BEFORE THE ARBITRATOR

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| In the Matter of the Arbitration of a Dispute Between | : | |
| MARK PEEBLES | : | Case 112 No. 44522 MA-6325 |
| and | : | |
| FOND DU LAC COUNTY (SHERIFF'S DEPARTMENT) | : | |

Appearances:
Cullen, Weston, Pines & Bach, Attorneys at Law, by Mr. Gordon E. McQuillen, on behalf of Mark Peebles.
Mr. Mark Peebles, Grievant, appearing in person.
Mr. Thomas L. Storm, Corporation Counsel, and Mr. William J. Bendt, Assist
Mr. James L. Koch, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CI

ARBITRATION AWARD

Fond du Lac County Sheriff's Department Employees, Local 1366-F, AFSCME, AFL-CIO, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and Fond du Lac County (Sheriff's Department), hereinafter the County, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. 1/ The County subsequently concurred in the request and the undersigned was designated to arbitrate in the dispute. A hearing was held before the undersigned on January 23-25 and March 11 and 12, 1991 in Fond du Lac, Wisconsin. There was a stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by July 22, 1991. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated there was no procedural issue and also stipulated to the following statement of the substantive issues:

> 1. Was discipline of Mark Peebles by the Fond du Lac County Sheriff warranted pursuant to Article 3 and Section 20.02 of Joint Exhibit 1?
> 2. If so, was the level of discipline that was imposed appropriate?
>
> 3. If the answer to one and/or two is no, what is the appropriate remedy?

CONTRACT PROVISIONS

The following provisions of the Collective Bargaining Agreement between the County and the Union are cited:

ARTICLE III - MANAGEMENT RIGHTS

3.01 Except as otherwise provided herein, the

1/ The Union subsequently withdrew from active participation in this case based on Mr. Peebles' desire to be represented by his own attorney. The parties also agreed to waive the Arbitration Board.

management of the work and the direction of the force, including the right to hire, promote, transfer, demote, suspend or otherwise discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reason is vested in the Employer.

3.02 The Employer shall have the right to establish reasonable work rules.

. . .

ARTICLE XX - GRIEVANCE PROCEDURE

. . .

20.02 Discipline, Discharge and Suspension - No regular employee shall be disciplined, or discharged except for just cause. Written notice of the suspension, discipline, or discharge and the reason or reasons for the action shall be given to the employee with a copy to the Union without (sic) twenty-four (24) hours if reasonably possible. Any grievance that may result from such action shall be considered waived unless presented in writing within seven (7) calendar days of the receipt of the notice by the employee. The grievance may be started at Step 2 or Step 3.

BACKGROUND

The County maintains the Fond du Lac County Sheriff's Department and operates the Fond du Lac County Jail. The Grievant, Mark Peebles, hereinafter "Peebles" or "Grievant", was employed in the Department as a full-time Correctional Officer II in the Jail for approximately four years until his termination on April 26, 1990. Correctional Officers are in the non-protective employes bargaining unit represented by Local 1366-F, AFSCME, for the purposes of collective bargaining. At all times material, James Gilmore has been the Sheriff of Fond du Lac County, Ed Henke has been the Chief Deputy and Lt. Gary Pucker has been in charge of the jail. The Grievant was working the 11:00 p.m. - 7:00 a.m. shift at the time of his termination and previously had been on the 3:00 p.m. - 11:00 p.m. shift.

On or about March 22, 1990, Peebles went to the County's Personnel Director, Rich Byrzozowski, and in the course of their conversation Peebles noted several areas of concern: (1) Whether he should continue to pursue the Patrolman position for which he was scheduled to be interviewed, (2) what he felt were problems in the Jail, such as favoritism by Lt. Pucker as to uniforms, scheduling, and promotions, etc., and (3) whether he could transfer to another County department, such as the Highway Department. There is a dispute as to how the conversation should be characterized. The County would characterize the matter as Peebles having gone there to complain and as having "invited the interrogation of the Personnel Director as to the reasons for his dissatisfaction. Grievant obviously went to the personnel office with a hidden agenda to stir things up within the department." The Grievant asserts he was unsure about whether to continue to pursue a promotion to Patrolman and decided to talk to the Personnel Director about his "concerns with the promotional process and with his desire to leave the jail". According to the Grievant, in discussing those concerns, Byrzozowski asked him "why he felt that way" and the Grievant then "told all". That evening, when Peebles went to work at the Jail,

he told another Correctional Officer who was on duty, Linda Schmitz, that he had gone to the Personnel Director about problems in the Jail. Schmitz subsequently told Lt. Pucker about Peebles' having gone to the Personnel Director and complained about problems in the Jail and Pucker. Pucker then advised Chief Deputy Henke on or about March 23rd that he heard from Schmitz that Peebles had gone to the Personnel Director and made complaints against the Department and Pucker. Henke then called Byrzozowski who confirmed that Peebles had talked to him the previous morning about some problems in the Jail and whether he (Peebles) should continue to pursue the promotion to Patrolman. Henke then advised Byrzozowski that he would look into the matter and talk to Peebles to determine whether an investigation was necessary. Henke then advised the Sheriff and Lt. Pucker as to the matter.

A couple of nights later, Henke talked to Peebles when he came in for his shift at the Jail about the concerns he had raised. Peebles was then off for the next three days on his work schedule.

When Peebles returned to work on March 28, 1990 he was questioned by Henke as to the specifics of his allegations. He was verbally informed by Henke that he was being suspended with pay immediately, and Henke accompanied him to his locker, ordering him to clean it out and also removing and taking three cartoons in Peebles' locker. Also at that time, Henke gave Peebles the following written notice of his suspension:

FOND DU LAC COUNTY SHERIFF DEPARTMENT

MEMORANDUM

DATE 3-28-90

TO: C.O. II Mark Peebles

FROM: Chief Deputy Ed Henke

SUBJECT: Informal Investigation

As a result of your allegations and complaints, an internal investigation is being conducted.

Preliminary information has resulted in the receipt of some potentially damaging allegations against you. These allegations and counter-allegations have produced a disruptive, tense, and potentially volatile environment within the work place.

In considering the welfare of all those involved, the maintenance and control of the work place, and providing safeguards to the investigation I have chosen to take the following course of action:

a. You are being suspended with pay, effective immediately.

b. Once I have reviewed available and necessary information, you will be contacted for an interview.

c. During this period, you will provide a means of contact, either via a mailing address or telephone number.

d. You are to have no adverse contact with present employees during this investigation.

Also on March 28, Henke began his investigation of Peebles' allegations by interviewing and taking statements from Lt. Pucker, and the full-time Correctional Officers. He interviewed, but did not take recorded statements from, the part-time employes at the Jail. A number of employes at the Jail also submitted written statements in addition to their recorded statements. Lt. Sheppard was assigned to contact former employes the Grievant had named in his discussion with Henke about the issues Peebles had raised.

On the morning of April 3, 1990, Peebles came to Henke's office in an emotional state, described the personal problems he was having in his life and told Henke that he was having trouble sleeping and asked if Henke could help arrange counseling. Henke called the Personnel Director to see about avenues for obtaining counseling for employes and then made an appointment for Peebles to see someone for an outpatient evaluation at the County's Health Care Center. Peebles was advised of the time of the appointment and that he should consider signing a patient release form as they needed to be made aware of the results. Peebles went to the appointment that afternoon, but did not sign a release so that the Department would have access to the results of the assessment. Henke was advised of the above on April 5th by the person who had done the

evaluation. The result of the assessment was a referral for a drug and alcohol assessment which Peebles did not feel was necessary.

On April 9, 1990, Henke met with and interviewed Peebles again, this time also questioning him about allegations made by other employes against him. By the following Memorandum of April 11, 1990, Henke advised Peebles of the following charges against him:

MEMORANDUM

TO: CORRECTIONAL OFFICER MARK PEEBLES

FROM: CHIEF DEPUTY ED HENKE

SUBJECT: SPECIFICATION OF CHARGES

DATE: April 11, 1990

As a result of information gathered through an internal investigation, which was conducted through the period from March 28 through April 10, 1990; the following specification of charges are being served on you.

A. Violation of policy 103.04 - Chain of Command

You failed to use the established Department Chain of Command for departmental functions.

B. Violation of policy 103.04(b) - Insubordination

Your actions or statements were made in an embarrassing or discrediting manner to an Officer in Charge or the Department in the presence of other Officers or the general public. You were disrespectful toward Supervisors or fellow employees through your bearing, gestures, language or other actions which were offensive, of doubtful social value, and are unacceptable.

C. Violation of policy 104.10 - Public Appearances and Statements

You publicly criticized or ridiculed the Department, it's policies, or other members by speech, writing, or other expression, where such speech, writing or other expression is viewed as defamatory, obscene, unlawful, undermines the effectiveness of the Department, interfered with the maintenance of discipline and was made with reckless disregard for truth or falsity.

D. Violation of policy 302.06 - Code of Conduct

Your demeanor regarding bearing, gestures, language, or other actions were offensive or of doubtful social propriety or gave the appearance of misuse of influence or lack of jurisdictional authority.

Your conduct is viewed as a serious rule infraction, in that it displays disrespect for a Supervisor and/or fellow Officers to include false statements.

Part of your overall conduct would pertain to each violation as stated in Items B, C, and D or it could stand alone in terms of sexual harassment. In that, employees were subjected to extremely vulgar and offensive sexually related epithets.

You routinely used profanity in the presence of women employees and had addressed obscene or offensive remarks to them.

Your conduct surrounding sexual remarks and derogatory statements is beyond the limits of lawfulness or decency, making for an intolerable condition, which management cannot or will not condone.

Therefore, you are to appear in the office of the Sheriff at 10:00am on April 19, 1990 to answer to the above mentioned charges. You may offer a statement or present any relevant information on your behalf at that time.

I acknowledge receipt of the specification of charges.

Mark D. Peebles /s/
Employee signature

Peebles received the Memorandum on April 16, 1990.

The Sheriff sent Peebles the following letter on April 12, 1990, advising him of a meeting on the charges:

April 12, 1990

Mr. Mark Peebles
418 6th Street
Fond du Lac, WI 54935

Dear Mark:

This letter is to apprise you of the results of the investigation conducted by Chief Deputy Henke. His report to me indicates that the allegations and complaints against Lt. Pucker are unfounded. He based this on the findings that the complaints are either demonstrably false or that there is no credible evidence to support them. The Chief Deputy attempted to contact you this morning to set up a meeting before the weekend, but was unable to locate you. I, therefore, have set aside time at 10:00am, Monday morning, April 16, 1990, to meet with you.

James Koch advised that he is uncertain whether he is representing you or not, but I would advise you that you may bring counsel with you.

Sincerely,

Jim Gilmore /s/
Jim Gilmore, Sheriff
Fond du Lac County

On April 13, 1990, Peebles received a call from Christ Tzakis, a Detective in the Department and a friend of Peebles and also the President of the local union representing the protective service employes in the Department. Peebles met with Tzakis at the latter's request and was told that the Department was requesting that Peebles resign and that nothing would be placed in his personnel file and he would not be denied Unemployment Compensation. Later that same afternoon, Peebles received a call from his Union representative, James Koch, who told him the same thing Tzakis had told him.

On April 19, 1990, Peebles, Koch, and Union President Harasimchuk met with Henke and the Sheriff to discuss the charges against Peebles. Koch requested more specificity as to the charges and Peebles stated that he would plead innocent to all the charges. Henke offered to orally clarify the charges and the Grievant indicated he would not respond beyond pleading innocent. At that time, Peebles was advised that since he would not cooperate, his status was being changed to "suspension without pay". He was also advised of that in writing that day. A grievance was filed the next day.

On April 22, 1990, the Grievant's ex-wife contacted the Fond du Lac Police Department with regard to statements Peebles had been making the past couple of weeks about suicide and about taking some other people with him, including herself and one of his co-employes, Chris Hess. The Officer contacted two of the Grievant's co-employes, including Hess, and also contacted the Grievant, regarding the alleged statements. Hess advised the Officer to send Chief Deputy Henke a copy of his report and one was sent and received by the Department the next day.

On April 23, 1990, Detective Tzakis and Henke were discussing concerns about Peebles and Tzakis offered to talk to him to determine whether he was a danger to himself and others. Tzakis and his partner went to the home of Peebles' parents where they talked to Peebles. In the course of this conversation, Peebles advised him that he was going for counseling for his emotional problems. Tzakis' assessment of the situation was that there was not a sufficient basis for an emergency detention of Peebles and he drove to Henke's home after the meeting with Peebles and advised Henke of the results.

On the afternoon of April 24, 1990, the Grievant's ex-wife, and a person from a local organization that helps people deal with violent relationships met with Sheriff Gilmore. At the ex-wife's request, Henke was not at the meeting. Initially, the ex-wife's comments were in regard to what she had heard about the investigation and why she felt it had been conducted unfairly and in a manner that would incriminate the Grievant. She also raised questions regarding favoritism toward certain employes. The Sheriff defended the manner in which the investigation had been conducted and the conversation then turned to problems the Grievant's ex-wife had been having with him. She told the Sheriff that she was sure that Peebles had been breaking into her apartment and also had at times hidden in the back of her car while she was driving, and that

she had reported this to the Police Department. She also mentioned threats she had heard Peebles make to the effect that if he went, he was taking six other people with him. The Sheriff indicated the Department was aware of the comment and was checking on it, but that they believed it was meant in the context of people being fired. The Grievant's ex-wife responded that the manner in which he last made the threat led her to feel that he meant that he would kill six people and then commit suicide. She also stated Peebles had told her how he had dreams about killing her and how he would do it and get away with it. In response to the Sheriff's question, the Grievant's ex-wife stated she was fearful of Peebles, but stated that Peebles' part-time employer told her he had spoken to Peebles and felt he was not serious about the threat. The Sheriff told her that they and the Police Department were checking it out and the other person advised the Sheriff they would go to the Police Department and discuss it with the Deputy Chief.

Also on April 24, 1990, the following Memorandum was sent to the Grievant:

FOND DU LAC COUNTY SHERIFF'S DEPARTMENT

M E M O R A N D U M

TO: Mark Peebles

FROM: Chief Deputy Ed Henke

RE: Supplement to the Specification of charges dated April 11, 1990

DATE: April 24, 1990

The following are your allegations and are based on our conversations of March 27th, March 29th, and April 9th.

1. Favoritism toward Carmen Vande Streek
   (a) Finding: Unfounded

2. Favoritism toward Shelly Walker
   (a) Finding: No credible evidence was found to support your claim.

3. Favoritism on Employee Scheduling, i.e., trades, vacation, overtime off requests, and number of employees off per shift.
   (a) Finding: The rules are "bent" from time to time, but it was done to accommodate the needs of employees and there was no evidence of it being a selective process. Requests were considered on reasonableness and staffing availability. Allegation was not supported by credible evidence.

4. Favoritism on Part-Time Employee Scheduling
   (a) Finding: Personnel are assigned on need availability and I found no misrepresentation of supervisory authority. Allegation unfounded.

5. Favoritism on Uniform Issue
   (a) Finding: Jackets with badges are issued on availability and need for the work place. Eventually, all employees should receive jackets, but budgetary constraints have made this a slow process. I found no intentional misconduct, but there may have been a lack of communications which created a procedural misunderstanding amongst employees. No credible evidence could be found to support your claim.

6. Inconsistencies with hiring, promotions and dismissals.

   (a) Finding: Management's actions are governed by a Union Contract and/or County-wide Personnel Policy. By your own admission, you were aware of the Job Posting clause within the union contract, but you didn't know what it said. Thus, your allegations were made without regard for or knowledge of the procedural process, as is the case with hiring and dismissals. An intentional misrepresentation of the facts on your part. I find no credible evidence to support your claim.

7. Employee Harassment by Lt. Pucker, i.e., intimidation and solicitation of information from employees to support this investigation, conversations surround sex and sexual related remarks in the presence of females, telephoning a former employee who for no apparent reasons in a non-professional manner making sexual suggestive remarks such as, "I'm ready to run anytime you are."

   (a) Finding: Your allegations are demonstrably false and there is no credible evidence to support them.

8. Promotion to Juvenile Center by resume only.

   (a) Finding: This was not a promotion, but an assignment of an existing Correctional Officer III to assume Juvenile Center responsibilities. This matter was discussed with Correctional Officer III employees, Union Personnel, and Management. While the entire matter may not have been fully resolved for all parties concerned, I feel we all made the best of a confusing situation under the circumstances. In any event, you personally were not affected by these actions and therefore have no standing in regard to this issue.

9. Employee ordered in against the Union Contract.

   (a) Finding: No other employee had an unresolvable problem in this area, except you. Without

specifics, and you have provided none, this is considered unfounded.

10. Miscellaneous allegations of: employees late on occasion and nothing was ever done, prisoner transports now take two (2) people, and employee calling in sick to help the supervisor pour cement.
    (a) Finding: No specifics were provided, nor did I find any to support your claim.

11. Correctional Officer II Rock appointed OIC over Janell Mueller and yourself.
    (a) Finding: OIC assignments are based on supervisory discretion by considering job performance, attitude, and who would best represent the interests of the displaced supervisor and the county. I feel you have no standing on this matter.

I find that your allegations and complaints against Lieutenant Pucker are unfounded, demonstrably false, or there was no credible evidence to support them.

As a result of the overall investigation you are charged with the following specific incidents of misconduct:

1. Your initial allegations were lodged with the County Personnel Director, intentionally by passing the Chief Deputy and the Sheriff in the departments chain of command. (Item A - Specification of charges)

2. An intentional, unwarranted, and unjustified open and public attack of a supervisor (Lieutenant Pucker) and the department through hearsay, opinions and/or perceptions with total and reckless disregard for truth or falsity.

3. You intentionally lied about portions of your conversation with the Personnel Director.

4. By your own admissions, and I quote, "Basically what alot of my grounds are standing, what the majority of other people are saying, not majority, but you just hear it from so many people, that obviously it must be happening."

   "I have a good work record, so what can they really do to me, the most I can get is a couple of days off."

In summary, the employer retains all managerial rights not expressly forbidden by statutory law in the absence of a collective bargaining agreement. (Non-union

personnel) When a collective bargaining agreement is entered into, these management rights are given up only to the extent evidenced in the agreement. (Union personnel) However, management's actions must not be arbitrary, capricious, or taken in bad faith. To assure order, there is a clear procedural line drawn, management directs and the union (or employee) grieves when it objects.

You, as well as any other employee, have that "clear procedural line" available to follow. You chose to follow your own line and created your own procedures. Your allegations, for the most part, were based on hearsay, perceptions, opinions and one-sided personalized stories. By your own admission, you were on a crusade for others and stated, "I figured everything that I came up with, there was probably no answer to, but didn't know what the answers were going to be". It's fairly evident that these allegations were made without regard for the truth or falsity.

The totality of your actions are violations as described and charged in Items B, C, and D of the Specification of Charges.

These are loosely formed allegations which lacked factual content, a vicious and malicious "scatter-gun" approach to bring disrespect, discredit, criticize and ridicule the department and it's staff. Your demeanor and subsequent actions were formulated with false, or at best half-truths, and served no constructive or reasonable purpose other than an attempt to satisfy your warped sense of justice. Your actions were insubordinate toward a supervisor and the department, and intentionally violated the public statements and code of conduct sections of policy.

In addition to the above:

5. You openly accused Lieutenant Pucker of having sexual relations with employee(s).

6. Your overall conduct in the work place is sexually harassing and offensive. Examples are as follows:
   (a) Routine conversations surrounded sex and were graphic, explicit, very descriptive to include body actions.
   (b) Described sexual encounters such as, how many strokes it would take you to reach an orgasm and how many strokes it would take her to reach an orgasm.
   (c) Talked openly about an apparent venereal disease you contacted and referred to yourself as having a "Drippy Dick".

(d) Openly talked about which employees you would like to have sex with and how they would rate.
(e) Described your decision making process for having oral sex with a female, that you stick your fingers in it and if they smell like the shit house door on a tuna boat - forget it!
(f) Accused a female employee of giving Lieutenant Pucker blow jobs.
(g) Told a female employee that you're so ugly you make toilets flush when you walk by.
(h) Told a female employee that she used to be a pretty nice girl, but now you look and smell like Cameron McGee.
(i) Advised a female that she wouldn't know good sex until she had it with a white man.
(j) Used sexual or offensive nicknames toward employees such as:

(1) Gobbler
(2) Marshmallow-tits
(3) Yummy Crotch
(4) Bull-Dike
(5) Momma

(k) Openly ridiculed an employee with an acne problem.

(l) Work place vocabulary in front of females was filled with profanity like "fuck" and "pussy". Filthy talk you referred to as "poot".

(m) You liked dissension in the work place, it keeps people on their toes. It's good to stir things up from time to time.

While this list is not inclusive, it is an attempt to provide examples of your conduct in the work place.

Again as stated in the original Specification of charges, the above described would pertain to each violation as stated in Items B, C and D or it could stand alone in terms of sexual harassment. In that, employees were subjected to extremely vulgar and offensive sexually related epithets.

You routinely used profanity in the presence of women employees and had addressed obscene or offensive remarks to them.

Your conduct surrounding sexual remarks and derogatory statements is beyond the limits of lawfulness or decency, making for an intolerable condition, which management cannot, nor will not condone.

Therefore, you are to re-appear in the office of the Sheriff at 10:00 a.m. on April 27, 1990 to answer to the above mentioned charges. You may offer a statement or present any relevant information on your behalf at that time.

By way of the following letter of April 26, 1990 from Koch, Henke was advised of Peebles' response to the April 24th Supplement:

> Re: Mark Peebles - Grievance
> Suspension without pay
>
> Dear Mr. Henke,
>
> Please be advised that Mark Peebles is in receipt of your April 24, 1990 correspondence entitled, supplement to the specific charges dated April 11, 1990.
>
> It is the position of the Union that the charges are still not specific, but ambiguous and vague in nature, missing the key ingredients of the times, places and dates of the alleged allegations, and the individual/s/ who in fact has/have made the allegations.
>
> This lack of specificity, makes it extremely difficult to answer or respond to same, and in addition thereto, inhibits the preparation of a proper defense.
>
> Therefore, after a review of the contents therein with Mr. Mark Peebles, he has advised me to inform you that he is declining to participate in the meeting scheduled for Friday 27, 1990.
>
> He is still denying any and all of the allegations as set forth therein, and will be awaiting the Sheriff's written response to the grievance as presented April 23, 1990.
>
> If you should have any further questions do not hesitate to contact me.
>
> Sincerely,
>
> James L. Koch /s/
> James L. Koch
> District Representative

By way of the following letter of April 26, 1990, the Grievant was notified he was terminated:

April 26, 1990

Mr. Mark Peebles
418 6th Street
Fond du Lac, WI 54935

Dear Mark:

Please be advised that we are in receipt of your response, through a letter from Mr. James Koch, whereby you have declined to participate in any further proceedings at the department level.

In reference to the times, places and dates of the alleged violations, they occurred in the workplace and were routine practices and behavior over the past several years.

We have scheduled meetings on two (2) occasions in an attempt to reach a mutual resolution on your requested Internal Investigation and the resultant charges.

At our meeting on April 19, 1990, after several attempts to make the meeting condusive (sic) to your needs and/or requests, you continuously refused to respond. We view that as an unreasonable lack of cooperation on your part.

Therefore, we are forced to render a determination based on available facts and information.

1. Your grievance in reference to your suspension, with and without pay, dated April 20, 1990, is denied.

2. The following determination is made as a result of charges brought against you from a recent internal investigation, along with your refusal to cooperate in resolving this matter.

   a. Effective immediately, your employment with the Fond du Lac County Sheriff's Department is being terminated.

Sincerely,

Jim Gilmore /s/ Ed Henke /s/
Jim Gilmore, Sheriff by Chief Deputy Ed Henke
Fond du Lac County

The Grievant's suspension without pay and termination proceeded through the grievance procedure and despite attempts to resolve the matter, ultimately proceeded to arbitration before the undersigned.

POSITIONS OF THE PARTIES

County:

The County takes the position that it had just cause for the termination of the Grievant's employment. It asserts that the most commonly accepted definition of "just cause" is whether the action of termination is "fair and reasonable, when all of the applicable facts and circumstances are considered, and are viewed in a light of the ethic of the time and place." Citing, in re: Hiram Walker & Sons, Inc. & Distillery Workers Union, 75 LA 899 (1980). The County argues that the generally-accepted standard for determining the reasonableness of employe sanctions is that the degree of the penalty should be in keeping with the seriousness of the offense. Citing, Elkouri & Elkouri, How Arbitration Works, 4th Ed. (1985), p. 670. There are two general classes of offenses, those extremely serious offenses which usually justify summary discharge without the necessity of prior warnings or attempt to correct, and those less serious infractions which do not call for immediate discharge but for milder penalty aimed at correcting the actions. The County asserts that under the totality of circumstances in this case, just cause existed for the Grievant's termination on a number of grounds.

First, the County alleges that it had just cause for termination based on the Grievant's threats against the lives of his ex-wife and six department employes. The County cites numerous arbitral decisions as holding that just cause exists for summary discharge without progressive discipline when an employe has made threats of physical violence against his employer or fellow employes. It asserts that the record clearly establishes that the Grievant physically threatened the lives of his ex-wife and the six co-employes. The Grievant admitted at the hearing that he made the threats. Further, those threats necessitated the intervention of the City's Police Department and were taken seriously by those who heard them. The threats were not isolated statements made in jest or anger, but were made repeatedly and were legitimate cause for alarm. While the threats alone constitute just cause for summary discharge, the circumstances in this case even more dramatically call for that result since the Grievant was employed at a security institution in a position of authority directly affecting the personal safety of other correctional officers and employes and inmates. Hence, public interest alone justifies the summary discharge in this case.

Second, the County asserts that it had just cause to discharge the Grievant due to his extreme emotional instability. The record clearly establishes that during the months preceding his termination, the Grievant conducted himself in an "emotional, and often bizarre and alarming fashion". Such conduct disqualified him from serving as a corrections officer in a security institution. The Department took steps to help the Grievant overcome his problems in that regard, but the Grievant would not cooperate with the Department by either participating in the treatment plan offered or by requesting alternative treatment. The Grievant also refused to authorize the Department to obtain access to his medical records so as to monitor the situation. The County offers as examples of the Grievant's emotional and bizarre behavior, various dreams he had about killing his ex-wife, riding in the back of his ex-wife's car in hiding until she reached her destination, and breaking into his ex-wife's apartment on several occasions. The Grievant admitted his emotional problems and the testimony of the Grievant's co-workers and Chief Deputy Henke clearly showed that he was not in control of his

emotions during the period just prior to his termination. Public interest in the security of the jail and the safety of County employes and inmates require the action taken by the Department in removing the Grievant from the workplace. Given the Grievant's condition, the Department's conduct was "fair and reasonable." The Department's efforts to provide medical assistance to the Grievant for his emotional problems were also fair and reasonable and the Grievant was treated in the same manner that the Department had treated other employes who required such assistance. The Grievant, however, refused to follow through with the treatment and refused to sign the medical release so as to enable the Department to monitor the situation. That refusal evidences the fact that the Grievant refused to cooperate with the Department in dealing with his problems and there is no evidence in the record to establish that the Grievant is presently in an emotional state of mind to justify his reinstatement. Rather, the record shows that even six months after his termination, the Grievant was still engaging in threatening behavior in November of 1990 by threatening a former corrections officer he had worked with in the past.

Third, the County asserts that taken together, the Grievant's conduct in sexually harassing female co-workers, making unfounded allegations against Lt. Pucker and going outside the chain of command constituted just cause for his dismissal. The County contends that the Grievant engaged in sexual harassment and that the Department has a legitimate interest in prohibiting such behavior. It asserts that the record is replete with "absolutely inappropriate" comments and remarks the Grievant made to other workers, the most offensive being directed at particular individuals with the intention of humiliating and degrading them. The record demonstrates that the Grievant's offensive remarks of a sexual nature far exceeded the norms of the workplace even admitting that everyone used foul language to some extent in the jail. The latter does not excuse the Grievant's conduct, since the record establishes that his co-workers had on occasion informed him that he had gone too far in that nearly all of the employes agreed that he carried the practice to an extreme. Also, the Grievant's allegations regarding Lt. Pucker having sexual relations with various female employes were unfounded and form an independent basis for discipline. Such comments were deliberately disrespectful towards a superior and could only be intended to cause dissention and disruption in the workplace. The County also asserts that the Grievant's going outside the chain of command to raise his allegations of favoritism and the unfounded nature of the allegations also merit discipline. There is no question that the allegations disrupted the workforce and caused a volatile atmosphere within the Department. Henke's thorough investigation revealed relatively minor problems concerning favoritism, all of which had occurred well in the past and which had been resolved by that time. The Grievant was unable to provide any evidence as to the supposedly intolerable favoritism that existed during the last six months of his employment. Finally, the Grievant went outside the established chain of command and the Department in making the allegations about problems in the Department. The County asserts that the Grievant's contention that he went to the Personnel Department only to talk about transferring to the Highway Department, is not credible. Rather, the Grievant went to the Personnel Office with a hidden agenda for the purpose of stirring things up in the Department. That is precisely why the Department has a formal chain of command to establish an orderly process for hearing grievances about problems in the Department and the failure to follow that procedure clearly merits discipline by itself.

In its reply brief, the County responds to the Grievant's initial arguments and asserts that the Grievant's statement of the facts completely ignores the serious misconduct which resulted in his termination and instead attempted to place the focus on the Department by mischaracterizing the conduct of the investigation. The County notes the Grievant's assertion that the Daugherty standards for just cause apply in this case. The County concedes

while those standards may be helpful as a tool in evaluating the reasonableness of an employer's action, they are not meant to be mechanically applied to the facts of a case. Not all of the standards apply in each case and when they do apply, they are not always applied in the same way. The fair and reasonable standard is commonly accepted by arbitrators and is really a shorthand for the Daugherty standards. It is preferable in that it focuses on the reasonableness and fairness of the employer's decision rather than on a litany of requirements that can be applied out of context. The Grievant's assertion that the first test under the Daugherty standards was not met because the Grievant was not given advance warning of the possible consequences of his conduct is an example of the misapplication. Some conduct is so egregious that summary dismissal, without advance warning or progressive discipline, is warranted. In this case, the Grievant engaged in such conduct by making physical threats against the lives of his ex-wife and fellow employes and engaging in emotional and bizarre behavior so as to evince an emotional instability threatening the security of the jail. A reasonable person does not need to be told in advance that such behavior is unacceptable.

According to the County, contrary to the Grievant's assertion, its actions in this case were reasonably related to the efficient and safe operation of the jail. The entire rationale behind the Grievant's dismissal for his physical threats against the lives of his ex-wife and fellow employes and his emotional and bizarre behavior is that he was a threat to the safety and security of the jail. The County asserts that the Grievant attempts to mischaracterize the investigation of his misconduct and confuses the issue by lumping into that investigation the Department's investigation of his complaints regarding Lt. Pucker. It asserts that the quality of the Department's investigation into the Grievant's allegations is not in issue, rather what is in issue is whether the process by which the Department learned of the Grievant's misconduct was undertaken in a reasonably fair and objective manner so as to lead to the truth. Or stated another way, whether there was anything objectionable about the process which would so taint the findings as to legitimately question their validity. Conceding that its investigation was not perfect, the County asserts that it was reasonably conducted and that the findings of the investigations were true and accurate. The investigation of the Grievant's conduct was the result of serious allegations made against him by fellow employes, the most serious concerning his making sexually harassing statements and his conversations with co-workers regarding threats he made against the lives of fellow employes and his bizarre dreams of killing his wife. The mere fact that the investigation into the allegations of the Grievant's misconduct was conducted at the same time as Henke conducted his investigation into the Grievant's allegations of favoritism, does not taint the objectivity of either investigation. Nearly all of the employes who signed statements were asked the same questions. While the Grievant complained that Henke asked, "leading" questions about his conduct, the record indicates that Henke also asked leading questions regarding Lt. Pucker's conduct. The Grievant's assertion that Pucker "coached" employes before their statements were taken is not supported by evidence in the record. The County contends that the Grievant does not really question the truthfulness of the answers of the employes on the statements, but attacks the method by which the statements were produced. Also, some of the most damaging information about the Grievant's misconduct was not obtained from the employe's statements, but was obtained when the Grievant's ex-wife came to the Department to speak to the Sheriff about the Grievant's threats against her life and the lives of others and other bizarre behavior he had engaged in. That information was substantiated by the City police report. Further, the Grievant's emotional condition was made known when he came to Henke's office crying and asking for counseling. The County asserts there is no doubt as to the legitimacy and truth of the findings that the Grievant made physical threats against the lives of others, engaged in bizarre behavior evincing an emotional instability

incompatible with maintaining a secure facility and that he made sexually harassing remarks to female correction officers. Absent such doubt, the Grievant's allegations regarding the conduct of the Department's investigation are irrelevant.

With regard to the Grievant's assertion that the Department did not attempt whatsoever to provide him with any meaningful information regarding the charges against him so as to give him the opportunity to participate in his defense, the County asserts this is not true. While the initial memorandum of charges dated April 11, 1990 was concededly too general, the Grievant was provided with a written supplementation of very detailed charges dated April 19, 1990. On that date, the Sheriff and Henke met with the Grievant and his Union representative to discuss his alleged misconduct and offered to provide him with more detailed information verbally. The Grievant responded at that time by stating he was not willing to reply to the allegations, even if they provided him with greater detail. Hence, the Department offered the Grievant a reasonable and fair opportunity to present his side of the story and he chose to merely "plead innocent to all charges."

The County asserts that the Grievant's arguments completely ignore the serious misconduct for which he was dismissed. It is not the initial charges contained in the April 11, 1990 memorandum, to which the Grievant now responds, rather it was the amended, more detailed, charges in the April 19 memorandum that are the basis for the Grievant's termination. Hence, the attack on the Department's alleged inability to prove the earlier charges is irrelevant.

The County also asserts that the Department did not apply its rules and penalties in a discriminatory fashion. There is no evidence that any other corrections officers made physical threats against the lives of employes or engaged in the kind of emotional and bizarre behavior engaged in by the Grievant, or exhibited the emotional instability which represented the imminent danger to the security institution. There is evidence that after the Grievant was terminated another officer requested and received counseling for an alcohol problem. That officer was treated in exactly the same manner as the Grievant, however that officer cooperated with the treatment and provided the Department with a medical release that enabled the Department to monitor his progress. The Grievant was offered the same opportunity but refused to follow up with the treatment and refused to authorize release of his medical records. The Department could not order the Grievant into treatment or force him to sign a medical release without his consent, but its offer of treatment and request for the release was fair and reasonable. In response to the assertion that the Grievant's mental instability cannot be used as a basis for his dismissal because it was not mentioned in the written specification of charges the County asserts that the Grievant was aware that Henke was concerned about his mental condition and knew that Henke wanted to know if he was crazy. Also any reasonable person would know that mental and emotional instability is a prerequisite for employment as a corrections officer in a security facility. Finally, contrary to the Grievant's assertion, the Sheriff did not disagree with Henke's recommendation on April 26 to terminate the Grievant's employment. Gilmore fully concurred in that recommendation and in fact made the decision to terminate. Both the Sheriff and Henke testified they would have considered reinstating the Grievant or allowing sick leave with pay had he cooperated with the treatment and authorized release of his medical records. Since he chose not to, the Department never reached a decision on that matter. The willingness to consider reinstatement or sick leave under the appropriate conditions underscores the fairness and reasonableness of the Department's decision.

Lastly, the County responds that its decision to terminate the Grievant's employment was reasonably related to the seriousness of his misconduct. The

making of physical threats against the lives of his ex-wife and fellow employes alone merits dismissal. His emotional and bizarre behavior which evinced emotional instability representing a significant danger to the security of the jail is also serious and further independent grounds for dismissal. The Grievant's conduct in sexually harassing female officers, making unfounded allegations against Pucker, and going outside of the chain of command, taken as a whole, constitutes still further grounds for dismissal.

Grievant:

The Grievant takes the position that the County lacked just cause for terminating his employment. The Grievant notes that in Article III, "Management Rights", and Article XX, Section 20.02, "Discipline, Discharge and Supervision", of the Collective Bargaining Agreement between the County and the Union require that the County have "proper cause" or "just cause" for discharge of an employe. The Grievant asserts that the best analytical paradigm to use in this case to determine whether the County had just cause to discharge him is that developed by Arbitrator Daugherty in Enterprise Wire Company, 49 LA 359 (1966). The Grievant lists the following seven questions of the Daugherty Standard and asserts that a "no" answer to any of those questions means that an employer has failed to make out "just cause":

> (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?

Even if it is concluded that those seven tests should not be applied precisely as described by Daugherty, it is still important to bear those questions in mind when considering this case according to the Grievant. The Grievant asserts that the Arbitrator is bound by the Labor Agreement to apply just cause as that term is now defined in labor arbitration cases. While some arbitrators apply a simpler framework for interpreting that term than the seven questions set forth above, the more thorough analysis must be subsumed within the less complex framework utilized by some arbitrators. The Grievant then asserts that none of the seven tests of just cause have been met by the County in any meaningful way.

The Grievant first contends that it is not possible to determine which

rules he specifically allegedly violated and that, therefore, there can have been no advance warning that discipline might result from the violations of such rules. The letter of termination and the follow-up supplement to the specification of charges dated April 24, 1990 make no reference whatsoever to any rule violations. Although the specification of charges dated April 11, 1990 contains references to a number of policies, there is no specific reference to any conduct by the Grievant. As demonstrated by subsequent correspondence between the Grievant and his Union representative, throughout this time the Grievant was demanding to know exactly what he was being charged with having done. The Grievant contends that it was not until the actual preparation for the hearing was underway that he was provided with the reasons for his suspension with pay, suspension without pay and subsequent termination. The Grievant's Union representative asked both at the meeting on April 19, 1990 and in a subsequent letter of April 26, 1990 for additional, more specific information on the charges. According to the Grievant, the County's response to those requests for specific charges was an outright denial of the information. Moreover, following a meeting in which the Grievant and his Union representative sought information, the Sheriff responded by writing to the Grievant and stating that "your lack of cooperation in resolving this matter leaves the County no choice but to change your status from Suspended With Pay to Suspended Without Pay until this matter is resolved." Thus, the County made no attempt to provide the Grievant with any meaningful information regarding the charges against him so as to provide him with the opportunity to participate in his defense. Rather, he was left to try to connect the rule citations from the April 11, 1990 letter with subsequent correspondence from the Department.

The Grievant asserts that there has been no attempt to demonstrate that the rules allegedly violated by him interfered with the safe and efficient operation of the Department. The Grievant contends that what rules the County is able to point to are "vague, ambiguous, and, for the most part, unrelated to this case." The Department never said which conduct relates to which rule and there is no way to demonstrate that the Department was disrupted in any way. Further, review of the Grievant's evaluations makes it totally clear that no one ever said that he was not doing his job. Even considering the results of the interviews of his co-workers which were supposedly voluntary statements made by a number of employes, there is no reference to a single incident wherein the Grievant somehow impaired the efficiency or safety of the operation of the Department. Thus, this test has not been met.

Third, the Grievant asserts that the County made no sincere effort to establish that he violated any rule or order and that the evidence in fact established that the contrary was true. The Grievant makes a number of arguments in this regard. First, it is asserted that no one complained about anything he did in terms of his job performance. While after an investigation was launched some employes did raise concerns about the Grievant's language and his mental health, no one ever said he did not do his job or that his conduct interfered with their doing their jobs. Secondly, since the Department consistently declined to give the Grievant sufficient information to allow him to participate in the investigation that investigation was incomplete, not due to his lack of cooperation but because of that failure to inform. Third, the Grievant was never asked whether he had sought treatment with regard to the mental health problems. It does not appear that there was any meaningful inquiry into this aspect of the proposed termination at all. The Grievant concludes that to the extent there was some attempt at investigation it was only with regard to a portion of the reasons for which the Grievant was ultimately fired. Given the unusual nature of that limited investigation this means that the Employer failed to meet this part of the test.

The Grievant next contends that the investigation conducted by the

Department was "somewhat bizarre." It is asserted that while the Department conducted some sort of investigation, that investigation was anything but thorough and impartial. Employes other than the Grievant were allowed to make completely unsubstantiated and irrelevant allegations against the Grievant and those employes making the complaints did so in a "very self-serving manner" and completely ignored the fact that they had also in many instances engaged in the same sort of behavior of which they accused the Grievant. In many instances, the complaints were petty and trivial and in others the conduct complained of was so old as to be completely irrelevant. The County also completely ignored the fact that some of the people making the complaints against the Grievant and those who responded negatively towards him in the interviews were the same people who had evaluated him for four or five years and never mentioned any of the problems they now allege to exist. It is also asserted that the Sheriff acknowledged he had not even reviewed those evaluations prior to imposing the discipline. Third, in some instances, Lt. Pucker who was the subject of the Grievant's concerns, conferred with those persons going in for the interviews and to some extent coached them on their responses. Fourth, the County completely ignored the exculpatory evidence regarding the Grievant such as the interviews conducted of former employes by Lt. Shepherd. In many of those reports there were specific references supporting the concerns the Grievant had raised in his meeting with the Personnel Director. Fifth, despite the Grievant having asked on numerous occasions to be provided with additional information so that he could meaningfully participate in his defense, the County refused to do so. The Grievant concludes that based on this flawed investigation, the County cannot demonstrate that it was justified in terminating him.

Next, the Grievant asserts that the investigation into the allegations failed to prove that he was guilty of the matters with which he was charged. According to the Grievant, he was specifically charged with violating four policies: the chain of command, insubordination, public appearances and statements, and code of conduct. However, the investigation only established that possibly the Grievant used more obscenities than some of his co-workers. With regard to violating the chain of command, the Grievant asserts that the Department policies set forth a chain of command within the Department that does not reference jailers and witnesses were not able to establish what the chain of command would be in the instance where a jailer had a complaint about the Sheriff. The County Executive's testimony established that the County's Personnel Department is not even in the chain of command. Further, the record establishes that the Grievant went to see the Personnel Director regarding a transfer from the jail to another County department and it was only in response to inquiries from the Personnel Director that the Grievant explained what he felt were problems within the Department. He asserts there is no evidence that he went to the Personnel Director deliberately to stir up trouble or to lodge complaints outside the chain of command. Since there is no evidence that the Grievant went outside the chain of command or what the chain of command is, if he desired to make a complaint, he cannot be found to have violated the chain of command.

Regarding insubordination, the Grievant cites the following dictionary definitions:

> A dictionary in common circulation defines insubordinate as follows: "not submissive to authority." The American Heritage Dictionary, Houghton-Mifflin Company, 1985, at 667. Somewhat more expansively, Black's Law Dictionary defines insubordination as follows: "state of being insubordinate; disobedience to constituted authority. Refusal to obey some order which a superior officer is entitled to give and have obeyed. Term imports a

willful or intentional disregard of the lawful and reasonable instructions of the employer."

The Grievant asserts there is no evidence that he exhibited any willful or deliberate disregard for rules or orders of the Department and there is no reference that he did so in the Specification of Charges. He asserts that the supplement to the Specification of Charges makes no reference whatsoever to insubordination. The Grievant also cites his past evaluations and asserts that there is no mention of any instance where he has willfully or intentionally violated a rule of the Department and indicates to the contrary that he is anything but insubordinate. He asserts that if there had been instances where he had been disrespectful towards the supervisors there would have been a specific reference to that somewhere in his personnel record, but there is none. The suggestion by the Employer that insubordination may have involved being disrespectful toward fellow employes will not stand unless there was a specific order that he no longer be disrespectful to peers, and there has been no evidence of such an order.

As to the allegation that the Grievant violated the policy regarding public appearances and statements, he asserts that a review of the evidence discloses that at no time did he ever go to the public and make any kind of public expression regarding the Department contrary to departmental rule 104.10. He asserts that even if he had, there is no indication that the Department was made less effective or that supervisors were unable to maintain discipline because of his conduct. Thus, even if he could somehow be found to have violated the rule, it is not reasonably related to the efficient and safe operation of the Department as required by the Daugherty Tests.

The Grievant also disputes that he violated the code of conduct and asserts there is no specific reference or evidence to demonstrate how he may have done so. Conceding that there is some evidence that the Grievant's conduct was offensive it is asserted that all of the witnesses testified that the norm in the jail was the use of obscene or crude language. Unless it can be shown that the Grievant's conduct was so egregious as to be completely outside the scope of normalcy in the jail, he cannot be found to have violated this policy. With regard to the statements of co-employes, the Grievant questions where those people were over all the years; questions whether it can be believed that he somehow intimidated 20 to 25 co-workers from saying or complaining about his conduct until now. Further, the record indicates that Lt. Pucker and Chief Deputy Henke were regularly in the jail and witnessed the conduct of the Grievant and his co-workers. Other employes in the jail engaged in conduct at least as bad as the Grievant's in this regard and their only complaint appeared to be that "Mark overdid it." The Grievant asserts that until there was some effort by the Department to correct his behavior, he cannot be fired for this alleged conduct.

The Grievant also asserts that he was treated differently than other employes in the Department. It is asserted that the Department does not have a history of regularly disciplining its employes and in fact there is no evidence that until the Grievant was terminated that anyone else had ever been disciplined. Other employes who engaged in conduct similar to the Grievant's have gone unpunished. With regard to violating the chain of command, the Grievant asserts that at least one other employe and perhaps two had gone to the Personnel Director to discuss problems in the jail and none had ever been disciplined. In this case he went only to discuss a personal personnel matter and the other matters concerning the jail only came up after he was questioned by the Personnel Director in that regard. Regarding the alleged insubordination, it is not clear exactly how he was supposed to be insubordinate. If it is referring to the "extremely vulgar and offensive sexually-related epithets," then all the other employes would have to be

punished as well as the Grievant, since that was the norm in the jail rather than the exception. The Grievant notes examples of other such conduct by co-employes including two female co-workers, and asserts that no one else was ever disciplined for that conduct. The Grievant posits that apparently the rule is that someone must be offended by the comments before there can be a basis for discipline, and asserts that "that is scarcely a neutral disciplinary position." Further, when the County Executive talked to the female jailers regarding such conduct, they told her that they did not want any protection. The Grievant also cites an instance where a surgical operation he underwent was the subject of a comment by the Sheriff in the Departmental newspaper. With regard to violating the policy regarding public appearances and statements, since there was no evidence presented in this regard, the Grievant assumes it is not necessary to rebut the charge.

With regard to violating the code of conduct, the only charge in this regard appears to be the use of the vulgar language and the Grievant asserts that he used no more or less than that used by others and that where he was asked by employes not to use such language he did not continue to do so.

With regard to the charge in the termination letter that the Grievant had not cooperated in the investigation, the Grievant first asserts that he was never ordered by the Sheriff to answer any questions. Second, far from refusing to cooperate he continued to seek information from the Department as to the specifics of the charges so that he could meaningfully respond. The Department's response to his request for specific instances was that "in reference to the times, places and dates of the alleged violations, they occurred in the workplace and were routine practices and behavior over the past several years." Third, absent a Departmental order, the Grievant was not required to cooperate in his own demise.

The Grievant asserts that according to the Sheriff, a major factor in his termination was the Grievant's emotional instability. The Grievant asserts that there are two major problems with that basis for his termination. First he was never told that lack of evidence of mental stability could form the basis for termination and it was only at hearing that this emerged as a basis. There is no reference in any of the Department documents as to a need for the Grievant to demonstrate psychological fitness for duty. In that regard the Grievant asserts he was treated differently than were other officers. The Grievant cites an instance when an employe that had an alcohol-related problem and another with a psychological problem who was continued on active duty. The Grievant contends that the Sheriff testified that had the Grievant in fact continued with the Employee Assistance Program that the Chief Deputy felt he had initiated for him begun to get at some of the problems in the jail, it is very probable he would have been continued at that status, i.e., on the payroll. The Sheriff however acknowledged that he never communicated this to the Grievant. According to the Grievant, every other employe who had a psychological problem was continued in their pay status and allowed to take sick leave during the pendency of treatment while the Grievant was terminated without ever being told he had that opportunity, citing the testimony of the Sheriff and the Personnel Director. The Grievant also asserts that the Chief Deputy made the decision to terminate the Grievant and that had the Sheriff been at the Department on April 27 when the decision was made he would have suggested a medical leave. The Grievant asserts that the evidence adduced at hearing indicates that the Sheriff disagreed with the decision of the Chief Deputy that termination was appropriate.

Finally, the Grievant asserts that even if he is found to have violated the rules, termination was an excessive penalty. It is again asserted that there is no evidence that any other employe was ever disciplined in the Department prior to this and the Grievant's personnel record discloses no prior

discipline. Thus, for the County to sustain its burden of establishing just cause, it must show that the Grievant's conduct was so egregious as to warrant immediate termination. In that regard, the evidence indicates that the Grievant's conduct regarding the use of profanity in the workplace had continued for years and that he was never warned that he should change his behavior or given a direct order or even an implied order to change his behavior and was never given a negative evaluation in that regard. In other words, he was never given any of the steps ordinarily ascribed to progressive discipline or a meaningful opportunity to respond to whatever charges that eventually led to his termination. Thus, it must be concluded that the termination was an excessive penalty even if the Grievant was guilty of some of the charges.

In his reply brief, the Grievant asserts the County's argument regarding the definition of "just cause for discipline" is not persuasive. The paraphrase utilized by the Employer in that regard does not capture the essence of the actual Award in Hiram Walker & Sons, Inc., supra. Secondly, it asserts that the Arbitrator in that case was "engaging in a wandering, philosophical exploration of the concept of 'just cause'." Third, that Arbitrator completely read out of existence the Daugherty arbitral, analytical paradigm in favor of simplicity. Fourth, the Arbitrator discounted an elaborate body of arbitral precedent employing the Daugherty Standards for just cause. The Grievant concludes that the Daugherty Test is the analytical framework to follow in determining whether there was just cause for his termination.

The Grievant also disputes the various allegations the County makes regarding his conduct and the bases offered for his termination by the County. With regard to the allegations in the County's initial brief that the Grievant was terminated for five reasons, the first of which was making repeated threats against the lives of his ex-wife and various co-employes and by conducting himself on and off the job in such a manner as to evince emotional instability representing significant danger to the security of the jail, the Grievant asserts that this is the first time those reasons have appeared in writing. He asserts he was never given the opportunity prior to his termination to respond to those reasons. The Grievant also asserts that the County in its brief makes only generalizations regarding his conduct and appears to want to avoid specifying examples of his conduct that formed the basis for termination. The Grievant goes on to assert that the County's "Statement of Facts" is filled with erroneous statements and mistimed facts.

The Grievant asserts that the County's contention that the Sheriff's conversation with the Grievant's ex-wife played a large role in his decision to terminate the Grievant is laughable since the Sheriff never mentioned his discussion with her in the letter of termination. If it had been on his mind at the time, he would have certainly put it in the termination letter. The Grievant also takes issue with the County's contention that Henke's concern regarding his emotional instability was with regard to the well-being and security of the jail and the security of the employes and inmates. The Grievant asserts that that contention is ridiculous because as of April 3, 1990, when he went to Henke, he had already been suspended for a week. The Grievant asserts that his emotional status has never been argued as a basis for his termination until the County's brief.

The Grievant also takes issue with the County's reference to their need to see the Grievant's medical records from the Health Care Center. He notes that he was there a single time for what was thought to be a referral for his emotional difficulties but which turned out to be a referral for alcohol and drug abuse counseling, symptoms which he did not display. He also asserts that contrary to the inference that he did not seek counseling on his own, the Employer conceded that he did in fact consult a stress management counselor.

He also asserts that the County offered him absolutely nothing by way of counseling.

With regard to the allegations of the Grievant's use of sexually improper language and its labelling of that language as "sexually harassing" without referring to the record, the Grievant asserts that no complaint was ever filed against him and that the evidence showed that not a single employe felt that she needed the assistance for protection of the County Executive in that regard. Rather, this was the "shop talk" in the jail. Where the County listed the "instances where Grievant made sexually or offensive remarks directed at specific people", the Grievant asserts that he was never alleged to have made such specific comments and, moreover, in each of those instances those comments came years before this event and are irrelevant. Also, virtually every witness who testified specified that the Grievant was not the only employe who used such language and the employes had not asked the Grievant to not use that language.

The Grievant disputes the allegation that he made allegations about a superior officer with "reckless disregard of truth or falsity". He asserts that the record indicates that some employes and the investigator from the Department, Lt. Sheppard, found that some of those complaints were substantiated. To have been reckless disregard of the truth there would have to have been no independent verification but that was not the case. He asserts that Henke indicated he was not going to contact any former employes because "some had left under adverse conditions and would have an ax to grind..." The Grievant asserts this shows that the Department was not concerned about whether his allegations showed a reckless disregard of truth but simply had set out to prove that he was wrong. Since the record shows he was not wrong he cannot be accused of recklessness. Hence, his conduct would not be of the sort to lead to termination.

Regarding the allegation he bypassed the chain of command, the Grievant notes that Henke apparently did not think this was very important as his own contemporaneous notes indicate "it's nothing more than professional courtesy to follow the chain of command..."

The Grievant reviews the various cases cited by the County where an employe's termination was found to be for just cause where he had threatened co-workers with physical harm. The Grievant argues that each case is clearly distinguishable from the instant one in that they involved the employe threatening the co-workers or supervisors to their face, bringing weapons to work, admitting the threats were genuine and had gone through progressive discipline. In this case, the Grievant did not threaten anyone to their faces, took no steps in furtherance of any alleged threats and was in no way counseled by the County regarding any perception that he was dangerous and was never disciplined for any perceived wrongdoing prior to termination. The Grievant concludes that regardless, however, it is all irrelevant since he was never charged with making such threats at the time he was terminated. It was not until the Grievant received a letter dated April 24, 1990 setting forth the results of the County's "investigation" into his misbehavior that the Grievant received any meaningful notice of any complaints or charges against him and that letter did not mention anything with regard to threats. Similarly, the earlier Specification of Charges dated April 11, 1990 made no reference to violent conduct. Thus, neither violence nor the threat of violence on the part of the Grievant formed the basis for his termination and must be rejected as the basis for just cause.

The Grievant also asserts that at the same time he received the Sheriff's April 19, 1990 letter suspending him without pay for "lack of cooperation" the Sheriff was denying the Grievant's request for more information and the same

day that his letter of termination was being drafted. The Grievant asserts that the alleged lack of cooperation was indeed relied on as a basis for his termination and that now that that basis is gone, presumably termination is not appropriate.

The Grievant concludes that even if the County had just cause to discipline him, termination is inappropriate and a short suspension is the most that can reasonably be assessed given the implicit standard of progressive discipline ordinarily read into a just cause standard.

DISCUSSION

The ultimate issue to be decided in this case is whether the County had just cause to terminate the Grievant, Mark Peebles. 2/ In addition, there are a number of sub-issues that must be decided in order to resolve the issue of just cause: (1) What were the reasons for which the Grievant was discharged; (2) may the County now rely on the Grievant's alleged emotional instability and making of threats; (3) did the Grievant engage in the misconduct alleged and, if so, did it violate Department rules or policies reasonably related to the safe and efficient operation of the Department; and (4) if the Grievant did commit the alleged violations, do they constitute just cause for his discharge.

The first issue is to determine what exactly were the reasons upon which the County relied in its decision to terminate the Grievant. In its brief, the County offers five reasons as justification for its decision: (1) Threats by the Grievant against the lives of his ex-wife and six co-employes; (2) the Grievant's "extreme emotional instability"; (3) the Grievant's conduct in sexually harassing female employes; (4) the Grievant's making unfounded allegations against Lt. Pucker; and (5) the Grievant's going outside the chain of command in raising his complaints. As to the first two reasons, the County asserts that each independently would justify terminating the Grievant, while the latter three reasons, taken together, would constitute just cause for discharge.

With regard to the first two reasons offered by the County, the Grievant asserts that the County may not now rely on the alleged threats against the lives of his ex-wife and six co-employes and his emotional instability. It is noted that no mention is made of either of those matters in any of the Department's correspondence to the Grievant detailing the charges against him or the letter of termination dated April 26, 1990. This is despite the fact that the Department was aware prior to April 26th of all of the information and incidents upon which the County now relies to support those allegations.

There is evidence to indicate that the Department had some concerns about the Grievant's mental state beyond responding to his request for help, such as later sending two detectives to talk to the Grievant and assess whether he presented a danger to himself or others. There is, however, no evidence that the Grievant was advised prior to his termination that those concerns were of such magnitude that his job was in jeopardy on those bases. Similarly, he was not advised that his refusal to sign a release of his medical records could affect his job security. Perhaps if he had been so informed, he would have

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2/ The parties do not agree on a definition of the "just cause" standard as it is to be applied in this case. Absent agreement of parties otherwise, the undersigned has traditionally viewed just cause as having two basic elements: (1) Did the employe engage in the misconduct alleged, and if so; (2) Under the circumstances, does that misconduct justify the disciplinary action taken against the employe.

officially informed the Department that he was seeking counseling elsewhere. 3/ Having not been advised of those reasons, he could not respond at the time and the Grievant's argument in that regard is well taken.

The Grievant was not advised until the May 24, 1990 meeting of the Protection of Persons and Property Committee (PPPC) that his mental and emotional state was of considerable concern to the Department, however, that was during settlement discussions well after he had been terminated. At that point it appears there were a number of communication breakdowns. The bottom line is that the Department did not appear by its actions/inaction to consider the "threats" or the Grievant's emotional state to be of sufficient cause for concern to mention those reasons at any time leading up to its decision to terminate the Grievant. Given no newly-discovered evidence that would exacerbate those concerns, over and above what the Department possessed at the time the decision was made to terminate the Grievant, those reasons cannot now be considered to stand as bases for justifying his discharge.

We turn now to the next three reasons argued by the County as justifying the decision to discharge the Grievant. Those reasons are congruent with the reasons given in the Specification of Charges of April 11, 1990 and the Supplement dated April 24, 1990. The Grievant's claims to the contrary, the Supplement to the charges dated April 24th and the earlier Specification of Charges, when read together, adequately identify the rules alleged to have been violated and the conduct which constituted the violations. The April 11th document identified the specific departmental policies alleged to have been violated: 103.04 - Chain of Command; 103.04(b) - Insubordination; 104.10 - Public Appearances and Statements; and 302.06 - Code of Conduct. As the County concedes, the conduct listed in that document as violating each specific rule was too vague and was insufficient to provide meaningful notice. That is not the case with the April 24th supplement, which was fairly detailed in describing the conduct the Grievant was alleged to have engaged in, and which also referred to the prior alleged rule violations. Further, it is noted that the County offered to provide more specific information at the April 19th meeting if the Grievant would respond, and that the Grievant indicated that he would not respond beyond stating his innocence, regardless of what information was provided. Therefore, he cannot now persuasively argue he was denied an opportunity to respond to the charges.

It is necessary then to determine whether the Grievant engaged in the alleged misconduct. The Grievant is charged with conduct violative of the Department's policy against "insubordination" and "public appearances and statements" and as violative of the Department's Code of Conduct. In addition, he is charged with violating the Department's chain of command.

The conduct referenced as violating those policies falls into two general categories - sexually harassing and offensive conduct toward female employes and false allegations against Lt. Pucker. The first category includes the Grievant's sexually related remarks and obscene language he used in front of female employes, and the alleged offensive remarks he made to individuals regarding themselves. The second category relates to the alleged remarks to and in front of other employes that Lt. Pucker was having a sexual relationship with various identified female employes and allegations the Grievant made regarding favoritism and problems in the Department.

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3/ It is noted that the Grievant did inform the two detectives that he was seeing a counselor.

With regard to the allegations of sexual harassment, the Grievant makes numerous arguments to the effect that the County's investigation that resulted in the charges against him was not thorough or impartial. He asserts that the County relied on self-serving statements from other employes who had engaged in the same conduct with which he was being charged, and who had failed to mention any of these complaints before this, even though some of the employes had formally evaluated him in the past. The Grievant asserts that the investigation only establishes that he perhaps used more obscenities than some of his co-workers, but argues obscene language was the norm in the Jail and no one had ever been punished for it. The Department's investigation admittedly had its flaws. Some of the Chief Deputy's questions in the interviews of employes were indeed leading. That, however, does not explain the voluntary statements from employes submitted prior to the interviews that identified some of these problems with the Grievant, nor does it explain why the Grievant's name kept coming up when the employes were asked

> "Other than general sexual remarks of a teasing, or joking manner, has anyone subjected you to sexual remarks or profanity which were offensive, overly graphic or obscene, either directly or indirectly?"

With regard to the Grievant's use of sexually graphic and foul language, the record indicates that rough language filled with expletives was common in the Jail and that dirty jokes and sex-related banter were not unusual. The record also indicates that management was aware of the Grievant's propensity to go beyond the norm in that regard. One ex-employe in the Jail testified that shortly after she was hired, she was asked by Lt. Pucker if she had met the Grievant yet and that he remarked "Well, you'll know when you do. You will never forget him." She testified that after she had met the Grievant and heard the way he talked, she asked Lt. Pucker why the Grievant was allowed to talk that way constantly and that Pucker replied to the effect, "That's just the way he is." (3/11/91, Tr. p. 72.) Thus, there was a lack of action on management's part in failing to warn the Grievant about his use of sexually-explicit language when management was aware of his language. Given the lack of prior warning that use of such language will result in discipline, and the fact that use of foul language was common in the Jail by other employes, albeit to a lesser degree, such language will not be considered a proper basis for discipline under the circumstances.

There is then the matter of the allegations that the Grievant made specific personally offensive and harassing remarks to a number of employes. Contrary to the Grievant's assertion, he was charged with making such comments to individual employes, and four of the statements he is alleged to have made are set forth as specific examples of his "sexually harassing and offensive" conduct in the April 24, 1990 Supplement to the Charges. The Grievant raises the question of why, if his remarks were so offensive and of such concern, did it take those employes and the CO III's who had evaluated his job performance in the past, until now to bring it to management's attention. It is noted that eight out of the approximately twenty-two full time Correctional Officers made statements that they were subjected to that conduct. That these employes, all but one of whom are women, did not come forward to management about the Grievant's remarks before this is adequately explained by their statements to the effect that they did not want to make trouble for themselves or for the Grievant. It appears that these were women trying to show they could make it in the rough world of the Jail and did not want to appear that they needed protection. Moreover, a number of the comments are such that they would be extremely embarrassing for the individual to repeat. As to the CO III's, Schmitz's statement claims she counselled the Grievant about his comments to McDermott, and McDermott testified that Schmitz told her she had talked to the Grievant after McDermott had complained about it. While the CO III's are considered the "officer in charge" of their shift in the Jail and they do the evaluations of the other employes on their shift, they are in the bargaining unit with the rest of the Jail employes, i.e., are fellow employes of the Grievant. Two of the CO III's, Schmitz and Harasimchuk-Becker, were also Union officers at the time. That also may explain why they tried to handle the problem on their own without bringing it to management's attention. Ultimately, it appears that the Grievant's going to the Personnel Director and complaining about problems in the Jail was what many employes perceived as being "the last straw", as well as a case of wanting to point out his faults if he is going to make accusations about others.

Although the record indicates that Lt. Pucker was aware before this that the Grievant used sexually explicit language beyond the norm in the Jail, there is no evidence that he was aware of the Grievant's personalized attacks on individual employes. It is also noted that the Grievant worked the 3 p.m. - 11 p.m. shift and later the 11 p.m. - 7 a.m. shift and that Lt. Pucker usually worked days. It also seems unlikely that the Grievant would have made such comments around the Lieutenant or anyone else in management, as it appears that a number of his comments were aimed at employes whom he felt were seeking and obtaining favors from management, and the comments indicated, in some cases, that the employes received the favors in exchange for providing sexual favors.

The Grievant for the most part does not deny, and the record establishes, that the Grievant made the following remarks to fellow employes:

- Made a remark to a female employe to the effect, "You're so ugly that when you walk by toilets, they flush by themselves." (Co. Ex. #9)

- Told a female employe, "I used to think you were really a nice girl, but now you look and smell like Cameron." (Joint Ex. #19)

- Told a female employe that she was a "Bulldike". (Joint Ex. #12)

- Told a female employe that the only reason she got where she is today is that she fucked the man.

(Joint Ex. #18)

- Told a Hispanic female employe that she never had good sex until she'd had it with a white man. (Joint Ex. #14)

- Called a male employe "Gobbler" whenever the Grievant perceived him as cozying up to management and made fun of the employe's acne problem by filling his mouth with Maalox and squeezing his cheeks while he spit out, describing it as one of the employe's "zits". (County Ex. #4, Joint Ex. #19)

- Told a female employe that she only got the job because she wore knee pads and gave the boss blow jobs under the table. (1/25/91 Tr. pp. 210-11).

Although the Grievant denied making the last statement noted, he did admit he said something to the woman to the effect "you might need bigger kneepads to get around..." (County Ex. #13). It is concluded that the record establishes that the Grievant made the remarks as alleged. Contrary to the Grievant's assertion, each of those comments were not made "years before this event". In fact, three of the individuals to whom the comments were directed had only been employed in the Jail a matter of months at the time they were interviewed and gave their statements. Regardless, as noted previously, there is no indication that management was aware of the comments until the events involved in this case occurred. The Grievant's characterization of the comments as "shop talk" of the same kind that other employes engaged in without being disciplined, confuses these comments directed to individuals with the charge that he used sexually graphic and obscene language around female co-workers. The Grievant's arguments have been found to be persuasive as to the latter charge, but they are not persuasive as to the former. There is no evidence in the record to establish that other employes made such remarks to the individual at which they were directed or even that other employes made such remarks about other employes. With the exception of perhaps one or two of the comments, it does not appear that they were even intended to be in jest. Instead, the comments appear to have been intended to be hurtful and degrading to the individual. There is also no indication that these comments were part of the give and take of banter between employes 4/ or that they were first provoked by the individuals at which they were directed. In other words, the comments exceed anything that could reasonably be considered "shop talk".

The Grievant is also charged with openly making statements that Lt. Pucker was having sexual relations with various female employes. Six of his co-workers indicated during their interviews with the Chief Deputy that they had heard the Grievant make such statements, thus supporting that charge. (Joint Exs. #5, 9, 11, 16, 17 and County Exs. # 4 and #9.) Again, it is noted the Grievant has not denied making the statements. Further, there is no evidence in the record to support those statements by the Grievant or even such

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4/ As one might characterize the Sheriff's comment in the Department newsletter about the Grievant's operation or the job application McDermott filled out as a joke for the Grievant. While the Sheriff's comment could well be considered embarrassing to the Grievant and the job application was right up there with some of the Grievant's worst language, neither displayed the same degree of maliciousness as did the Grievant's comments.

a perception on his part.

The Grievant is also charged with making unfounded allegations of favoritism against Lt. Pucker so as to constitute "an intentional, unwarranted and unjustified open and public attack of a supervisor (Lieutenant Pucker) and the department through hearsay, opinions and/or perceptions with total and reckless disregard for truth or falsity." There is no doubt that the Grievant's allegations of favoritism were based on his perception of the facts, which in turn was based upon what he had seen himself or had been told by others. However, as an employe, that would likely be all upon which he could base such allegations. Further, his perceptions were shared by some other employes with regard to favoritism as to discipline, promotions, uniforms and scheduling, as indicated by the responses of some employes to the Chief Deputy's questions and the responses of ex-employes questioned by Lt. Shephard. The Chief Deputy's report to the Sheriff of April 11, 1990 regarding the Grievant's allegations noted a "potential problem" as to scheduling on the basis that Lt. Pucker at times would "bend" the rules, but that it was not selective and was based on the reasonableness of the request. He also indicated that he found "no intentional misconduct" with regard to uniforms, just "a lack of communication which creates a procedural misunderstanding amongst employees."

Thus, while the Grievant may not have had all the facts, the undersigned is not convinced that the Grievant made an "intentional, unwarranted, and unjustified open and public attack. . .with total and reckless disregard for truth or falsity."

The Grievant is also charged with violating the Department's chain of command. The applicable Department policy provides, in relevant part, as follows:

> 103.04 COMMAND AUTHORITY:
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> The department will function with a formal chain of command. The chain of command provides consistency throughout the organization by insuring a flow of communication to all and by providing necessary information to those who must make decisions.
> Members of the department are responsible for insuring that the chain of command is adhered to and functions properly, and have the authority necessary to insure this responsibility. It should be emphasized that all personnel are required to use the chain of command for all normal departmental functions. The only exception shall be for problems of a personal nature whereby the individual may contact any position within the command.
> The chain of command is established as follows:
>
> -Sheriff
>
> -Chief Deputy
>
> -Lieutenant
>
> -Sergeant
>
> -Detective
>
> -Patrolman

> During the temporary absence of a superior officer, when no other provision is made by competent authority, the chain of command automatically revolves upon the next position of authority, as established above.

The Grievant's claim that the Correctional Officers are not included in the chain of command, or that there is confusion in that regard, is not supported by the record. The statements of his various co-workers and his own statements require a conclusion that they all understood what the chain of command was and that they were to follow it. The undersigned is also not totally convinced that the Grievant's intent in going to the Personnel Director was strictly to ask about whether he should continue pursuing the Patrolman position. He would have had to know that he would be asked to explain why he was unsure about it and he knew that his explanation would then lead to his feelings about the Jail and the problems he perceived. However, the undersigned is also not convinced that the Grievant really went there to make the allegations about problems in the Jail and only meant his questions about the Patrolman position as a subterfuge. Regardless of the Grievant's intent, the record establishes that at least two other Correctional Officers in the Jail have "gone to the Fourth Floor" and went directly to the County Executive with their complaints. With regard to the one part-time employe who did so, there is some question as to whether she quit or was laid off and never called back. With regard to the full-time employe who had gone outside the chain of command, there is no evidence the employe received any discipline in that regard. Based on the inability to conclude that the Grievant went to the Personnel Director with the intent of raising the allegations, the fact that some of the allegations regarding hiring and dismissals would involve the Chief Deputy and Sheriff as well (i.e., the top of the Chain) and the lack of evidence that other employes who had clearly gone outside the chain were similarly disciplined, this charge of violating the chain of command is not sustained.

The charges that have been found to be supported by the record then, are the charges that the Grievant made sexually harassing and offensive remarks to other employes and made open allegations that Lt. Pucker was having sexual relationships with a number of identified female employes of the Jail. The Department charged that such conduct violated the Department policies regarding insubordination, public statements and the Code of Conduct. Those rules provide, in relevant part, as follows:

> 103.04 COMMAND AUTHORITY:
>
> . . .
>
> (b) Insubordination:
>
> (1) Insubordination is an overt act or statement by a subordinate member that embarrasses or discredits the officer in charge or the department in the presence of other officers or the general public. Respect for all members of the department shall be monitored at all times. Disrespect toward supervisors or fellow employees through an employee's

bearing, gestures, language, or other actions which are offensive or of doubtful social value are unacceptable and will result in disciplinary action.

. . .

104.10 PUBLIC APPEARANCES AND STATEMENTS:

(a) Officers/employees shall not publicly criticize or ridicule the Department, its policies, or other members by speech, writing, or other expression, where such speech, writing, or other expression is defamatory, obscene, unlawful, undermines the effectiveness of the Department, interferes with the maintenance of discipline, or is made with reckless disregard for truth or falsity.

. . .

302.06 CODE OF CONDUCT:

Specific categories of misconduct that are subject to disciplinary action are precisely defined. These include:

. . .

- Demeanor: Complaint regarding a Department member's bearing, gestures, language, or other action which are offensive or of doubtful social propriety or gives the appearance of conflict of interest, misuse of influence; of lack of jurisdiction or authority.

- Serious Rule

Infractions: Complaint such as disrespect toward supervisor or fellow officers, drunkenness on duty, sleeping on duty, neglect of duty, false statements or malingering.

- Minor Rule

Infractions: Complaint such as untidiness, tardiness, faulty driving, or failure to follow procedures.

. . .

Chief Deputy Henke's unrebutted testimony was that all members of the Department are provided with a copy of the Department's Policy Manual.

The Grievant objects that "insubordination" entails willful or deliberate disregard for rules or orders of the Department and asserts there is no evidence he engaged in that conduct. He further asserts that disrespect toward fellow employes will not stand as insubordination unless there was a specific order that he no longer be disrespectful towards them. The Grievant's reliance on dictionary definitions of "insubordination" is misplaced, as the term is expressly defined in Department policy. That definition includes "Disrespect toward supervisors or fellow employees through an employee's bearing, gestures, language or other actions which are offensive. . ." There is no need to look beyond that definition to determine what the term "insubordination" means as far as providing notice to the employes of the Department of what conduct is proscribed. That same conduct is also proscribed under the Code of Conduct as a "serious rule infraction."

The undersigned concludes that the Grievant's personalized remarks to his co-workers, and his conduct toward them, some of which occurred within a few months of his discharge and some one or two years earlier, and his statement to other employes that Lt. Pucker was having sexual relations with various female employes were disrespectful and offensive to such a degree as to constitute both insubordination and violations of the Code of Conduct. Contrary to the Grievant's assertions, such conduct, and the rules it allegedly violated, go directly to the efficient operation of the work place and the ability to maintain discipline. Although some of the employes said they could work with the Grievant and just tried to ignore it, others stated they were glad when they were no longer on the same shift with the Grievant or that they purposely tried to avoid being around him. There was also testimony that asking him to stop did not do any good and would likely make things worse. Further, making unfounded statements that the officer in charge of the Jail is doling out favors in return for sex with various female employes, aside from being an outrageous personal attack on both the officer and the employes, undermines respect for authority in the Jail.

The above conduct is not, however, deemed to constitute a violation of the Department's policy regarding public statements. The policy concerns "public appearances and statements", and read in context appears to speak to statements made outside the Department, i.e., to members of the public or the public at large. There is no evidence that the Grievant made any allegations to the public, orally or in writing. 5/

Finally, it must be determined whether the misconduct in which the Grievant has been found to have engaged constitutes just cause for the discipline imposed. The Grievant argues that even if he is guilty of some misconduct, it is not sufficient to constitute just cause for his immediate discharge. In that regard, it is noted that the Grievant worked for the Department for approximately four and one-half years. His evaluations indicate that he was an average employe with a need to improve his attitude toward the work place, but with no prior discipline on his record.

The Department's Code of Conduct lists "disrespect toward supervisor or fellow officers" among what may be characterized as capital offenses, as indicated by the following examples of "Serious Rule Infractions":

Serious Rule

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5/ The Personnel Director is not considered to be a member of the public by the undersigned for this purpose.

Infractions: Complaint such as disrespect toward supervisor or fellow officers, drunkenness on duty, sleeping on duty, neglect of duty, false statements or malingering.

The degree of disrespect shown toward the supervisor or fellow officers must of course be considered, and in these instances it was egregious. The abusive, malicious nature of the Grievant's comments to fellow employes and about Lt. Pucker, and his total disregard for the feelings and reputation of those persons, constitutes conduct so obviously wrong that no warning is required. Further, the record indicates that it has been a pattern of the Grievant's behavior to make such personal attacks without any provocation and that it is not a matter of it happening once or twice over the last two years. Given an employer's liability under the fair employment laws, the obvious disruptive impact of such statements in terms of hard feelings and creating dissension, and the lack of a basic respect for the feelings of others, the Grievant's conduct is deemed to be of such an outrageous nature that an employer will not reasonably be expected to tolerate it in the workplace. As such, the Grievant's conduct is concluded to constitute just cause for discipline, including the Grievant's immediate discharge, as required by Article III and Article XX, Section 20.02, of the Agreement.

Based upon the above and foregoing, the record and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 18th day of February, 1992.

By David E. Shaw /s/
David E. Shaw, Arbitrator