

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

MILWAUKEE COUNTY DEPUTY
SHERIFFS' ASSOCIATION

and

MILWAUKEE COUNTY (SHERIFF'S DEPT.)

Case 298
No. 44877
MA-6444
(George White Suspension)

Appearances:

Gimbel Reilly, Guerin & Brown, Attorneys at Law, 2400 Milwaukee Center, 111 East Kilbourn Avenue, Milwaukee, WI 53202 by Ms. Marna M. Tess-Mattner, appearing on behalf of the Union.

Mr. Timothy R. Schoewe, Deputy Corporation Counsel, Milwaukee County Courthouse, Room 303, 901 North 9th Street, Milwaukee, WI 53233 appearing on behalf of Milwaukee County.

ARBITRATION AWARD

The Milwaukee County Sheriff's Association (hereinafter referred to as either the Association or the Union) requested that the Wisconsin Employment Relations Commission designate a member of its staff to serve as arbitrator of a dispute between the Association and the Milwaukee County Sheriff's Department (hereinafter referred to as either the County or the Department) over the suspension of Deputy George White. The undersigned was so designated. A hearing was held on March 6, 1991 at the Milwaukee County Courthouse in Milwaukee, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. The parties submitted post-hearing briefs, and the Association submitted a reply brief, which was received on April 19, 1991, whereupon the record was closed. Now, having considered the evidence, the arguments of the parties, and the record as a whole, the undersigned makes the following Award.

ISSUE

The parties stipulated that the following issues should be determined herein:

- (1) Did Deputy White violate rules as alleged by the Sheriff? 1/ If so,
- (2) Was the Sheriff's imposition of a one day suspension appropriate? If not,
- (3) What is the appropriate remedy?

In addition, the Association proposed that the following issues be decided:

- (4) Is the discipline barred as untimely?
- (5) Was Deputy White denied due process in that he was not allowed to see investigative materials prior to meeting with the Sheriff and was not informed of the "Conduct of Members" charge until he received the discipline?

In its brief, the Association disclaimed any interest in securing a ruling on the right of a grievant to see the investigative file, but asked that it be considered a mitigating factor. With this narrowing of the issue, the undersigned agrees that the additional issues are appropriately presented on the record.

PERTINENT CONTRACT PROVISIONS

See Appendix "A" of this Award for the text of the pertinent contract provisions:

PART 1 - §1.02
 PART 5 - §5.02 (4 & 5)
 PART 5 - §5.06

PERTINENT DEPARTMENT RULES

See Appendix "B" of this Award for the text of the pertinent Department Rules:

§1.03.39	§1.03.42	
§1.05.02	§1.05.04	
§1.05.06	§1.05.5	8
§1.07.30	§1.07.37	

BACKGROUND

1/ The parties also stipulated that if the arbitrator concluded that Deputy White did not violate rules, no discipline would be appropriate.

The County provides general governmental services, including law enforcement, to the people of Milwaukee County, in southeastern Wisconsin. Richard Artison is the elected Sheriff. The grievant, George White, has been a deputy on the department for 17 years. He has been assigned to the detective bureau since 1987.

On February 6, 1990, the grievant stopped at MoFoCo Auto Parts and dropped off a cracked cylinder head he had purchased elsewhere, asking that the shop evaluate whether it could be repaired. He did not actually authorize them to make any repairs. At the time of this transaction, the grievant was on duty and driving a county vehicle.

On the next day, the grievant returned to MoFoCo just before noon to check on the part. He discovered that some work had already been done on the cylinder head, and the shop mechanic demanded that he pay for the work before the part would be released. The grievant demanded to see the manager, and the mechanic told him the manager was not in. The grievant then told the mechanic that he would not pay for work he had not authorized, but the mechanic stood firm in refusing to release the cylinder head. The grievant identified himself as a police officer and displayed his badge. He warned the mechanic that he could be arrested for being a party to the crime of theft. The mechanic then located the manager, who also refused to give the grievant the cylinder head.

The grievant informed the manager that he was a police officer, and that he had extensive experience with consumer fraud cases from his work as an investigator with the District Attorney's office. He showed his departmental identification and badge, and warned the manager that he would be arrested for theft if he did not return the cylinder head. The manager refused to believe that the grievant was a police officer. The grievant then said he would contact the City of Milwaukee Police. The manager refused to let him use the phone, so the grievant called the police from the car wash next door. Meanwhile, the manager at MoFoCo called the Glendale Police. 2/

The grievant returned to MoFoCo and found that the manager was gone, as was his cylinder head. He told the mechanic to get the manager, and again flashed his badge. The mechanic disputed his claim of being a police officer and told him to go fuck himself. The grievant attempted to arrest and handcuff the mechanic, but the mechanic pulled away from him and grabbed a torque wrench. The grievant left the building and went to his squad, radioing his dispatcher to contact the Milwaukee Police. A few minutes later, he observed the Milwaukee Police arrive and enter the store through one entrance, while the Glendale Police simultaneously entered the store through another entrance.

The grievant identified himself to the Milwaukee and Glendale officers. He then placed

2/ The shop straddled the border between Milwaukee and Glendale.

the mechanic under arrest for being a party to the crime of theft and resisting an officer. At that point, the manager appeared with the cylinder head, and the grievant also arrested him. He handcuffed the two men together, and they were placed in the back seat of the Glendale squad. The grievant took the cylinder head and placed it in a box, to be marked as evidence. He placed the box next to his squad. Two other officers arrived on the scene. There was some discussion among the various officers about who should transport the two men to the jail. Once that matter was settled, the grievant got in his squad and started driving downtown. After a few blocks, he realized that he'd forgotten the box with the cylinder head in it. He returned to the MoFoCo parking lot, but the box was gone.

The grievant went to the Safety Building and met the two suspects at the District Attorney's office. He took them to the jail and booked them, and then filed a report on the incident. Upon reading the grievant's report and speaking with the grievant, the Acting Director of the Support Services Bureau, Lt. Arnold Nannetti, reprimanded him for using poor judgment and for conducting personal business while on duty. While Nannetti felt the arrest was proper, he stated that, given the grievant's personal involvement in the case, it would have been better practice to order the suspects to appear at the District Attorney's office instead of taking them into custody. In response to the grievant's explanation that the personal business was being conducted on his lunch hour, Nannetti took the position that deputies are not entitled to use meal breaks for personal business.

The Department assigned two officers to conduct an independent investigation of the incident. On Wednesday, February 14th, all of the parties involved in the incident appeared before the Assistant District Attorney in charge of misdemeanors. The Assistant District Attorney found that there was probable cause for the grievant to make an arrest based on violations of the Wisconsin Administrative Code, but that the evidence would not sustain the charge of Theft. He declined to issue warrants against the shop manager and mechanic on the obstructing charge, because the evidence of obstructing was weakened by a questionable identification by the grievant. He reprimanded the two suspects and released them. As to the grievant, the Assistant D. A. concluded that he had used poor judgment in making the arrests. Lt. Nannetti was apprised of these facts. As Bureau Director, Nannetti was the grievant's superior and responsible for imposing minor discipline, such as verbal reprimands, and for recommending more serious acts of discipline to the Sheriff. Lt. Nannetti filed a report with Bernard Tesmer, the Department Administrator, later on the 14th, summarizing what had occurred and recommending an official written reprimand for the grievant on a charge of conducting personal business while on duty. The grievant did not receive a copy of this report.

Shortly after Nannetti's report was sent to Tesmer, Tesmer contacted the Lieutenant and told him that the District Attorney's office wanted the grievant reassigned, since it wished to avoid the potential embarrassment of one of its investigators having been engaged in such an incident. Nannetti told the grievant he would be reprimanded and transferred for his part in the MoFoCo incident. Tesmer then contacted the grievant, and told him that the transfer was not disciplinary,

that the D.A. had given him a good recommendation, and that he could choose among three possible assignments. The grievant was then reassigned within the Detective Bureau.

On April 11th, the grievant was called in to speak with Sergeant Schaeffer of the Department's Office of Professional Standards. He was informed that OPS was investigating the MoFoCo incident. In the presence of his Union representative, the grievant gave Schaeffer a statement on the incident. He heard nothing further about the matter until the following October.

The OPS investigation was opened on February 16th, when the file was referred by Tesmer. No work was done on the file until the grievant was called in in April. In April, OPS interviewed the grievant and other witnesses. Their investigation was completed on May 3rd with the interview of another officer involved in the incident. At some point between July and October, the file was returned to the Bureau of Support Services. 3/

Nannetti, who had been Acting Director since January, retired in the summer of 1990. On July 22nd, John Tobiasz was named the new Director of Support Services, which was renamed Investigative Services as part of a general reorganization of the Department. On October 18th, Tobiasz sent the OPS investigative file to Lieutenant Peter Misko of OPS, with a handwritten note added to the bottom of Nannetti's original recommendation:

"I concur with the recommendation of Lt. Nannetti regarding an official reprimand for conducting personal business while on duty. However, using his badge of office to make a summary arrest to solve a personal problem should be considered more serious. For that conduct my recommendation is a one (1) day suspension - Violation 1.05.06 Misuse of official position."

Misko called the grievant and informed him of the charges and the recommended discipline. Misko recalls relating all of the charges to the grievant, while the grievant recalls only two charges being mentioned -- misuse of official position and conducting personal business while on duty.

The grievant requested a meeting with the Sheriff and asked to review the investigative file. His request to review the file was denied. He met with the Sheriff on October 23rd and asked to be allowed to submit additional information. This request was granted, and he submitted the additional information for the Sheriff's consideration on October 26th. On November 12th, Sheriff Artison issued a one day suspension for violating Department Rules concerning "Conduct of Members", "Attention to Duty" and "Misuse of Official Position":

3/ This is inferred from the record facts that (1) Nannetti never saw the investigative file while he headed the Bureau through the end of July, and (2) OPS received the file from the Bureau with John Tobiasz' recommendation for discipline in October.

This suspension is made because on Wednesday, 02/07/90 Detective White, while on duty, became involved in a dispute while conducting personal business at a local place of business known as MoFoCo Auto Parts, Inc., located at 102 West Capitol Drive. During this dispute Detective White arrested two employees of MoFoCo, Inc. and caused them to be conveyed to the Milwaukee County Jail. Both employees were subsequently unarrested. A review of this matter by the District Attorney's Office resulted in no charges issued against the MoFoCo employees.

Based on the above incident it has been determined Detective White violated the following:

1.05.02 RULE 2 - CONDUCT OF MEMBERS

Members of the department shall not commit (sic) any action or conduct which impedes the department's efforts or efficiency to achieve it's (sic) policies and procedures or brings discredit upon the department.

1.05.04 RULE 4 - ATTENTION TO DUTY

Members of the department shall devote their whole time and attention to the service of the department, and they are expressly prohibited from engaging in any other business or occupation while on duty.

1.05.06 RULE 6 - MISUSE OF OFFICIAL POSITION

Any member whose conduct or action is taken to use their official position for personal gain or influence is prohibited. (sic)

The grievant's recollection is that this is the first time he became aware of the charge concerning "Conduct of Members". The instant grievance was thereafter filed. It was not resolved in the lower steps of the grievance procedure and was referred to arbitration.

Additional facts, as necessary, will be set forth below.

ARGUMENTS OF THE PARTIES

The Position of the Association 4/

4/ For clarity of presentation, the Association's primary arguments are set forth first, followed by the County's arguments and the Association's reply. In presenting the arguments in this order, the undersigned does not suggest that the County is relieved of its burden of proving cause for the discipline.

The Association asserts that there was no cause for discipline in this case because there is no evidence of any rule violation. The "Conduct of Members" rule prohibits conduct "which impedes the department's effort or efficiency to achieve it's (sic) policies and procedures or brings discredit upon the department." This is a catch-all rule, which might be cited in any case, but the Association argues that there must nevertheless be some proof to support a charge under the rule. Nothing that the grievant did impeded the department or brought discredit upon it. He made an arrest for violations of the law, and his supervisor agreed that the arrests were proper. The fact that charges were not issued is irrelevant.

As for the charge of conducting personal business on duty in violation of the "Attention to Duty" rule, any violation was purely technical. The grievant believed that he had the right to conduct personal business on his lunch break. The Department interprets the meal break as being strictly for the purpose of eating a meal, and counselled the grievant to this effect. An honest mistake on a fine point of rule interpretation should not be grounds for more than very minor discipline.

There is no factual basis for a charge of Misuse of Official Position. The grievant only identified himself as a deputy sheriff after he concluded that the MoFoCo personnel were violating the law. Rule 58 requires deputies to take law enforcement action when violations are observed:

"Members shall not ignore violations of the law which may come to their attention through citizen complaints, by their own observations, or through their own investigation."

The grievant sought no personal gain through identifying himself as a deputy sheriff. His actions were, instead, appropriate and required under departmental rules.

Even if there were some basis for discipline, the Association maintains that a one day suspension is clearly excessive. The grievant has 17 years of service without formal discipline, and the only informal discipline was a counselling session with the Sheriff in 1986 regarding outside employment. The grievant's superior, Lt. Nannetti, who was well aware of the facts and the grievant's record, felt that verbal counselling and a written reprimand were the appropriate acts of discipline. This would have been in keeping with Department Rule 1.03.42, which provides that "punitive action should be directed toward retraining whenever an act is not willful or overt..." and Department Rule 1.02.39 which requires supervisors to consider the employee's motive and intent and to weigh whether a violation sprang from deliberate defiance of the rules, or simply from ignorance or carelessness. The Department has, the Association argues, ignored the traditional standards of progressive discipline, as well as its own rules, in imposing the suspension in this case. In light of the grievant's record, the unreasonable lapse of time in imposing discipline, and the Department's refusal to follow due process in this case, the Association argues that a verbal reprimand is the most serious discipline that can appropriately be imposed.

It is the Association's view that the discipline in this case should be barred by the passage of time. The investigation was completed by May 3rd. Nannetti, the Bureau Director, had already made his recommendation. There is no justification for the lapse of five months before the new Bureau Director submitted a new recommendation. The Department's own rules require that OPS investigations be "thorough, timely and complete." As a matter of fairness, the discipline should be barred.

The Department denied the grievant his due process rights by failing to reveal all of the charges against him (specifically the "Conduct of Members" charge) and by refusing to allow him access to the investigative file. These actions denied the grievant a meaningful opportunity to defend himself in his meeting with the Sheriff. The effect of these due process violations should be considered in judging whether the discipline imposed was appropriate.

For all of the foregoing reasons, the Association asks that the grievance be sustained, the one day suspension removed from the grievant's record, and the grievant made whole for his losses.

The Position of the County

The grievant was clearly guilty of using County time and property for personal gain when he transported the cylinder head to MoFoCo in a County squad while on duty, and then returned in a County squad while on duty the next day. This violates both the rule against conducting personal business while on duty and the prohibition against impeding the efficiency of the department. Furthermore, the grievant had an inherent conflict of interest in attempting to take police action in a case where he himself was the alleged victim. He used his badge and identification to intimidate the MoFoCo personnel in order to gain a personal advantage in his business dealings with them. In so doing, he misused his public position.

The claim of untimeliness was raised for the first time at the arbitration hearing. Nothing in the collective bargaining agreement suggests a schedule for meting out discipline. The mere passage of time does not somehow reduce the grievant's culpability for his rule violations, and the grievant has not identified any prejudice or harm which has accrued to him by reason of the delay. Thus the timeliness argument should be dismissed.

The Association's attempt to raise due process arguments is without contractual foundation. Nothing in the collective bargaining agreement gives an employee the right to review investigatory files, and this issue is the subject of a separate grievance. The content of the files is none of the deputy's business. In this case, the grievant was given the right to meet with the Sheriff and provide as much information as he wanted. In fact, the Sheriff agreed to accept additional documents from the grievant after the meeting to bolster the grievant's request for mitigation of the discipline. Clearly the County treated the grievant in a fair manner while considering discipline in this case.

As for the allegation -- again raised for the first time at the hearing -- that the grievant was not informed of the charge under the "Conduct of Members" rule, this is debunked by testimony of Lt. Misko. Misko testified that he informed the grievant of all three charges when he called him on October 18th. Thus this claim must fail.

Since the grievant was obviously guilty of the charges against him and since there is no viable defense on either substantive or procedural grounds, the County urges that the grievance be denied.

The Association's Reply Brief

The Association takes exception to the County's arguments. The County is factually incorrect in charging that the grievant misused his County squad. The record shows that the grievant was conducting an investigation in the area of MoFoCo, and thus would have had the county squad on the east side of Milwaukee even if he hadn't conducted some personal business. Thus the suggestion that he misused County property to transport the cylinder head is unfounded.

The Association argues that County has not carried its burden of proof. The "Conduct of Members" rule goes to conduct unbecoming an officer. This involves some measure of intentional wrongdoing. At most, the grievant was guilty of misinterpreting the lunch break rules. This constitutes a minor, technical violation of the "Attention to Duty" rule, for which the grievant was appropriately counselled by Nannetti. Nannetti himself acknowledged that employees sometimes conducted minor personal business such as cashing paychecks while on duty, and that such violations were tolerated by department management. As for the County's claim that the grievant tried to intimidate the MoFoCo employees, there is simply no factual basis for this charge. As previously noted, the grievant identified himself as an officer only after the repair shop personnel engaged in a violation of the law.

The Association avers that the timeliness issue is properly before the arbitrator. Nothing in the contract requires the raising of defenses at a stage earlier than the arbitration step, and the grievant, who had never before been involved in an OPS investigation, could not be expected to be aware of all of the technical arguments available to him at the time of his meeting with the Sheriff. Again, the Department's own rules require prompt resolution of disciplinary matters, and the arbitrator should hold the Department to this standard.

The Association dismisses the County's claim that Misko should be credited with having fully informed the grievant of all of the charges against him. Misko testified that he related "the charges" and assumed that this included the "Conduct of Members" charge. He did not have an independent recollection of his specific statements. The grievant, aided by contemporaneous notes of the conversation, testified that two charges and two recommendations of discipline were communicated -- a reprimand for "Attention to Duty" and a suspension for "Misuse of Official Position". The grievant's testimony in this regard must be considered more reliable than Lt.

Misko's.

DISCUSSION

The threshold issue in this case is whether the grievant was guilty of violating departmental rules in his conduct on February 6 and 7, 1990. Three rules are alleged to have been broken: "Attention to Duty", "Conduct of Members", and "Misuse of Official Position".

Attention to Duty

The grievant rather clearly violated the rule directing officers to "devote their whole time and attention to the service of the department" during duty hours and prohibiting them from "engaging in any other business or occupation while on duty". On both February 6th and 7th, he stopped at MoFoCo to conduct personal business during duty hours. While he asserted that he was on his lunch break, the department's rules plainly designate such breaks as being solely for the purpose of eating meals:

"Members of the department may suspend their police duty for a brief lunch period to be taken within assigned duty areas, subject to recall buy (sic) some means of communication. Meals shall be eaten with reasonable dispatch when in public view."

Conduct of Members

The grievant is accused of violating §1.05.02, "Conduct of Members":

"Members of the department shall not commit (sic) any action or conduct which impedes the department's efforts or efficiency to achieve it's (sic) policies and procedures or brings discredit upon the department."

The Association characterizes this as a catch-all charge, and the undersigned agrees that this is the way it has been employed in this case. Neither Nannetti nor Tobiasz cited this provision in recommending discipline, and no rationale was cited by Artison for its inclusion in the Notice of Suspension. In its brief, the County argues that the grievant impeded departmental efficiency by deviating from his official duties, which is the essence of the "Attention to Duty" rule violation discussed above. This is a derivative violation, dependent for its sufficiency upon proof of the "Attention to Duty" charge. There are three implications to this.

The first implication is that this charge is sustained, since the "Attention to Duty" violation has been sustained and it necessarily involves impeding the department's efficiency. The second is that the alleged failure to give notice of this charge can have had no prejudicial effect, since successfully defusing the independent charge of conducting personal business on duty would have

resolved the derivative violation. Given that this charge, as used here by the County, is entirely dependent upon establishing the substantive offense under "Attention to Duty", no additional proof or defense was required of the grievant by its addition. Therefore that aspect of the Association's due process argument need not be addressed, as it can have had no impact on the grievant's ability to defend himself in this case. The third implication of the "Conduct of Members" violation's derivative nature is that it cannot be used to compound the discipline imposed as a result of the substantive violation. Certainly it is possible that, in the course of one transaction, an employee could run afoul of several substantive rules, and subsequently be found guilty of multiple rule violations. In this case, however, the County has not alleged that the grievant's conduct independently violated both rules. Rather, the County's position asserts that the violation of the first, specific rule against conducting personal business is necessarily and automatically a violation of the second, general rule because the general rule encompasses a variety of behaviors, including those proscribed by the specific rule. Inasmuch as both rules apply to the identical, discrete act, it serves no valid purpose to impose a more serious punishment simply because there are technically two rule violations rather than one.

Misuse of Official Position

The most serious allegation is that the grievant used his position as a law officer for personal gain in his dealings with MoFoCo. Tobiasz cited this as the basis for imposing a one day suspension, while approving Nannetti's recommendation of a written reprimand for the "Attention to Duty" violation. 5/ Section 1.05.06 of the Policy and Procedure Manual sets forth Rule 6 - Misuse of Official Position:

"Any member whose conduct or action is taken to use their official position for personal gain or influence is prohibited." (sic)

The rule requires that the employee's "action" be taken "to use their position for personal gain", and intent is therefore required. Intent may, of course, be inferred from conduct and surrounding circumstances. The County's brief asserts that the rationale for this charge was that the grievant intended to intimidate the repair shop personnel. Nothing in the disciplinary record suggests that the management of the Sheriff's Department focused on quite this broad a basis for the charge. Instead, Tobiasz concluded that the grievant intended to use his status as a deputy "to make a summary arrest to solve a personal problem" and in that way abused his position.

Whether one focuses on the entire transaction or simply on the arrests, it is at the very best

5/ See Tobiasz's October 18th note on Nannetti's original memo: "...However, using his badge of office to make a summary arrest to solve a personal problem should be considered more serious. For that conduct my recommendation is a one (1) day suspension - Violation 1.05.06 Misuse of official position."(Joint Exhibit #14).

a strained interpretation of the record to infer that the grievant intended to use his position for gain. He did not identify himself as a police officer until the point in the transaction where a violation of the law appeared to be taking place. Neither did he, initially at least, take any direct action other than advising the repair shop personnel that they were violating the law and could be arrested. Indeed, when it became apparent that he could not persuade the MoFoCo personnel to return the cylinder head, he called the Milwaukee Police Department. Granting that he had a personal interest in having the law complied with and the cylinder head returned, the grievant was nonetheless acting in a reasonable manner to that point, and in conformance with department policies:

"RULE 58 - VIOLATIONS OF THE LAW

Members shall not ignore violations of the law which may come to their attention through citizen complaints, by their own observations, or through their own investigation."

After calling the Milwaukee Police, the grievant returned to the repair shop and renewed his confrontation with the mechanic, whom he attempted to arrest. At that point, the grievant had repeatedly identified himself as a deputy sheriff, and had repeatedly shown his credentials. The mechanic disbelieved him, evaded the arrest and brandished a wrench. The grievant went back outside to check on the progress of the Milwaukee Police and await their arrival. When they arrived, he identified himself to them and arrested both the mechanic and the shop manager.

The grievant testified without contradiction that he had made summary arrests for similar violations in the past and that arrests in such cases were not unusual. The arrests themselves were supported by probable cause. While the grievant may well have taken some personal satisfaction from arresting the two men himself, the record does not suggest any tangible gain or advantage he might have obtained through this action. In fact, as an incident of the arrest, his cylinder head became evidence and would have been unavailable to him.

The undersigned cannot identify the personal gain or advantage the grievant intended to obtain in this transaction. Certainly his involvement as both law officer and a victim in this case could have presented the appearance of impropriety, and it is fair to conclude that he used very poor judgment in making the arrests himself rather than relying on the Milwaukee and Glendale officers who were also present. This conclusion, however, flows from a possible adverse public perception, rather reflecting any improper intent by the grievant. This is the conclusion that Nannetti reached after reviewing the record and speaking with the grievant at the time of the incident, and no additional evidence of intent appears to have informed Lt. Tobiasz when he increased the disciplinary recommendation some eight months after the fact.

The circumstance of this case will not sustain an inference that the grievant intended to misuse his public position. Absent evidence of an intent to secure personal gain or influence, the undersigned finds that the County has failed to meet its burden of proving a violation of Rule 6.

Appropriate Penalty

The conclusion that Rule 6 was not violated necessarily reduces the penalty in this case to a written reprimand. Both Nannetti and Tobiasz cited this as the appropriate response to a violation of the "Attention to Duty" rule, and the "Conduct of Members" violation, as previously noted, cannot be considered an aggravating circumstance because of its purely derivative nature. The Association, however, argues that at most a verbal reprimand is justified, given the time lapse between the offense and the penalty, the refusal to share file information with the grievant and the lack of any prior disciplinary record. The undersigned cannot agree.

The lapse of time between the February incident and the November discipline is unexplained and unreasonable. In order to be more than simply punitive in nature, discipline must be imposed reasonably close in time to the event giving rise to the discipline. If the increase in severity to a suspension was justified by the facts, the Association's argument about the lapse of time might well operate to defeat the suspension. Given the finding that a written reprimand rather than a suspension is in issue, however, the lapse in time is far less egregious. The grievant was told by Nannetti almost immediately that he would be receiving such a reprimand, and testified that he thought it had been issued in February. There is no discernable prejudice to the grievant in making official in November what he thought had been accomplished -- without protest by him - - in February. Given that the Association's timeliness argument is grounded in equity rather than specific contract language, the lack of any prejudicial impact leads the undersigned to reject it as a basis for challenging a written reprimand.

The Association also argues that the County's failure to provide the grievant with access to the investigative file should mitigate the offense, although they disclaim any desire for a ruling on whether the County is obligated to provide such information to the grievant.^{6/} Frankly, given the Association's disclaimer, the undersigned has no idea what this argument is aimed at. If employees have the right to these files, and this right is denied, such a denial is a factor that might, as a policy matter, be considered in weighing the appropriateness of a given act of discipline. If these files are privileged, as claimed by the County, using the County's refusal to provide them as a mitigating factor would substantially impair the privilege. Neither the factual record nor the arguments of the parties are well enough developed on this point to draw any reliable inference from the County's refusal to allow the grievant to see his file. Given the state of the record on this point and the fact that the substance of the Association's complaint is the subject of another pending grievance, the undersigned declines to speculate on the possible impact of the County's denial of access.

Finally, the Association maintains that the principles of progressive discipline demand

^{6/} The right of employees to access investigative files is the subject of another pending grievance.

nothing greater than a verbal reprimand as the appropriate discipline in this case. The Department's rules do incorporate some of the principles of progressive discipline. Absent contract language or a clear practice, however, progressive discipline cannot be treated as a lockstep procedure, with discipline inevitably starting with a verbal reprimand, followed by a written reprimand, followed by a suspension, etc. While this is the customary progression, different facts may well call for different acts of discipline. The appropriate measure of discipline is management's decision in the first instance, and management is entitled to exercise reasonable discretion in arriving at the decision. In particular, management has the right and the obligation to consider all of the circumstances surrounding a grievant and an offense and to then assign discipline which is proportionate. In this case, the grievant has a long and clean record. He also engaged in what he should have understood to be a violation of department rules by conducting personal business on department time, and he exercised very poor judgment in personally making arrests in a case where he was the victim of the alleged crime. The degree of concern over this latter point was apparently great enough to cause dismissal of the charges against the mechanic and the shop manager. The judgment of the two lieutenants that a written reprimand, rather than verbal counseling, was the appropriate disciplinary response to the grievant's lack of attention to duty cannot be said to be an abuse of management's discretion or inconsistent with the principles of progressive discipline.

On the basis of the foregoing, and the record as a whole, the undersigned make the following

AWARD

- (1) Deputy White violated departmental rules concerning "Attention to Duty" and, by derivation, "Conduct of Members" as alleged by the Sheriff. Deputy White did not violate departmental rules concerning "Misuse of Official Position";
- (2) The Sheriff's imposition of a one day suspension was not appropriate in light of the failure to prove "Misuse of Official Position"; Instead, the violation of the rules regarding "Attention to Duty" and "Conduct of Members" warrant a written reprimand;
- (3) The appropriate remedy is to immediately remove any reference to a one day suspension from the grievant's personnel file, and other County files, and to pay him the amount of his lost wages for the day of suspension. The County may, at its option, replace the Notice of Suspension with a written reprimand for the violations proven in this case;
- (4) The written reprimand is not barred as untimely;
- (5) Deputy White was not denied due process by any failure on the County's part to inform him of the "Conduct of Members" charge until he received the discipline;
- (6) The record is not sufficient to determine whether Deputy White was denied due process in that he was not allowed to see investigative materials prior to meeting with the Sheriff.

Signed and dated at Racine, Wisconsin this 3rd day of October, 1991:

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator