

IN RE ARBITRATION BETWEEN:

TEAMSTERS LOCAL 320

and

WRIGHT COUNTY

DECISION AND AWARD OF ARBITRATOR

BMS 15-PA-0148

JEFFREY W. JACOBS

ARBITRATOR

July 28, 2015

IN RE ARBITRATION BETWEEN:

Teamsters Local 320,

and

Wright County.

DECISION AND AWARD OF ARBITRATOR
BMS Case # 15-PA-0148
Heather Gerads Clanton grievance

APPEARANCES:

FOR THE UNION:

Kevin Beck, Attorney for the Union
Heather Gerads (Clanton), grievant
James Clanton
Brianna Samantel Deraad

FOR THE COUNTY:

Susan Hansen, Attorney for the County
Todd Hoffman, Captain Wright County Sheriff's Office
Lt. Sean Deringer, Wright County Sheriff's Office
Joe Hagerty, Wright County Sheriff
Captain Pat O'Malley, Wright County Sheriff's Office
Sgt. Kent Lipelt, Training Sergeant

PRELIMINARY STATEMENT

The hearing was held on May 7, and June 2, 2015 at the Wright County Law Enforcement Center in Buffalo, Minnesota. The parties presented oral and documentary evidence at that time. The parties submitted briefs dated July 10, 2015 at which point the record was closed.

ISSUES PRESENTED

The parties stipulated to the issue as follows: whether the termination of the grievant was for just cause? If not what shall the remedy be?

CONTRACTUAL JURISDICTION

The parties are signatories to a collective bargaining agreement covering the period from January 1, 2012 through December 31, 2014. Article VII provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the State of Minnesota Bureau of Mediation Services. The parties stipulated that there were no procedural arbitrability issues and that the matter was properly before the arbitrator.

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE XII – DISCIPLINE

12.1 The EMPLOYER will discipline employees for just cause only. Discipline will be one or more of the following forms:

- (a) oral reprimand;
- (b) written reprimand;
- (c) suspension;
- (d) demotion; or
- (e) discharge.

RELEVANT EXCERPTS FROM COUNTY JAIL POLICY AND PROCEDURE MANUAL POLICY

POLICY NUMBER 2.06

- 15. Employees shall not fraternize or become personally involved with any prisoner/inmate while on duty, nor shall they fraternize or become involved with any existing-prisoner/inmate for at least (1) one year from that person's last discharge date from the jail, prison, or supervised release.
- 16. If a family member, friend, or significant other is incarcerated in the Wright County Jail the employee must, without delay, notify their immediate Supervisor or Jail administrator.

POLICY NUMBER 2.18

- 2. Employees shall not fraternize or become personally involved with any prisoner/inmate while in the employment of the Sheriff's Office; or become involved with any existing-prisoner/inmate for at least (1) one year from that person's last discharge date from the jail, prison, or unsupervised/supervised release.
- 4. Employees will refrain from any personal and/or sexual association with offenders as defined above and as stated in Policy 2.06.

Authorized Personal Associations:

- 1. If a family member or close personal friend comes into custody, notify your Supervisor or Jail Administrator so that precautions can be taken to preserve the safety and security of the jail, inmates, and staff.
- 2. Family relationships will most likely constitute authorized personal association, but still must be reported to Jail Administration.
- 3. Employees wishing to establish, encourage or maintain personal association with offenders, including visitation while incarcerated in another facility, must submit a request to Wright County Administration.
- 4. Non family associations will be looked at on a case by case basis.
- 5. Employees who become aware that they or a member of their immediate family have a personal association with offenders must immediately report it to Wright County Jail Administration.

POLICY NUMBER 4.15

POLICY: The Wright County Jail will take all necessary precautionary measures to prevent the introduction of contraband within the facility to ensure the safety of the inmates, the staff and the public. Only authorized personal property will be allowed in the secure area. Cellular telephones are strictly prohibited unless authorized by the Jail Administrator or designee. Reading materials and bags will be kept at a minimum to ensure a safe and secure facility.

Camera features on cellular phones held by non-Wright County employees will not be used inside the secure perimeter. Camera features on authorized department cellular telephones may not be used within the secure perimeter unless there is a security emergency or documentation is required for a business reason. Extended reading that hinders the Officer's ability to manage their assigned post is not allowed.

PROCEDURES

Personal cell phones will not be allowed inside the jail.

Only authorized department issued cellular telephones are allowed inside the Wright County Jail.

COUNTY'S POSITION:

The County's position was that the grievant was discharged for just cause for her actions in this matter. In support of this position the County made the following contentions:

1. The grievant is an experienced jail employee who, as a sergeant, knows the policies and rules against fraternization with inmates. She further knows the risks to safety of inmates and staff if fraternization is allowed or occurs. She has been employed in the Wright County Sheriff's Office since 2006 and was promoted to Correctional Sergeant in 2011. As such she is responsible for setting a proper example of adherence to the rules and policies of the department and has in fact been responsible for enforcing and monitoring those rules as well.

2. The County further noted that the grievant did not have a recognized previous relationship with or a prior personal association with James Clanton prior to his incarceration. At most they were casual acquaintances prior to his incarceration and thus did not fit into the exception to the general policy clearly prohibiting fraternizing with inmates by jail staff. The County pointed to her Garrity statement in which she described Mr. Clanton as a "friend" and indicated that she and Mr. Clanton were "just friends" prior to his incarceration.

3. The County asserted that the policy is clear and prohibits unauthorized personal associations with out-of-custody offenders. “Out-of-custody offenders” are defined as those individuals who have been released from a County jail, probation or parole for a period of less than one (1) year. “Personal associations” are also defined as any sexual or personal interaction with out-of-custody offenders. See Policy 2.18, Definitions paragraphs 3 and 4. As a Corrections Sergeant the grievant knew of these policies and of the consequences of violating them. She was also required to undergo ongoing training on this very issue and signed certifications that she attended and understood the training on this policy.

4. Further, as noted below, she was also specifically advised of them during her conversation with Captain O’Malley only days after Mr. Clanton had been in the jail and was advised to have no further contact with him.

5. The County noted that the reasons for this rule are obvious and that the rule is there both to protect against abuse of inmates, as the Prison Rape Elimination Act, PREA, and to protect staff from inmates who may wish to use that relationship to gain some advantage. It is also there to protect the safety of staff as well. The County argued that rationale behind the rule is unassailable and further asserted that it must be enforced strictly for the safety and security of all.

6. The County acknowledged that there were a number of text messages between the grievant and Mr. Clanton before his incarceration but that it was apparent that they were not close and in fact did not even recall each other’s last names at first. The County argued that what constitutes a close personal relationship is done on a case by case basis but that what these two people had prior to the incarceration did not qualify under any reading or reasonable interpretation of the policy and is much like a clerk at a gas station or the clerk at a local coffee shop that someone might see on a regular basis. That person may be someone a person sees almost every day but which does not qualify as a close personal friend allowing a jail staffer to maintain or, as in this case, effectively start, a relationship with after the inmate leaves jail.

7. Despite the text messages, some of which were sexually suggestive, their relationship had not become a dating relationship. The County noted that they had met in a very casual basis several months before but that there was a long break in between contact and that after the dart league that caused them to meet ended in early 2013, they did not even see or have any contact with each other until January 23, 2014 – only 2 days before Mr. Clanton was scheduled to enter the Wright County Jail to serve a weekend for a pervious DUI offense.

8. In fact, the County noted that the text messages discussed going out on dates only after he was released from jail. Thus there was no actual relationship in place that would fit into the exception to the policy at all prior to his incarceration.

9. The County also acknowledged that the grievant advised her supervisor that she knew Mr. Clanton and that he was going to enter the Jail, which she was obligated to do. After Mr. Clanton left jail the grievant and Captain O'Malley discussed this very issue and she was told specifically not to see Mr. Clanton again. The County indicated that he told her this could result in both serious discipline as well as possible criminal charges if she did not follow his direct order. The grievant cannot claim that she was unaware of the consequences of her actions and while she was free to date Mr. Clanton, she was not free to violate clear policy and an even clearer order not to see him.

10. The County also pointed out that portion of the policy that prohibits fraternization with an inmate until one year after that person's release from unsupervised or supervised probation Mr. Clanton was, and remains, under supervision, due to his previous DUI offense. The County also noted that he may even have yet another such offense, which could certainly lead to his incarceration again, which is exactly why that rule is in place. Thus, the grievant should not have had any contact with him for at least a year following his release from probation.

11. The County noted that there is no dispute that not only did the grievant violate policy and the direct order of her Captain, she saw Mr. Clanton, began dating him and eventually married him only months later. The County asserted that this action demonstrated a flagrant and willful disregard for the policy and the directives of her direct supervisor and cannot be tolerated.

12. When the County discovered that the grievant had indeed violated the policy and the specific orders of her Captain, it began an investigation both internally and criminally. Fellow employees reported this, just as the grievant had reported other jail staff who had fraternized with inmates in the past in her capacity as a Sergeant.

13. During the investigation both the grievant and Mr. Clanton were interviewed as well as many other employees who confirmed that the grievant and Mr. Clanton did not have a dating relationship before his incarceration and that at best they were simply texting each other. The grievant's cell phone was examined during the criminal investigation that showed all of the text messages. The employer argued that these texts did not establish the sort of personal relationship necessary to meet the exception stated in County policy and that the relationship between the two was akin to a very casual acquaintance – much like a store clerk that one might see on a regular basis but without any sort of personal relationship. The cell phone records showed only that they were texting but nothing else had occurred. They had not slept together, had not dated each other and had not spent any actual physical time with each other.

14. The County further asserted that the union's reading of the policy was “tortured” and that all corrections employees know that they are not to become involved in any personal relationship for at least a year after that person is out of jail and off supervision of the correctional system. The grievant waited only 1 day before becoming sexually involved with Mr. Clanton – a clear violation of that policy and well known understanding regarding anti-fraternization.

15. Even one of the grievant's friends, Officer Purvis, testified that she told the grievant that dating Mr. Clanton was not a good idea. She had processed Mr. Clanton into the jail and he apparently told Ms. Purvis that he was going on a date with the grievant once he got out of jail. The County asserted that this also indicated that all the corrections officers know the rule.

16. The County vehemently denied that the criminal investigation was a subterfuge to get to the grievant's cell phone. The County asserted that under the PREA statute as well as state law regarding sexual misconduct, it had an obligation to determine if anything untoward had occurred or whether the grievant was guilty of any sort of criminal sexual conduct due to her position as a jail staff person who had obviously begun an overt sexual relationship with a person who had just spent 2 days in the Wright County Jail. Clearly, the two had a sexual relationship after Mr. Clanton was released from jail and the County had an obligation to determine if any applicable statute was violated.

17. The County acknowledged that the County Attorney declined to prosecute the matter, See Exhibit 1 at Tab R, page 16, but noted that the statute in question was arguably violated. That provision reads in relevant as follows: a person who engages in sexual contact with another person is guilty of criminal sexual contact in the fourth degree if the actor is an employee of a county adult or juvenile correctional system including jails and the complainant is a resident of a facility or under supervision of the correctional system. Consent by the complainant is not a defense. See, Minn. Stat. § 609.345(m). Thus, since Mr. Clanton was clearly still under the supervision of the correctional system when the sexual contact occurred, Captain O'Malley's concerns and the criminal investigation were more than justified in this case.

18. The investigation also revealed that some of the texts were received and sent from the grievant's personal cell phone during the time when she was in the jail working on the days before Mr. Clanton was there. The use of cell phones inside the secure perimeter is strictly prohibited pursuant to Policy 4.18. The County also asserted that this rule is in place for obvious safety and security reasons.

19. The nature of the relationship was discovered when the grievant posted a Facebook picture of flowers Mr. Clanton had sent her. Sgts. DuBois and Aarvig recognized the name, James Clanton, as the person who had been in the jail only a few days before and became concerned about the grievant's relationship with Mr. Clanton given his recent incarceration. They reported their observations immediately and the County took this information very seriously given the closeness in time of the incarceration and the obvious personal nature of the picture and the messages.

20. The County also countered the claim that other staff had used their personal cell phones without apparent disciplinary consequences. The County first asserted that it was unaware of any such infractions and that if they had, appropriate disciplinary action would have been taken.

21. Second, the mere fact that the grievant saw others, even supervisors, using cell phones inside the jail might well have been nothing more than the use of their official cell phones in an official capacity. Thus, there was no proof that the County was ever aware of these violations and cannot therefore be a valid claim of lax enforcement of the clear rule.

22. The County further asserted that it takes fraternization very seriously and that when it was discovered the Sheriff considered the grievant's length of service but concluded that the seriousness of this violation warranted her dismissal. The County argued that the grievant's status as a sergeant holds her to a higher standard of conduct and that she must take every precaution to avoid the appearance of impropriety. While nothing untoward occurred while Mr. Clanton was in jail, he is still under the supervision of the correctional system and the public demands that law enforcement officers be free from any possible allegation of inappropriate relationships with inmates or potential inmates – as Mr. Clanton still is.

23. Further, her status as a Sergeant requires an even higher standard of conduct since she is responsible for enforcing the rules and policies of Wright County. In fact she has enforced those policies against fraternization and thus is well aware of the consequences of violating that policy. The County noted too that her prior enforcement of those policies undercuts her claims that as long as one reports the relationship to jail administration, that means you are somehow “OK.”

24. The County also countered the claims by the union of disparate treatment. The County countered the claim that there was disparate treatment. Specifically with regarding to Corrections Officers, CO, Winkelman, the County argued that these situations were not the same. Even though he received only a 144 hour suspension, there was no proof of a sexual relationship following the inmate’s incarceration and noted that the information came from the ex-husband of the inmate, which called into question the veracity and reliability of the initial report. Corrections Officer Winkelman also denied it and there was no proof of anything sexual that occurred in that case as there is here.

25. Further, in the Winkelman case, the actions occurred in 2010, well before the current policy was in place. The current policy is clearer and prohibits any sort of fraternization with a person who is under the supervision of the correctional system for one year. Thus the two cases are different and do not present an example of disparate treatment.

26. With regard to Deputy Silbernagel, the County first noted that this occurred in 1998, well before the current sheriff was in office and even before he was in a supervisory capacity. Thus it is inapposite to even compare these two cases since they are so far apart in time and occurred under very different policies and administrations.

27. The County pointed to all of the other instances where jailers have been fired or have resigned in lieu of termination where fraternization has been shown. The County pointed to several such instances, many of which occurred with the union's knowledge as supportive of the claim that termination is appropriate here. See County exhibits 8, 9, 10 and 12 – all of which involved employees who violated the anti-fraternization policy and who would have been fired if they had not resigned.

28. The County argued finally that due to the seriousness of the grievant's conduct, the fact that there was no established prior personal relationship between her and Mr. Clanton, the fact that she was warned not to begin dating him and the clear fact that she violated the policy and the orders of superior officers, termination is the only appropriate result. That action was taken after consideration of the grievant's record and was not arbitrary or discriminatory in any way and should be upheld.

The County requests an award denying the grievance and upholding the termination.

UNION'S POSITION

The union's position is that the County did not have just cause for the grievant's termination. In support of this position the union made the following contentions:

1. The union asserted that the grievant is a long time, very competent employee who was promoted in 2011 by the very people who now seek to fire her. The union pointed to the grievant's evaluations, see Union exhibit 9, all of which were very good. The union pointed to the comments on these evaluations, such as she "does a fine job," "thinks through problems and makes good decisions" and "is knowledgeable in all areas of jail operations." The union asserted that these evaluations do not paint the picture of an irresponsible officer bent on ignoring rules as the County sought to portray her.

2. The union further asserted that the grievant did exactly what she was directed to by the terms of the policies at play here. She notified the Captain of her association with Mr. Clanton once she knew he would be entering the jail the weekend of January 24-25, 2014. Her understanding of the policy was that once that notification was done, that person had discharged their obligations under the terms of the anti-fraternization policy.

3. The union further asserted that she had no contact whatsoever with Mr. Clanton during his stay in the jail and that therefore there is no issue with respect to PREA. He received no special treatment and nothing inappropriate occurred.

4. The main thrust of the union's claim though is that the two did in fact have a personal relationship prior to Mr. Clanton's incarceration. There is no requirement of a sexual relationship in the policy in order to meet the definition of a prior relationship and no clear definition of what constitutes a prior relationship.

5. The union asserted that the grievant and Mr. Clanton have in fact known each other and had personal contact with each other as early as January 2013 – fully one year prior to the events in question here. While they were not as close as they became later, the union maintained that there was a friendship relationship that had begun well prior to Mr. Clanton's January 2014 incarceration.

6. The union further asserted that the two talked during dart league in 2013 and found each other easy to talk to. They had shared experiences, were both divorced and had kids about the same age. The union noted that the two saw each other during the winter of 2013 and knew there was a mutual attraction but did not act on it since they were dating other people. For that reason they did not see each other during the rest of 2013 but knew each other when dart league started in January 2014.

7. When they reconnected on January 22, 2014, there was an almost instant attraction. The union noted that by now they were both single and when the grievant gave Mr. Clanton her number, the two began texting immediately. The union pointed to both the sheer number of text messages as well as the content of them and argued that it was clear from these that this was far more than some casual acquaintance relationship as one might have with a store clerk and showed that the two were involved in a personal relationship well before Mr. Clanton went into the Wright County Jail.

8. The union also pointed to the notification the grievant gave Lt. Pippo and Capt. O'Malley regarding Mr. Clanton, Tab R, at page 20. In that message she described him as a friend and indicated that she had known [Mr. Clanton] since January 2013. . . [and] never knew of any criminal charges that he had pending.” This was all quite true and the union asserted that there is nothing in the policy or the practice that prohibits a staff person from continuing a personal relationship that had existed before an inmate goes into jail from continuing afterwards.

9. The union argued that the county seems to be concerned that the relationship blossomed into something more romantic after Mr. Clanton left jail but asserted that it was clear that it was already headed in that direction before he got there. Further, there is nothing in the policy prohibiting that nor is there anything in the policy that requires a sexual relationship prior to the incarceration in order to meet the definition of personal association. Indeed, the policy refers to “friends” apart from family or spouse, strongly implying that a “friend” is covered by the exception to the general prohibitions in Policy 2.06 and 2.18.

10. The union examined the terms of the policies themselves and argued that there was no violation of either Policy 2.06 or 2.15 as the County alleged. It is clear that the term “personal association” encompasses, “any sexual *or* personal interaction with in-custody inmates and out-of-custody offenders other than as required by departmental work assignments.” Tab V (emphasis added). Policy 2.18 acknowledges that there are authorized personal associations and the union asserted that the personal association between the grievant and Mr. Clanton fit almost precisely into that as an authorized association. There is thus no requirement that the interaction be sexual prior to the incarceration. The union also characterized the County’s seeming infatuation with the exact moment the two had sex as bizarre. More to the point it was inapplicable as the policy does not require it and the facts here show that there was a personal relationship in place.

11. Further, the union argued that the policy itself acknowledges that there will be times when the association must be determined on a case by case basis. The union argued that this situation cries out for a determination that these two were “personally associated” prior to the incarceration.

12. Both parties went through the texts and noted that these were in cases quite friendly and even sexually suggestive. The union noted that this was no mere happenstance acquaintance – as one might have with a store clerk or gas station attendant, as the County suggested. The union argued that it was clear from these texts that the two were in fact very much engaged in a personal relationship.

13. Further, the union asserted that the reality of our current times is that texting, social media and electronic communication is how these kinds of relationships start and how they are maintained. Thus, the notion that the County seems to be clinging to that personal/dating relationships must somehow follow the societal norms of the 1970's is Byzantine and ignores the current reality of how people in their early 30's and younger communicate with and find each other.

14. The union pointed to several of the County's witnesses and those interviewed in support of this argument. For example, as Sergeant Dubois indicated in his statement to investigators, a "previous relationship" that is already established is what is necessary to meet the exceptions contained in the policy. Others also acknowledged that if a staff person has a previous relationship with someone who enters the jail they are required to report this to Jail Administration but they are not prohibited from seeing that inmate after they leave jail.

15. The union acknowledged the rationale behind the policy, i.e. to prevent staff and inmates from illicit fraternization while that person is incarcerated and to prevent inappropriate relationships from blossoming while a person is incarcerated, but maintained that this is not what happened. The grievant already knew Mr. Clanton.

16. The union noted that even County witnesses acknowledged that if a jail staff person has a previous relationship with a person coming into to the jail, as long as that is disclosed, as it was here, there is no violation of the policy.

17. The union noted that the County seems to be requiring a sexual sort of relationship between "friends" to qualify under the terms of the policy. The County thus ignores the clear reality that texting and the use of social media is how those sorts of relationships are created and maintained and that the nature of personal communications between people has changed. Texting is the basis of a personal relationship.

18. The union noted the inconsistency and even hypocrisy of the application of this policy and noted that if the two had simply seen each other at the dart league as before, there would have been no violation of the policy and none of this would have happened. It was only because the two moved their relationship to a more romantic one that seemed to cause the County to take this wildly inappropriate action. There is nothing in the policy that prohibits this sort of change in relationship as long as there was a previous relationship prior to the incarceration.

19. The union also pointed to several examples of other deputies some of whom have had intimate relations with inmates either while they were in jail or where it was shown that the relationship began while the inmate was incarcerated and there was no contact between the employees and the inmate at all prior to the incarceration.

20. In several of those the employee was not terminated and the union alleged disparate treatment of the grievant here, even if one assumes that there was not the requisite “previous relationship” necessary under the rules.

21. The union also argued that there was no direct order as the County alleged and that the conversation occurring after Mr. Clanton left the jail between the grievant and Captain O’Malley was jovial and friendly. The grievant asserted that there was no such direct order not to see Mr. Clanton.

22. The union and the grievant asserted that Captain O’Malley spent the bulk of the time in the discussion they had after Mr. Clanton left jail discussing Minnesota criminal statutes prohibiting sexual contact between jailers and inmates while the inmate is in jail. This certainly did not happen so the grievant had no reason to believe she would be in any sort of trouble due to those kinds of allegations. The grievant maintained adamantly that there was no direct order not to see Mr. Clanton. The County could not point to any written directive to the grievant to that effect. The sole writing was a memo on the e-mail the grievant sent to Jail Administration regarding Captain O’Malley’s self-serving recollection of the conversation – but nothing was ever sent to the grievant. One of the recognized elements of a direct order is that there must be an order – and there was not in this case.

23. The union also noted that the charge of insubordination was raised for the first time at the hearing and should not be considered. Further that charge is not noted in the discharge letter and is therefore not a basis upon which the County can rely to sustain discipline.

24. The union asserted too that without the criminal charges, which were ultimately dismissed by the County Attorney, See Tab R at page 16. The union noted that the County Attorney determined that no crime was committed, thus undercutting the claim by Capt. O'Malley that the grievant could be labeled a sex offender. The County Attorney noted the "strong possibility of jury nullification" and the attorney's opinion that "it is not in the interests of justice to charge any offense" based on the evidence provided to him.

25. The union asserted that this clear opinion by the County Attorney demonstrates the extreme weakness of the County's case against the grievant both criminally as well as contractually. The union used this as well to assert that the criminal charge was nothing more than a subterfuge to get access to the grievant's cell phone. Without that criminal charge, the County would not have been able to gain such access to verify the texts.

26. The union asserted that the grievant did nothing wrong as the result of her actions here and that she followed protocol in reporting her friendship with Mr. Canton but that even if there was a finding of some inappropriate action, the discharge is simply far too harsh a penalty given what occurred here. The grievant believed in good faith that she was following policy and then simply followed her heart in the relationship. There was no showing at all of any favoritism toward Mr. Clanton and nothing untoward happened while he was in jail nor has here been any showing of any inappropriate actions taken since as the result of his relationship with the grievant. If he were to be recommitted, this would be handled just as any other situation where a family member is incarcerated – just as the policies contemplate. Here there has been no clear showing of any reason to discharge the grievant for her actions.

27. The union also maintained that the grievant has been treated differently from other similarly situated staff; some of whom committed far worse offenses by starting the relationship with inmates while they were in jail and continuing those relationships afterwards.

28. The union pointed to several other staff who met inmates while they were in jail and who started relationships with them yet who were not terminated. Those individuals were found to have actually first met inmates in jail, as opposed to the situation here where there was a prior relationships beforehand, and clearly became involved with them, arguable sexually, either while they were there or shortly after those inmates left.

29. The union pointed to the Corrections Officer, CO, Winkelman situation and asserted that the grievant is being treated disparately even though CO Winkelman's conduct was far worse in that he apparently met the woman he struck up a very close and highly suspicious relationship with while she was in jail. He then paid for the female inmate to come to Missouri while he was away on military leave – twice. The union asserted that this should have been clear evidence of an inappropriate relationship that started while the female was incarcerated, yet the County issued a 144 hour suspension to CO Winkelman. The County's claim that it could not prove a sexual relationship was a red herring since the policy prohibits exactly the relationship he had with a female inmate.

30. The union also noted that the female stayed with CO Winkelman in his apartment while he was in Missouri. To suggest that there was no sexual relationship is incredibly naïve and strongly suggested that CO Winkelman was untruthful under Garrity when he denied a sexual relationship. There is no suggestion that the grievant lied under Garrity here. As here, the two eventually married. The union also noted that CO Winkelman had prior discipline yet the grievant has none.

31. Moreover, the mere fact that the policy changed slightly was, in the union's eyes, irrelevant since the older policy would also have allowed a discharge upon sufficient just cause. The new policy does not change the general admonition not to engage in fraternization or to commence a relationship with an inmate while that person is in jail and to continue that relationship later. The union argued adamantly that there is disparate treatment at work here.

32. The union acknowledged that some employees were terminated or resigned upon a showing of sexual interaction while either inside the jail or where there was a showing that the staff person met the inmate for the first time in jail and became involved with them either there or immediately afterward. The union noted that the County's reliance on these situations is inapposite since the facts are so radically different.

33. One employee was terminated for showing his penis to a female inmate while she was in jail. That is a clear violation of PREA and has no bearing here. Another was terminated for alleged sexual contact with female inmates while they were in jail. He was also a probationary employee and of course had no ability to file a grievance over the charges levied against him. In any event, the conduct complained of occurred in the jail.

34. Yet another employee was shown to have passed confidential information to inmates, had sexual encounters with them while they were in the jail and accessed confidential department files for personal reasons. He was not disciplined for this until he did other even more serious matters later.

35. Finally, CO Silbernagel was shown to have established sexual relationships with female inmates and to have continued those after they were released yet he was not terminated. Instead he was issued a written reprimand. The union acknowledged that this incident occurred some 17 years ago but argued that despite the passage of time it has never been acceptable to have sex with an inmate or to establish a relationship that leads to one almost immediately after an inmate is released. Yet that is what happened.

36. The union countered any claim by the County that PREA was violated. The union noted that the federal law prohibits sexual encounters while an inmate is in jail – which clearly did not happen here. Thus, the repeated references to PREA here are again a red herring that should be disregarded.

37. The union asserted that even if there is a finding that some part of the policy was violated, those have generally resulted in progressive discipline, yet none was even tried here. The union asserted that there was no violation of policy but that even if one is found on some technical ground, progressive discipline must be afforded her, just as it was for others.

38. With regard to the remaining charge of inappropriate use of a cell phone, the union maintained that this is not a dischargeable offense. The union asserted that there was no evidence presented that an employee has ever been disciplined for using his/her personal cell phone while working. Capt. O'Malley testified that if he had seen the grievant using a personal cell phone, he would simply tell them to put the phone away or words to that effect. In fact, during the investigative meeting the grievant indicated to Capt. Hoffman that "Captain O'Malley's has seen me answer my phone in my office before" yet no discipline was ever issued. Tab M, p. 19.

39. The essence of the union's case is that there was no violation of the policy and that what the grievant did was entirely consistent with it and even contemplated by the terms of Policy 2.06 and 2.15. Further, the claim that the grievant was insubordinate was not even made part of the discharge letter and cannot be considered now. There was further no direct order given, nor would that order have been valid since there was no policy violation in the first place. The grievant must be afforded progressive discipline even if a technical violation is found based on general arbitral principles as well as the other cases raised by the union discussed above. Finally, no one has ever been discharged for a cell phone violation and even if it is found that she used her personal cell phone while in the jail this should result in nothing more than a reprimand not to do so again.

The union seeks an award reinstating the grievant to her position with full back pay and benefits restored and to be made whole in every way. The union offered alternative results of a 144 hour suspension as was meted out to Corrections Officer Winkelman, as discussed above, or for any other relief the arbitrator deemed appropriate in this situation.

DISCUSSION

FACTUAL BACKGROUND

The grievant is a Corrections Sergeant with the Wright County Sheriff's department and has been since 2006. The evidence showed that she has no prior significant discipline and that she is a very good officer who was promoted to the rank of Sergeant in 2011 based on her performance and adherence to policies as well as her adherence to the rules to maintain the safety of inmates and staff alike. Her evaluations were reviewed and corroborated this finding and showed above average ratings. Her job performance is not strictly at issue in this matter but that evidence was considered.

The Wright County Sheriff's office maintains a jail to house offenders for various criminal activities and has policies in place to ensure the safety and security of inmates and staff alike. In addition, the County is subject to the Prison Rape Elimination Act, PREA, which is a federal law designed to prevent prison rapes. It strictly forbids fraternization between jail staff and inmates while they are incarcerated and provides for severe penalties for the violation of the law.

The operative events that led to the grievant's discharge began in January 2013. The grievant plays darts at a local bar and met Mr. James Clanton during the dart league. Mr. Clanton was also acquainted with some of the grievant's friends and/or family members, so there was a connection in that regard as well.

The evidence was clear that the two talked during dart league on an occasional basis during the winter of 2013 approximately once per week for several months. The evidence was also clear that the two liked each other but did not act on this mutual attraction because each was involved with other people. They testified credibly that they found each other easy to talk to and had mutual interests. There was also evidence that Mr. Clanton discussed renting space from the grievant's boyfriend but did not for reasons unrelated to any personal connection with the grievant.

The two had no contact with each other until January 22, 2014 when the two saw each other during a dart league outing at a local bar. By then the two had broken off their relationships with the people they had been seeing the winter before and were both single. The grievant saw Mr. Clanton and asked the bartender to give him her number on a small slip of paper with her phone number on it. She asked that "tall Jamie," call her. Jamie was Mr. Clanton's nickname and the grievant knew that.

The two began sending text messages to each other almost immediately. These texts, some 35 pages worth between January 23, 2014 and January 31, 2014, Tab N, demonstrate that the two were clearly interested in each other and that the messages turned sexually suggestive immediately. It was also clear that these messages were not those of mere casual acquaintances as one might have with a store clerk or gas station attendant but were clearly romantic in nature.¹

The messages from January 22, to January 25, 2014 show that the two were clearly contemplating a dating relationship and that this was planned before Mr. Clanton's incarceration that weekend. Suffice it to say that on these unique facts there clearly was a personal relationship prior to the incarceration. Even though there had not been a sexual event at the point at which Mr. Clanton was processed into the Wright County jail that weekend, the two were clearly contemplating one and the messages show that in vivid detail.

¹¹ The texts, literally hundreds of them, were reviewed and showed that within minutes of the first text there were clear references to being "sexy" and "hot" and a request to go out for a drink. The next day he texted her and told her he "could not stop thinking about you." These types of messages appear throughout the conversations. There were also references to personal matters such as difficulties with ex-spouses, issues with their children and other matters that only people with a relatively comfortable and somewhat close personal relationship would discuss.

Mr. Clanton indicated that his weekend “sucks,” in an obvious reference to his impending incarceration, but the evidence here gave rise to a very clear inference that the two would certainly have gone on a date that would likely have resulted in a sexual encounter that weekend if he had not been incarcerated. More to the point, there was clear evidence that the two had a personal association. The County made much of the fact that Mr. Canton could not at first recall the grievant’s last name.

It was apparent that she did not recall his last name either until he told her at 6:18 pm. This was in the context of his acknowledgement that he would be spending the weekend in jail. There was however no evidence whatsoever that the personal nature of the messages were in any way related to his impending incarceration. The grievant did not know that until January 23rd late in the day and there was absolutely no evidence that he began this relationship with her in order to gain some sort of influence regarding his upcoming weekend in jail. In fact, as noted above, she initiated the conversation with the slip of paper with her number on it. She had no idea he would be coming to jail at that point or at any point until he told her that. On this record the fact that the two did not know each other’s last name was given very little weight, since within a few hours they certainly did and were discussing very intimate and personal things.

Moreover, the question, as discussed below is whether there was a personal relationship prior to the incarceration. Simply stated, there was, and whether he did not immediately recall her last name was not controlling on these facts.

The County also made much of the fact that the two had not slept together by the time Mr. Clanton entered the jail. That too was given almost no weight at all. As discussed below as well, the policies in place do not require that and in fact talk in terms of “friends,” which of course can easily be a friendship relationship without any sexual overtones at all. As noted, the text messages were very sexual in nature in any event and the evidence showed that the two indeed were becoming quite close. By late that afternoon the two began discussing scheduling a time to get together.

During this discussion, at 5:59 on January 23, 2014, Mr. Clanton informed the grievant that he would be coming to the jail in the following exchange:

Clanton Full disclosure I have to spend Friday evening through Sunday evening with some of your coworkers

[Grievant] Really? For what?

[Grievant] I'll see you tomorrow night then

Clanton: I had a DUI in October of 2013

[Grievant] Ah I see

Clanton Correction it was 2012

Clanton Fought it for over a year

[Grievant] What's your last name? I don't see u on the list to come in

[Grievant] It happens!

Clanton It's James Clanton. Probably because I'm going to the courthouse jail you're the new jail right

[Grievant] Actually no one stays in that jail

[Grievant] You'll have to come here

[Grievant] Silly

Clanton Lol ;-)

Clanton My first name legally is James if that helps you find me

[Grievant] I'll look u up

[Grievant] Since u have til the 30 to report that's why you aren't on the list

[Grievant] But of course you can come in tomorrow

Clanton Great! Looking forward to it :-)

[Grievant] Lol it won't be bad at all

[Grievant] Plus you'll see me lol

[Grievant] But yes we should hang out soon

Clanton Agreed, no arm twisting required ;-)

[Grievant] What are you doing Sunday night? My kids are gone til Monday

Clanton Ah hanging out with you! I'll just want to run home for a bit after I get out and change...

[Grievant] :-) ok

[Grievant] I was really nervous about giving you my number by the way ...

Clanton I'll text you as soon as I can on Sunday, we can figure out a time and a place. I'm pretty glad you did pass your #, you won't regret it :)

[Grievant] Sounds good. Maybe you can give me some lessons in darts sometime! Lol

Clanton I'd love to.
[Grievant] Sweet
Clanton Lol
[Grievant] But it's fun anyway
Clanton Well I'll play with you. And we can shoot darts too if you want;-)
[Grievant] Hmmmm... Naughty. Yes we can
Clanton Sorry, lost control for a second there...
[Grievant] No worries. I like it.

These kinds of messages go on for pages for the transcript of the texts from the grievant's cell phone. They clearly showed that the two were going to go on a date with each other very soon.

Pursuant to County policy, the grievant reported that Mr. Clanton, whom she characterized as a friend, would be coming to the jail that weekend. See Tab R at page 20. The grievant sent an e-mail the following day to Lt. Pippo and Captain O'Malley advising them of Mr. Clanton's impending jail appearance. She identified him by name and indicated that she had known him since January 2013. She also indicated that she never knew of the charges he had pending. The evidence showed that this was entirely accurate.

Mr. Clanton appeared as required for his weekend jail time and except for one brief time when he saw the grievant in the jail from afar but did not talk to her there was no contact between them. The grievant did not work that weekend. Contrary to other cases of contact between jailers and inmates, it was clear that the grievant did not first meet Mr. Clanton in jail nor did his incarceration figure into the blooming friendship and romance that occurred between them later.

Mr. Clanton left jail that Sunday but the two did not see each other that night due to inclement weather. They saw each other the following night and slept in the same bed but did nothing else. The two began seriously dating that following week and eventually were married on April 17, 2014. They remain married as of the date of the hearing.

Mr. Clanton also remains on unsupervised probation with the corrections system. There is some chance if he re-offends he could be sent back to the Wright County Jail. As of the date of the hearing he has not been re-committed to jail.

Captain O'Malley and the grievant met on January 28, 2014 to discuss her message to Jail Administration from the preceding Friday regarding Mr. Clanton. There was considerable dispute about what was actually said in this meeting. Captain O'Malley indicated that he told the grievant not to see Mr. Clanton and reminded her of the rule against fraternization with inmates or those who are under the supervision of the corrections system for one year following their release from jail or one year after their release from probation. He further indicated to her that continuing the relationship could result in a prosecution under Minnesota law as a sex offender, even though the two had met before and that they had no contact with each other while he was in jail the preceding weekend.

The grievant characterized the meeting as friendly and that she never received any direct order to discontinue seeing Mr. Clanton and that she never took Captain O'Malley's comments as a direct order but rather simply as a warning to be careful. She believed that her disclosure of the relationship to Jail Administration fulfilled her obligation under the policy. She further indicated that she consulted with her union representative who told her that given the clear previous relationship with Mr. Clanton that she would not be in violation of County policy.

On this record there was insufficient evidence of a direct order and no written directive regarding continuing the relationship.² Certainly there was a conversation and Captain O'Malley expressed his concern and his warning about continuing the relationship but it was also clear that he did not have the text messages at that point and that there had been no "case by case" analysis of the relationship between the two. However, on this record the evidence fell far short of the requisite showing of a direct order from a superior officer.

² There was some doubt about whether such an order would even be enforceable anyway given that it would have been about a personal off duty romantic relationship between two consenting adults but given the other findings and determinations in this case it will be unnecessary to reach or decide that issue.

Some weeks later, after the grievant and Mr. Clanton had been dating, he sent her flowers. She posted a picture of that on her Facebook page for her friends to see. Some of her friends included other jail staff who remembered the name and reported the relationship to jail administration.

The County then commenced an internal investigation as well as a criminal charge. Suffice it to say that the criminal charge was investigated, the grievant's cell phone was taken and the texts revealed through the course of that investigation. The County determined that some of the texts were sent and received during work hours – as noted in the transcripts of the text messages – and charged the grievant with violations of the anti-fraternization policy as well as violation of the use of cell phone policy set forth above.

The criminal charges were referred to the County Attorney who declined to prosecute finding that there would be difficulty sustaining the necessary proof and that there was a substantial chance of jury nullification. The County Attorney further indicated that “in the interests of justice” he would not prosecute the case. There was no evidence that the criminal prosecution was a sham as the union alleged or that it was done merely to gain access by warrant of the grievant's cell phone.

The grievant was interviewed under Garrity and was forthright with the investigators about her relationship with Mr. Clanton. She told them that Mr. Clanton was a friend and that she had had previous contact with him before he went into the jail and that they took the relationship to a romantic level very shortly after he was released. There was no evidence that she was untruthful under Garrity.

As noted above, there was considerable evidence that some of the texts were sent during work hours. The totality of the evidence showed that these were on all on approved break time give the sheer number of them and the times involved.

The Sheriff and county administration reviewed the information from the internal investigation and determined that the grievant had violated both the anti-fraternization policies and the cell phone policies set forth above. He further determined that termination was the appropriate level of discipline indicating that he had no choice in the matter given what had occurred and that he needed to send the message that fraternization with inmates was strictly prohibited.

The union filed a timely grievance challenging the discipline meted out in this matter and the case proceeded to hearing on the dates set forth above. It is against that factual backdrop that the analysis of the matter proceeds.

COUNTY POLICY REGARDING FRATERNIZATION

Make no mistake about it, fraternization between jail staff and inmates can be a very serious safety and security problem. Such policies are in place for valid reasons to ensure everyone's safety and to prevent undue influence by jail staff over inmates and to ensure that inmates do not manipulate jail staff. There is thus no question that these policies are in place for very good reason and that statutes like PREA were enacted to deal with a very real and sometimes extremely dangerous and volatile situations. It is well known in corrections that fraternization, especially that of a sexual nature between jail staff and inmates, can lead to severe problems and even lead to tragedy.

County policy, as many such policies do, anticipate that at times, people known or even related to jail staff may be sent to jail. These situations must be dealt with appropriately to prevent any sort of manipulation, as discussed above, and to ensure that jail staff and inmates remain at arm's length. The Wright County policies were reviewed in some detail in this matter to determine what the rule actually is with respect to these kinds of situations. As noted, there was no evidence of anything that happened in the jail and no suggestion that any sexual contact occurred, including the text messages sent or received, while Mr. Clanton was in jail. Simply stated, PREA did not apply to this case at all.

Having acknowledged that, the question here is whether the grievant violated the policies in place under these unique circumstances. A review of those policies reveals that she did not.

Initially, there is a general prohibition against fraternization or “becoming personally involved with any prisoner while on duty” or “ex-prisoner for at least one year from the person’s last discharge from jail or supervised release.” See Policy 2.06 (15). The following paragraph requires that jail staff notify Jail Administration or their supervisor if a friend is incarcerated. *Id.* at (16). The County argued that this is clear and argued that the grievant should have waited to have any further contact with Mr. Clanton until one year after he was released from supervised probation. Irrespective of whether he was on supervised probation or not – it appeared that he was on unsupervised probation so the strict terms of that part of the policy did not apply.

However, putting the question of supervised or unsupervised probation aside, the words used are significant. First, the term “become personally involved” implies that one “becomes” involved while the inmate is in the jail. That did not happen here. These two were already personally involved before Mr. Clanton went into jail. Clearly too, there was no fraternization while he was in jail. It does not prohibit a staff member from continuing the existing relationship where there is a showing that there was one before the inmate came to jail. Here the facts were undeniable that the grievant and Mr. Clanton had met each other and were friends prior to him coming to jail,³ and well before he got there the texts clearly showed a strong personal association that fit within the notion of a prior relationship.

The crux of the County’s case seems to be that there was fraternization and personal involvement after Mr. Clanton got out of jail and well within a year of his release. As noted above, that general policy makes eminent sense where the facts show that the initial contact occurs while the inmate is in jail but fades once these facts are applied to that policy.

³ The grievant reported that Mr. Clanton was coming into the jail and in fact described him as a “friend,” which on this record he clearly was at the time she reported this. The policy speaks in terms of a “family member, friend or significant other” implying clearly that a jailer can certainly continue a relationship with a friend after that person comes to jail as long as there is compliance with the reporting requirements of 2.06 (16). Here the evidence showed that the grievant complied with this and that Mr. Clanton fell well within the definitions set forth in the policies.

Second, Policy 2.18 discusses “authorized personal associations” and allows certain involvement where family members or close personal friends come into custody. Policy 2.18. The essence of this discussion centers on whether the grievant and Mr. Clanton had a personal association prior to his coming to jail. Clearly they did. As the union asserted, there is no requirement anywhere in the policy that a friendship relationship have a sexual element to it in order to qualify as a “prior personal association.”

Further, Policy 2.06 uses the term “friend” and requires only that if a friend is incarcerated the sole responsibility is to notify jail administration. There is no general prohibition on staying friends nor is there any prohibition on becoming even closer friends with someone who is already a friend prior to coming to jail. Neither is there a prohibition against a friendship becoming romantic after incarceration where there was a friendship relationship prior to that incarceration. In this regard the union's arguments were well taken.

The County seems to be concerned that the relationship changed after Mr. Clanton was there but the policy does not address that nor does it prohibit that. If you had a prior relationship before incarceration the fact that it changed afterwards is not a violation of the terms of the policy.

The County argued too that Mr. Clanton remained on probation and under the supervision of the Court after his stay. This was of course true but the question here is whether there was a personal relationship prior to Mr. Clanton’s jail stay. There was, as noted above.

The other prong of the County’s case is that the grievant and Mr. Clanton had very little personal face to face contact prior to the incarceration and that the sole basis of their “relationship” was the plethora of texts. This frankly ignores the reality of communications in the 21st century and applies a mid-20th century set of assumptions to today’s reality.

The stark reality is that the method by which these two communicated *is* the generally accepted way of establishing personal relationships now by younger individuals. While each case is different (discussed more below regarding the case by case analysis also contained in Policy 2.18) these facts demonstrated that these two were in fact very personally involved in what has clearly a budding romantic relationship well before Mr. Clanton went into the jail. This was shown not only by the number of texts but also based on their content.

While NLRB decisions are not strictly controlling, one recent decision comes to mind. In *Purple Communications*, 362 NLRB No. 59 (2015) the Board overturned its longstanding rule in *Register Guard*, 351 NLRB 1110 (2007), enfd in relevant part and remanded sub nom. *Guard Publishing v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009) regarding the use of e-mails and other forms of electronic communications. In so doing the Board recognized and held that “the workplace is ‘uniquely appropriate’ and the ‘natural gathering place’ for such communications, and the use of email as a common form of workplace communication has expanded dramatically in recent years. The NLRB has long been regarded as somewhat lagging in its recognition of technological changes yet here the Board acknowledged that electronic communications is the main form of communication in today’s economy. This is undeniably true in people’s personal lives as well. Here the facts showed that even though most of their interaction in the few days before his incarceration was by text message, Mr. Clanton and the grievant had a well establish personal relationship. Even to the most naïve eye this was clearly headed to exactly the destination it eventually reached.

Moreover, in Policy 2.18 there is a specific recognition that “non family associations will be looked at on a case by case basis.” This is unclear in terms of what that means but shows the clear recognition that certain relationships will fall into the exceptions stated in that policy allowing a jail staff person to have a personal relationship with a person who comes to jail that may well continue after the inmate leaves. It was apparent that the requirement that each situation be reviewed on a case by case basis was either not done or the County discounted the reality of the texts messages.

As the union noted, and as many of the witnesses from both sides acknowledged, an existing “previous relationship” is what is necessary to meet the exception in the policy. Others also acknowledged that if a staff person has a previous relationship with someone who enters the jail they are required to report this to Jail Administration but they are not prohibited from seeing that inmate after they leave. What constitutes a previous relationship will of course depend on the facts of each case. That policy statement allows a reviewing arbitrator to examine each such case as well.

The term previous relationship is not defined in policy. It is also to be reviewed on a case by case basis, and the analysis of this case shows that indeed the grievant and Mr. Clanton had a previous relationship. There is no requirement that the relationship be a sexual one or a family relationship. There is also no definition of how close the relationship must be or how many times or under what circumstances the individuals involved have to have had contact with each other in order to be considered to have had a previous relationship. Further, it was apparent the grievant thought there was a prior relationship worthy of reporting – because she reported it.

The fact that she advised the captain that Mr. Clanton would be coming to jail in accordance with the policy to advise Jail Administration of the fact that a friend was coming to jail supports the view that she certainly thought he was a close friend as of that time. What is required at that point is that the staff person must report to Jail Administration the fact that a friend is coming to jail – which is exactly what the grievant did. As noted above, she referred to him as a friend and indicated that she had known him since January 2013. Why the County did not simply apply the “case by case” analysis part of its own policy to determine that these two clearly had a prior relationship remained a mystery on this record.⁴

⁴ The union asserted that this was all that was required and that once the report is made that ends the analysis. That may not always be the case; since each situation must be determined on a case by case basis. The issue here is not so much whether the grievant reported it but whether there was a violation of policy because of what happened both before and after the incarceration. No decision is made on a future set of facts in this regard. This case is decided on these unique facts alone.

The other prong of the County's claim here seems to be based on the fact that the two friends became something more than friends after the incarceration but the evidence showed that this had absolutely nothing to do with Mr. Clanton's incarceration nor was there anything untoward or inappropriate about the transition to a more romantic relationship after the incarceration. The County also made reference to the possibility that Mr. Clanton might be remanded if he re-offends. That is certainly a possibility but the policies in place contemplate that and steps would need to be taken to prevent any contact between the two if that were to occur – just as it would if someone's own spouse were sent to jail, released and then remanded back to jail. On these facts, that possibility did not provide adequate basis for discipline. The question is whether the grievant violated the policies by continuing a relationship that had already begun and was already underway before the incarceration.

Certainly, the County's initial concern given that Mr. Clanton and the grievant were married only a few months after his jail time was cause for some investigation to make sure that indeed nothing did happen while he was in jail or that the jail stint was not related to the subsequent romantic relationship. Thus, while there was clearly a reason to investigate this further, that alone did not carry the day for the County. At the end of the day, these facts showed that there was an existing personal relationship that already was of a sexual nature that simply continued after the weekend in question.

DISPARATE TREATMENT

The union raised a disparate treatment claim. Obviously each prior case will depend on its own unique facts and no two cases are identical. However, some discussion of this is warranted.

Initially, it was noted that the County takes PREA and the general anti-fraternization policies very seriously and the Sheriff testified credibly that he wants to be sure that the public trusts that here is nothing inappropriate happening in his jail.

In that regard, several jail staff members have been terminated or have resigned in apparent lieu of termination for violations of that policy. One officer was terminated for physically showing his penis to a female inmate while she was in the jail. See Employer Exhibit 8. This was a violation of the policy and of PREA as well. That however did not support the County's actions here since nothing of the sort even remotely like that happened.

Another officer, a probationary officer was terminated for similar misconduct that apparently caused troublesome rumors to spread by the female inmates. This clearly could have caused trouble in the jail and outside as well. There were also allegations that he began seeing a female inmate immediately after her release.

That officer was terminated but again those facts were somewhat different. Even though there were allegations that the two had met very casually prior to the female going to jail, there was no other contact at all. There were no text messages or other such communications prior to her incarceration but that almost immediately after she got out, the staff person contacted her. Two differences appear here. First, the employee was probationary and could not have filed a grievance over the termination. Second, while there was a very casual contact prior to the jail time, there was nothing of the sort that occurred here and the initial contact to "meet" after her incarceration occurred only after she got out. There is a strong implication that something may well have happened while she was in jail even though both parties denied it. On this record, that alone did not carry the day for the County.

Another officer was terminated for a series of transgressions, from passing unauthorized information to an inmate that interfered with an ongoing felony criminal investigation, accessing DMV and DPS files inappropriately and for romantic relationships with female prisoners. This too showed a radically different set of facts in that there was a prior warning for establishing romantic relationships with female inmates. There was no immediate termination for this offense even though there was an allegation that these relationships were formed while the inmates were in jail.

The information contained in Employer exhibit 10 is somewhat sparse so it is not clear what the facts were with regard to the second set of allegations of establishing sexual relationships was all about. It was also clear that the other serious charges had to do with passing information to an inmate and accessing files inappropriately were clearly a part of the reason for discharge.

Finally, there was the matter of CO Winkelman. The evidence there showed that he established a relationship with a female inmate while she was in jail and continued it after she got out. The County maintained that they could not prove that the relationship after she left jail was sexual yet the policy itself does not require that. It speaks in terms of “fraternization” or “becoming personally involved” with an inmate. The evidence showed that not once but twice CO Winkelman paid for the former inmate to come visit him in Missouri while he was on military leave.

The sheriff indicated that he was unable to prove a sexual relationship and was only willing to impose a 144 hour suspension. This was frankly curious since the policy does not rest solely on a sexual relationship. Further, as the union asserted, given that the female, went to Missouri for an extended period of time – twice, stayed with the employee in his apartment there and that they were later married, it is almost shocking to believe that there was not a sexual component of this relationship. Simply because there was no admission of it did not provide any support for the County’s case here merely because the grievant was forthright with the investigators. As noted above, there is no prohibition against an existing relationship continuing under these unique circumstances. Second, and significantly, the failure to admit the obvious by CO Winkelman, implies strongly too that there may have been untruthful statements given under Garrity in that situation as well. No decision can be reached on that issue but it was a curious set of facts.

Moreover, the notion that there was no proof of a sexual relationship was somewhat naïve on the County’s part. Further, the admissions he did give showed a clear violation of policy. The facts showed that he paid the transportation costs for a woman he met while she was an inmate – there was no showing of any sort of prior relationship at all.

Thus, this was ‘worse’ in the sense that the initial fraternization, with all of the attendant risks to the safety of deputies and inmates alike as well as for undue influence outlined by the County in this case were clearly present in that one. The County imposed a 144 hour suspension on CO Winkelman under those circumstances.

Here, the County’s assertion that the two cases are different is accurate – except the Winkelman case was *far* worse and was a direct affront to the policy in place at the time. Also policies in place in 2010 are substantially similar if not identical in every material respect to that which is in place now and the rules against fraternization were the same.

The evidence showed that if they had stayed friends and had merely seen each other while playing darts it would have been OK in the County’s eyes. Yet the fact that they moved it to a different level of relationship the County took the position that it was not OK. The policy does not prohibit that. The problem with the County’s argument is that the policy is not clear about what a close personal friend is.

Had there been a showing of an actual policy violation by the grievant here, these facts would have provided strong support for suspension of some sort. Having determined that there was no actual policy violation here and that the relationship between Mr. Clanton and the grievant on these unique facts constitutes a previous personal relationship allowing the two to have contact with each other after his release there is no basis for the imposition of any discipline. They grievant did as she was directed to do under the policy and disclosed her friendship with Mr. Clanton.

WAS THERE A DIRECT ORDER FROM CAPTAIN O’MALLEY?

As discussed above, on these facts there was an insufficient showing of a direct order not to see Mr. Clanton. Certainly there was a warning about the need to be careful and of the requirements of PREA during the conversation he had with the grievant on January 28th. There was nothing in writing and no clear evidence of any directive.

Further, insubordination was not a stated basis for the grievant's discharge and was not raised until well after the discharge letter was sent to her even though the County clearly knew about the conversation. Thus on these facts, without adequate evidence of a direct order, without a statement that insubordination was even a charge against her no discipline can be imposed here. Further, it is unclear that a direct order not to see Mr. Clanton would have been enforceable given these facts but that issue need not be decided given the other findings.

USE OF THE CELL PHONE WHILE ON DUTY

There was evidence that the grievant used her personal cell phone during work hours to text Mr. Clanton even though she knew he would be coming to the jail. This should not have happened and was a violation of the County policy against such cell phone usage.

The union assailed this charge on the grounds that the criminal charges used as the basis for a warrant to gain access to the grievant's cell phone was nothing more than a subterfuge and an abuse of process. This was a somewhat close issue, given that the County could likely not have compelled the access to the cell phone without the warrant in the criminal charge and the clear fact that the criminal charges were so weak. By a close margin though it was determined that the County's actions in charging this criminally were not the subterfuge the union asserted since the County had an obligation to investigate whether there was any sort of violation of state law or PREA. The mere fact that there was not does not control the result here. Also, as discussed above, the County's investigation was warranted due to the facts it had at the time the investigation was initiated.

A review of the texts showed that there were a considerable number of them sent during work time and that the timing of them supported the reasonable inference that they were not all sent on approved break time and that it was used in the jail in violation of the policy.

Further, there was evidence to suggest that the rule is known and enforced. Even though the grievant indicated that others do it too and that she has seen supervisory staff using personal cell phones while in the secure area, there was no hard evidence of that. There was also evidence from jail supervisory staff that if they had seen this they would have immediately admonished staff to put the phone away. Thus, on these facts it was shown that the grievant violated County Policy 4.15.

The remaining question is what level of discipline should be imposed here. This is always a conundrum for any arbitrator in a circumstance like this. There was clearly insufficient evidence to support the main charge here of a violation of the anti-fraternization policy. What we are left with then is the appropriate level of discipline for this one established violation. Resort was made to the CBA itself. Article XII calls for certain levels of discipline but does not require that they be in the order listed in Article 12.1. Moreover, there was evidence that no one has been fired for this sort of violation and that the grievant's disciplinary record is clean.

On the other hand, the union claimed that all that would likely happen if supervisory staff sees someone violating this policy is to direct them to put the phones away. That was somewhat troubling, but on these facts, the sheer number of texts and the obvious attention the grievant was paying to them countered the union's claim that no discipline should be imposed.

On these facts it is determined that a written reprimand for the violation of Policy 4.15, cell phone use, is appropriate. Accordingly, that will be awarded.

In terms of the remedy for the discharge, since there was no policy violation of the fraternization policy the grievant must be reinstated with full back pay and contractual benefits, subject to the reprimand as noted above.

AWARD

The grievance is **SUSTAINED IN PART AND DENIED IN PART**. The grievant is to be reinstated within 10 business days of this award with full back pay and all accrued contractual benefits as set forth above. Reinstatement is subject to the written reprimand set forth above for her use of her personal cell phone in violation of Policy 4.15.

Dated: July 28, 2015

AFSCME and Wright County – Gerads Award

Jeffrey W. Jacobs, arbitrator