

**BEFORE ARBITRATOR MICHELLE CAMDEN
IN THE MATTER OF THE ARBITRATION BETWEEN**

JERSEY COUNTY SHERIFF, AND POLICE BENEVOLENT LABOR COMMITTEE, PROTECTIVE ASSOCIATION	GRIEVANT: Larry Ontis ISSUE: TERMINATION ILRB Case. No. S-GA-13-008
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APPEARANCES:

For Jersey County Sheriff:

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For the PBPA:

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Location of Hearing:

Jersey County Courthouse
Jerseyville, IL

Date of Hearing:

April 4, 2013

Date of Award:

August 26, 2013

AWARD:

For the reasons stated in this Opinion and Award, the Arbitrator finds:

The Grievance of Larry Ontis is denied.

Michelle Camden, Arbitrator
August 26, 2013

I. INTRODUCTION

The Hearing in this matter took place on April 4, 2013, at the Jersey County Courthouse in Jerseyville, Illinois. The Hearing commenced at 10:10 a.m. before the undersigned Arbitrator who was duly appointed by the parties to render a final and binding decision. At the Hearing, the parties were afforded a full opportunity to present such evidence and arguments as desired, including examination and cross-examination of all witnesses. A transcript of the hearing was made. Both parties filed post hearing briefs on or about June 27, at which time the evidentiary portion of the Hearing was declared closed. Both parties stipulated at the Hearing to this Arbitrator's jurisdiction and authority to hear this case and issue a final and binding decision in this matter.

II. ISSUE

Was the termination of Larry Ontis supported by just cause, and, if not, what shall the remedy be? (Tr. 3).

III. RELEVANT CONTRACT PROVISIONS AND STATUTES

ARTICLE II - MANAGEMENT RIGHTS

It is understood and agreed that any rights, powers, or authority the County and the Sheriff had prior to the signing of this Agreement are retained by the County and the Sheriff except those specifically abridged, granted or modified by this Agreement. It is further understood and agreed that the employer and the Union will abide by the provisions of 5 ILCS 315.4.

ARTICLE X - DISCIPLINE AND DISCHARGE

Section 1 - Definition

Employer agrees with the tenets of corrective and progressive discipline. Disciplinary action shall include only the following:

- (a) oral warning
- (b) written warning
- (c) suspension without pay
- (d) discharge

Section 2 - Just Cause

Employer agrees that disciplinary action shall only be imposed for just cause and shall be imposed as soon as practical after the Employer learns of the occurrence giving rise to the need for disciplinary action and after the Employer has a reasonable opportunity to investigate the facts.

Section 3 - Limitation

The requirement to use progressive disciplinary action does not prohibit the Employer from using a severe measure, including discharge, when the offence indicates that a substantial shortcoming or action of an employee renders the continuation of employment of the employee in some way detrimental to the Employer. Such disciplinary actions shall include but are not limited to: intentional destruction or theft of County property, fighting on the job, appearing for work under the influence of drugs or alcohol or other substance that may impair an employee's ability to perform all of the duties required. Both the employee and Union shall be notified of disciplinary action. Such notifications shall be in writing and reflect the specific nature of the offense.

Section 4 - Written Notice

Both the employee and the Union shall be notified of disciplinary action; such notification shall be in writing and reflect the specific nature of the offense and directions to the employee for future behavior.

Any information of an adverse employment nature, which may be contained in any unfounded, exonerated, or otherwise not sustained file, shall not be used against the officer in any future proceedings.

Section 5 – Prescribed Drugs

Employees who are taking legally prescribed drugs under a doctor's supervision, while on duty, which may inhibit or negatively affect the employee(s) ability to perform his/her duties in a safe manner, shall present notice to his/her supervisor of this fact. Failure to do so may result in disciplinary action.

ARTICLE XI - DISPUTE RESOLUTION AND GRIEVANCE PROCEDURE

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Both parties agree to make a good faith attempt to arrive at a joint statement of facts and issues to be submitted to the arbitrator.

The Employer or Union shall have the right to request the arbitrator to require the presence of witnesses and/or documents. Each party shall bear the expense of its witness.

Questions of arbitrability shall be decided by the arbitrator. The arbitrator shall make a preliminary determination of the question of arbitrability. Once a determination is made that the matter is arbitrable or if such preliminary determination cannot be reasonable made, the arbitrator shall then proceed to determine the merits of the dispute.

As used in this Article, the term “working days” shall mean from 9:00 am to 5:00 pm Monday through Friday and shall exclude Saturdays, Sundays and Holidays.

The expenses and fees of the arbitrator mutually agreed to and shall be shared equally by the parties. The decision and award of the arbitrator shall be made within forty-five (45) days following the hearing and shall be final and binding on the Employer, the Union and the employee or employees involved. The arbitrator shall have no power to amend, modify, nullify, ignore, add to, or subtract from the provisions of the Agreement. (J.Ex. 1, p.17).

ARTICLE XIX - VALIDITY AND COMPLIANCE WITH LAW

If any court holds any part of this Agreement invalid, such decisions shall not invalidate any other part this agreement. The employer and the Union shall comply with any and all Federal and State statutes.

All employees covered by this Agreement shall be entitles to all benefits under any and all Federal and State statutes, including, but not limited to the Public Safety Employees Benefits Act, the Public Employees Disability Act and the Uniform Peace Officers Disciplinary Act.

ARTICLE XXI - SAFETY ISSUES

Section 1 - Safety

The Sheriff and Union upon notice shall meet at a mutually agreed upon time to discuss safety issues.

The Employer agrees to abide by the Illinois Department of Corrections County Jail Standards, and will abide by recommendations made by authorized inspectors.

ILLINOIS JAIL STANDARDS

§701.90 Medical and Mental Health Care

- a) Medical and Mental Health Services

All jails shall provide a competent medical authority to ensure that the following documented medical and mental health services are available:

- 3) Prescription of medications and special diets.

- 8) Administration of medications.

10) Maintenance of detailed records of medical supplies, particularly of narcotics, barbiturates, amphetamines and other dangerous drugs.

IV. STATEMENT OF FACTS

A. Introduction

The instant case involves a dispute between the Policemen's Benevolent Labor Committee, Protective Association ("PBPA" or the "Union") and the Jersey County Sheriff's Department, ("Sheriff" or "Employer"). This is a grievance filed on behalf of Larry Ontis, who is covered by the Collective Bargaining Agreement (the "Contract") between the parties. The instant dispute is a result of the Employer terminating Grievant. (Jt. Ex. 2)

B. Jersey County Sheriff's Department

Sheriff Mark Kallal has been the Sheriff of Jersey County since December 1, 2006. (Tr. 8) The sheriff's department operates the county jail. If inmates are on regular medications, the county is responsible for distributing the medications. For the two years prior to this incident, the corrections officers on the midnight shift prepared the inmates' medication(s) for the next day.

The Department's policy regarding medication distribution states:

When dispensing prescription or non-prescription medication to any inmate, it is the policy of this department that YOU SHALL WATCH THEM swallow it. No exceptions are allowed at any time. If the inmate refuses to ingest in your presence, retrieve the medicine from the inmate and record the incident in your logs as a refusal. This is the only way to prevent the hoarding of medication that may be abused, shared or used in a suicide attempt.

Failure to comply with this directive may subject you to disciplinary action up to and including dismissal. (Er.Ex. 16).

The Department placed the inmates' medication in a locked black metal toolbox, inside an unlocked cabinet. (Tr. 17, 18, 42, 45). According to Grievant, if an inmate had several prescriptions, their medicine would generally be grouped together in a zip lock bag inside the toolbox. (Tr. 43). Otherwise, individual medicine bottles would be placed in the top tray of the toolbox. (Tr. 43). Usually, that toolbox was full of medicine. (Tr. 43). The Department also kept discarded medication in a separate plastic toolbox. (Tr. 42).

Grievant testified that when he was first hired, the night corrections officer would occasionally prepare medication for distribution in advance, "[b]ut most of the time we would make up our own meds because we know what was goin[g] into [th]em." (Tr. 38). During 2010, the Department began requiring corrections officers on the midnight shift to prepare all of the medication for distribution the following day. (Tr. 14-15, 38-39). There was no official policy establishing how the corrections officers were to go about that task. (Tr. 39, 52). The Grievant was not trained as to how to go about this process. (Tr. 39, 52).

The corrections officers used small plastic cups to distribute medicine. (Tr. 17). All of the cups were the same color. (Tr. 55). The corrections officers would write the inmate's last name on the exterior of the cups, and any single inmate could have between one and four cups, depending on how often they were to receive medication. (Tr. 44). These cups were then grouped by times of distribution (i.e. 8:00 a.m., noon, etc.). (Tr. 44, 45). And, the corrections officers would try to organize the cups based upon where the inmate was housed in the jail geographically, working backwards so that the last cell visited would be the first cup prepared, and placed at the bottom of the stack. (Un.Ex. 3; Tr. 53-54, 55). Proceeding from east to west, the female inmates were given medication before the men, and more specifically, the northeast women's dorm was issued medication before the southeast women's cell. (Tr. 54-55; Un.Ex. 3).

While the bulk of the medication was kept in the locked toolbox, the stacked cups of medication were not locked and were instead kept in front of the tool box. (Tr. 44).

The Grievant testified that he and the other night corrections officer would place a small “x” in the upper right hand corner of the Medication Records form to indicate that “medication was distributed...into the cup.” (Tr. 46). The Medication Records were kept on a clipboard with the medication. (Tr. 49). Those records were not arranged by the inmate’s name, but were instead organized by jail cell. (Tr. 54). According to Grievant, the corrections officers responsible for actually handing the medication to the inmates did not double-check the pills in the cups against the Medication Records. (Tr. 49). There was no policy or practice instituted for double-checking the pills in the cups against the Medication Records before distribution. (Tr. 56).

The County employs a physician’s assistant, Jim Nanney. (Tr. 16). However, the physician’s assistant is not always present in the jail. The Sheriff testified that he is there two or three times a week, sometimes more often. (Tr. 17). The physician’s assistant does not sort medication for distribution to the inmates, nor does he administer the medication. (Tr. 57; Un.Ex. 2).

C. Grievant

Larry Ontis was hired on October 28, 2008 as a corrections officer for Jersey County Sheriff. (Tr. 9, Jt. Ex. 5) During his tenure he worked the midnight shift. He attended the State of Illinois’ academy for correctional officers as provided at St. Clair County. (Tr. 37-38). During that training, the Grievant was issued a copy of the Illinois County Jail Standards. (Tr. 38; Un.Ex. 2; Er. Ex. 17). While at the Academy, Grievant stated that he was not trained on how to distribute medication. (Tr. 57). He testified that during that training, he was instructed that corrections officers were not to be distributing medication. (Tr. 57-59; Un.Ex. 2). The Grievant

has also testified that he was not trained to identify prescription medication to determine if pills in an inmate's prescription bottle actually are what they purport to be. (Tr. 57).

D. August 16, 2012

Correctional Officer Adam Walkington distributed medication to the inmates at about 7:00 a.m. on August 16, 2012. When performing this task, Angela Scott informed him that he forgot her medicine. CO Walkington had CO Todd Reese go check for Inmate Scott's medication. Walkington continued to distribute medication. When he began distributing medication to the male inmates, Alan Simpson refused his, "saying that some of the medicine was not his." (Er.Ex. 8) After looking into it further, CO Walkington discovered that Grievant had put Inmate Scott's medication in Inmate Simpson's cup. (Er.Ex. 8)

E. The Investigation

Walkington reported the two incidents to the Sheriff. (Tr. 11-12). After he explained to the Sheriff what happened, the Sheriff ordered him to write a report. (Tr. 12, Er.Ex. 8). Then the Sheriff contacted Grievant and told him not to come into work that day and to instead report the following day for a meeting with the Sheriff and his Union Representative. (Tr. 12)

The Sheriff next reviewed the medication records of both inmates. (Tr. 12, Er.Exs. 9, 10). Inmate Simpson had three medications (but four pills) he was supposed to receive at 8:00 a.m. on August 16, 2012: two Pheytoin, one Diclofenac and one Cephalexin. (Er.Ex. 9, 11). Inmate Scott had two medications on her list: Atenolol and Hydrocodone. (Er.Ex. 10, 12). There was no verification of the dosage levels to determine if both inmates were prescribed the same or different dosages. It appears as though Inmate Simpson's medication cup also had Inmate Scott's medication in it as well. (Er.Ex. 14). The Sheriff neither viewed, nor collected any of the plastic cups or pills involved. Neither inmate involved was interviewed. (Tr. 21)

The Sheriff also discussed the incident with the Physician's Assistant utilized by the County. (Tr. 33) The Physician's Assistant told the Sheriff that if the inmate had taken the medication "it would make him severely ill." (Tr. 33).

Sheriff Kallal issued a written notice of Investigation and Advisement of Rights. See, Employer Ex. 14. Grievant was interviewed and a recording was made of that meeting. (Er.Ex. 13.) At the meeting, Grievant was represented by Deputy David Womak. (Tr. 14) The recording of the interview was played at the hearing. During the interview, Grievant admitted to incorrectly dispensing the medication in the cups. (Er.Ex. 13).

The Sheriff told Grievant that his mistake could have caused Inmate Simpson to become ill and that was "just a mistake [he could] not afford." (Er.Ex. 13) The Sheriff reminded Grievant that he had "given him every chance" to improve. *Id.* Thereafter, the Sheriff notified the Union and Grievant that he would be "seeking immediate termination." *id.*

During the interview, Grievant was not provided copies of any written policies, nor did the Sheriff discuss any particular policies. (Tr. 56). Grievant admitted that he had not put the medication into Inmate Scott's cup and he should have. (Tr.61)

F. Prior Discipline

The Grievant has a number of prior disciplinary incidents leading up to this termination. He was hired on October 28, 2008. Poor or incomplete documentation has been an area of concern for the Grievant, and he has been reprimanded or counseled for such deficiencies on several occasions. (Er.Exs. 1, 3, 4). On December 29, 2008, while still on probation, Grievant received a verbal warning for failure to properly complete paperwork on four separate occasions. (Er.Ex. 1) Five months later on April 29, 2009, Grievant was given a written warning for leaving the jail unguarded to escort an inmate "to the ATM across the street to obtain bond money." (Er.Ex. 2). On January 7, 2010, the grievant was given another verbal counseling for

"inferior work performance" as it related to booking inmates. (Er.Ex. 3) Then, less than a month later, on February 3, 2010 the Grievant was given a written warning for making booking errors. (Er.Ex. 4)

Next, on April 29, 2010, Grievant was suspended for one day for booking in an inmate under the wrong name. (Er. Ex. 5). Then, on November 4, 2011, Grievant was given a three day suspension for removing the screws that held the plexi-glass screens to the television creating safety issues. (Er.Ex. 6)

Finally, in July 2012 Grievant was given a 15-day suspension for failing to complete appropriate documentation in connection with the release of an inmate on June 26, 2012. (Er. Ex. 7)

G. The Grievance

According to the Sheriff, Grievant's actions created a "safety issue for inmates as well as correctional officers," the Grievant's conduct was "definitely uncalled for" and "it was a big liability on the county." (Tr. 18). The Sheriff testified that this was the first time such a mistake had ever occurred at the jail. (Tr. 15). He sent out an e-mail warning "everybody" about "double checking everything before it goes out." (Tr. 15, 20, 25). He considered this warning to double-check the medications to be a reprimand to all corrections officers. (Tr. 62). The Grievant was disciplined more harshly because of his past disciplinary record. (Tr. 62).

The Department also abandoned the cup system and began using sealed bags, because this system was a "better way to regulate the medications." (Tr. 33, 35).

On August 27, 2012, a grievance was filed with the Sheriff contesting Grievant's termination. (Jt Ex. 2). The grievance was denied and on August 30, 2012, the Union advanced the Grievance to arbitration. (Jt. Ex. 3.)

V. POSITIONS OF THE PARTIES

A. The Union

The Union takes the position that there is no just cause for this termination. The Union argues that discharge for failure to meet non-existent production standards is not an appropriate outcome in this case. The Union points out that the Employer failed to prove the existence of an established procedure which the Grievant was required to follow. Grievant was terminated for failing to perform his duties as required, but it was never proven what those requirements included. There were no alleged violations of any rules, regulations, policies or procedures in this matter.

Moreover, the Sheriff's reaffirmation or alteration of policy is inconsistent with the Grievant's termination. According to the Union, if the department policy was clearly communicated and well understood by all, there would be no reason to restate it or change it after Grievant was removed from duty, as was done here with the blanked reprimand to all.

The Union also points out that the Grievant conduct was not intentional, malicious or reckless. There was simply no evidence of any ill will by Grievant, this was simply a matter of simple carelessness, oversight or negligence. To that end, it is not clear that Grievant made any mistakes because of the flaws in the investigation. The poor internal investigation never determined with any degree of certainty what exactly occurred on the morning of August 12, 2012.

If the Grievant's conduct was merely negligent, discharge was too severe. The inmates' safety was not jeopardized and there was no risk of litigation from the inmates. Not only that, but the Employer's policy is contrary to its allegation that the Grievant would be responsible for any harm caused by ingestion of medication.

Finally, the Union asserts that the Employer failed to show that Grievant's performance could not be improved through a performance improvement plan or training. The Employer refused to take responsibility for the lack of training or failure to manage the correctional officer and their refusal to follow the jail code.

For all the reasons outlined above, the Union asks that the Grievance be sustained in its entirety and that Grievant be made whole for his losses.

B. The Employer

The Employer takes the position that there is more than the requisite was just cause for termination. The Employer asserts that the continued employment of Grievant is detrimental to the safety and security of employees and inmates of the Jersey County Jail. Progressive discipline is not required. The Employer points out that it is reasonable for the Sheriff to expect that employees will be able to prepare and dispense medication correctly to the inmates. Contrary to the Union's assertion, the Jail Code only requires that a competent medical authority ensure there is a way for medication to be administered to inmates, not that the medication must be administered by a medical professional.

The Employer points out that the current procedure for dispensing medication had been in use for two years without incident and without complaint from the Union. If the Union had an issue with the way medication was dispensed by their members, they could have requested a Labor Management Meeting. That did not happen.

The Employer argues that Grievant knew the procedures to be followed. He had been doing it for two years. He just didn't do it on August 15. The Employer maintains that the Grievant was treated fairly and that a fair and impartial investigation was conducted. This process yielded proof of wrongdoing. The process led to implementation of progressive discipline, even where

the progression was not required. This, according to the Employer, showed a substantial shortcoming that rendered Grievant's continued employment detrimental to the Employer.

Grievant had a troubled history with the Employer. In a span of 3 years and 9 months, Grievant had 7 incidents of discipline, the most recent of which was a 15-day suspension only 17 days prior to this incident. In short, the termination was for just cause.

For these reasons, the Employer requests that the Grievance be denied in its entirety.

VI. DISCUSSION AND FINDINGS

A. Introduction

This matter is a discipline case and therefore the burden is on the Sheriff to establish that reasonable cause exists for the termination. After a complete and thorough review of this matter, I find that the Sheriff has established reasonable cause for termination. The grievance is denied in its entirety.

B. Discussion

This matter comes before the Arbitrator as a result of Grievant's termination. The parties' stipulated that the issue involved whether or not there is cause for the termination. The Union makes a number of different arguments as to why there is not just cause in this matter.

Initially the Union points out that there were no allegations of any policy or procedures that were violated here. From the Union's perspective it seems as though Grievant was terminated for not following some non-existent production standard. Grievant was terminated for endangering the safety and security of both the inmates and the employees of the jail but not putting the correct medication in the correct inmate's cups.

It is virtually impossible to craft a policy or rule to cover every possible situation one would encounter while operating a jail. At some point common sense must prevail. The safety and security of both the people and the facility are paramount. Actions or inactions that

compromise that cannot be tolerated in a correctional facility regardless if there is a policy that specifically states this.

This is not the Grievant's first time being disciplined for endangering the safety of the staff or inmates. In November 2011, Grievant was discipline for an incident where the plexi-glass from around the TV was broken, creating potential safety hazards. And now, less than a year later the Grievant finds himself in the hot seat again for this incident.

The Union argues that Grievant's conduct was not intentional, malicious or reckless; at best it was careless, an oversight or negligent, not worthy of termination. Discipline does not necessarily require intent, malice or a finding of recklessness. It is undisputed that something went wrong on the morning of August 15. The Grievant testified that none of the Corrections Officers would double check the medication in the cups, and apparently they don't because there is nothing that requires them to do so. It is unfortunate that the officers need to be told to exercise that level of caution when distributing multiple medications to multiple inmates. It should be everyone's responsibility to ensure that each inmate gets the correct medication.

Not only that, but Grievant has handled medications virtually his entire, albeit short, career with the Sheriff. He has distributed the medication many times. It appears as though the corrections officers were given the flexibility to create system that works for them and had a couple of years to refine the process if it wasn't working. The process they developed was working very well when they were careful and put the correct medications in the correct cups.

Given this Grievant's short employment history and the number of incidents and prior discipline, termination is appropriate in this matter.

VII. AWARD

For the reasons stated in this Opinion and Award, the Arbitrator finds:

The Grievance is denied.



**Michelle Camden, Arbitrator
August 26, 2013**