheduled to be held within thirty (30) calendar days of the appointment of a hearing officer. The hearing officer may reschedule the hearing with the mutual consent of the parties.
  - (6) Not less than seven (7) calendar days prior to the hearing, the grievance and the county shall exchange lists of the witnesses and exhibits that each intends to introduce at the hearing.
  - (7) The hearing officer may, with consent of the parties, use his or her best efforts to mediate the grievance.
  - (8) The county has the burden of proof in a suspension or termination grievance to show just cause for its action. The employee has the burden of proof in a workplace safety grievance. The standard required of the party with the burden of proof in all cases is a preponderance of the evidence. The hearing officer shall deny and

dismiss the grievance so long as the County's action was reasonable and supported by the evidence even if evidence is presented at hearing that reveals other reasonable conclusions.

- (9) The hearing officer is authorized to administer oaths and affirmations, conduct the proceedings, and take the testimony of witnesses. The hearing officer is not bound by the strict rules of evidence, but shall exclude irrelevant, immaterial or unduly repetitious evidence. Hearsay that is probative, trustworthy, and credible may be received into evidence and given such weight as the hearing officer deems appropriate. However, no factual finding may be made solely on the basis of hearsay evidence. The hearing officer may request oral arguments.
- (10) The hearing officer shall make a record of the proceedings. The county shall provide the equipment and materials necessary to make a video recording of the hearing.
- (11) The hearing officer has the authority to sustain or deny the grievance. The hearing officer may not change or modify any discipline imposed.
- (12) In a workplace safety case, the hearing officer may recommend a remedy.
- (13) In a suspension or termination case, the hearing officer shall provide a written decision within twenty (20) workdays following the close of the record, unless the hearing officer extends the time frame. The written decision shall include a case caption; the parties and appearances; a statement of the issues, findings of facts; any necessary conclusions of law; the final decision and order; and any other information the hearing officer deems appropriate.
- (14) In a workplace safety case, the hearing officer shall provide a written recommendation within twenty (20) workdays following the close of the record, unless the hearing officer extends the time frame.
- (15) Following issuance of the decision or recommendation, the hearing officer shall provide the record to the Human Resources Director for preservation.

### **FINDINGS OF FACT**

1. The Grievant, Natalie Behrendt, was employed by the County in the Jail and held the rank of corporal until her termination on May 10, 2012. At all times relevant herein, the Grievant's supervisor was Bob Majewski, County Jail Administrator and the Sheriff was Jerry Saube.

2. The County contracts with Correctional Healthcare Companies, Inc. hereinafter "CHC," a private healthcare company, to provide medical services to inmates in the jail. Lisa Swanson is employed by CHC and has been the County Jail Nurse for nine years.

3. CHC and the County have an established procedure to follow when an inmate with life sustaining prescription medication is incarcerated. When the inmate is booked into the jail by the correctional officer, the inmate presents his/her prescriptions to the correctional officer. The officer is expected to count the number of pills/capsules in the bottle(s) and list the prescriptions on a Medication Verification Form. The jail personnel communicate with the CHC physician by telephone for the purpose of verifying the medication and seeking approval to dispense the medication to the inmate. If the inmate is received into the jail on a weekday, Swanson makes contact with the CHC physician. If the inmate is received into the jail on a weekend or evening, the on-duty jail corporal makes contact with the CHC physician. Once approval to dispense the medication is provided by the CHC physician, a Medication Administration Record, hereinafter "MAR," and a medication distribution card are completed. The medication distribution card is attached to and made part of a plastic medication cartridge which contains the inmate's medications for the week separated by day and frequency. The MAR is stored in a three-ring binder on the medication cart and the inmate's medication cartridge is placed on the cart in the appropriate pod area.

4. On April 20, 2012 at 1900 hours, Inmate B entered the County jail with three medications.

5. On April 21, 2012 during the a.m., the Grievant was the duty corporal in the jail. The Grievant completed the Medication Verification Form and the medication distribution card for the medication cartridge. The Grievant noticed that one of the prescriptions was expired and as a result, the Grievant re-packaged the expired prescription in bubble wrap.

6. The Grievant administered two medications to Inmate B the evening of April 21, morning and evening of April 22 and morning and evening of April 23.

7. Swanson and the Grievant spoke on April 23, 2012 about Inmate B's medication. The Grievant informed Swanson that she contacted the CHC physician to obtain approval for Inmate B's prescriptions; that she noticed one of the prescriptions was expired and that because it was expired, she did not include it in the plastic medication cartridge. Based on this information, Swanson went to the medication room where the medication cart was located and discontinued one of the three prescriptions for Inmate B by "lining out" in yellow that

prescription on the medication cartridge. Security video confirms that Swanson entered the medication room, looked at a specific medication cartridge and wrote on a MAR at 11:17 a.m.

Later in the day, Swanson returned to the medication room, opened the MAR three ring binder and removed a piece of paper at 3:59 p.m. Video confirms that Swanson is the only person to have removed something from the binder while the medication cart and binder were in the medication room, although the paper removed was from the inside cover of the binder and not the section where MARs are stored.

8. A review of all MARs indicated that no other inmate's prescription was discontinued on April 23, 2012.

9. Swanson testified that she discontinued a prescription for Inmate B on both the medication cartridge and his MAR on April 23.

10. Inmate B's medication distribution card was not offered as an exhibit therefore whether the card contains three medications including one that is "lined out" is unknown.

11. On April 24, 2012 Corporal Stacey Matz distributed medications between 5:50 a.m. and 5:33 a.m. Matz noticed that a MAR did not exist for Inmate B. Matz informed Swanson of the missing MAR.

12. At 8:31 a.m. Swanson and Matz reviewed the MAR book in the medication room. Swanson removed "paperwork" from the book and two minutes later put paperwork in the book. There is insufficient information to determine the nature of the paperwork or if the paperwork removed was the same as the paperwork placed in the book.

13. Swanson testified that at 2:40 p.m. on April 24, she sent a text to the Grievant asking the Grievant if she had any knowledge as to the location of Inmate B's MAR. Thereafter, Swanson and the Grievant spoke by telephone. Swanson testified that the Grievant told her that she (Grievant) had not completed a MAR for Inmate B, but that she was willing to come to the jail to complete one. Swanson disagreed with the Grievant telling her that she (Grievant) had prepared a MAR the day before since Swanson had written on it when she discontinued a medication for Inmate B. Swanson informed the Grievant that she was currently preparing a MAR for Inmate B. The Grievant asked Swanson whether she had left the signature line on the MAR blank and Swanson told her that the MAR had been signed for.

14. The Grievant did not ask Swanson to write in the Grievant's name on the MAR.

15. The security video indicates that on April 24 Swanson and Matz looked at a medication card and a bubble wrapped pack of medication at 4:06 p.m. At 4:09 p.m. Swanson took out a MAR sheet and at 4:29 p.m. Swanson completed a new MAR sheet for Inmate B which Matz initialed.

16. The County practice when staff distribute medication to inmates is for the employee to write his/her initials on the cartridge and the MAR in the space for the corresponding day and time. In the event that an employee fails to “initial” at the time of distribution, the record is corrected. MARs are reviewed monthly for compliance and if a medication was dispensed and not signed for, the County determines who was on duty and therefore would have been the staff person responsible for distributing the medication and obtains that staff person’s initials on the MAR for the missing date. The County does not discipline employees who fail to timely “initial.”

17. The County initiated an investigation into the missing MAR. Lieutenant Barry Degnitz conducted the investigation. Degnitz interviewed the Grievant, Swanson, Matz and three other officers all of whom worked between April 21 and 23, 2012. Degnitz reviewed video for the dates April 20 through 24 of the medication room. Degnitz assessed the credibility of the Grievant and Swanson and concluded that Swanson was more credible.

18. Correctional Officer Michelle Steiner worked in the jail on April 21, 22 and 23, 2013. Steiner did not recall the Grievant preparing a MAR on April 21 nor did she recall the Grievant removing a MAR from the binder on any of the three dates. The record is silent as to whether Steiner was asked if she saw a MAR for Inmate B.

19. Correctional Officer Chad Huston worked in the jail on April 21 and did not see the Grievant prepare a MAR. The record is silent as to whether Steiner was asked if she saw a MAR for Inmate B.

20. Correctional Officer Dave Gregerson worked in the jail on April 23. Gregerson had no knowledge of why a MAR would be removed from the book. Gregerson did not remove a MAR from the book. The record is silent as to whether Steiner was asked if she saw a MAR for Inmate B.

21. The Grievant denied ever having prepared a MAR for Inmate B.

22. The Grievant deviated from protocol when she administered medication to Inmate B and failed to make a notation on his MAR.

23. On May 10, 2012, the Grievant was terminated for “Disregard for proper work procedures,” “Falsifying documents, solicit assistance to falsify a document,” and “Other: Dishonesty.”

24. The County defines just cause as:

(1) Dismissal. Termination

(2) Just cause. A legally sufficient reason for a suspension or termination. A reason is legally sufficient if it is supported by a preponderance of the evidence. The elements of just cause are:

- (a) Whether the employee could reasonably be expected to know the probable consequences of his/her conduct.
- (b) Whether the rule or order that the employee allegedly violated is reasonable.
- (c) Whether the employer made a reasonable effort to investigate whether the employee violated the rule or order.
- (d) Whether the employer's investigation was fair and objective.
- (e) Whether the employer's investigation produced substantial evidence that the employee violated the rule or order.
- (f) Whether the employer applied the rule or order fairly and without discrimination.
- (g) Whether the discipline reasonably relates to the seriousness of the offense and to the employee's overall record.

25. The record is silent as to the Grievant's work history and whether she had any prior disciplinary sanctions.

### **FINAL DECISION**

The County policy states that the County bears the burden of proof and must meet that burden with a preponderance of the evidence, but offers two different standards. Not only does that policy indicate that the County's action must be for "just cause," but it also directs the hearing officer to deny the grievance if the County's action is "reasonable and supported by the evidence." While these are conceivably two different standards, given that the County has specifically defined what constitutes just cause, I am affording this standard greater weight than the more general "reasonable and supported by the evidence."

The Grievant was disciplined for three offenses 1) disregard for County procedure, 2) soliciting a co-worker to falsify a document, and 3) dishonestly. The Grievant is or should have been aware that these are serious offenses and further, that she would subject herself to disciplinary consequences should she engage in such behavior.

#### **Disregard for County Procedure**

Looking first to the charge of disregarding County procedure, the County concluded that the Grievant completed a MAR when Inmate B was incarcerated and then later destroyed it. The Grievant maintains that she never completed the MAR when Inmate B was received into the jail. Regardless of what actually occurred, the Grievant failed to follow County protocol.

When the Grievant completed the Medical Verification Form for Inmate B, she should have completed the MAR. When the Grievant administered medications to Inmate B on April 21, 22 and 23, she should have initialed a MAR. If indeed she did not create a MAR, then she deviated from policy by not creating one, by not verifying the dispensing of the medication on those three dates, and further, by not noticing the absence of a MAR and thereafter rectifying the situation. Alternately, if the Grievant completed a MAR and later destroyed it, that destruction was inconsistent with County protocol. Accepting either version of the events, the Grievant was guilty of disregarding County procedure.

#### Soliciting a Co-Worker to Falsify a Document

The County concluded that the Grievant solicited Nurse Swanson to falsify a document, specifically the MAR. The evidence does not support this conclusion. First, Swanson testified that the Grievant did not ask her to write in the Grievant's name on the new MAR for the prior dates. Had she done so, then the charge would have been supported. Instead, the Grievant asked Swanson whether she had "left it blank." I concur that it's possible that the Grievant's question was intended to allow the Grievant the opportunity to back date the document and therefore could be interpreted to be solicitation, but the County not only condones, but directs the back initialing of medication distribution documents, and therefore, a behavior that is expected and condoned by the County cannot concurrently be a disciplinable offense.

#### Dishonesty

The third charge leveled against the Grievant is that she was dishonest, specifically, that she created a MAR on April 21 and thereafter lied that she had prepared the MAR. The County's entire case rests on Swanson. The County concludes that Swanson is credible and from that extrapolates that the Grievant created a MAR on April 20, destroyed that MAR between April 20 and April 24, and then lied. The only evidence that supports this conclusion is Swanson's testimony that she saw and wrote on Inmate B's MAR. The County's investigation did not locate any employee who saw Inmate B's MAR, did not locate any employee who saw Grievant prepare Inmate B's MAR or locate any employee who observed the Grievant remove and/or destroy Inmate B's MAR. This is a classic "she said, she said."

The County concluded that Swanson was more credible than the Grievant, but this record is void of any evidence to substantiate that credibility assessment. The County reasonably viewed the Grievant's recitation of events as self-serving, but Swanson's testimony is similarly self-serving.

The County's review of the security video for the medication room does not support the conclusion that the Grievant prepared a MAR and then destroyed it. Rather, the video feed establishes that Swanson modified a piece of paper in the MAR binder and a medication distribution cartridge on April 23, but also that Swanson removed something from the MAR binder later that day. It further establishes that Swanson removed paperwork from the binder on April 24 even though she indicated during the investigation that she "did not remember going back in the MAR binder for anything later." While it is possible that the Grievant created a



MAR and later destroyed it, it is also possible that a MAR was never completed or that Swanson created the MAR and later removed it. Ultimately, the evidence that the Grievant was dishonest falls short of meeting the preponderance standard.

The County identified an animus relationship between Matz and the Grievant during its investigation and at hearing. I do not find this to be relevant to the case at bar. Neither the Union nor the County have argued that the behaviors of either Matz or the Grievant impacted the circumstances of Inmate B's incarceration nor was there any evidence offered to substantiate that such a hostility impacted the events between April 20 and April 24, 2012.

### Conclusion

The County terminated the Grievant for three infractions. Termination is the "capital industrial penalty." The evidence supports the finding that the Grievant deviated from County policy, but falls short on the charges of solicitation to falsify a document and dishonesty. When two of the three charges for termination are removed, I cannot sustain the discharge. Moreover, given that my authority is grounded in County policy wherein it states, "the hearing officer may not change or modify the discipline imposed," I cannot impose a reduced level of discipline. Having concluded that the County's action was not supported by the evidence, I sustain the grievance.

### **ORDER**

The grievance is sustained.

Dated at Rhinelander, Wisconsin, this 9th day of April, 2013.

Lauri A. Millot /s/

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Lauri A. Millot, Impartial Hearing Officer