

In the Matter of Arbitration)
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 between)
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 LAW ENFORCEMENT LABOR)
 SERVICES, Inc., UNION)
)
 and)
)
 PENNINGTON COUNTY,)
 MINNESOTA, EMPLOYER)

OPINION AND AWARD

BMS Case No.: 08-PA-0452

Appearances:

For the Union: Mark W. Gehan, Collins, Buckley, Sauntry & Haugh, P.L.L.P.

For the Employer: Scott M. Lepak, Barna, Guzy & Steffen, Ltd.

Procedures:

The undersigned was selected as Arbitrator in the present Matter through the procedures of the Minnesota Bureau of Mediation Services. A Hearing was held in the County Court House in Thief River Falls, Minnesota on November 25, 2008, commencing at 8 a.m...With the simultaneous submission of Briefs on January 13, 2009, the Record in this Matter was closed.

Parties

The Employer is a medium-sized county in the state of Minnesota. As such, its Sheriff's Department handles many aspects of law enforcement, including the operation of the County Jail, located in Thief River Falls, the county seat. The Union, despite its incorporated form of organization, is an exclusive representative under Minnesota's Public Employment Labor Relations Act, representing law enforcement personnel including jailers. The Parties are

signatories to a Labor Agreement effective from January 1, 2006 through December 31, 2008.

Issue

Was the Grievant discharged for just cause, the standard set in Article 19, section 1 of the Labor Agreement?

Some Central Facts or Allegations

The Grievant, Kay Melvie Tesch, was from late 1998 or early 1999 (inferred from the fact that the first performance appraisal in Tab 12 of the County Exhibits is for the period “hire to 10/99;” in fact, nobody asked her when she was hired) until her discharge on October 2, 2007 a correctional officer (jailer) with the Pennington County Sheriff’s Office.

The Employer advances the following conclusions as the basis for discipline:

- 1) Threatening a fellow officer—violates Principle 2 of the Code of Ethics
- 2) Insubordination—violates of [sic] Principle 5 in the Code of Ethics and Section 21.5 and Section 21.7 of the Pennington County Employees Personnel Policy.
- 3) Negligence and carelessness by throwing the radio on the floor—violates Section 21.6 of the Pennington County Employees Personnel Policy.
- 4) Allowing inmates under your supervision to play basketball—violates previously issued and generally understood directions.
- 5) Disobeying clear and reasonable directives provided to you by a jail sergeant.

[Sheriff’s letter of September 18, 2007; Tab 18 in Employer Exhibits]

These conclusions were based on the evaluation of two events: 1) a conversation between Ms. Tesch and fellow officer Christina Pribyl in early 2007 and 2) a series of interactions with Sgt. Brandy Nelson on July 15, 2007.

The decision to terminate was based on these alleged violations and “consideration of [the Grievant’s] record as a whole.”

The conversation with Ms. Pribyl

In the course of investigation of the July 15, 2007 events, an incident about two months earlier was “revealed” (Sheriff Hruby’s expression). Officers Tesch and Christina Pribyl were on duty together. Ms. Pribyl reported in an investigation conducted by Deputy Al Melbye [Tab 5 in Employer Exhibits] and later testified at the Hearing to the interchange with Ms. Tesch given below. A television was on in the room where they were working and, knowing Ms. Tesch to be a dog lover, she told her colleague that there was a program on rescue dogs on the Animal Planet Channel, and asked if she wanted to watch it. Let Ms. Pribyl tell her side of the story:

A (by Ms. Tesch): Nope.

Q (by Ms Pribyl): Are you sure? It’s about animal rescues, it’s about dogs.

A: No, and don’t you ever fuckin’ mock me again or I’ll knock you into the middle of next fuckin’ week.

Q: Excuse me, what did you just say to me?

According to Ms. Pribyl, Ms. Tesch then repeated the threat. [conversation adapted from Ms.

Pribyl's interview with Deputy Melbye, Tab 5 in Employer's Exhibits]

Ms. Tesch, for her part, categorically denies saying these words or making this threat. The Employer asks why Ms. Pribyl would make up an incident like this. The Union asks why, in a "she said, she said" situation like this, Ms. Pribyl's charges should be believed, when in the analogous "she said, she said" situation involving Ms. Tesch's charges of sexual harassment against Jail Administrator Susan Halverson, those charges were held to be unfounded.

Ms. Pribyl's account has the ring of truth to it, especially her response to the threat to "knock you into the middle of next fuckin' week." But, especially if one reads the entirety of a lengthy phone conversation to be discussed later, one is not sure what to make of the "threat" involved: rough and salty language seems to come naturally to Ms. Tesch. But in Ms. Pribyl's interview with Deputy Malbye, she emphasized that the incident had left her "uncomfortable" when she subsequently had to work with Ms. Tesch.

Rough Outline of the Events of July 15, 2007

This summary of events is based on testimony at the Hearing and to Deputy Malbye and on a videotape submitted as Employer Exhibits, Tab 3. The videotape was made by a surveillance camera in the "control room" of the County Jail Annex. As will be noted, the Parties differ on many points of testimony and on what conclusions the videotape will support.

On July 15, 2007, the Grievant, Ms. Kay Melvie Tesch, was on duty as a jailer. Sometime around noon, she was observing inmates in the exercise area who, according to her

testimony, were playing “horse” on the basketball court. “Horse” is a game played with a basketball, in which the contestants successively attempt to make a shot already made by the person who started the particular series of shots. It is not a team activity and does not involve constant running, guarding opponents or physical contact. It could certainly include jump shots.

Sgt. Brandy Nelson was the supervisor on duty in the control room. She testified that she saw the inmates playing basketball itself—“they were running and jumping”--- which is against the rules due to problems with such matters as injuries. No tapes of the exercise yard were submitted in evidence to clarify this disagreement; it is not clear as to whether such tapes were or could have been made. Sgt. Nelson testified that she saw the basketball game on the monitor from a camera. When she drew a diagram of the Jail Annex’s layout [Union Exh. 2] during the Hearing, Ms. Tesch indicated the locations of two camera in the inner yard, but she didn’t think there were cameras in the basketball area beyond the inner yard. Three employer witnesses (Jo Elaine Williams, Susan Halverson and Sheriff Michael Hruby) seem to agree that there were cameras there.)

The Union asks, if there were tapes as suggested by Sgt. Nelson’s testimony, why they weren’t presented at the Hearing, so we might know what the inmates were doing. We are interested in resolving this question since it is directly relevant to the fourth violation listed in Sheriff Hruby’s letter of September 18, 2007. And the answer might explain some of Ms.. Tesch’s displeasure with Sgt. Nelson, but such resolution is not going to be obtained. This is too

bad, since the violations charged in Sheriff Hruby's letter of September 18, 2007 are serious, even if the alleged behavior cannot be "justified" by who was right or wrong in the horse vs. basketball debate. It may be that the exercise yard tapes may not have been thought of before they got to the end of 30 days and started to "record over." [Kittson County Deputy Wilwant's report on his investigation of Ms. Tesch's sexual harassment complaint against Ms. Halverson, Union Exh. 1]

But it remains a nagging fact that the responses of the top employer principals in this matter to questions about the possibility of videotape evidence are, at best, enigmatic. Asked on cross-examination about tapes in the basketball area, Jail Administrator Susan Halverson had the following responses:

Q: Did anybody get the video of inmates playing basketball?

A: No.

Q: Why not? If it was a safety issue...so why not, if they are doing it? If you had that, you'd have video of Brandy Nelson yelling at Kay Tesch?

A: Yes, if we had chosen to do so.

A similar exchange was had on cross-examination of Sheriff Hruby.

Q: How do you know they [inmates] are playing basketball?

A: Videotapes show them playing basketball. Brandy Nelson saw them playing

basketball.

Q: You're aware that Kay Tesch says they are playing horse?

A: Yes.

Q: You could make video and you didn't?

A: That's right.

Sgt. Nelson testified further that she tried to call Tesch on her telephone, but "couldn't get her to answer." As a result, Ms. Nelson testified that she went out to the exercise area and shouted to the Grievant to turn on her phone. In her interview by Deputy Melbye, Sgt. Nelson recounted two trips from the control room to the doorway, the first to tell inmates to stop playing basketball, the second to tell Ms. Tesch to turn her phone on. In that account, each trip was preceded by attempts to reach Ms. Tesch by phone. Sgt. Nelson's testimony at the Hearing (at least as recorded by the Arbitrator) suggests there was only one trip. In any event, Sgt. Nelson spoke loudly to Ms. Tesch, who was an estimated 70 feet away. Ms. Tesch's testimony at the Hearing was that Sgt. Nelson was "yelling like a fishwife, in a voice extremely loud and shrill." After this, Sgt. Nelson then evidently went back to the control room.

Our attention next turns to the videotape of the control room. It shows a large room with a smaller partially enclosed area within it. The semi-enclosed area contains one or more tables and desks and is occupied by a woman identified as Sgt. Nelson. The surrounding room has unidentified objects scattered about, with inmates in orange jump suits pursuing various tasks or walking through the area. At some point, the Grievant enters from a door at the right of the room

(as seen from the vantage point of the surveillance camera), walks across the area and enters the semi-enclosed space through a doorway. At this point, the Grievant is standing at the left end of the camera's view of the room, with Sgt. Nelson seated off to the right. As she turns to her left to address Sgt Nelson, the Grievant is seen to reach out with her right hand which is holding an object identified as her phone (or radio or "walkie," all terms apparently interchangeable).

Now, the video is very jumpy in the sense that you see persons walking across the floor and their gaits are not even—normal motion is suddenly followed by a jump or lurch. It is possible that the film slips and jumps to get back on track. (The Arbitrator is not an expert in many matters, including the operation of surveillance cameras.) One of the jumps comes just as Ms Tesch puts out her hand with the walkie and the hand jumps forward just as the walkie should have made contact with the table. One does not see the walkie on the table afterward, so presumably it is on the floor where it is placed in much testimony. The jump in the tape is consistent with throwing the phone onto the floor (the Employer's contention) or a simple mishap or "slip" (the Union's position). The tape evidence is inconclusive. But in her interview with Deputy Melbye, Ms. Tesch stated that she was "swinging" the phone and it "bounced once" on the floor, which is certainly more consistent with a conclusion that Ms. Tesch did propel the walkie toward the floor. In the Hearing, Ms. Tesch denied throwing the phone, denied it being "intentional," but did state that she "was swinging it around."

In the tape, the Grievant completes her turn to the left and begins to speak with Sgt Nelson. There is some arm waving on the Grievant's part, but it seems to be for emphasis and

not some form of threat. After approximately 12 seconds (of a 70 second confrontation), Ms. Teach sits down, de-escalating the situation. The tape does not have a sound track (which might not help much, anyway), so we have to look elsewhere to evaluate the Employer's contentions about the damage done to respect by inmates for the role and authority of the jailers. Does the confrontation between Tesch and Nelson seem to have constituted a "row?" Sgt. Nelson, asked by Deputy Melbye "Were you able to notice if any of the inmates took notice?", answered, "Oh, yes." At the Hearing, Sgt. Nelson responded affirmatively to a question whether the "inmates were staring and looking." In the interview by Deputy Melbye, Sgt. Nelson estimated that the confrontation lasted 5 minutes; at the Hearing, she said 5 to 10 minutes. The tape appears to answer these questions more satisfactorily than in the case of whether the phone was thrown to the floor or not. Neither inmates or other passersby seem to have paid any attention to the confrontation between Tesch and Sgt Nelson. It is, however, unclear to this viewer just how high the wall is in front of the semi-enclosed space nor what its acoustical properties might be. So the answer to the question about the existence of a row is not conclusive—there might have been one but nobody seems to have paid any attention—which sounds like an oxymoron. In any event, the confrontation did not last nearly as long as Sgt. Nelson thought: elapsed time on the tape is 70 seconds. Perhaps the brevity of the confrontation meant it was over before any one noticed. [At the Hearing, Sgt. Nelson testified that she had not reviewed the tape.]

According to Ms. Tesch's interview with Deputy Melbye, one of the topics raised by Ms. Tesch in the control room interchange was that Sgt. Nelson's alleged proclivity for telling sexual anecdotes should stop (being a form of workplace sexual harassment) or it might cost Nelson her

job. This is evidently the “threat” referred to in Ms. Tesch’s recorded phone conversation with fellow officer Craig Ellithorpe [Tab 3 of Employer’s Exhibits is a transcription of the recording—the actual recording is in a file on the CD containing the videotape. The Arbitrator was unable to open the recording file (something about a “failed codec”). The Arbitrator asked the attorneys to confer and verify that there don’t appear to be any disagreements about the accuracy of the transcription.] We pick up the conversation between Ms. Tesch and Mr. Ellithorpe:

Tesch: And then when I came over [reference unclear], Brandy [Nelson] says well are you better now [apparent reference to anger during the July 15 episode], I said yeah.

Ellithorpe: Oh, really.

Tesch: Yeah. Maybe threatening people does work around here.

Ellithorpe: You threatened her?

Tesch: Um hum.

Finally, there is no dispute that Ms. Tesch left her phone lying on the control room floor when she left the room, despite Sgt. Nelson’s repeated instruction to pick it up. Hence, for the 10-15 minutes (at the Hearing) or “less than 30 minutes” (to Deputy Malbye) Ms. Tesch testified that she spent in the “Med/Max” area, she was not carrying her phone which all officers are required to do whenever on duty.

Additional Evidence

In the testimony at the Hearing and the interviews by Deputy Malbye, in the various exhibits submitted by the Employer (notably performance appraisals and employee misconduct write-ups), and in the several pages of the conversation with Mr. Ellithorpe that are not quoted above, there is ample additional evidence supporting a picture of Ms. Tesch's behavior—especially as relates to language involving sexual matters and interpersonal violence--- on the job. Unquoted above from the Tesch-Ellithorpe phone conversation were discussions of whether Tesch or Ellithorpe had the bigger “balls,” an offer by Tesch to lend Ellithorpe her pair, and “threats” to deck both Sgt. Nelson and her friend Ellithorpe. Granted that the atmosphere of the Pennington County Sheriff's Department was pretty rough and tough, with a large streak of sexual randiness thrown in, but Ms. Tesch seems to have been above average on many scores. From time to time, she may have been able to straighten out her ways, but that doesn't seem to have stuck: “In the years since she was hired, Kay has been a roller coaster of positive and negative attitudes.....She needs to learn to eliminate negative situations as much as possible, and when that's not possible, to take a more moderate approach in dealing with them.” [2005-6 performance appraisal in Tab 12 of Employer's Exhibits].

Conclusions

This is a hard case, since so much depends on sorting out conflicting testimony and when all is said and done, evaluating that testimony against the social and cultural backdrop of the Pennington County Jail. The lengthy phone conversation between Grievant Tesch and her friend and colleague Craig Ellithorpe gives us a really good look at the latter situation, and conformed

well with other testimony about coarse language, sexual stories and threats of various kinds which largely informed the depiction of the atmosphere presented in the previous paragraph. Ms. Tesch was a normal part of that social and cultural milieu; as she told Deputy Melbye: “...you know I swear like a sailor, and I’m not ashamed of it.” [Employer Exhibits, Tab 9, page 10]

We shall examine the five conclusions reached in Sheriff Hruby’s September 18, 2007 letter in order.

1. Threatening a fellow officer: This involves the interchange with Ms. Pribyl, not the self-confessed threatening of Sgt. Nelson with a sexual harassment complaint. For reasons given above, we find Ms. Pribyl’s account credible, but are unsure how serious in fact was the threat. From her statements to Deputy Malbye, it is certain that Ms. Pribyl took it seriously. Hence, Sheriff Hruby’s conclusion has merit.

2. Insubordination: This is apparently partially based on disagreeing with Sgt. Nelson’s order to turn on her radio, commenting in the presence of inmates that “maybe if you weren’t so annoying, I’d talk to you.” Nobody has disputed that this interchange took place, so Sheriff Hruby’s conclusion has merit as relates to that part of the events of July 15, 2007. But this single verbal shot is only a small part of the insubordination charge.

The larger part of the insubordination charge and probably what raises the whole issue to

paramount importance is the control room confrontation. The Employer has made this confrontation into the major ingredient in the case for termination. This is based on Sgt. Nelson's descriptions of the event which has Ms. Tesch "yelling," "screaming," "swearing" and "ranting and raving" for 5 or 5-10 minutes in the presence of numerous inmates. But the Arbitrator has viewed the control room videotape many times and agrees with the Union that the confrontation is much shorter than Sgt. Nelson estimated (70 seconds instead of at least 5 minutes) and nobody around seems to have paid notice to it. The Arbitrator even noted above that, after 12 seconds on her feet, Ms. Tesch sat down on a chair, "de-escalating the situation." The videotape record will not sustain Sheriff Hruby's apparent conclusion that a major and noisy spectacle of insubordination took place, witnessed by many inmates, bringing a challenge to the authority of all jail staff.

3. Negligence and carelessness by throwing the radio on the floor: As indicated above, the control room video is inconclusive about this, but the fact that the radio never appears on the table and Ms. Tesch's admission that she was "swinging it [the radio] around" and that it "bounced once" on the floor suggest that Sheriff Hruby's conclusion has some considerable support, even if the verb, "throw," can only be inferred and not seen. To suggest that the action might have been accidental and/or not intentional does not mean that "negligence and carelessness" (the words of the County Personnel Policy) are not involved.

4. Allowing inmates under your supervision to play basketball: This conclusion can not be sustained. Four witnesses (Sgt. Nelson, Sgt. Williams, Jail Administrator Halverson and

Sheriff Hruby) indicated that videotape of the basketball area could have been available, while Halverson's and Hruby's responses to questions about presenting the tape at the Hearing were, as noted above, "at best, enigmatic." If such evidence was not submitted as a matter of choice, it invites the conclusion that it would not support the Employer's contention.

5. Disobeying clear and reasonable directive provided to you by a jail sergeant: There is no dispute that Ms., Tesch failed to pick up her phone from the floor of the control room and failed to take it with her when she left the room. Thus, Sheriff Hruby's conclusion on this point is sustained.

Of the Sheriff's five conclusions, #2 (Insubordination in front of numerous inmates affecting their respect for all jail staff) and #4 (allowing inmates to play basketball, bringing potential legal and financial liability for the County) would seem the most important, with #5 (disobeying orders about the radio, with potential for lack of communications in a dangerous setting) also of considerable importance. However, the insubordination charge loses a good bit of its weight when the July 15, 2007 control room episode is evaluated in light of the videotape.

Although the #4 conclusion (allowing inmates to play basketball) can not be sustained and #3 (throwing the radio) is sustained only with the caveat that it may have been accidental, the rest of Ms. Tesch's record remains intact. She was terminated not just for the five allegations in the letter of September 18, 2007, but in light of her overall record. Even as amended to disallow the charge of permitting inmates to play basketball, softening the verb "throw" in the radio-to-the-

floor incident to allow for the possibility of an accident, and downgrading the public insubordination charge to focus mostly on the zinger in the exercise area, still leaves this balance sheet:

1. The threat to Ms. Pribyl
2. Negligent or careless handling of the radio
3. A public insubordinate response to Sgt. Nelson's legitimate directive to turn on radio
4. Refusal to pick up the radio from control room floor
5. Consequent failure to carry the radio, as required at all times when on duty

This seems pretty petty stuff for a termination. The most serious allegation left standing is the threat to Ms. Pribyl, although failure to carry the radio could have had most serious consequences. What does the balance of Ms. Tesch's "record as a whole" reveal?

Annual Performance Appraisals

There are 31 work standards on the Employee Performance Report, grouped in four categories: I. Health, Safety & Security; II. Behavioral management and Program; III. Communication; and IV. Institutional Policies and Procedures.

1. Hire to October 1999: "needs improvement" on 3 (or 4, one X is on the line) items, largely involving interpersonal skills; above "fully capable" on none.
2. October 1999 to September 2000: "needs improvement" on 0 (or 1, one X is on the line)

item involving relationships with residents, “significantly above average” on doing her share of housekeeping, etc. chores

3. 2000 to 2001: not in Employer Exhibits, Tab 12.

4. 2001 to 2002: “needs improvement” on 3 items involving safety, resident supervision and manner of interaction with co-workers; above “fully capable” on none

5. 2002 to 2003: not in Tab 12

6. 2003 to 2004: “needs improvement” on zero items, “significantly above average” on 1 (or 3, 2 X’s are on the line) item(s), notably doing her share of chores

7. 2004 to 2005: “needs improvement” on 2 communication items, “significantly above average” on crisis performance and doing her share of chores

8. 2005 to 2006: Checklist replaced by narrative performance evaluation—making “significant progress in communication skills with both staff and inmates,” “works well with inmates overall,” “willingness to do what needs to be done.” On the whole this is a strongly positive report, even if the comments already quoted about her “roller coaster of positive and negative attitudes” and the need to “learn to eliminate negative situations” are there as well.

Disciplinary actions: There are two Employee Violation Records in Employer Exhibits (Tabs 14 and 15)—both are from earlier in 2007. On March 27, she was written up for 2 instances of “substandard work” and “attitude” involving admission of inmates on March 20; no disciplinary action is noted on the form. On June 11, she was written up for “conduct,” “attitude,” and “disobedience” for “call[ing] an inmate a liar and mak[ing] jokes about his mother being in the hospital.” At an administrative meeting on June 6, Ms. Tesch was

ordered to apologize to the inmate; the “disobedience” lay in the fact that she evidently did not do so. Discipline imposed was a 3 day suspension.

The Grievant’s “record as a whole” does not convince this Arbitrator that the somewhat qualified and thinned-down list of allegations taken in conjunction with that “record as a whole” rises to the level of just cause for termination.

In its post-Hearing Brief, the union states: “LELS does not assert that Kay Tesch is utterly without fault for what happened on July 15, 2007. She quite clearly believed, rightly or wrongly, that she had been reprimanded in the presence of the inmates she was supervising. The appropriate way for her to take this up with Sergeant Nelson would have been when they were alone, and when she, Tesch, had had a chance to cool down.” [Union Brief, page 8] As a result of this conclusion, apparently, the Union has not requested a “make whole” remedy.

AWARD

The Grievance is sustained. The Grievant is to be reinstated. No back pay or other make whole remedies are awarded. Her seniority clock is to be restarted at its reading when she was terminated.

Given at St. Paul, Minnesota this twenty-ninth day of January 2009.

James G. Scoville, Arbitrator.