BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
POLK COUNTY SHERIFF'S DEPARTMENT EMPLOYEES ASSOCIATION	
and	Case 50 No. 41037 MA-5267
POLK COUNTY 1/	

Appearances:
Cullen, Weston, Pines & Bach, Attorneys at Law, by Mr. Gordon E. McQuillen, 20 North Carroll Street, Madison, Wisconsin 53703, appearing on behalf of the Grievant.
Mulcahy & Wherry, S.C., Attorneys at Law, by Mr. Joel Aberg, 715 South Barstow Street, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the County.

ARBITRATION AWARD

Polk County Sheriff's Department Employees Association (hereinafter Association) and Polk County (hereinafter County or Employer) have been parties to a collective bargaining agreement at all times relevant to this matter. Said agreement provides for arbitration of unresolved disputes involving the interpretation or alleged violation of the agreement by a three person Arbitration Board. On July 25, 1988, the Association and the County filed a joint request to initiate grievance arbitration with the Wisconsin Employment Relations Commission (hereinafter Commission). On August 19, 1988, the Association and the County advised the Commission that they had agreed to the selection of James W. Engmann, a member of the Commission's staff, as the sole arbitrator of this dispute. On September 9, 1988, the Commission appointed the undersigned as the impartial arbitrator in this matter. At hearing on November 2, 1988, Donald J. Hansen (hereinafter Grievant), represented by Attorney Thomas D. Bell, and the County agreed to mediation of the dispute by the undersigned, at which time the parties entered into a tentative agreement, pending review of the final written document. On January 5, 1989, the Grievant advised the undersigned that the dispute had not been resolved, that he was no longer represented by Mr. Bell, and that a new hearing date needed to be scheduled. A hearing was held on March 14, 1989, in Balsam Lake, Wisconsin, at which time the parties were afforded the opportunity to present evidence and to make arguments as they wished. A transcript was made of the hearing, a copy of which was received by the undersigned on March 23, 1989. The County submitted in brief in chief on May 3, 1989. The Grievant submitted his brief in chief on June 9, 1989. The County submitted its reply brief on June 26, 1989. Full consideration has been given to the evidence and arguments of the parties in rendering this decision.

STATEMENT OF FACTS

Donald Hansen (hereinafter Grievant) has been employed by the Polk County Sheriff's Department as a part-time or full-time deputy sheriff from 1981 to on or about March 10, 1988. During October 1985 the Grievant took a prisoner from the cell to the jail library and weight room after the 11:00 p.m. lock-up time. The Grievant was not disciplined for this. In December 1985 the Grievant unlocked the cell doors in the minimum security cell block to allow prisoners to sing Christmas carols with two ministers visiting the cell block. The Grievant was not disciplined for this. On December 23, 1986, Jail Supervisor Gordon Peterson (hereinafter Jail Supervisor) wrote a message to the Grievant, stating that on December 22, 1986, the Grievant had released a prisoner on a signature bond at the direction of the District Attorney, that a probation hold had been placed on this prisoner and that the Grievant should not have released him. This verbal warning was placed in the Grievant's personnel file.

On January 19, 1987, a memo from Chief Deputy Robert Moore (hereinafter Chief Deputy) to the Grievant was placed in the Grievant's personnel file. Said memo replaced a letter dated November 14, 1986, regarding complaints of sexual harassment. The Chief Deputy stated that any more complaints of this nature would result in suspension or dismissal. On April 13, 1987, the

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1/ At hearing Gordon E. McQuillen stated that Grievant Donald J. Hansen was his client, not the Association. On brief Mr. McQuillen stated that the County had used an inaccurate caption in its brief by referring to the Polk County Sheriff's Department Employees Association, and he stated that the grievant in this case is Hansen alone, not the Employees' Association. Notwithstanding these statements and based upon my reading of the collective bargaining agreement in question and applicable arbitrable precedent, I believe this is the appropriate caption in this matter.

Grievant was given an oral warning by the Jail Supervisor to wear his uniform while on duty. During 1987 the Grievant was notified on several occasions about failures to administer proper medication for prisoners during his shift. The Grievant was not disciplined for this.

On August 21, 1987, the Jail Supervisor wrote a memo to the Grievant, stating that on August 1 and 2, 1987, the Grievant unlocked the cell doors in the minimum security cell block during both the nighttime and daytime hours, that the Grievant left the doors open due to the heat, and that this was a gross violation of jail security. Therefore the memo advised the Grievant that he was suspended without pay for three days, effective August 31 through September 2, 1987. This suspension was grieved by the Grievant, which grievance was denied by the County. The grievance was not appealed to arbitration.

On March 5, 1988, the Grievant was working in the jail on the 6:00 a.m. to 2:00 p.m. shift. At approximately 10:00 a.m. the Grievant left the jail, leaving Rodney Elbaor, a certified jailer-dispatcher, and Carolyn Foltz, a trainee jailer-dispatcher, on duty. The Grievant drove to downtown Balsam Lake, purchased cigarettes, gum and a newspaper, and returned 15 to 30 minutes later. On March 8, 1988, the Grievant worked in the jail on the 2:00 p.m. to 10:00 p.m. shift. The Grievant did not wear his uniform to work, having come from a drug information meeting at a school; instead, he wore a shirt and tie with his badge placed on his belt.

On March 10, 1988, Elbaor advised the Jail Supervisor of these two incidents. The Jail Supervisor discussed the situation with Sheriff Paul R. Lindholm (hereinafter Sheriff). The Sheriff determined that the Grievant should be discharged. The Jail Supervisor drafted the following letter:

> March 10, 1988
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> TO: Deputy Donald Hansen
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> FROM: Gordon Peterson, Jail Supervisor
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> RE: Violation of Jail Security
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> During the past several years you have been given several verbal and written reprimands for your conduct while on duty at the Polk County Jail. This misconduct includes not wearing the department provided uniform, and leaving cell doors open and unattended while prisoners were in those cells. That conduct led to you being suspended from work for three days.
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> On March 5th, 1988 while you were working the 0600 to 1400 hour shift at approximately 1000 hours you left LEC to go downtown Balsam Lake, and were gone for about 1/2 hour. During this time that you were gone from LEC, the Jail was left with only one certified Jailer-Dispatcher on duty and one uncertified Jailer-Dispatcher trainee. You vacated your duty post without authorization. This is a gross violation of jail security. On March 8th, 1988 while you were working the 1400 to 2200 hour shift, you were not wearing the proper Polk County Jail uniform.

Therefore your employment with the Polk County Sheriffs Department is hereby terminated as of March 10th, 1988.

Gordon Peterson, Jail Supervisor

cc: Sheriff Paul Lindholm
Chief Deputy Robert Moore
Personnel File

The Jail Supervisor met with the Grievant on March 10, 1988, and presented him with this letter. The Grievant appealed the discharge through the grievance procedure. The grievance is now properly before this arbitrator.

PERTINENT CONTRACT LANGUAGE

ARTICLE II - MANAGEMENT RIGHTS

The ASSOCIATION recognizes the lawful management rights reposit in the County which include:

A. To direct all operations of the Department.

B. To establish reasonable work rules.

. . .

D. To suspend, demote, discharge and take other disciplinary action against employees for just cause.

. . .

Whether or not the Employer has been reasonable in the exercise of these management rights, A through J, shall be subject to the provisions of Article III.

ARTICLE III - GRIEVANCE AND ARBITRATION PROCEDURE

. . .

Section 2. A grievance is defined to be a controversy between an employee and the Employer as to:

A. A matter involving the interpretation of this Agreement.
B. Any matter involving an alleged violation of this Agreement in which the employee or the Association maintains that any of their rights or privileges have been impaired in violation of this Agreement.
C. Any matter involving wages, hours or conditions of employment.

STATEMENT OF THE ISSUE

The parties stipulated at hearing to framing the issue as follows:

Did the discipline of Don Hansen by the Polk County Sheriff's Department comport with the just cause provisions of the collective bargaining agreement in effect between Polk County and the Polk County Sheriff's Department Employee's Association?

If not, what is the appropriate remedy?

POSITIONS OF THE PARTIES

1. County Brief

On brief the County argues that the collective bargaining agreement does not include any provision for progressive discipline nor is there any contractual obligation, other than just cause, upon County management to utilize one form of discipline over another, that the March 1988 incidents involving the Grievant culminate a pattern of employe behavior which could no longer be tolerated, and that the Grievant exhibited poor judgment and insubordination in a course of conduct which was potentially threatening to the security of the Polk County jail.

In regard to leaving the jail, the Grievant does not deny that he left his post on March 5, 1988; that in fact he readily admits that he drove into Balsam Lake from the jail for the solely personal purpose of obtaining cigarettes, a newspaper and something to eat; that there can not be any serious disagreement that the Grievant had absolutely no necessity nor compelling reason for leaving the jail to obtain these items as like items were available at the jail; and that the Grievant admitted he did not have to make the trip to Balsam Lake to

obtain these items.

The County further argues that what makes this situation more egregious and serves to point out the Grievant's poor use of discretion is the fact that, in essence, the Grievant had been assigned to supervise the conduct of two part-time jailers-dispatchers, neither one of whom had state certification and one of whom was still in training; that the Grievant's leaving the jail area for purely personal reasons unreasonably jeopardized the security of the jail and demonstrated extremely poor judgement; that the Grievant knew he was the most experienced and qualified jailer and yet he left, without good reason, leaving less experienced part-time jailer/dispatchers on their own with no idea as to where he had gone or when he would be back.

Therefore the County asserts its belief that this conduct is intolerable and, when considered with the Grievant's work record, is just cause for dismissal; and the County asserts that arbitrators have upheld disciplinary actions, up to and including discharge, for unauthorized absence from a work station, citing Hoboken Land and Improvement Co., 1 LA 554 (Scarborough), and U.S. Naval Supply Center, 52 LA 350 (Williams).

In regard to not wearing a uniform, the County argues that the Grievant admits he did not wear his uniform on March 8, 1988; that he had been told by his supervisor to wear his uniform on the job and that failure to do so could result in discipline; that the County has a written policy that requires deputies to wear the badge on the left breast of a regular uniform; that the Grievant improperly displayed his badge on his belt; that the Grievant's excuse that he did not have time to change into his uniform does not speak well of his professionalism and job
experience; and that the importance of wearing a law enforcement uniform while on duty is recognized by arbitrators, citing City of Erie, 73 LA 605 (Kreimer).

In regard to the discipline imposed, the County asserts that the infractions discussed above are sufficient to sustain the discharge; that in determining the discipline, the County considered Hansen's prior employment record with the County; that the validity of utilizing an employe's work record in considering discipline has been well established by arbitrators, citing Harslaw Chemical Co., 32 LA 23 (Belkin); that the Grievant's prior record was less than stellar and, in fact, supported disciplinary action; and that arbitrators generally agree that the "straw that breaks the camel's back" may be a seemingly minor offense but looked at in conjunction with a pattern of conduct is judged to be significant, citing International Shoe Co., 32 LA 485 (Hepburn); Friden, Inc., 52 LA 448 (Koven); and Amper Corp., 44 LA 412 (Koven).

The County argues that the Grievant exhibited a persistent propensity for poor judgment in his duties as a jailer; that this represented potential jail security breaches in these prior occasions during the year and one-half prior to March, 1989; that the Grievant allowed a prisoner access to the jail library and weight room after hours; that he allowed members of the public to mingle with the prisoners; that he opened and left open the doors to the Huber dorm; that there incidents which management believed led to unreasonable opportunities to breach security at the jail were perceived by the Grievant to be legitimate exercises of his own judgement; that this type of continuing behavior is insubordination because of the stubborn insistence of an employe to do this his way; and that damage to the employer-employe relationship from insubordination is well documented by arbitrators, citing Albany Times Union, 33 LA 517 (Turkas), and Honeywell, Inc., 48 LA 1201 (McNaughton).

Therefore the County asserts that the discharge of the Grievant was for just cause and should be upheld by the arbitrator by denying the grievance in all aspects.

2. Grievant's Brief

On brief the Grievant asserts that it is not disputed that the Grievant was entitled to the full panoply of due process incorporated in the concept of just cause prior to being discharged, that it is clear that the County afforded the Grievant none of the well-established indices of just cause, and that, accordingly, the arbitrator should determine that the grievance is sustained and should order appropriate relief.

The Grievant argues that the Grievant was deprived of the procedural process due him pursuant to the just cause provisions of the collective bargaining agreement in effect between the County and the Association when he was discharged by the Polk County Sheriff; that the collective bargaining agreement provides for just cause for deputy sheriffs; that the procedural aspects of just cause are well-established and embodied in the seven tests attributed to Arbitrator Daugherty; that the seven tests are applied to notice, reasonable rule or order, investigation, fair investigation, proof, equal treatment and penalty; and that applying the seven tests of just cause to the facts in the Grievant's case must lead to the conclusion that the County did not have just cause to discharge him.

Specifically, the Grievant argues that the County did not provide the Grievant with adequate notice so as to allow him forewarning or foreknowledge of the possible or probable consequences of the alleged conduct for which he was terminated; that the County failed to establish that it had in effect any reasonable rules or orders intended to prevent the alleged conduct of the Grievant; that as part of just cause procedures, the County, prior to administering discipline of an employe, must make an effort to discover whether the employe did, in fact, violate or disobey a rule or order of management, and the investigation conducted by the Employer must be fair and objective; that in this case the County conducted no investigation whatsoever into the discharge of the Grievant prior to effecting that discharge, nor was the Grievant provided with a pre-discharge interview or administrative hearing at the hands of the Employer so as to allow him to rebut any evidence that may have been provided to the Employer; and that based upon this duality of failures, the Grievant's discharge must be reversed and the Grievant must be reinstated with full back pay and allowances. In addition the Grievant argues that the decision maker in this case did not obtain substantial evidence or proof that the employe was guilty as charged, and that the treatment of the Grievant at the hands of the Employer was inequitable.

Finally, the Grievant argues that even if the Grievant was guilty as charged of all allegations made by the County, termination is an inappropriate punishment; that just cause connotes the concept of progressive discipline, even absent a specific requirement in the collective bargaining agreement; that if progressive discipline was to be applied to this case, it is clear that termination cannot be sustained as the Grievant has extremely limited disciplinary measures noted in his file; that if the arbitrator should determine that discipline is warranted, the discipline imposed upon the Grievant should perform the appropriate dual functions of punishing the Grievant while warning him of future consequences and of providing an example for other employes; and that a 10-day suspension, at the maximum, would accomplish the goals traditionally sought by the disciplining of employes.

The Grievant also argues that the cases cited by the County in its brief do not support the County's decision to discharge the Grievant; that under the traditional seven factors of just cause, the discharge of the Grievant by the County cannot be sustained; that the Grievant must be ordered reinstated as a Polk County deputy sheriff and must be provided with all of his back pay and allowances; that because of the length of the Grievant's absence, he must be provided with appropriate retraining at the County's expense prior to resuming any duties as a Polk County deputy sheriff; and that because of the manner in which the Grievant was treated by the Jail Supervisor, the Grievant should be reassigned to a different division of the Polk County Sheriff's Department.

3. County Reply Brief

The County asserts that there is no dispute that the Grievant left the jail without authorization while on duty nor that he failed to appear for work in his officer's uniform, and that the only dispute is whether the Grievant should be discharged because of these events.

The County argues that the collective bargaining agreement specifically reserves the County's right to establish reasonable work rules, that no argument has been advanced by the Grievant that wearing his uniform while on duty or that staying at his assigned post while on duty is unreasonable, that the imminent reasonability of these rules or order, in whatever form, is self-evident, and that the fact that such rules promote the orderly, efficient and safe operation of the Employer's business makes the Employer's expectation that they be performed reasonable.

As to the Grievant's statement on brief that there is no credible evidence of any kind in the record to establish that there was any notice of any sort given to the Grievant regarding consequences of his conduct, the County argues that this is a blatantly false and misleading representation, that the Grievant knew that he was subject to discipline because he left his post without authorization and because he did not wear a uniform while on duty, and that to contend now that the Grievant's culpability should somehow be diminished because he did not know the exact nature of the disciplinary action which could be taken would make the Grievant impervious to discipline in any form.

According to the County, minimum staffing levels at the jail is not the issue, that the issue is that the Grievant left his assigned post while on duty without authorization, and that the County believes that this is such a serious offense that it would independently support management's decision to discharge the Grievant. The County argues that three of Daugherty's seven factors, that is "Investigation," "Fair Investigation" and "Proof", are superfluous when the Grievant readily admitted his actions, that nothing was revealed at the arbitration hearing which would have changed the County's decision to discharge the Grievant as it did, that there was no testimony to prove the Grievant's contention that he was inequitably treated from other jailers, and that progressive discipline is not an issue in this case as it is neither expressly provided for in the collective bargaining agreement nor can it be inferred from Daugherty's seven factors.

Therefore the County believes its case proves with certainty that the Grievant's employment was terminated for just cause and his grievance should be dismissed in all respects.

DISCUSSION

In essence the question before the undersigned is whether the County had just cause to discharge the Grievant and, if not, what is the remedy? The County argues that the testimony and evidence shows the County had just cause to discharge the Grievant and asks that the grievance be denied. The Grievant argues that the County failed to prove it had just cause to discharge the Grievant and asks that the Grievant be made whole, that he be retrained at the County's expense and that he be transferred from the jail. In the alternative, the Grievant argues that a ten-day suspension, at a maximum, should be imposed on the Grievant in place of discharge.

No dispute is present in this case that the standard to be applied to the discharge of the Grievant is one of "just cause", a term common to collective bargaining agreements, but one that lacks a clear and precise definition. The Grievant advocates use of Arbitrator Daugherty's seven test questions for determining

the presence of just cause. 2/ While this Arbitrator does not accept Arbitrator Daugherty's standard that a "No" answer to any of these seven test questions indicates just cause for discipline did not exist, this Arbitrator does find the questions helpful in analyzing whether just cause did exist. The County, while not advocating a specific definition of just cause, argues that just cause does not require the use of progressive discipline or any specific form of discipline over another. While this Arbitrator agrees that certain actions by employes support summary discharge, the norm under just cause is to provide for a system of progressive discipline.

In this case the Grievant makes much of the lack of notice to the Grievant of the consequences of his conduct, specifically his not wearing his uniform to work and his leaving the jail to go downtown. The Grievant also makes much of the lack of specific rules directing him to wear his uniform, and to remain in the jail. In these areas, the Grievant makes much of nothing. He had been specifically warned by the jail supervisor that he would be subject to discipline if he wore street clothes to work. He knew or should have known that he would be subject to discipline if he left the jail to go downtown without permission. While the County's work rules may not be model rules, that is not sufficient to overrule the discipline in this case.

The Grievant also makes much of the investigation that occurred prior to the discharge. The Jail Supervisor was advised by a part-time deputy sheriff on March 10, 1988, that the Grievant had not worn his uniform on March 8, 1988, and that the Grievant had left the jail on March 5, 1988. The Jail Supervisor checked the March 5, 1988 incident with a part-time deputy sheriff trainee on duty at the time of the incident. He then brought the matter to the Sheriff's attention. The Sheriff decided the Grievant should be discharged and the Jail Supervisor wrote and typed the letter discharging the Grievant. The Jail Supervisor presented the letter to the Grievant on March 10, 1988, the same day he learned of the alleged misconduct.

At no time prior to the decision to discharge did the Jail Supervisor, the Sheriff or anyone else on behalf of the County ever question the Grievant. No one asked him why he came to work in a shirt and tie instead of his uniform on March 8, 1988. Not one person inquired of the Grievant as to why he left the jail, or as to how long he was gone. While the County made an effort to determine if the Grievant had acted inappropriately on March 5, 1988, no one ever asked the person who knew best - the Grievant. Surely in the line of criminal investigations, the business of the Sheriff's Department, one of the people a law enforcement officer questions is the suspect. But that was not done in this investigation of misconduct.

While some investigation did occur, the County's failure to question the Grievant to give him a chance to collaborate his accusers, to explain his actions, or to deny the charges, raises strong suspicion that the investigation was neither fair nor objective. Yet there is no doubt that the Grievant was not in uniform on March 8, 1988, nor that he left the jail for 15-30 minutes on March 5, 1988. If the Jail Supervisor had questioned the Grievant on March 10, 1988, the Jail Supervisor may very well have been told by the Grievant that he had been out of uniform on March 8, 1988, and he had left the jail on March 5, 1988. But do these two incidents give the County just cause for discharge?

The County argues that these incidents culminate a pattern of employe

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2/ His test questions are:

(1) Was the employee given advance warning of the possible or probable disciplinary consequences of the employee's conduct?

(2) Was the rule or order reasonably related to the efficient and safe operation of the business?

(3) Before administering discipline, did the employer make an effort to discover whether the employee did, in fact, violate a rule or order of management?

(4) Was the employer's investigation conducted fairly and objectively?

(5) Did the investigation produce substantial evidence or proof that the employee was guilty as charged?

(6) Had the company applied its rules, orders, and penalties without discrimination?

(7) Was the degree of discipline administered in the particular case reasonably related to (a) the seriousness of the employee's proven offense, and (b) the employee's record of company service?

Enterprise Wire Company, 46 LA 359, 362-365 (Daugherty).

behavior which could no longer be tolerated and that the Grievant exhibited poor judgment and insubordination which potentially threatened jail security. The record does not support a finding as to insubordination. As to poor judgment, the County points to one instance in which the Grievant was suspended for three days for opening the cell doors in the Huber dorms without obtaining permission. The Grievant grieved the suspension, which the County denied. The matter was not appealed to arbitration. The Grievant argues that his behavior in this matter was consistent with sound jail management. Nonetheless, the failure to arbitrate this grievance sustains the discipline and the factual basis underlying it.

But the County points to other "incidents" to support its claim that the Grievant exhibited a pattern of poor judgment. Yet most of these incidents did not rise to the level of discipline. While I concur with the County that it is valid to utilize an employe's work record in considering discipline, see Harslow Chemical Co., 32 LA 23 (Bilkin), such "incidents" as appear here are given little if any weight for several reasons. First, arbitrators consistently hold that past rule infractions for which the employe was not disciplined should not be considered in determining level of discipline. Western Air Lines, 37 LA 130, 133 (Wychoff). Second, past warnings which have not been put in such a form as to subject them to the grievance procedure cannot be the basis of other discipline. Duval Corp., 43 LA 102, 106 (Myers). Therefore, the County's "straw that broke the camel's back" argument must fail for there is little discipline in the record to support such an argument.

In looking at the two incidents separately, it is clear that, in and of itself, the County did not have just cause to discharge the Grievant for failure to wear his uniform on March 8, 1988. While the Grievant had been previously warned that failure to wear his uniform would subject him to discipline, the County never determined why the Grievant did not appear in uniform so it could not judge whether the Grievant's reason was legitimate. In this case, the Grievant may have had a legitimate reason for appearing out of uniform as he had participated in a drug information program at a school. As most, the Grievant's behavior may have been cause for a letter of reprimand. Since the County did not investigate the reason for his appearing out of uniform and therefore chose not to judge whether his reason was valid, and as his reason may very well have been valid, I find no just cause for any discipline in regard to the Grievant's not wearing his uniform on March 8, 1988.

As for the Grievant's leaving the jail, the County argues strenuously that the Grievant by his action jeopardized the security of the jail. Yet the record is clear that the jailer routinely leaves the jail for various reasons: to take prisoners to court, to get records, reports and files from the squad room, to register vehicles in the parking lot, to make photocopies and to get prisoner medication from the drugstore. To suggest that jail security is seriously jeopardized when one jailer leaves the jail is to suggest the jail security is routinely jeopardized since jailers frequently leave the jail as part of normal operations. Thus, leaving the jail in and of itself is not the concern of the County here since the County not only allows jailers to leave the jail for various reasons but requires them to do so at times. What appears to be the legitimate concern of the County is that the Grievant left the jail without authorization.

There is no doubt that the Grievant left the jail without authorization, nor is there any doubt that he knew or should have known that such conduct would subject him to discipline. In addition there is no doubt that the County never questioned the Grievant prior to making a decision to discharge him, nor did the County grant the Grievant any opportunity to defend himself or to offer mitigating circumstances. Finally, there is no doubt that the Grievant's reasons for leaving the jail would not have swayed the County in its decision to discharge.

I have no doubt that the Grievant's conduct in leaving the jail is cause for discipline, but whether it is cause for discharge is another matter. I agree with Arbitrator Spaulding that "where the contract uses such terms as discharge for 'cause' or for 'good cause' or for 'justifiable cause' an arbitrator will not lightly upset a decision reached by competent careful management which acts in the full light of all the facts, and without any evidence of bias, haste or lack of emotional balance." Fruehauf Trailer Co., 16 LA 666, 670 (Spaulding). Although I will not lightly upset management's decision to discipline, in this case the decision to discharge the Grievant was not made carefully after hearing all the facts, but was made in haste and in such a way as to raise a suspicion of prejudice.

This is not a case where the County had to discharge the Grievant immediately. This is not a case where the County had to make its decision to discharge without first listening to the Grievant's side of the story. Nothing would have prevented the County from interviewing the Grievant prior to making its decision to discharge. If it felt it was necessary, nothing prevented the County from suspending the Grievant pending completion of the investigation. Yet the County heard an accusation made against the Grievant and on the same day, without ever asking the Grievant for his side of the story, the County decided to discharge the Grievant.

Why the haste? Why the lack of investigation? The Grievant suggests it may be because his candidacy for sheriff was announced in the newspaper the day before. Whatever the reason, the County acted recklessly in that it acted quickly prior to securing all the evidence. It also acted prejudicially by not affording the Grievant an opportunity to respond to the charges prior to the issuance of the penalty. For some arbitrators failure by management to make a reasonable inquiry or investigation prior to assessing punishment is the only factor necessary for the arbitrator's refusal to sustain a discharge. See, i.e., Ryder Truck Rental, Inc., 78 LA 542, 544 (Allen). Some arbitrators have refused to sustain a discharge solely because management did not give the employe a chance to be heard prior to discharge. See, i.e., St. Clair County, 80 LA 516, 520 (Roumell).

But even if the County had complied with the procedural requirements of just cause, the degree of penalty should be in keeping with the seriousness of the offense. No doubt that the Grievant committed a serious offense, one that the County believes justifies discharge. But because of the manner in which the County made its decisions, its objectivity is certainly subject to being questioned. The Grievant's offense was not securing approval for leaving the jail. (As noted earlier, jailers leave the jail often and for a variety of reasons). This was not insubordination, as argued by the County, but an error in judgment, albeit a serious error. Previously the Grievant had received a three-day suspension for an error in judgment by opening the Huber cell dorms. (The Grievant argues that this was a difference of opinion on jail management and not an error in judgment; as the grievance was not arbitrated, the three-day suspension stands as is). Punishment for this error in judgment, therefore, could range progressively from a five-day suspension to discharge.

Based upon the facts of this case, this Arbitrator believes that discharge is too severe a penalty for this offense. A thirty-day suspension would be the outer limits in terms of advising the Grievant and others against leaving the jail without permission and punishing the Grievant. In fact, this Arbitrator would have upheld a 30-day suspension if it had been imposed by management but for the County's failure to fully adhere to the requirements of just cause. On the other hand, management's actions or lack thereof lend themselves to an argument accepted by some arbitrators, as noted above, that no penalty whatsoever should be enforced. If management had less fully complied with the requirements of just cause, this Arbitrator would order a total make-whole remedy.

This Arbitrator believes a balance needs to be drawn here so as to encourage both the Grievant and the County to abide by the rules. This Arbitrator believes a ten-day suspension 3/ will put the Grievant on notice to use better judgment in performance of his duties. This Arbitrator also believes that reinstating the Grievant and making him whole but for the ten-day suspension will put the County on notice to more rigoriously fulfill its contractual obligations under just cause. Therefore, my award reduces the discharge of the Grievant to a ten-day suspension and requires the County to otherwise make the Grievant whole for any losses he suffered because of any punishment above and beyond the ten-day suspension. This includes any training the Grievant would have received or needs to undergo in order to return to work. As to the Grievant's request that he be assigned to a different division of the Department because of the manner in which he was treated by the Jail Supervisor, such a remedy is not supported by the record and is therefore not granted.

For these reasons, based upon the foregoing facts and discussion, the Arbitrator renders the following

AWARD

1. That the discipline of Don Hansen by the Polk County Sheriff's Department did not fully comport with the just cause provisions of the collective bargaining agreement in effect between Polk County and the Polk County Sheriff's Department Employee's Association.

2. That the discharge of Don Hansen is vacated; that he is reinstated to his position as a deputy sheriff effective March 10, 1988; that he is suspended for ten work days effective March 10, 1988; that he is otherwise to be made whole, including back pay and fringe benefits; and that he is to receive all training he would have received but for the discharge or needs in order to be reinstated to his duties as deputy sheriff.

Dated at Madison, Wisconsin this 20th day of September, 1989.

By _____
James W. Engmann, Arbitrator

3/ This suspension is in terms of work days, not calendar days.