BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between WALWORTH COUNTY COURTHOUSE EMPLOYEES, LOCAL 1925-B, AFSCME, AFL-CIO and WALWORTH COUNTY	Case 127 No. 49784 MA-8063

Appearances:

Lawton & Cates, S.C., Attorneys at Law, by Mr. Bruce F. Ehlke, on behalf of Walworth County Courthouse Employees, Local 1925-B, AFSCME, AFL-CIO.

Davis & Kuelthau, S.C., Attorneys at Law, by Mr. Roger E. Walsh, on behalf of Walworth County.

ARBITRATION AWARD

Walworth County Courthouse Employees, Local 1925-B, AFSCME, AFL-CIO, hereinafter the Union, and Walworth County, hereinafter the County, jointly requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the Company, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. 1/ The undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on June 9, 1994, in Elkhorn, Wisconsin. A stenographic transcript was made of the hearing and the parties submitted post-hearing briefs in the matter by September 15, 1994. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties agreed there are no procedural issues, and stipulated to the following statement of the substantive issues to be decided:

> Was the Grievant, Thomas Pauly, discharged for just cause? If not, what is the appropriate remedy under the contract?

1/ The parties waived the contractual time limit for the issuance of an award in this case.

CONTRACT PROVISIONS

ARTICLE XXVI - DISCHARGE AND DISCIPLINE

26.01 Right of County. The County shall have the right to discipline or discharge any employee for just cause.

26.02 Discharge - Time Limit for Filing Grievance. In the event that a discharged employee feels he has been unjustly discharged, said employee may file a complaint with the Personnel Director provided he does so within ten (10) working days after notice of discharge has been given as provided in Section 26.03. Said complaint shall be treated initially at Step 3 of the grievance procedure.

26.03 Notice. Notice of discharge shall be given by personal delivery of the written termination report, if the employee is available at the Courthouse in Elkhorn, Wisconsin. If, however, the employee is not at once available at the Court House, then such report shall be mailed by certified mail to the employee's last known post office address.

26.04 Failure to File Timely Complaint. If no complaint is filed within the time specified, the discharge shall be deemed to be absolute.

26.05 Discharge - Not For Just Cause. If after proper hearing the employee is found to be innocent of charges filed, said employee may choose to return to his former position or a similar position within the County at the same rate of pay, with no loss of seniority, pay or fringe benefits. This may be modified by an arbitration award, but, in any event, the employee shall not receive more than his regular wages and benefits.

26.06 Work Rules - Discipline. Employees shall comply with all provisions of this Agreement and all reasonable work rules. Employees may be disciplined for violation thereof under the terms of

this Agreement, but only for just cause and in a fair and impartial manner. When an employee is being disciplined or discharged, there shall be a Union representative present. However, written notice of discipline may be sent by certified mail (return receipt requested) to an employee's home, provided two (2) copies are sent at the same time to the local Union president. When an employee is given a written reprimand, a copy of the reprimand shall be given to the Local Union President.

26.07 Work Rules - Rescission of Disciplinary Action. If an employee has been disciplined for the violation of a minor work rule but has had no further discipline for a period of twelve (12) months such disciplinary action will be rescinded after the elapse of that period. If an employee has been disciplined for the violation of a major work rule, but has had no further discipline for a period of thirty-six (36) months, such disciplinary action after the elapse of that time shall be rescinded.

BACKGROUND

At the time of his discharge, the Grievant, Thomas Pauly, had been employed by the County for approximately seven years in the Walworth County Sheriff's Department as a Correctional Officer in the Jail. The Correctional Officers are included in the bargaining unit represented by the Union. During his employment as a Correctional Officer, the Grievant had received satisfactory evaluations and a written commendation and had not received any written warnings or suspensions prior to his termination on July 1, 1993.

Sometime in the Spring of 1993, an inmate escaped from the Jail and was subsequently recaptured. As a result of the escape, several Correctional Officers were disciplined, one of them, Alice Nocek, received a suspension, and a grievance was filed in that regard. In the course of investigating that grievance, Nocek and another Correctional Officer obtained a statement from the inmate who had escaped.

At a third step grievance meeting on Nocek's grievance on May 27th, the Union's President, Kathleen Franklin, and the Union's Secretary, Diane Strunk, informed the Jail Administrator, Captain Reiff, that the Union had obtained a statement from the inmate. Captain Reiff was upset that the employes had taken an inmate from a secured area and obtained a statement from him while there was an ongoing criminal investigation with regard to his escape

and that the Union had not disclosed that it possessed such a statement before this. Captain Reiff told them they could be criminally charged for what they had done.

On June 22, 1993, Lieutenant Starks, a Lieutenant of Investigations in the Sheriff's Department, was assigned to do an internal administrative investigation regarding the interview of the inmate by Correctional Officers. On June 23 or 24, Starks contacted Correctional Officer Sandra Wilkie and met with her on that date. Starks informed Wilkie of her administrative rights and she requested that she have Union representation present. Due to Starks' days off, Wilkie's days off, and other matters, the interview with Wilkie was rescheduled to June 29th.

On June 29, 1993, Starks met with Wilkie and two representatives of the Union, Diane Strunk and Linda Eastburg. In questioning Wilkie about the interview of the inmate, Wilkie was asked what other Correctional Officers were on the shift when the interview occurred and Wilkie mentioned Alice Nocek and the Grievant, Thomas Pauly.

After completing his interview with Wilkie, Starks called Pauly to his office for an interview. Pauly reported to Starks' office from his work area at approximately 2:25 p.m. on June 29th. Starks began, as he had with Wilkie, by advising Pauly of his rights. This is done by reading and giving to the employe the "Informing the Member" form. The form was read and given to Pauly, and states, in relevant part, as follows:

WALWORTH COUNTY SHERIFF'S DEPARTMENT
ADMINISTRATIVE INVESTIGATION

INFORMING THE MEMBER

1. The Walworth County Sheriff's Department is presently investigation (sic) an incident concerning Correctional Officers Interview of Prisoner Chad MILLER.

2. Disciplinary action may result.

3. This is an internal administrative investigaion, (sic) and the answers you give, or the fruits thereof, cannot be used against you in a criminal proceeding.

4. Pursuant to Wis. Stat. 164.02 (Officers Bill of Rights) you may be represented by a representative of your choice, who, at your discretion, may be present for consultation at all times during the interrogation. It is understood that the representative cannot ask questions or otherwise interfere in the investigative process.

5. **Refusal to respond during the interrogation, or any response which is untruthful, could result in disciplinary action, suspension or termination from the Walworth County Sheriff's Department.**

6. All matters discussed in this interview/interrogation are of a confidential nature.

7. You may be required to submit a written report, detailing your knowledge of the incident under investigation.

. . .

Both Starks and Pauly signed the form acknowledging that it had been read and given to Pauly. Pauly then told Starks he wanted his lawyer present. Starks advised Pauly that he could have his lawyer present and that they would reschedule the interview for 2:00 p.m. the next afternoon, June 30th. Pauly then went to Strunk's office at approximately 2:30 p.m. on June 29th and told Strunk that he would be interviewed the next day at 2:00 p.m. and that Pauly wanted a Union lawyer to be present. Strunk asked Pauly if he meant Larry Rodenstein (the Union's Staff Representative from AFSCME Council 40) and Pauly indicated that was who he wanted.

Strunk called the Council 40 office in Madison and left a message for Rodenstein to call her and he eventually did so at approximately 4:00 p.m. on June 29th. Strunk told Rodenstein about Wilkie's interview and that Pauly was scheduled to be interviewed at 2:00 p.m. the next day and wanted Rodenstein to be present. Rodenstein advised Strunk that he had previously scheduled engagements and could not be at the interview, but he gave her dates he was available, one of which was July 1st. Strunk immediately called Stark's office, but he had already left for the day. Strunk left a message for Starks with a woman in the Investigation Bureau telling him that Pauly's interview needed to be rescheduled to a different date and that Rodenstein was available to meet at 1:00 p.m. on July 1st, or on July 8th or 12th. The woman called back a few minutes later to tell Strunk that Starks was scheduled to take vacation on those dates.

A thunderstorm hit the area where Pauly lived in the early morning hours of June 30, 1993. When Pauly awoke at approximately 5:00 a.m. that morning, his apartment building was without power or water. At approximately 5:10 a.m. Pauly called the Jail and told the Correctional Officer who answered that he would not be reporting to work that day because his power was out due to the storm. Pauly worked the 7:00 a.m. - 3:00 p.m. shift and was scheduled to work on June 30th.

At approximately 8:30 a.m. Strunk called Pauly and he told her that his power was out and he was not going in to work or to the meeting. Strunk informed Pauly that she had talked to

Rodenstein and it looked like there was going to be a scheduling problem and she would get back to him when she had a firm date. Strunk then called Starks and told him that Rodenstein would not be able to make the meeting that afternoon, but that he could make it there the next day, and that Pauly wanted Rodenstein at the meeting. Starks advised Strunk that the meeting was set for 2:00 p.m. and that Pauly better be there. Strunk asked Starks if someone else could interview Pauly and Starks hung up the phone without answering Strunk. Strunk then called Rodenstein and advised him that Starks insisted upon going ahead with the meeting that afternoon.

At approximately 9:05 a.m. that morning, Rodenstein called Starks and told him that he could not make the meeting that day, but he was available the next day. Rodenstein told Starks that he ought to be more willing to accommodate the request to reschedule the meeting and that it would be in everyone's interests for him to be there. Starks advised Rodenstein that he expected Pauly to be at the meeting, as ordered. Rodenstein then called Strunk back and told her that Starks would not reschedule the meeting and that she should advise Pauly to attend the meeting. Strunk then called Pauly and informed him that Rodenstein could not make the meeting that day and that Starks would not reschedule the meeting. Strunk also told Pauly that it was Rodenstein's and her advice that he attend the meeting that afternoon and Strunk offered to attend the meeting with him. Pauly became upset and Strunk tried to give him some background on what had precipitated the internal investigation.

Pauly called Starks' office and left a message for Starks to call him. At approximately 9:40, Starks returned Pauly's call and the following conversation ensued:

P: Hello.

S: Yes, this is LT STARKS. Is this Tom PAULY?

P: That's me.

S: Okay. I got a message here to call you.

P: Yeah. Okay, David, I can't make it in there today.

S: How come is that?

P: We don't have any electricity here. And, furthermore, anything that I would have to say will be said in a court of law.

S: So you, you're not going to be here at 2:00 as ordered.

P: Period. Right.

S: Okay. Thank you.

P: Okay?

S: Bye now.

P: Bye.

Undersheriff Uwe Niemetscheck was subsequently informed that Pauly did not intend to be at the interview that afternoon. Niemetscheck called Pauly at approximately 10:25 a.m. that morning and had the following conversation with him, set forth in relevant part:

N: Yeah. Hey, Tom GRAVES just mentioned to me that you are refusing to come in for the interview that you were ordered to come in for today, is that true?

P: That's right.

N: Would you mind telling me why? I mean, you're really running a risk here of, of being disciplined or terminated even.

P: Well, I think the County's running a bigger risk right now because any, like I told LT STARKS, anything I have to say will be said in a court of law.

N: Well, what court of law are we talking about? I mean, this is just, this is, right now this is an internal investigation.

P: Well,

N: This is not a disciplinary hearing or anything else.

P: As far as, as far as I'm concerned, this is, is a gross act of intimidation.

N: Well, not, no, it doesn't. It's, it's an internal investigation but I'm not going to argue with you about

P: It's intimidation.

N: what we're doing on this. I'm, I'm just, you know, I just want to caution you, Tom,

P: Well, Captain REIFF has stepped over the line.

N: about the risk you're running here.

P: Captain REIFF has stepped over the line on this one.

N: That's, well, that may be your opinion but, I mean, do you really realize how, what kind of serious problems you're going to have if you refuse to do this?

P: Well, hey, I'll take my chances in a court of law.

N: Well, Tom.

P: I'm talking lawsuit here, Uwe.

N: Tom, you know, we are following our department policy on internal investigations.

P: This does not apply to me. I'm not a law enforcement officer.

N: The department, or the policy on internal investigations applies to every member of the Walworth County Sheriff's

P: Well,

N: Department.

P: like I say, we'll take that up in a court of law.

N: Okay. Well, Tom, I'm going to reinforce STARKS' order, LT STARKS' order.

P: Go right ahead.

N: Are you refusing for any reason other than you don't want to do this?

P: Like I said, anything I have to say will be said in a court of law.

N: Okay. We expect to see you at 2:00 today, with any representation you want, but we want to see you at 2:00 today. If you aren't here at 2:00 today, then, you know, we'll, we'll see what other steps we're going to take, but that could be up to termination.

P: Well, we'll see.

N: Okay. Okay, Tom, just so you understand. Do you have any questions about this?

P: No.

N: Okay, Tom.

P: Do you have any questions?

N: No, I have none.

P: Okay. Like I said, it will be in a court of law.

N: Okay. Well, you know, we're a little premature on courts of law right at the moment. We're still doing an investigation now.

P: Well, ah, as far as I'm concerned, people's rights are being violated here, and I could care less on what the, the department's point of view is on this. People are being messed with here.

N: Okay.

P: Okay?

N: That's your opinion, Tom.

P: Well, not, it'll be reinforced in court.

N: Okay.

P: Okay?

N: Good-bye, Tom.

Pauly did not appear for the interview that afternoon. Strunk was working, as was Linda Eastburg, who had been present at Wilkie's interview along with Strunk, and Kay Broihahn, another representative of the Union.

On July 1, 1993, Pauly was discharged from his employment, pursuant to a written "Notice of Discharge" sent that date by Undersheriff Niemetscheck which, in relevant part, stated:

> RE: Notice of Discharge
>
> Dear Mr. Pauly:
>
> Effective today, July 1, 1993, you are hereby notified that you have been discharged from your position as a Correctional Officer of the Walworth County Sheriff's Department.
>
> This discharge is pursuant to Article XXVI of the Agreement Between County of Walworth, Wisconsin, and Walworth County Employees' Local 1925B, AFSCME, AFL-CIO.
>
> You are being discharged for insubordination. This is based on your willful refusal to obey a direct, lawful order of two superiors on June 30, 1993, that of Lieutenant Starks and me.

. . .

Lieutenant Starks was on vacation the following days in July of 1993: July 1, 2, 5, 8, 9, 12, 13, 14, 15 and 16. The third Correctional Officer that was to be interviewed, Alice Nocek, was off work due to her spouse's illness and death and was not interviewed by Starks until the latter part of July.

Pauly grieved his discharge. The grievance was processed through the parties' contractual grievance procedure. The parties attempted to resolve the dispute, but were unsuccessful, and proceeded to arbitration of the grievance before the undersigned.

POSITIONS OF THE PARTIES

County

The County takes the position that Pauly deliberately and willfully refused to obey Lt. Starks' order, despite repeated warnings that his refusal could result in his discharge, and that

his action amounted to gross insubordination which constitutes just cause for discharge.

Contrary to the claim that Pauly refused to attend the meeting on June 30th because Rodenstein could not be there, the evidence shows that Pauly had decided when he woke up that morning that he was not going to his shift that day, nor attending the meeting that afternoon. He called in at 5:10 a.m. and informed the Department he was not coming in because he was without electricity. At 8:30 a.m. he called Strunk and told her that he would not be going to work or to the meeting because he was without electricity. He told Starks later that morning that he would not make it in for the meeting because he was without electricity, and that is the only reason he gave Starks for not coming in. Pauly did not learn that Rodenstein would not be able to attend the 2:00 p.m. meeting until his second telephone conversation with Strunk that morning. Pauly admitted on cross-examination that he had already decided not to attend the 2:00 p.m. meeting prior to being told that Rodenstein would not be there. Pauly also admitted he never told Starks that the reason he was not coming to the meeting was because his Union representative or lawyer could not attend.

The claim that Pauly did not attend the meeting because he was concerned about criminal proceedings also is not supported by the record. The "Informing the Member" form read and given to Pauly at the meeting on June 29th states, "This is an internal administrative investigaion, (sic) and the answers you give, or the fruits thereof, cannot be used against you in a criminal proceeding." Pauly mentioned nothing about potential criminal proceedings in his conversations with Lt. Starks and Undersheriff Niemetscheck.

Pauly was advised several times that he was being given a direct order to be present at the 2:00 p.m. meeting on June 30th and the possible consequences if he failed to attend by both Starks and Niemetscheck. In his telephone conversations with them on June 30th, Pauly was defiant, and made numerous references to "courts" and "lawsuits". Pauly also told Niemetscheck that the Department's policy on internal investigations did not apply to him and refused to obey Niemetscheck's order to come in for the meeting. Pauly was warned by Niemetscheck on at least four occasions during that conversation that his failure to obey the order to attend the meeting could lead to his discharge. Pauly conceded on cross-examination that he clearly understood the possible consequences if he failed to show up for the meeting. The "Informing the Member" form also warns individuals that refusal to respond during interrogation could result in disciplinary action up to, and including, termination. Further, Pauly was advised by his Union representatives to attend the meeting in recognition of the general, long-standing axiom of labor relations that an employe should "obey now, and grieve later". Pauly still refused to attend the meeting.

In an organization of a para-military nature, such as a law enforcement agency, obedience to lawful orders is extremely important. The County cites several arbitration awards in support of the premise that respect for authority and discipline and obedience to orders is considered to be more essential in such quasi-military organizations.

In its reply brief, the County disputes the claim that Pauly failed to attend the meeting primarily because he was afraid of being criminally prosecuted. The alleged threat of criminal prosecution originated at a grievance meeting in Captain Reiff's office on May 27, 1993, regarding the discipline of another employe for her part in the escape of an inmate. Pauly was not present at that meeting, and the threat of criminal prosecution was allegedly directed at Strunk and Franklin due to a statement that had been taken from a prisoner. As far as the County knows, Pauly had no role in obtaining that statement beyond being in the area at the time the inmate was brought into the interview room and his testimony that he asked the inmate to write a letter of explanation on his escape. The threat of criminal prosecution was made only because Franklin and Strunk were refusing to turn over a copy of the statement to the County. When that statement was turned over on June 1, 1993, any and all threats of criminal prosecution ended. Also, the "Informing the Member" form clearly states that answers given, or the fruits thereof, cannot be used against the individual in a criminal proceeding. That was read to Pauly during his initial interview on June 29th, and a copy of the form was given to him. Further, Pauly never mentioned any concern over possible criminal prosecution in either his initial interview on June 29th or in subsequent telephone conversations on June 30th with Starks, Niemetscheck or Strunk. The only information Pauly had regarding criminal charges was what he had heard, i.e., "some talk of criminal charges pending from this investigation", as Pauly testified. There is no corroborating testimony that Pauly was even aware of any threat of criminal prosecution related to the taking of the statement prior to his being terminated.

The County notes the Union's contention that "the County's threat to initiate criminal prosecution against Pauly and the other targets of the investigation rendered the interrogation order illegal and unreasonable.", citing, Omaha City Employees, Local 251, AFSCME, 90-1 ARB 8274 and Washoe County Employees' Association and Washoe County, Nevada, 92-1 ARB 8002. There is no factual support in the record for the claim that the County threatened Pauly with any criminal prosecution. Further, both the Omaha and Washoe County cases are distinguishable. In Omaha, the grievant had been arrested and charged with a crime related to the incident that was the subject of the interview, and the grievant stated that based on advice of her attorney, she was invoking her Fifth Amendment rights and would not give any information. Her superiors told the grievant she could not have her attorney present during the interview, and there was a factual dispute over whether the grievant had been told that her statements could not be used against her in any criminal proceeding. None of those facts are present in this case. Similarly, in Washoe County, the grievant received a letter of reprimand stating she had violated two criminal misdemeanor statutes. The grievant was asked to provide a statement in front of a district attorney and, on the advice of her union representative, specifically exercised her Fifth Amendment right against self-incrimination and refused to give a statement. The grievant in that case was not told that her statements could not be used against her in any criminal proceeding. Again, those facts are not present in this case.

The County also disagrees that a "formal" court-ordered grant of immunity from criminal prosecution is required in order to compel an employe to give information, and disputes the

Union's reliance on the Omaha award for that proposition. The arbitrator in Omaha did not state that formal immunity is required in all cases, but merely concluded that based on the record, the employer had not given the grievant sufficient immunity from criminal prosecution. The Union's claim is also not supported by the U.S. Supreme Court's decision in Lefkowitz v. Turley, 414 U.S. 70 (1973). The Court stated that a witness need not answer, "unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant", and that employes "may be compelled to respond to questions about the performance of their duties, but only if their answers cannot be used against them in subsequent criminal prosecutions." The Court never referred to "formal immunity". In Washoe County, the arbitrator based his decision to reverse the discharge on the fact that the employer had not conducted a "proper proceeding" as outlined by the Nevada Supreme Court in a decision where it concluded that an employe may be compelled to give answers about the performance of his duties, and may be subject to dismissal for refusing to give answers, where the employe has been advised of the consequences of his choice, including advice that he is subject to discharge for not answering, and that his replies and their fruits cannot be used against him in a criminal case. Gandy v. State, 607 P.2d, 581 (1980). A review of the federal court precedent establishes that the "proper proceedings" does not require a "formal grant of immunity", but rather, what may be referred to as "use immunity", i.e., protection against use of the employe's answers or the fruits thereof, in any criminal prosecution. The County cites Wisconsin decisions following the federal precedent in that regard. Based on those precedents, "formal" immunity is not required, and the "Informing the Member" form contains the appropriate admonitions required in such situations. Further, this case does not involve the Fifth Amendment, as Pauly never exercised or attempted to exercise his Fifth Amendment rights. He was also not terminated for refusing to answer questions, but for refusing to show up at the meeting. Pauly had been given the appropriate admonitions and he had been given the proper immunity from criminal prosecution. Therefore, the County asserts it had the authority to interview Pauly and that it could have terminated him for refusing to answer the questions as well.

While the Union accepts the premise that employes are to "obey now, and grieve later", it argues "that an exception to this rule is if the harm done to the employe by complying with the order could not be remedied in a grievance procedure." As argued previously, the claim that one of the applications of this exception occurs when an employer attempts to use the threat of criminal penalties to obtain information does not apply, since Pauly was not threatened with criminal penalties and had been given immunity from using his statements, or the fruits thereof, in any criminal proceedings against him. Further, there was nothing that could not have been remedied through the grievance procedure if Pauly had appeared at the meeting. He could have appeared and refused to answer the questions, since he had no representative with him. Since his electricity was out, he would not have been expected to be showered and shaved for the meeting. That Pauly was subject to the "obey now and grieve later" rule was shown by Strunk's advice that he attend the meeting, and she even offered to attend it with him. Pauly rejected both the advice and the offer and intentionally disregarded Starks' order.

The County also disputes the claim that the exception to the "obey now, and grieve later" rule where an employe is denied union representation is applicable in this instance. Pauly never requested that a Union representative be present; rather he only told Starks that he wanted his "lawyer" present, and never told Starks or Niemetscheck the name of the lawyer. Starks testified that no one, including Strunk and Rodenstein, ever told him that Pauly wanted Rodenstein to be his representative at the June 30th meeting, or any other meeting relating to the investigation. Starks mistakenly thought Rodenstein was an attorney for the Union, and not Pauly's attorney, and Rodenstein never told Starks that he was representing Pauly, or that he was requesting the postponement because he wanted to be there as the Union representative and was not available on June 30th. Further, Rodenstein recognized the "obey now, grieve later" rule, and even he realized the Union could effectively grieve the failure to reschedule the meeting to a later date.

With regard to the Union's citation of case law regarding the right to union representation, the County asserts that the U.S. Supreme Court's decision in N.L.R.B. v. Weingarten, 420 U.S. 251 (1975), i.e., federal law, does not directly apply to municipal employes in this state. The Wisconsin Employment Relations Commission has established the representation rights of employes at various meetings with management. Under Commission case law, there is no general right to a "particular" union representative. The Union also mistakenly relies on the Kimberly-Clark award as supporting its claim that an employe always has the right to the union representative of his choice. In that case, there were two union stewards available, and the arbitrator concluded that it was up to the employe, rather than the employer, to decide which one he wanted to represent him. While an employe has a legal right to a union representative in meetings the employe reasonably believes could result in discipline or discharge, there is no legal requirement that the employe is entitled to a specific union representative. Here, Strunk advised Pauly to attend the meeting, and offered to go with him. There were also two other local union representatives working that afternoon, Eastburg and Broihahn. Further, Pauly never requested a particular person, but just asked for his "lawyer". Finally, Pauly conceded on cross-examination that he decided not to attend the meeting prior to becoming aware that Rodenstein could not be present. The only reason Pauly gave for not intending to come to the meeting was the loss of his power and water due to the storm, and not because he was denied union representation.

The County also disputes several other claims the Union made in Pauly's defense. While the Union claimed that a 24-hour extension "on its face abridged Pauly's right to a representative of his choice", Pauly agreed to that extension, and never later requested further postponement. Starks wanted to have the interview as soon as possible, as he knew he was going to be on vacation for the next two weeks. He had no reason to cancel the meeting on June 30th, and did not know that Pauly's "lawyer" would not be present. The only reason for not attending given by Pauly was that he had no electricity, and Starks legitimately concluded that was not sufficient reason to cancel and reschedule the meeting. Pauly knew nine hours prior to the 2:00 p.m. meeting, that he was without power, and he had plenty of time to make alternate arrangements. Unlike the "act of God" in the Tokheim award relied on by the Union, it was not "impossible" for Pauly to get to the meeting. The Union also claimed mitigation of Pauly's insubordination because

his acts or statements were not stated in the presence of other employes. However, Strunk, who is also an employe and a local union representative, was aware of Pauly's outright refusal to attend the meeting, and she would surely use that against the County in subsequent insubordination situations. The County also disputes the assertion that it has the burden of proving its case by "clear and convincing" evidence. The County cites a number of arbitration awards for the proposition that the standard of proof in such cases is normally the "preponderance of the evidence". The County also notes some confusion in Strunk's testimony as to when she talked to Rodenstein and was informed that he could not make the meeting, and when she talked to Pauly. Her testimony in those regards is contradicted by that of Rodenstein and Pauly. While the Union attempts to characterize Pauly as "scared", in his phone conversations with Starks and Niemetscheck, Niemetscheck testified that Pauly's attitude was "very uncooperative" and his discussion with Starks also did not indicate that he was "scared".

Finally, as to the Union's request that the Arbitrator reduce the discipline imposed, the County cites awards of Arbitrator Daugherty in Enterprise Wire Co., 46 LA 359 (1966) and Arbitrator McCoy in Stockham Pipefitting Co., 1 LA 160 (1945), for the proposition that arbitrators are not to substitute their judgement for that of the employer unless the employer has abused its discretion. The County asserts it has not acted arbitrarily, capriciously, or discriminatorily in discharging Pauly.

Union

The Union takes the position that the County has the burden of justifying the discharge by "clear and convincing evidence", and that Pauly was not insubordinate and given his years of service and good record, the discharge cannot be sustained. The Union makes the following arguments in support of its position.

Citing awards in Mead Co., 80 LA 713 and Southern California Permanente Medical Group, 92 LA 41, the Union asserts that "where the underlying conduct alleged is of a type which will permanently affect the grievant's work record, and seriously damage future work opportunities, the employer must prove its case by 'clear and convincing evidence'." Here, Pauly was terminated for insubordination, which is likely to permanently affect his work record and seriously damage his future work opportunities, particularly in law enforcement. Hence, the County is required to prove its case by "clear and convincing evidence."

The County cannot meet its burden of proof in this case because the order to appear for interrogation without representation was neither reasonable nor lawful, and therefore, Pauly's refusal was not insubordinate. While generally the applicable rule is that an employe must "obey now and grieve later", there are a number of important exceptions to that rule. Employes should not have to comply with an order where "the harm done to the employes if they comply with the

order, could not be remedied through the grievance procedure." 2/ A specific application of this exception occurs where an employer attempts to use the threat of criminal penalties to obtain information. Citing, City of Omaha. In that case, a felony was committed, and police believed that the grievant had information on the crime. The grievant was read her rights, but declined to answer questions, and ultimately was arrested on the charge of accessory to a felony. An internal investigation was initiated and the grievant was ordered on two occasions to appear for interrogation and was advised that "no statement would be used for criminal investigation or prosecutorial purposes. . ." The grievant refused to appear or participate in the interrogation and was discharged for insubordination. In overturning the discharge, the arbitrator quoted the following from Lefkowitz v. Turley, 414 U.S. 70 (1973):

> "the [Fifth Amendment] privilege [against self-incrimination] is not ordinarily dependent on the nature of the proceeding in which the testimony is sought or is to be used. It applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it. The privilege protects a mere witness as fully as it does one who is also a party defendant."

The arbitrator concluded that the promise that the information would not be used in criminal proceedings was insufficient to require the grievant to answer; rather, it is only where the employe is formally granted "immunity of prosecution based on the compelled information" that the testimony could be required pursuant to "adequate court procedures. . ." As the grievant had not been granted immunity from criminal prosecution, the arbitrator concluded that the Fifth Amendment privileged the grievant not to answer. Since the employer sought to unconstitutionally compel the grievant to provide the information, the grievant's refusal to comply could not constitute insubordination. Similarly, in Washoe County, the arbitrator held that where an employe cannot be compelled to answer a question, the employe cannot be considered insubordinate when he or she refuses to do so. The reasoning in the Omaha and Washoe County cases is controlling in this case. Captain Reiff made an unambiguous threat to initiate criminal proceedings against those involved in the inmate interview. Pauly was aware of that threat prior to his first interview with Starks on June 29th and at no time was he promised immunity from prosecution. The language of the "Informing the Member" form Pauly signed on June 29th merely stated that "the answers you give, or the fruits thereof, cannot be used against you in a criminal prosecution." Thus, Pauly was under no obligation to appear or testify. Under the circumstances, pursuant to the Fifth and Fourteenth Amendments, Pauly did not commit an act of insubordination. The order to appear at the meeting was neither legal nor reasonable, and therefore cannot serve as a basis for insubordination.

2/ Goldsmith and Shuman, "Common Causes of Discipline", Bornstein and Goslin, editors, Labor and Employment Arbitration (1/92 Supp.) at page 20-20.

The Union cites Goldsmith and Shuman, supra, and numerous arbitration awards for the proposition that a separate exception to the "obey now and grieve later" rule occurs when an employe has been denied the right to the presence of a union representative. The Union cites the award in Kimberly-Clark Corp., 55 LA 291 (1970) for the further principle that the right to a union representative includes the right to a representative of the employe's own choosing. In that case, the employer had permitted union representation, but refused to permit the grievant to have the representative of his choice present. The arbitrator held that the employe was entitled to a representative of his own choice as "it seems fairly evident that the option should be in the man represented", and not with the employer. That reasoning is persuasive here. It is also plain, pursuant to governing law, which was in effect reinforced by the form given to Pauly, that Pauly was entitled to the representative of his choice. When Pauly requested at his June 29th meeting with Starks that his representative be present, Starks rescheduled the meeting for less than 24 hours later. On its face, that patently inadequate extension abridged Pauly's right to a representative of his choice. When advised by both Strunk and Rodenstein on the morning of June 30th that Rodenstein could not make the scheduled meeting that afternoon, Starks was obliged, under any reasonable construction of the "Informing the Member" form, to reschedule the meeting so Pauly's representative of choice could attend. Starks ignored his statutory obligations and, in effect, sought to force Pauly to attend either unrepresented or with a representative not of his choosing. Since Pauly was effectively precluded from having Rodenstein's representation, he was denied the representation to which he was entitled under the law. Under those circumstances, the order to appear was neither legal nor reasonable, and Pauly could not properly be subject to the "obey now, grieve later" rule.

Next, the Union cites arbitral awards where the conduct of management was partially at fault for the circumstances that led to the alleged insubordination, and the discipline imposed was either vacated or reduced by the arbitrator on that basis. Also citing, Elkouri and Elkouri, How Arbitration Works, (4th ed.) at p. 688. The same reasoning applies in this case. Starks gave Pauly less than 24 hours' notice of the rescheduled hearing, and then insisted Pauly appear as scheduled on June 30th, despite having been advised that Pauly's representative of choice could not appear but was available the very next day. While Starks asserted that the interrogation had to take place immediately as a matter of "investigative technique", and that if it were delayed, it would create a risk that Pauly and the other witnesses could exchange information, he was able to wait a full month after the scheduled Pauly interrogation to interview Nocek. Also, Starks was assigned to the investigation on June 22nd, but waited a full week to initiate the first interrogation of Wilkie. The delay was attributed to Starks' and Wilkie's scheduled days off as well as other obligations. Thus, on at least those two occasions, Starks disregarded the vital "investigative technique" when it suited him, yet when Pauly sought an extension of one day, Starks rejected the request out of hand. Thus, Starks delayed interrogations to accommodate his own days off, and accelerated interrogations to accommodate his own vacation plans. Rather than being concerned that Pauly got the representative of his choice pursuant to the "Informing the Member" form, Starks dictated events in a contrary manner to accommodate his own vacation plans. Such capricious management action supports vacating the discharge.

The Union also asserts that there are several mitigating factors present in this case. "Acts of God" constitute a mitigating factor where they hinder an employe from complying with his job responsibilities. Tokheim Corp., 62 LA 1040 (1974). The arbitrator concluded in that case that an employe should not be penalized where "an act of God intervened" to affect his conduct. That reasoning applies in this case. Pauly lost his power and water as a result of a storm, and could not shower or shave for the meeting. Pauly advised management that he would not be able to properly prepare to appear for his shift as a result of the storm. The meeting was set on June 30th because Pauly was scheduled to work on that date. Given that that circumstance had changed, it was unreasonable for the County to reverse its position and insist that Pauly appear despite the fact that he would not be working that day. Since Starks had accommodated scheduled days off in scheduling the other interrogation, it was unjust for the County to impose discipline on Pauly in the circumstance where an act of God prevented him from attending to his personal hygiene. Another mitigating circumstance is the fact that Pauly's statements were not made in the presence of other employes, but were made over the telephone. Citing, Morgan Adhesives Co., 101 LA 115 (1993), the Union asserts that, as in that case, there was no "diminution of (supervisory) authority in front of the other employes." The Union also cites a number of arbitration awards where a discharge based on insubordination was vacated based on the grievant's seniority and clean disciplinary record. Pauly had nearly seven years of service at the time of his discharge and no prior discipline, and he had received a letter of commendation less than a year before his discharge. Based on his length of service and his service record, Pauly must be restored to his position.

In its reply brief, the Union asserts that the County did not dispute in its initial brief that it has the burden of proof to justify the discharge by clear and convincing evidence and did not deny that Pauly was a senior employe with a positive work record. Hence, those two undisputed propositions must be considered to be in Pauly's favor.

The remaining dispute, then, relates to the merits of the alleged insubordination. The Union reiterates its assertion that the order for Pauly to appear for interrogation without representation was neither reasonable nor lawful. The County does not contend that it offered Pauly immunity from prosecution; rather, it merely asserts that the "Informing the Member" form states that the information gained could not be used against Pauly in a criminal proceeding. The employer in the Omaha award failed with precisely the same contention. The arbitrator held in Omaha that a positive grant of immunity from prosecution is required and that since at no time during the investigation did the employer grant the grievant immunity, the grievance was sustained. Similarly, Pauly was not given immunity from prosecution and still could have been subject to criminal prosecution if information relative to an offense was obtained from other investigatory sources, including information obtained as a result of information Pauly provided. The failure to grant him immunity requires that the grievance be sustained.

The County also ignores the significant influence Rodenstein's absence had on Pauly's

decision not to appear for the interrogation. The bulk of the County's arguments are devoted to the contention that Pauly's motive for not attending the meeting was related to the loss of power at his home, and unrelated to the fact that he had been effectively denied his right to have Rodenstein present. The County's assertion that Pauly had already decided not to come to the meeting prior to being told that Rodenstein would not be there, and that Rodenstein's presence or absence was irrelevant to his decision, is not supported by the portions of the record cited by the County. The record is clear that subsequent to 8:30 a.m. Pauly did become aware Rodenstein could not attend the meeting and this information had a marked influence on his ultimate decision not to attend the 2:00 p.m. meeting, as indicated by his subsequent conversation with Starks at 9:30 a.m. In his conversation with Niemetscheck, Pauly repeatedly stated that requiring him to appear without his representative was a "gross act of intimidation". If Pauly had made a final determination as of 8:30 a.m. not to appear due to the loss of electricity, there would be no reason for him to express concern about a "gross act of intimidation" and there would be no explanation for his statements that "anything he would have to say would be said in a court of law". Pauly testified those statements referred to the denial of his right to a representative of his choice. The evidence demonstrates Rodenstein's absence had a marked impact on Pauly's decision not to appear for the interrogation.

The County also concedes in its brief that the timing of the Pauly interrogation was precipitated by Starks' vacation plans, and abandons its argument that his insistence on holding the interrogation on June 30th was based on "investigative technique". Pauly's discharge arose in significant part due to the investigating officer's desire to take his vacation, regardless of Pauly's right to a representative of his choice. Therefore, the discharge is flawed on its face and must be vacated.

The County failed to respond in its brief to the fact that Pauly was hindered from attending the meeting by an "act of God". Even assuming that the loss of power and water was the sole ground for Pauly's inability to appear, discharge would not be justified where Pauly could not take any action to avoid the consequences of the storm, particularly where the County had accommodated mere days in off in scheduling the other interrogation. If a day off is sufficient to justify delaying an interrogation, the storm cutting off Pauly's power and water must be considered to constitute proper justification for a similar extension.

Finally, the Union reiterates that since Pauly's statements were not made in the presence of other employes, the arguments regarding the para-military nature of the Department are meritless. The County's argument that "it is necessary that the Department send a strong message to the 166 members of the Walworth County Sheriff's Department" ignores the fact that Pauly's remarks were not made in public and there is no evidence other employes heard the remarks, nor is there any evidence disciplinary problems arose with other employes as a result of Pauly's remarks. Further, the cases cited by the County in support of its assertion involve grooming requirements for police officers, a subject not at issue in this case. Allusions to the para-military nature of a police department carry no force where the department itself has raised the prospect of criminal

charges. Citing, Omaha. Thus, the Union concludes that for the reasons it has stated, the punishment of discharge was far too severe a sanction in this case, and that, at most, a written warning would have been the appropriate discipline.

DISCUSSION

The first issue the parties raise is the burden of proof the County is to be expected to meet. The Union argues for the application of the "clear and convincing" standard. The County asserts that the "preponderance of the evidence" is the appropriate standard. As noted in Elkouri and Elkouri, in general, arbitrators apply a "preponderance of the evidence" rule or a similar standard to decide issues of fact in ordinary discipline or discharge cases, but that a higher standard is often applied in those cases where the misconduct alleged is of the type that is criminal in nature or "which carries the stigma of social disapproval". 3/ The alleged misconduct in this case, insubordination, is not of the latter type and the "preponderance of the evidence" is the appropriate standard as to the County's burden of persuasion.

In most cases where the issue is whether there was just cause for the discipline imposed, there are two primary questions to be answered: Did the employe engage in the misconduct alleged, and, if the answer is yes, does the punishment reasonably fit the crime?

As to the first issue, the letter of discharge of July 1, 1993, sent to Pauly by Undersheriff Niemetscheck, charged Pauly with the following:

> You are being discharged for insubordination. This is based on your willful refusal to obey a direct, lawful order of two superiors on June 30, 1993, that of Lieutenant Starks and me.

There is no dispute that Pauly was ordered by Lt. Starks to appear at 2:00 p.m. on June 30, 1993, to be questioned regarding the interview of the inmate incident, and that he ultimately refused to appear for that meeting, despite being warned by the Undersheriff that he could be terminated if he refused to appear.

The Union argues that the order that Pauly appear for the meeting was unreasonable and unlawful, as it violated his Fifth Amendment rights against self-incrimination and, in light of the circumstances, it denied him his right to appear with the representative of his choice. The Union asserts that, therefore, this case falls within recognized exceptions to the general rule that an employe "obey now, and grieve later".

With regard to whether Pauly had a constitutional right under the Fifth Amendment to

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3/ How Arbitration Works, (4th Ed.) at p. 662.

refuse to answer any questions regarding the subject of the interview, the undersigned has reviewed both the Omaha and Washoe County awards the Union cited, as well as the federal and state case law cited in those awards. Both the Omaha and Washoe County cases are distinguishable on the facts. In Omaha, the employe was to be questioned about off-duty criminal activity that was not, in itself, directly related to her job performance or duties and there was some dispute as to whether she had been given "use immunity". In both cases, the threat of criminal prosecution was much more direct. Here, Pauly had heard, through the grapevine, that Capt. Reiff had threatened criminal charges at a grievance meeting with regard to the removal of the inmate from his cell to take a statement. In Washoe County, the employe was not granted use immunity. In this case, the "Informing the Member" form states:

> 3. This is an internal administrative investigaion (sic), and the answers you give, or the fruits thereof, cannot be used against you in a criminal proceeding.

That is not a verbal promise from an individual, but a written affirmation of Department policy and, as such, a sufficient grant of immunity as to the use of his statements or their fruits against Pauly. In Lefkowitz v. Turley, 414 U.S. 70 (1973), a decision of the U.S. Supreme Court relied upon by the arbitrator in Omaha, the Court stated:

> **IV**
>
> We should make clear, however, what we have said before. Although due regard for the Fifth Amendment forbids the State to compel incriminating answers from its employees and contractors that may be used against them in criminal proceedings, the Constitution permits that very testimony to be compelled if neither it nor its fruits are available for such use. Kastigar v. United States, supra.
>
> . . .
>
> Also, given adequate immunity, the State may plainly insist that employees either answer questions under oath about the performance of their job or suffer the loss of employment. . .
>
> (At 84).

It appears from that discussion that the Court is speaking of "use immunity" and not immunity from prosecution altogether. The grant of use immunity in the "Informing the Member" form is sufficient to permit the County to insist that Pauly answer questions about what happened on his shift or face termination from employment, without violating his rights under the Fifth

Amendment.

The Union also asserts that the continued order to appear at the meeting, after Starks was made aware Pauly's chosen representative could not attend, violated Pauly's right to have his representative present. Both parties cite case law in support of their respective positions on this issue. To the extent that the Union argues that it was violative of Pauly's statutory right to representation for the County to continue to insist that Pauly appear for the 2:00 p.m. meeting after it was made aware that Rodenstein could not attend, and that, therefore, the order to appear was illegal at that point, the Arbitrator disagrees. The Union is essentially arguing that the law entitles an employe in this situation to the particular representative of his choice and that an employer must reschedule an investigation meeting to reasonably accommodate that representative's schedule, even though other union representatives are available. The principal case in the private sector is the U.S. Supreme Court's decision in Weingarten, Inc., supra, decided under the federal National Labor Relations Act. That decision has not been construed to require that an employer postpone an investigative interview because the specific union representative the employe requests is not available, as long as another union representative is available at the time set for the interview. Further, an employer is not obligated to suggest or secure alternative representation for the employe. 4/

The Wisconsin Employment Relations Commission, the agency responsible for administering the Municipal Employment Relations Act covering public sector employers and employes in Wisconsin, has not directly ruled on this question. In its decision in City of Milwaukee, 5/ however, the Commission held that certain situations fell within the scope of the right to representation recognized in Weingarten, and expressly noted that in one of those situations that the following was not being posited, "It is not an absolute right to so consult; it is not a reasonable opportunity to consult the representative in person (by telephone will suffice here); and it is not a reasonable opportunity to consult with a particular Association representative." 6/ (Emphasis supplied). The arbitration awards the Union cites in this regard are distinguishable, as those cases involved management, instead of the employe, selecting the employe's representative.

The Union cites the "Informing the Member" form that was read, and provided, to Pauly by Lt. Starks as giving Pauly the right to have the representative of his choice present at the meeting for consultation. In recognition of that right, Starks rescheduled the meeting to the

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4/ Patrick Hardin, ed., "The Developing Labor Law", Vol. I, 3rd ed., page 156, citing, Pacific Gas & Electric Co., 253 NLRB 1143 (1981); Roadway Express, 246 NLRB 1127; Coca-Cola Bottling Co., 227 NLRB 1276 (1977).

5/ Dec. Nos. 14873-B, 14875-B, 14899-B (WERC, 8/80).

6/ Ibid, p. 48.

afternoon of the next day. The Arbitrator does not read that right as being somehow more absolute than the right provided by law. In other words, that right does not necessarily require the County to postpone the meeting a second time in order to accommodate the schedule of the employe's chosen representative, rather than requiring the employe to choose a representative from among those who are available.

At bottom, the order that Pauly appear at the meeting even though his first choice as to a representative was not available, was not illegal on its face, and was not unreasonable to the degree that Pauly was justified in ignoring that order. Moreover, as the County points out, Pauly conceded on cross-examination that he had decided by 5:10 a.m. on June 30th that he was not going to work, nor to the meeting that afternoon with Lt. Starks, as he was without power and water, and that he made that decision before he was informed by Strunk that Rodenstein could not make it to the meeting that afternoon:

> Q At 8:30 in the morning, when you told -- you said you told Dian Strunk that you weren't going to be there at 2 o'clock in the afternoon, it was because you had no electricity?
>
> A Right.
>
> Q It was not because Mr. Rodenstein was not going to be there?
>
> A I didn't -- I wasn't aware that Mr. Rodenstein wasn't going to be there.
>
> Q At 8:30 in the morning you weren't going to be at the meeting at 2 o'clock and Mr. Rodenstein's presence or absence had nothing to do with it?
>
> A I don't understand the question, sir.
>
> Q At 8:30 in the morning, you told Dian Strunk that you weren't going to be there at 2 o'clock?
>
> A Right.
>
> Q For that 2 o'clock meeting?
>
> A Right.
>
> Q And 8:30 you did not know that Mr. Rodenstein wasn't

going to be able to make that meeting?

A Correct.

Q Because she didn't know at the time that Rodenstein wasn't going to be there?

A That's correct.

Q So it made no difference to you at 8:30 in the morning whether Mr. Rodenstein was going to be able to be there or not be there at 2 o'clock as to whether you would be at that meeting?

A I had said to Dian that I would not be able to make it because I was without electricity.

Q Right. My question to you is whether Mr. Rodenstein was going to be at the meeting or not or able to come to that meeting at 2 o'clock made no difference to you at 8:30 in the morning?

A I was unaware of what was going on then.

Q Did it make any difference to you whether he was there or not at 8:30 in the morning?

A Yes, it did.

Q You didn't know he was going to be there, did you?

A No.

Q At 8:30?

A No.

Q You weren't going to be there at 2 o'clock, at 8:30 in the morning you had already made up your mind that you were not going to that meeting at 2 o'clock?

A No. That's not true, sir.

Q Well, you just testified that you told Ms. Strunk at 8:30 in the morning that you would not be at that meeting at 2 o'clock because you had no electricity?

A Correct.

Q So you were not going to be at the meeting at 2 o'clock, were you? At that time in the morning, your intent was not to go to the meeting?

A That's correct.

Q Mr. Rodenstein's presence or absence from that meeting had nothing to do with your decision not to go to the meeting at the 2 o'clock meeting, at least as of 8:30 in the morning?

A No, sir.

Q Ms. Strunk called you back about a half hour later?

A Correct.

Q And that's when she told you Mr. Rodenstein couldn't come to the meeting?

A Right.

Q But as far as you were concerned, that made no difference, did it?

A No, sir, it didn't.

Q Because you weren't going to go to the meeting anyway?

A Because I was without power.

(Tr. 76-79).

It is clear from the above testimony that Pauly's decision not to attend the interrogation meeting the afternoon of June 30th was not based on Rodenstein's inability to be present for the meeting. That conclusion is further borne out by Pauly's conversation with Starks that morning.

The only express reason Pauly offered for not coming in was that he was without electricity. While the knowledge that Rodenstein could not make the meeting on June 30th, and that Lt. Starks would not reschedule the meeting, likely reinforced Pauly's decision not to attend the interrogation meeting, it appears he had made up his mind not to attend the meeting before he learned of these facts.

The next question then, is whether being without electricity and water was a sufficient basis for refusing to attend the meeting. For the following reasons, it is concluded that it was not. Pauly was aware at 5:00 a.m. that he had no electricity or water, but he did not know at that point how long that would be the case. The meeting was scheduled for 2:00 p.m. and Pauly's decision at 5:10 a.m. was, at best, premature. Further, there was ample time between 5:10 a.m. and 2:00 p.m. for Pauly to find a place to clean up and shave for the meeting, or he could simply have asked that his not being shaved and showered be excused under the circumstances.

The assertion that it was unreasonable for Starks to continue to insist that Pauly appear at the meeting even though he was off work due to the storm, in light of his having taken his and Wilkie's days off into consideration in scheduling her interview, is not persuasive. June 30th was not Pauly's scheduled day off and there is no evidence that the storm caused problems for him beyond the loss of power and water in his apartment. While it is true that Starks could have been more accommodating than he was, the fact that he was going to be on vacation for most of the first half of July and wanted to complete Pauly's interrogation before he left on vacation does not make his order to Pauly so unreasonable that Pauly was justified in taking the matter into his own hands by refusing to obey the order. It is a long-standing principle in labor relations that, with certain exceptions having been determined not to be present here, an employe is to obey now, and grieve later. Simply put, that means an employe must follow management's orders and then file a grievance if he/she feels the order violated the contract or was otherwise unfair or unreasonable. In recognition of that principle, and to avoid additional problems for Pauly, such as those that resulted, Rodenstein and Strunk wisely advised Pauly to attend the meeting with Starks on June 30th, as ordered. Pauly should have followed their advice. His refusal to appear at the meeting constituted insubordination.

Having concluded that Pauly's refusal to attend the meeting constituted insubordination, it is necessary to determine whether that conduct justified his being discharged. The Union offers several bases for mitigating the discipline in this case - the fact that Pauly's conversations with Starks and Niemetscheck were not in the presence of other employes, the length of Pauly's service in the Department and his good work record. Conversely, the County contends that it would be inappropriate for the Arbitrator to substitute his judgement for that of the County as to the level of discipline imposed, unless it acted arbitrarily, capriciously, or discriminatorily in discharging Pauly, which it asserts, it did not. The Arbitrator reiterates that one of the questions that must be decided in determining whether there was just cause for the discharge, is whether the level of

discipline imposed is justified by the employe's misconduct. 7/ In making that determination, the Arbitrator must consider the circumstances involved in each case. If it is determined that the punishment is too severe, the question becomes whether it is appropriate for the arbitrator to modify the discipline to a lesser penalty or whether to overturn the discipline altogether. The answer to that question often depends upon the parties' submission to the arbitrator. The Arbitrator notes that the parties submitted the issue of the "appropriate remedy under the contract" for his determination if it is determined there is not just cause for Pauly's discharge. Also, Section 26.05 of the Agreement provides:

> 26.05 Discharge - Not For Just Cause. If after proper hearing the employee is found to be innocent of charges filed, said employee may choose to return to his former position or a similar position within the County at the same rate of pay, with no loss of seniority, pay or fringe benefits. This may be modified by an arbitration award, but, in any event, the employee shall not receive more than his regular wages and benefits.

Although it initially speaks in terms of an employe found innocent of the charges, that provision goes on to infer that an arbitrator is authorized to modify a discharge to something less, as well as to completely overturn it. Given the nature of the issue of whether there is just cause and the parties' submission, it is necessary and appropriate to consider the circumstances present in this case in determining first whether discharge was justified, and if it is found it was not, whether lesser discipline is appropriate.

The County has a significant interest in maintaining discipline among its employes, and this is especially true in a law-enforcement setting such as the Sheriff's Department. It is also important for the Department to be able to carry out internal investigations of possible wrongdoing on the job by its employes. Pauly's refusal to show up for the meeting as ordered was damaging to that interest, in that generally it cannot be left up to the employe to decide whether he will appear, or when he will appear, for questioning in those situations. However, the likely effect on the Department's investigation of Pauly's refusal to appear on June 30th, along with the Union's attempt to reschedule that meeting, must also be considered. In this case, there would have been no real consequence, since Lt. Starks knew at the time that he had to wait for Nocek to return to work to question her before he could complete the investigation. The most significant consequence to the Department of Pauly's refusal to appear was the fact of the refusal itself and

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7/ See the discussion of Arbitrator Harry Platt, set forth in Elkouri and Elkouri, How Arbitration Works, supra, at page 668 and in Hills and Sinicropi, eds., Remedies in Arbitration (2nd ed.), along with that of Arbitrator Adolph Koven, at page 267.

the message that would send to the other employes in the Department if it were overlooked. There is, however, a legitimate need on the County's part to let employes know that a refusal to follow orders will not be tolerated.

As to the mitigating factors offered by the Union, the fact that Pauly's conversations with Starks and Niemetscheck were not heard by other employes goes primarily to what he said, rather than what he did. Pauly was discharged for not appearing as ordered for the interrogation meeting on June 30th, not for what he said in his telephone conversations with Starks and Niemetscheck. The reality in the workplace being what it is, the other employes in the Jail would have eventually become aware that Pauly had not shown up as ordered for the meeting. Therefore, the fact that Pauly's conversations with Starks and Niemetscheck were not in front of other employes does not merit much weight. There are, however, also the matters of Pauly's length of service and work record. Pauly had almost seven years in the Department at the time of his discharge and no record of prior discipline. He had received a letter of commendation from the Sheriff the year before, commending him for his past performance. We have then, a valued employe with fairly substantial years of service and no prior discipline who was guilty of a single instance of insubordination.

Given the limited impact of Pauly's insubordination on the Department's operation, Pauly's length of service in the Department and his good work record with no prior discipline, it is concluded that discharge was too severe a penalty for his insubordination. Nevertheless, given the fact that Pauly was warned several times of the possible severe consequences if he failed to appear as ordered, and the need to address the Department's interest in seeing that orders are obeyed, it is concluded that a thirty-day suspension without pay is warranted.

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

AWARD

The grievance is sustained to the extent that the County did not have just cause to discharge Thomas Pauly. Therefore, for the reasons discussed above, the discipline is reduced to a thirty (30) day suspension without pay. The County is directed to immediately offer Pauly reinstatement to the same or equivalent position he held in the Walworth County Sheriff's Department at the time of his discharge and to make him whole for the lost pay and benefits he would have received but for his termination, less the thirty (30) days without pay and less any compensation he has received from other employment he engaged in since his termination. For the limited purpose of resolving any disputes that may arise as to this remedy, the Arbitrator will retain jurisdiction in this matter for sixty (60) days from the date of this Award.

Dated at Madison, Wisconsin this 6th day of February, 1995.

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