

BEFORE THE ARBITRATOR

In the Matter of the Arbitration	:	
of a Dispute Between	:	
	:	
TOM TYNAN	:	Case 130
(OF UNION LOCAL 1366C, AFL-CIO)	:	No. 48562
	:	MA-7640
and	:	
	:	
FOND DU LAC COUNTY	:	
SHERIFF'S DEPARTMENT	:	
	:	

Appearances:

Cullen, Weston, Pines and Bach, 20 North Carroll Street, Madison, Wisconsin 53703, by Mr. Gordon E. McQuillen, for the Grievant.
 Decker & Gunta, S.C., 219 N. Milwaukee Street, Milwaukee, Wisconsin 53202, by Mr. Gregg J. Gunta and Mr. Kevin P. Reak, for the County.

ARBITRATION AWARD

Union Local 1366C AFL-CIO and Fond du Lac County are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant to the parties' request for the appointment of an arbitrator, the Wisconsin Employment Relations Commission, on February 23, 1993, appointed Jane B. Buffett, a member of its staff, to hear and decide a dispute regarding the interpretation and application of the agreement. Hearing was held in Fond du Lac, Wisconsin on September 21, 22, 23, & 24, 1993; November 8, 9, 10, 22, 23, & 24, 1993; January 20, 1994; and March 8 & 9, 1994. A transcript was taken the last volume of which was received on April 8, 1994. The parties filed briefs, and reply briefs, the last of which was received July 26, 1994.

ISSUE

The parties stipulated to the following statement of the issue:

Did the County have just cause to discharge the Grievant? If not, what is the appropriate remedy?

BACKGROUND

Grievant Thomas Tynan (herein "Grievant"), was a Sheriff's Deputy employed by the Fond du Lac County Sheriff's Department, (herein, "the Department" or "the County"), for approximately 14 years. On September 15, 1992, the Department issued Grievant a Specification of Charges. The matter was heard by a committee of the Fond du Lac County Board on November 22, 1992, after which time he was terminated. The Specification of Charges cited three areas of alleged wrong-doing: Grievant's conduct relating to an incident that took place April 13, 1992 1/ at the Forest Mall, Grievant's use of sick leave, and Grievant's failure to report and gain approval for his secondary employment.

Grievant had secondary employment as a Lead Security Officer for Mel Simon Associates which operates the Forest Mall in Fond du Lac and the Memorial Mall in Sheboygan. Grievant worked at both malls. As Lead Security Officer, Grievant participated in hiring security officers and arranged the work schedules. On April 13, 1992, A.H., the manager of a cafe at the Forest Mall, was patted on the buttocks without her consent by another security officer,

1/ Unless otherwise noted, all dates refer to 1992.

D. J., who was also a Fond du Lac County Sheriff's Deputy. On April 14, A.H. reported the incident to the mall management office. On the evening of the same day, Operations Manager Ed Saiberlich asked Grievant to find out about the incident. Grievant did speak to A.H. that evening and was the first person from Mall security to talk to her. A.H. described the incident to Grievant who told her she could report the matter to the Fond du Lac Police Department, the Fond du Lac County Sheriff's Department or the Mall management, since D.J. was employed by the mall.

On April 15, A.H. spoke to Mall Manager Vernon Meckel, regarding the incident, and a meeting was arranged with A.H. and D.J. for the next day. Mr. Saiberlich asked the Grievant to attend the meeting. When the Grievant first declined, Mr. Saiberlich prevailed upon him to be present.

On April 16, Meckel, Saiberlich and Grievant met with D.J. who denied recalling the incident. None of the three listeners, however, believed him. A.H. then joined the meeting. D.J. then apologized and the two shook hands. The Grievant then said "A. -, because of the reputation of our security officers and the fact that we are dealing with your point of view versus D.'s point of view, I would appreciate it if you didn't discuss this matter further." A.H. left. D.J. then resigned and Meckel wrote a report to the Mel Simon corporate officer in charge of human resources and risk management and considered the incident concluded.

Between April 16 and 20, A.H. continued to talk to other security officers, who were also members of the Department. One suggested that she could call the Chief Deputy, another gave her the telephone number of the Sheriff's secretary. A.H. ultimately contacted Chief Deputy Ed Henke on April 20. Since she did not want to go to the Department to discuss the matter, Chief Deputy Henke came to the cafe where she worked. She was reluctant to file a complaint regarding the incident, but the Chief Deputy Henke encouraged her to do so, saying that D. J. might commit similar offenses in the future, and the Department could not act unless she did so. Ultimately he prepared a complaint which A.H. never signed.

That evening, when the Grievant worked at the Mall, A.H. approached Grievant and told him that the Chief Deputy had come to talk to her. During the twenty-minute conversation, A.H. told Grievant what the Chief Deputy had told her. Grievant told A.H. that he questioned the Chief Deputy's motivation. A.H. asked Grievant to talk to D.J. because she believed he needed help.

The next day, April 21, at roll call, the Grievant told D.J. that he needed to talk to him. After roll call, the two met, just outside of the County parking lot. After the Grievant told D.J. that the Chief Deputy had spoken with A.H., the two arranged to meet with A.H. that evening.

At that meeting, A.H. related the conversation she had with the Chief Deputy, including the Chief Deputy's suggestion of things D.J. might do in the future if no complaint were filed. D.J. assured A.H. that he would not do any such things and that the Chief Deputy hated him. A.H. told D.J. that her main concern was that he get help. At the end of the meeting, Grievant asked A.H. if she had other concerns about the incident to which she replied that she did not.

FOND DU LAC COUNTY SHERIFF'S DEPARTMENT POLICIES AND PROCEDURES

. . .

103.01:

It shall be the duty of every officer/employee of the department to preserve the peace, aid in crime prevention, protect life and property, and, in general, to fulfill all police duties respecting the Constitutional Rights of all to liberty, equality, and justice.

104.01:

"Officers/employees of the Fond du Lac County Sheriff's Department shall not commit any acts or omit any acts which constitute a violation of any of the policies of the department, whether stated in these Rules of conduct or elsewhere. Violations of this policy or any of the following policies are cause for disciplinary action. Department officers/employees shall obey all laws of the United States and of any state and local jurisdiction in which they are present.

. . .

103.1(b), Off Duty Responsibilities:

Off duty officers have the same peace officer authority under Wisconsin Statute as they have when on duty. Off duty officers shall take appropriate action in any situation where there is an immediate danger to person or property, where there is probable cause to believe a crime has been committed, or the perpetrator of such a crime is likely to escape.

103.11(d)(2), Off Duty Officers should:

When outside normal jurisdictional limits, unless an officer witnesses a serious crime or there is an immediate danger to person or property, he/she should notify the responsible law enforcement agency.

302.06, Code of Conduct:

Harassment - Complaint that the taking, failing to take or method of police action was predicated upon factors irrelevant, such as race, attire, sex, age, etc.

103.04(b)(4), Insubordination:

. . . .

"Members of the department shall not withhold information that may be pertinent to any investigation."

NOTE: All officers have an obligation to report any obvious violations of officer's failure to operate within the department guidelines, policies, procedures, rules, regulations, or other department directive.

103.05(a), Performance of Duty:

"Unsatisfactory performance may be demonstrated by a general lack of knowledge of the law; an unwillingness or inability to perform assigned tasks; . . .; the failure to take appropriate action on the occasion of a crime, disorder, or other condition deserving police attention;. . .

103.05(b), Performance of Duty:

"Any officer who shirks from . . .responsibility will be guilty of gross neglect of duty."

601.01, Investigation; Purpose and General Policy:

"Once a crime has been or is being committed, and investigation will be undertaken to: Establish that a crime, in fact, has been or is being committed."

302.01, Citizen Complaints Against Department Personnel; General Purpose and Policy:

"The objective of this policy is to provide citizens with a fair and effective avenue for redress of their legitimate grievances against law enforcement officers and, by the same token, to protect officers from false charges of misconduct or wrongdoing and provide accused officers with due process safeguards. This agency seeks to maintain its integrity and that of its employees.

. . .

"It is the policy of the Department to accept and investigate all complaints of officer misconduct or wrongdoing from any citizen or agency employee. . .

. . .

"The Department is committed to providing law enforcement services that are fair, effective and impartially applied. In so doing, offices are held to the highest standards of official conduct, and are expected to respect the rights of citizens. Officers' voluntary adherence to these standards, motivated by a moral obligation to perform their job to the best of their ability, is eminently desirable and an ultimate objective of this agency.

. . .

This policy deals with complaints against officers while on duty. Any complaints against officers for misconduct off duty will be handled the same as complaints against any other citizen, unless the complaint deals with policy infractions.

302.09, Investigation of Citizen Complaints:

All complaints of alleged misconduct by members of the department will be investigated to a logical conclusion.

If the alleged misconduct is criminal in nature, the complaint shall be referred to the Sheriff. He will make a determination on whether the complaint is to be investigated internally, by an outside agency, or the District Attorney's Office.

. . .

All complaints of alleged misconduct irregardless of their nature, origin or magnitude, will be referred to the Sheriff and Chief Deputy for review.

302.08(1) & (2), Receipt and Processing of Complaints:

All department personnel have a duty to assist any person wishing to make a complaint against another member of the Department.

. . . .

When assisting a person who wishes to file a complaint, members of the Department shall:

- (a) Refer the individual to the Shift Commander or Officer in Charge;
- (b) When the Shift Commander or Officer in Charge is not available, a report shall be completed by the person taking the complaint and, if appropriate, a written statement should be taken and signed by the complainant. The person receiving the complaint shall submit the report to the accused member's Shift Commander, either in person or in a sealed envelope.
- (c) Each complaint shall be investigated to its logical conclusion,

. . . .

103.05(b), Performance of Duty:

. . . .

"Any Officer who shirks from . . . responsibility will be guilty of gross neglect of duty.

103.04(b) (4), Insubordination:

Full cooperation shall be given to all members of the department. Members of the department shall not withhold information that may be pertinent to any investigation.

. . . .

NOTE: All officers have an obligation to report any obvious violations of officer's failure to operate within the department guidelines, policies, procedures, rules, regulations, or any other department directive.

302.06, Code of Conduct:

Crime - Complaint regarding the involvement in illegal behavior. . .

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, or lack of jurisdiction or authority.

Serious Rule Infraction - Complaint such as neglect of duty.

104.08(c) (3), Hours worked:

Upon request by the Administration, an employee shall provide verification of the hours worked in any given period.

103.04(b) (3) Insubordination:

Officers/employees shall promptly obey any lawful order of a superior officer.

103.04(b) (4), Insubordination:

Full cooperation shall be given to all members of the department. Members of the department shall not withhold information that may be pertinent to any investigation.

POSITIONS OF THE PARTIES

The Grievant

According to the Grievant, the Department officers who investigated the Green Oaks incidents were biased against him and conducted an unfair investigation in which witnesses were interviewed with leading questions. According to Grievant, the investigation should have been conducted by an independent agency. The Grievant rejects the assertion that he had any investigatory or supervisory authority in his employment as a security officer at the Mall. He emphasizes that he did not file a complaint or encourage Hanke to file a complaint because she did not express any desire to do so. He emphasizes that no other of the deputies who worked as security officers at the Mall filed complaints or notified the Department of the incident. He notes that D.J.'s misconduct toward women had been well-known for some time and had not been addressed by the Department and that ultimately, the Grievant became the scapegoat for a situation which the leadership had condoned for some time.

As to the allegation of sick leave abuse, the Grievant notes that there was no written policy that employees were to remain at home for 24 hours after calling in sick. He asserts that he never received notice that his sick leave usage was improper, and he asserts that the issue is merely fabrication by the Department in its zeal to add to its allegations of Grievant's wrongdoing.

According to the Grievant, his secondary employment was either de minimis, known to the Department or non-existent. Additionally, the policy is widely ignored by Department members and those violations are condoned by the Department.

Finally, the Grievant argues that the Department imposed excessive discipline. Based on the Arbitrator's ruling that an earlier discipline would only be admitted for the purpose of showing that the Grievant had received warning, the earlier discipline cannot be used to justify the severity of the instant discipline. He argues that the Department was improperly influenced by the Grievant's responses to his evaluations, notwithstanding its stated policy that employes should have an opportunity to respond to their evaluation. He disputes the assertion that the Grievant's reinstatement would be disruptive to the Department by pointing to the testimony of Department employes, as well as his immediate supervisor who testified that they would be able to work with the Grievant. The Grievant asserts the Department is inconsistent by having merely reduced in rank the officer who was charged with shoplifting and by not disciplining officers when citizen complaints against officers were not treated with follow-up letters.

In his reply brief, the Grievant discusses various arguments of the County which it considers irrelevant or a distortion of the facts. He insists he did encourage A.H. to contact the Department, and the other four deputies to whom A.H. spoke also did not report the matter to the Department. He criticizes the County's references to matters that are not relevant, such as the reference to the RISC training incidents and the allegation that Grievant did not produce the requested information regarding his hours at his secondary employer.

As to the sick leave issue, Grievant insists he had offered various reasons for his use of sick leave and the headaches from the weight lifting caused only a small percentage of use of sick leave, but the leading questions used by the Department during the investigatory interviews distorted that record. He disputes the existence of the alleged "24-hour" rule. Grievant disputes the fairness of his discipline as compared to the Departments' treatment of the other deputies involved, including D.J. Grievant insists that he is not, contrary to the County's contention, a detriment to the Department morale and unable to accept criticism and disputes the relevance of testimony of other deputies regarding his place in the Department. He insists that the County is ignoring the arbitrator's ruling on the admissibility of earlier discipline and also requests that the arbitrator strike the County's inclusion of an article regarding the current election for Sheriff. He ridicules the theory that he sought to be fired so that he could be reinstated and run for Sheriff.

The County

The County asserts the Grievant clearly had sufficient notice of the policies he is charged with violating. In addition to the evidence that he frequently studied the policies and prided himself on his familiarity with them, the obligation of a law enforcement officer to report misconduct of a fellow officer and not to interfere with an investigation is self-evident. Although there was no rule expressly stating that deputies should schedule weight-lifting programs in order to recover in time to report for duty, common sense dictates such an understanding. The Grievant's understanding of the requirement to report secondary employment was demonstrated by his compliance with the policy when he sought employment with the North Fond du Lac Police Department. All of these policies were reasonable.

The County insists it conducted an extensive investigation that was fair and objective. Although the Grievant argues that an outside agency ought to have investigated this matter, he did not present any evidence that the Department's investigation failed to disclose which an outside investigator would have uncovered. It strongly disputes Grievant's assertion that he was discriminatorily disciplined, and it finds termination reasonably related to Grievant's past record and the unlikelihood that his conduct would change.

In its reply brief, the County emphasizes that all allegations of law enforcement misconduct must be investigated. It disputes Grievant's argument that the Department's investigation was unfair. Underlining the Grievant's duty to report the alleged misconduct, it argues that he had a duty to report the incidents regardless of A.H.'s decision to not file a complaint. Similarly it argues the Grievant's lack of police power to arrest D.J. did not affect his duty to report. As to the use of sick leave, it notes that no witness testified of having engaged in outside employment on the same day that he was on sick leave from the Department. As to the outside employment issue, it alleges that the employment which went unreported was not reportable under the then-effective rules. The County asserts that discharge was appropriate and details the ways in which earlier disciplines of other employes was distinguishable and consistent with the discipline meted to the Grievant.

ADDITIONAL FACTS AND DISCUSSION

The central issue in this case is Grievant's handling of the April 13 incident at Forest Mall. In the fourteen-page Specification of Charges, the County recites the facts as disclosed by its investigation, portions of Department policy and the following pertinent portions of its conclusion:

On or about April 14, 1992, after being made aware of a criminal act or other condition deserving police attention you failed to take appropriate action by reporting Ann Hanke's complaint to the Fond du Lac County Sheriff's Department; through the taking of an official report and/or personally reporting it to your Shift Commander or the Sheriff.

It was common knowledge at Forest Mall, and Ann Hanke also knew the Forest Mall Security Officers to be off duty Deputy Sheriffs, and she held a reasonable expectation for proper redress on her complaint. Knowing this, and with good intentions, she reported the incident to the Forest Mall Office and expected to receive understanding and assistance from those she viewed as authority figures, Mall colleagues and

friends. Hanke's good faith efforts were rewarded with your manipulation, intimidation and insensitivity; which was primarily the result of your attempt to protect the reputation of Forest Mall and it's [sic] security officers at her expense.

You have a duty to assist any person wishing to make a complaint against another member of the Department and to accept and/or investigate alleged misconduct to a logical conclusion.

You knew that the alleged misconduct was criminal in nature and that there was a witness, yet you did nothing to protect the interests of this citizen, or this Department and it's [sic] personnel. Your actions served as gross misconduct and neglect of duty.

You are well versed on what this conduct was (sexual assault) and how to handle it, except when it involves your private security officers, fellow deputy sheriffs and Forest Mall. Afterall, you privately teach self-defense for sexual assault! (page 5)

. . .

Your actions served as a conflict of interest, misuse of influence and lacked jurisdiction and authority whereby you attempted to mediate a criminal violation of the law to protect the reputation of Mall security officers and ultimately protect a fellow co-worker and deputy sheriff for Fond du Lac County. Your actions served as gross misconduct and neglect of duty. (page 6)

. . .

Jurgenmier really didn't want to meet Hanke, but he agreed to based on your suggestion that he should attend this meeting. With knowledge of the Department's involvement, you again involved yourself in a conflict of interest, misuse of influence and lack of jurisdiction or authority by intentionally withholding investigative information. Rather than voluntarily report to department officials, you chose to arrange a meeting between the victim and accused and intervene in an attempt to obstruct an official investigation for personal reasons; a final attempt to protect the Mall, your security position, and circumvent the legal system. You had a total disregard for the interests of your primary employer, while you supported the interests of your secondary employer, and you viewed the County's investigation as having no merit and it's [sic] motives were questionable! (page 7)

The first assertion of wrong doing is that Grievant violated Department policy by his failure to report the incident once he became aware of it. The evidence of such an obligation is ambiguous.

The impropriety of D.J.'s conduct was clear to Grievant. He believed the event

had occurred as A.H. reported it, believed that it could be found to be fourth degree sexual assault and knew it was serious enough that D.J. would have been fired by the Mall if he had not resigned. 2/ Even aside from this incident, Grievant had believed that D.J. was unstable and knew D.J.'s reputation for inappropriate conduct with women. This knowledge of D.J.'s personality should have indicated that the April 13, 1994 incident was not an aberration, possibly explained by temporary circumstances, but was in keeping with D.J.'s character. All these considerations indicate that the Department's interest in maintaining the integrity and reputation of the officers called for the Grievant to report D.J.'s misconduct.

Counterbalancing these indications of an obligation to report the incident, however, is the fact that the Department policy does not clearly command a report from an officer who is off-duty when he learns of alleged misconduct of another officer who is off-duty when no citizen's complaint has been filed.

The picture is further muddied by the fact that other off-duty Sheriff's Deputies working at the mall learned of the incident subsequent to Grievant's learning of it. They neither reported the incident nor were disciplined for their failure to report it.

Given these contradictory indications, the undersigned does not reach any conclusion regarding Grievant's failure to report the incident.

The issue of reporting, however, is only one element in a series of actions. This incident gave rise to other, clearly intolerable conduct. Although Grievant, in first discussing the matter with A. H. on the night of April 14, told her that she had the options of going to the Fond du Lac Police Department or to the Sheriff's Department as well as to the Mall management, he went far beyond the bounds of acceptable conduct by subsequently pressuring her to keep the matter quiet.

The first instance of this undue influence took place in the meeting at the Mall office on the morning of April 16. A.H., a 19-year old woman stood in a room of four men, all of whom (based on their employment history) were older than her. 3/ Grievant said to her: "A. - because of the reputation of our security officers and the fact that we are dealing with your point of view versus D.'s point of view, I would appreciate it if you didn't discuss this matter further." These words carried the authority of a man A.H. knew to be a Sheriff's Deputy and the authority of a man who was one of the two (the other was Meckel) who first interviewed her about the incident.

At this point, Grievant's earlier listing of the options for reporting had been cancelled by his forceful proposal that she keep the matter quiet. This was not a matter of asking her if a non-legal solution to a problem was acceptable to her. This was a persuasive request to let the matter disappear for the good of other people. It made no reference to A.H.'s interest or the interest of the Department in maintaining its integrity. (In fact, A.H. did not keep quiet, but continued to discuss the matter with other Mall security officers and ultimately contacted the Department. This fact does not belie the

2/ This award is not concerned with any legal determination regarding D.J.'s alleged conduct. The only fact relevant to this inquiry is that Grievant believed the incident had taken place.

3/ The record shows that A.H. stood, and suggests that the men, except for D.J., sat.

impropriety of the remark which was clearly intimidating.)

Such an overbearing suggestion, offensive in itself, becomes more egregious in light of the fact that Grievant, a Sheriff's Department employe, was asking A.H. to withhold information the Sheriff's Department needed to maintain standards of conduct within its ranks. The Department in its Specification of Charges correctly characterized this act as a misuse of influence.

Unfortunately, the chain of events did not end on April 16. Even if it were to be found that Grievant did not have an obligation to report his involvement in this case prior to April 20, there is no doubt that on that date, when he learned that Chief Deputy Ed Henke had interviewed A.H. about the incident, Grievant clearly had an obligation to come forward with information regarding the incident. It is self-evident that a law enforcement officer must offer any information regarding an investigation, but in addition, the obligation is made explicit in Policy 103.04(b)(4), which provides:

Insubordination: Full cooperation shall be given to all members of the Department. Members of the Department shall not withhold information that may be pertinent to any investigation.

Not only did Grievant fail to report his information even after learning that Chief Deputy Henke was involved, but in addition, he continued to surreptitiously interfere in the investigation. On the evening of April 20 he talked to A.H. about her interview with him. Still trying to resolve the matter, he arranged a meeting for the next evening between A.H. and D.J. which he opened and closed with statements apparently designed to resolve the matter.

Surreptitious interference in an investigation is self-evidently improper for a law enforcement officer, but beyond that common sense obligation to refrain from such meddling, Grievant had been specifically warned about such interference in connection with an earlier incident. 4/

In pressuring a victim to be silent about an assault, by withholding information after learning that the Department was conducting an investigation, and by interfering in the investigation, Grievant committed serious violations of his duty as a law enforcement officer. A law enforcement agency has the utmost interest in maintaining its reputation for integrity. It is entitled to expect its members to relay information regarding possible misconduct of its members and not to work to hide it. If a law enforcement agency develops a reputation for covering up misconduct and "taking care of its own," it will lose public confidence and be viewed cynically by the very citizens it must police. Grievant himself demonstrated an understanding for the way the public's view of one employe can taint its view of the employe's colleagues when, in explaining his concern for the reputation of the Mall, he said: "I did not believe that the security officers who had done nothing wrong should have been painted with the same brush as D.J." 5/

In this situation, as referred to in the Specification of Charges,

4/ Grievant correctly cites the Arbitrator's ruling that the earlier incident, which happened prior to the three-year time period reviewed by the Department prior to imposing the instant discipline, could not be used to justify the discipline itself, but could be used as evidence that Grievant had received prior warning for certain conduct.

5/ Tr. 1828.

Grievant was faced with a conflict of interests. Grievant chose to sacrifice the interest of the Department in maintaining high standards of conduct, to the interests of the mall in maintaining the reputation of the its security officers. Grievant's choice to maintain the reputation of the Mall by pressuring a citizen keep silent about misconduct, withholding information after he knew the Department was conducting an investigation, and interfering in that investigation is so improper that the undersigned concludes the County's decision to terminate grievant must be upheld on that basis alone.

In reaching the above conclusion, the undersigned has also given consideration to the Grievant's assertion that the Department did not conduct a fair investigation and that its imposition of discipline was discriminatory.

Grievant asserts that the County's investigation was flawed because in this case, where there was enmity between Grievant and Department management, the Department conducted the investigation internally instead of using the services of an independent agency. The undersigned, however, declines to decide that an internal, as opposed to independent, investigation is necessarily unfair. The fairness of the investigation must be determined by the investigation itself, not the question of who conducted it.

The aspect of the County's investigation most vulnerable to criticism is the questioning of witnesses by leading questions, as in the following example cited by Grievant in his brief:

E.S. [Lt. Ed Sheppard]: Did you give her [A.H.] his [Chief Deputy's] name?

J.T. [John Toney]: His name, yes. And she said okay. I said well if you go in and discuss the matter with him, also understand they won't take it lightly either and that if you start something, you are going (sic) have to finish it.

B.F.[Det. William Flood]: You didn't do that in a effort to intimidate her, but did you do that in an effort to give her a clear idea of what the gravity of the situation is?

J.T. That is correct. 6/

However, this arbitrator's decision is based on the record created at the arbitration hearing. At that time, the witnesses were questioned under oath and Grievant's counsel had opportunity to cross-examine the testimony. Although it is conceivable that an internal investigation could be conducted in such a biased manner that the subsequent hearing evidence was unreliable, this arbitrator does not find that such corruption of the evidence occurred in this case.

The undersigned concludes that the County conducted a fair investigation.

The concept of just cause also includes a requirement of evenhandedness, requiring that the employer discipline similar infractions in a similar manner and that various disciplinary actions have a logical consistency. Comparing his termination to other disciplinary actions, Grievant claims that it is too

6/ Tynan Exhibit 34. Interview with John Toney, April 28, 1992.

severe a penalty. 7/

Grievant points to the case of the employe who committed an act of shoplifting yet was only reduced in rank. Although the general category of shoplifting can include significant misconduct, this particular instance involved a package of Roloids. The officer voluntarily reported the incident, and a psychiatric report concluded that the officer was not fully aware at the time of the incident, due to his preoccupation with the medical problems of a family member who was subsequently diagnosed as terminally ill. The officer received counselling and the County imposed a reduction in rank from Lieutenant to patrol officer. Such a reduction is no small matter, involving not only responsibility and status, but reduction in pay. Given the mitigating circumstances, it was not a lenient sanction and does not indicate inconsistency as compared to Grievant's penalty.

Another incident involves hay bales removed from a construction project near Sergeant John Damrow's property. Damrow regarded it as a practical joke, akin to the officers' occasionally hiding each others jackets and hats, and did not pursue the matter. The treatment of this prank does not call into question Grievant's termination.

Grievant considers the most serious indication of disparate treatment of misconduct was the imposition of only a 60-day suspension upon D.J. for his conduct involving A.H. D.J. was not terminated at that time but was put on a 60-day suspension and ordered to undergo a psychological evaluation to determine his fitness for duty. At the time the suspension was imposed, the Department also had pending a disciplinary action based on his performance. The Department chose to impose a 60-day suspension, rather than a more extreme and summary discipline, in order to force D.J. to obtain a psychological evaluation. After the suspension, D.J. was placed on involuntary administrative sick leave during which time he committed another offense and chose to resign rather than face further disciplinary proceedings. D.J., then, was never an active employe after the completion of the investigation of the Mall incident. This scenario does not indicate any leniency in D.J.'s case which is inconsistent with the discipline Grievant received. 8/

Having found that Grievant's actions surrounding the Mall incident give the County just cause for discharge, the undersigned does not address the alleged wrong-doing in connection with use of sick leave and reporting of secondary employment.

Grievant's action in pressuring a citizen to remain silent about a possible complaint against a Sheriff's Deputy, in failing to report his part in a matter known to be under investigation and in surreptitiously interfering in the investigation were grave offenses. The record shows Grievant had clear

7/ The undersigned does not address the matter of another employe who failed to report secondary employment, for that matter is not addressed in the award for the reason cited below.

8/ In response to Grievant's request in his reply brief that the County's inclusion in its brief of a newspaper article be struck, the undersigned notes that although this unilateral submission of post-hearing evidence is improper, it has no effect upon the conclusion of this award which is reached without regard to any elections for Sheriff, past or present.

notice of the impropriety of these actions and the County conducted a fair investigation and imposed an appropriate sanction.

Based on the record and the above discussion, the arbitrator issues the following

AWARD

1. The County had just cause to discharge Grievant.
2. The Grievance is denied and dismissed in its entirety.

Dated at Madison, Wisconsin this 31st day of October, 1994.

By Jane B. Buffett /s/
Jane B. Buffett, Arbitrator