BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between JUNEAU COUNTY PROFESSIONAL POLICE ASSOCIATION and JUNEAU COUNTY (SHERIFF'S DEPARTMENT)	Case 118 No. 53374 MA-9334

Appearances:

Cullen, Weston, Pines & Bach, Attorneys at Law, by Mr. Richard Thal and Mr. Lyle Rowen, appearing on behalf of the Union.

Bell, Metzner, Gierhart & Moore, S.C., Attorneys at Law, by Mr. Mark B. Hazelbaker, appearing on behalf of the County.

ARBITRATION AWARD

Pursuant to a request by the Juneau County Professional Police Association, herein the Union, and the subsequent concurrence by Juneau County, herein the County, the undersigned was appointed Arbitrator by the Wisconsin Employment Relations Commission on December 14, 1995 pursuant to the procedure contained in the grievance arbitration provisions of the parties' collective bargaining agreement, to hear and decide a dispute as specified below. A hearing was conducted by the undersigned on February 26 and 27, 1996 at the Juneau County Courthouse in Mauston, Wisconsin. The hearing was transcribed. The parties completed their briefing schedule on May 3, 1996.

After considering the entire record, I issue the following decision and Award.

STIPULATED ISSUES:

1. Did the County have just cause to discharge Deputy Strompolis?

2. If not, what is the proper remedy?

FACTUAL BACKGROUND:

General Background

On April 18, 1995, Juneau County Sheriff Richard McCurdy, hereinafter McCurdy, suspended Kim Strompolis, hereinafter Grievant, with pay "pending the completion of an investigation into a suspected discrepancy of MEG Unit funds and related matters." On April 19, 1995, at McCurdy's request, Special Agent Michael Myszewski, hereinafter Myszewski, of the Wisconsin Department of Justice, Division of Criminal Investigation, hereinafter DCI, commenced an eight-month criminal investigation of the Grievant for misconduct in public office. At or about this same time, the Sheriff's Department, hereinafter the Department, interviewed witnesses and received information concerning certain allegations against the Grievant primarily those related to the Rainbow Casino incident. By letter dated August 4, 1995, McCurdy informed the Grievant in writing of the proposed grounds for terminating him. McCurdy cited (1) the Grievant's inability to account for missing MEG funds in the amount of $1,031; and (2) his gambling in the Rainbow Casino on duty and falsely reporting time. On August 7, 1995, in response to an offer from McCurdy to talk about the proposed termination, the Grievant called McCurdy's office with some proposed dates for a meeting. McCurdy never confirmed a meeting time with the Grievant over the termination. The Grievant had no contact with any deputy sheriff from the Department in reference to the above allegations prior to August 8, 1995.

On August 8, 1995, McCurdy informed the Grievant by letter that he was being terminated from his position of Juneau County Deputy Sheriff. In said letter McCurdy noted that the Grievant was "provided with written notice of the grounds for dismissal and an opportunity to provide your version of the facts." McCurdy added with respect to his decision to terminate the Grievant:

> I have carefully considered many factors. I have considered that you have worked for the Department for many years. I also have considered your previous performance. On balance, none of the positive things I could find about your record with the Department outweigh the seriousness of the three matters related above. I regret that your actions have left me no alternative but to terminate your employment, effective immediately.

On November 8, 1995, a Department of Industry, Labor and Human Relations Administrative Law Judge (ALJ) upheld said department's initial determination that the Grievant was eligible for unemployment compensation benefits. In her decision ALJ Karen L. Godshall concluded:

> The employer's specific allegation with regard to misuse of work time related to the employe's having been at a casino on the

evening of February 24 during hours for which he claimed overtime pay. The employe has offered a reasonable explanation for his presence there, having to do with meeting officers from another jurisdiction with regard to undercover work. This explanation has not been effectively rebutted by the employer.

With regard to the complaint of mismanagement of funds, the employe was one of several individuals having access to funds used in undercover drug buys and for related purposes. The employer contends that over $1000 of that money was not accounted for. However, no evidence has been offered that would establish that the employe was responsible for any such loss.

The DCI investigation was concluded on December 1, 1995. Special Agent Myszewski interviewed the Grievant twice as part of the investigation. In his report, Special Agent Myszewski made the following observations:

> Detective Kim T. Strompolis was interviewed and denied stealing the $1,041.00. Strompolis stated that many individuals had access to the MEG unit buy funds. He stated that it was a common practice for the bank bag containing the buy funds to be passed around from member to member prior to, and during, undercover operations. Strompolis stated that it was not uncommon for members of other law enforcement agencies to handle the money bag during undercover operations.
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> . . .
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> All of the current and former members of the Juneau County MEG unit were interviewed. All of the members denied knowledge of what happened to the missing $1,041.00. The members of the MEG unit confirmed Strompolis' statement that the MEG unit money bag was passed from member to member during undercover operations.
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> RAINBOW CASINO
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> During the course of the investigation, an allegation was made that Detective Strompolis and another deputy, Steven Coronado, gambled at the Rainbow Casino in Wood County while on overtime

> status. It was also alleged that Strompolis and Coronado, along with two other law enforcement officers, used $141.00 in buy money for meals and gambling expenses at the Rainbow Casino.
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> The investigation revealed $141.00 was spent by a City of Marshfield officer in an undercover capacity at bars inside Juneau County. It was also learned that some MEG unit money was spent on meals for the four officers at the Rainbow Casino.

On January 24, 1996, Juneau County District Attorney Dennis Schuh notified McCurdy of Special Prosecutor Patricia Barrett's decision, based on Special Agent Myszewski's investigation, to decline any prosecution of the Grievant for official misconduct under Sec. 946.12, Stats. Schuh noted in his letter that "the investigation did not produce evidence to form the basis of a criminal complaint against anyone for the disappearance of the MEG funds."

Special Prosecutor Barrett's assessment of the proof against the Grievant included the following observations:

> The investigation indicated not only that numerous individuals handled the money, various procedures were put into place during the fund discrepancy and since the time frame is essentially an entire year, there is no detailed information . . . in pinpointing any one person as the culpable party.
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> Nothing in the investigation indicated that Detective Strompolis failed or refused to perform any known mandatory non-discretionary ministerial duty of his employment with the Juneau County MEG Unit.
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> Additionally, there is no evidence that Det. Strompolis performed any act which he knew was in excess of his lawful authority or was forbidden by law to do in his official capacity in handling the MEG Unit funds. There is no evidence to indicate that Det. Strompolis exercised any discretionary powers in a manner inconsistent with the duties of his employment on behalf of Juneau County with the intent to obtain a disadvantage for himself.

Barrett added with respect to the Rainbow Casino charges that based on the "limited information provided, these do not rise to the level of misconduct in public office." Barrett concluded regarding possible other criminal charges:

> While the case was referred to this office as a potential misconduct in public office charge, the facts, or lack thereof, developed during

> the DCI investigation were also evaluated based on any other chargeable criminal offense. Reviewing the necessary elements for a theft, contrary to Section 943.20 of the Wisconsin Statutes, again the investigation falls woefully short of any substantiated facts which would pinpoint Det. Strompolis by sufficient factual allegations to support a criminal complaint. While the shortage of funds is apparently uncontroverted, the broad time frame in which the funds allegedly were misdirected, along with the multiple individuals who had access to the funds, reporting of expenditures, etc., there is no basis to identify Det. Strompolis as a viable defendant for a successful prosecution.

MEG Unit

The MEG unit fund first came under Department scrutiny in 1990 when a meeting was held between then-Sheriff Orlando Bellini, hereinafter Bellini, and County Finance Committee member Ronald Brunner, hereinafter Brunner, regarding problems with the accounting procedures of the MEG funds. Bellini requested an audit of the MEG unit account. He also asked that the County hire a part-time bookkeeper to assist with the accounting of the MEG funds. Bellini's request for a bookkeeper stemmed in part from his concern that the accounting responsibilities of the MEG funds were an inappropriate burden for the Grievant in addition to his law enforcement work load.

At or about this same time, Bellini transferred $2,000 from the investigative account to the MEG fund because "we ran out of money in the drug account itself."

By letter dated January 25, 1991, the accounting firm Johnson Block, who performed the audit, found that no money was missing, but identified weaknesses in the procedures used in managing the MEG funds and made recommendations to improve them.

Lori Chipman, hereinafter Chipman, was hired as an auditor accountant by the County in March of 1992 in part to provide such assistance to the Grievant for managing the MEG fund. Chipman functioned as a "double-check" or backup on the MEG accounts. Every month Chipman received a bank statement of the MEG account and reconciled it with the receipts issued on the account for that month. Every March Chipman performed an annual reconciliation of the MEG account and the "buy bag" (the bag in which MEG unit funds are kept to fund undercover operations and to make drug purchases). Chipman maintains the MEG unit account and other County financial records in her computer. Chipman retains the detailed receipts which back up the account activities in a locked file cabinet in her office.

Beginning with the term of McCurdy in January of 1993, Undersheriff Robert Tyler, hereinafter Tyler, was responsible for MEG unit operations. Management of the MEG Account

and cash funds was shared by the Grievant and Tyler.

The Grievant was in charge of the field operations of the MEG unit and coordinating its activities with the other counties that were with the MEG unit. Tyler, however, approved individual operations on a day-to-day basis and the Grievant usually reported to Tyler the success of an operation from the previous night.

The Grievant was in charge of the buy bag. The buy bag was generally stored in the Grievant's office or with the Grievant. However, other MEG officers would also have possession of the buy bag and it was transferred among various MEG unit members. One officer (John Weger) even kept the buy bag at his residence overnight on several occasions for other MEG officers to stop by and take cash for use in undercover work in the area. On at least one or two occasions, the buy bag was left in Tyler's office for transfer to another officer. In December 1993, the buy bag, containing $1,500.00 in MEG funds, was stolen from the Grievant's office.

With respect to the financial details of the buy bag, the Grievant has been the second signature on the checking account used to finance the buy bag since 1989. The Grievant generally made out the checks and secured a second signature from either Bellini or Tyler. Statements for the MEG checking account were mailed directly to the Grievant.

Tyler sometimes cashed checks on the MEG fund account.

There was a procedure or numbered accounting system for putting cash in the buy bag and for withdrawing it for various purposes. The Grievant was responsible for assuring that the money in and out of it was properly accounted for. He maintained a case log book of MEG buys of illegal drugs which showed where funds were expended on drug purchase operations. However, when the buy bag was not in his possession the Grievant had "no way of knowing for sure that the money is accurately accounted for during those situations." The Grievant testified that in those situations he "would rely on . . . the receipts that the officer would turn in." The Grievant added that at no point did he think money was missing from the buy bag.

The Grievant was also responsible for timely filing of the MEG unit's quarterly financial reports.

On or about March 1995, the County Board voted to reorganize the Sheriff's Department management. Three supervisors (Captains) were hired to oversee operations of the Department. As part of the transition from former to future management, Tyler directed that there be an audit of all funds which were to be transferred to incoming managers. Said audit included the buy bag for the MEG unit.

An in-house audit was performed by Chipman which showed that $1,031 was missing. Chipman reported her finding to Tyler. Tyler was shocked over the missing money because "the

operations and checking with Lori Chipman . . . was going fine, everything was accounted for." Later, Tyler informed McCurdy and the Sheriff's Committee including Brunner of the missing money.

On April 18, 1995, Chipman reported to the Sheriff's Committee that her annual reconciliation found that $1,041.00 of the MEG funds was missing. On the same date the accounting firm Johnson Block reported agreement with Chipman's findings regarding the $1,041.00 discrepancy with the MEG account. On July 5, 1995, the accounting firm, McGladrey and Pullen, also reported a discrepancy in the MEG funds between January 1, 1994 and April 28, 1995. McGladrey and Pullen noted that said discrepancy "consisted of a $1,041 shortage, which had been identified by the County Auditor/Accountant, relating to the period January 1, 1994 through December 31, 1994 and a $10 overage relating to the period January 1, 1995 through April 28, 1995." McGladrey and Pullen audited the MEG unit's checking account and cash on hand and found five (5) discrepancies from MEG unit procedures mainly regarding lacking proper signatures or receipts. However, the McGladrey report was not prepared according to generally accepted accounting procedure. Consequently, the McGladrey report did not express an opinion on any of its findings. The McGladrey report added: "Had we performed additional procedures or had we made an audit of the financial statements in accordance with generally accepted auditing standards, matters might have come to our attention that would have been reported to you."

Rainbow Casino

At 6:30 p.m. on the evening of February 24, 1995, a meeting was scheduled at the Rainbow Casino between four officers of the multi-jurisdictional MEG unit of which the County is a member. The participating officers were the Grievant, Steve Coronado of the County, Detective Jackie Albers of the Marshfield Police Department, and Detective Randall Thurley of the Waushara County Sheriff's Department. The Casino was selected as the place to meet and conduct a briefing of the night's operations for two reasons: one, it was in close proximity to two other business that were going to be investigated later that night; and, two, Detectives Thurley and Albers wanted to make contact with a female subject who they had been buying drugs from. Albers first suggested meeting at the Casino so that she could make contact with the woman who was selling them drugs.

The official investigation to be conducted that night after the briefing at the Casino involved drug sales and video poker machines at two other Juneau County businesses, the Barn and Josie's Hideaway. Tyler had approved the Grievant and Coronado going to the Casino to meet the other aforesaid agents to work in Juneau County that evening but was unaware of any undercover investigation being conducted at the Casino that night.

Juneau County was the "host" county on the night of the meeting. That required the Grievant and Coronado to arrive before Albers and Thurley both as a courtesy and to determine whether known subjects of current or past investigations were at the Casino who would recognize

any of the officers, thereby blowing the cover of the officers for future work in the area if the officers were seen together by such subjects. Due to this responsibility of being the hosting county, it was appropriate for the Juneau County officers to be on-duty while waiting for MEG officers to arrive at the designated location. The Grievant informed Tyler on the morning of the meeting that Albers and Thurley might be late to the meeting because they would be working on an investigation in Wood County earlier and might get tied up. The Grievant explained that this might result in some down time, and asked if they should go forward with the investigation or reschedule. Tyler told him to go ahead with the operation.

The Grievant claimed overtime pay for the evening in question commencing at 5:00 p.m. He spent the first part of that time meeting Coronado, gathering equipment, getting the money pouch ready and moving some MEG vehicles around. Then they drove to the Casino. On the way up to the Casino, they stopped and "drove into a couple of places to take down license plates . . . to gather intelligence type information" for their operation.

The officers left the Mauston area at approximately 5:45 p.m. They arrived at the Casino about 6:15 p.m. They first drove around the Casino parking lot two times to look for "vehicles that might contain Detective Albers or Detective Thurley," but did not see them. Then the Grievant and Coronado went into the Casino, separated and circled the inside of the Casino including the snack bar area and the restaurant area in an unsuccessful attempt to find the MEG unit officers.

Detectives Thurley and Albers arrived at the Casino at approximately 6:30 or 6:45 p.m. and observed the Grievant gambling at the blackjack table with Coronado standing near him but not gambling. Upon arrival, Albers saw a woman from a prior investigation who knew her as a police officer. As a precaution, Albers distanced herself from Thurley who was conducting an investigation in the City of Marshfield so as not to blow his cover.

Tim Cottingham, another employe of the Sheriff's Department, testified that he saw the Grievant gambling shortly after he arrived at the Casino at approximately 7:30 p.m. Cottingham testified that the Grievant was at a blackjack table out in the open near the main entrance where he "could see people coming and leaving the Casino." The Grievant acknowledged Cottingham's presence, but said nothing about any undercover operation being underway. Later, Coronado informed him "we're MEG" so Cottingham distanced himself from him "because Deputy Coronado stated they were working, so I left the table."

Deputy Tom Czys was at the Casino with Cottingham, and also saw the Grievant. Czys testified that he arrived at the Casino sometime after 6:00 p.m. The Grievant greeted Czys informally and talked with him normally, never indicating any undercover work was going on.

Neither Albers nor Thurley regarded the time during which the Grievant was gambling as paid work time. Albers claimed pay starting at 9:00 p.m. that night. Thurley stated he started

working at 8:00 p.m. Thurley testified that he was unaware of any investigation or work going on at the Casino. Albers also testified that there was no investigation going on at the Casino, and it was solely a meeting place. However, Thurley said he did not openly greet the Grievant at the Casino to avoid blowing their cover. In addition, Albers testified that while she and Thurley went off the clock they did this without discussing it with the Grievant or Coronado whom "assumed that we were still working." Albers testified that the Grievant "felt he was in fact backing us up" because she has previously talked to him about functioning as a back-up in connection with meeting an employe of the Casino who had purchased cocaine from Albers and Thurley earlier that day, and who was scheduled to work at the Casino on February 24th. Said employe was not present at the Casino that night because she called in sick to work, however, the Grievant was unaware of this. Albers stated: "He made the logical assumption she was there, but she wasn't." Albers added that this misunderstanding was complicated because another woman (from Marshfield) was there, and the Grievant could have thought said woman was the woman from the Casino they were investigating. Albers testified that no one from the Juneau County Sheriff's Department contacted her regarding her activities at the Casino or The Barn tavern or Josie's prior to August 8, 1995. The day after the Grievant was terminated Captain Stavlo talked to her, and she "asked if I could ask a few questions and that it wouldn't take long, and I was told no." Albers wanted to explain the apparent misunderstanding noted above which caused the Grievant to believe he was in fact working as back-up to an investigation when, in fact, he wasn't because unknown to him the suspect was not present at the Casino. Albers explained: "I wanted to ask if anyone explained about the woman at the Casino and that we were working, and Mr. Tyler told me they were too busy."

Around 7:20 or 7:25 p.m. the Grievant and the other three officers went into the Casino grill and ate. They paid for the meal out of Juneau County MEG funds. Then, they left the Casino and went to the aforesaid two bars in Juneau County where they investigated drugs and video poker machines in the taverns. During these investigations, the Grievant and Coronado were the back up for Thurley and Albers. The Grievant and Coronado waited in the tavern parking lot in Strompolis' van. During this investigation, Albers used MEG unit funds to play video poker machines. Thurley drank beer at The Barn tavern.

PERTINENT CONTRACTUAL PROVISIONS:

ARTICLE XIII - DISCIPLINE/DISCHARGE

> Section 13.01: Employees may be disciplined or discharged for just cause. The County recognizes the principle of progressive discipline as part of its discipline practices.
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> Section 13.02: Discipline shall consist of: oral warning/reprimand, written warning/reprimand, suspension, demotion, or discharge.

Section 13.03: No person shall be deprived of compensation while suspended pending disposition of departmental charges.

Section 13.04: Any discipline or discharge may be appealed through this Agreement's grievance procedure, consistent with the following:

A. Should the County choose to adopt the grievance procedure contained in Wis. Stats. S. 59.21(8)(b), any discipline or discharge which is imposed or sustained by the County's Grievance Committee may either be appealed through the grievance procedure of this Agreement or to Circuit Court under Wis. Stats. S. 59.21(8)(b)6. Where an employee appeals action imposed or sustained by the County's Grievance Committee to Circuit Court under Wis. Stats. S. 59.21(8)(b)6, said employee waives the right to appeal the action through this Agreement's grievance procedure.

. . .

PARTIES' POSITIONS:

The Union initially argues that the County's decision to terminate the Grievant failed to satisfy the "just cause" standard set forth in sec. 13.01 of the parties' collective bargaining agreement. In support thereof, the Union relies on the seven tests to determine whether just cause exists for sustaining disciplinary action set forth by Arbitrator Carroll R. Daugherty in Enterprise Wire Company, 46 LA 359 (1966) and incorporated into law protecting deputy sheriffs of the state against unjust discharge. Sec. 59.21(8)(b)5m., Stats. The Union argues that a negative finding to one or more of the seven tests or inquiries means that just cause either was not satisfied or at least was seriously weakened by the presence of some arbitrary element citing A. Koven & S. Smith, Just Cause: The Seven Tests 23-24, 23 (2nd ed. 1992). The Union maintains that the County flunked three of the just cause tests in this dispute. First, the County did not provide reasonable notice to the Grievant that his conduct placed him at risk for discharge. Second, the County did not investigate the alleged misconduct until after the discharge penalty was imposed. Finally, the County failed to prove that the Grievant violated a single departmental rule or regulation.

In particular, the Union argues that the County failed to show just cause for discharging the Grievant for his inability to account for missing MEG unit funds because the County failed to provide the Grievant with notice that he was solely responsible for balancing the MEG unit fund account and that his inability to account for MEG funds would result in his discharge. The Union

notes that the Grievant never held exclusive responsibility for or access to the MEG funds, and received no prior discipline for previous problems involving MEG funds. The Union adds that the County did not make a reasonable effort to discover whether the Grievant did in fact mismanage MEG funds before imposing discharge and failed to prove that he in fact mismanaged said funds.

The Union also argues that the County failed to show just cause to discharge the Grievant for gambling while on duty because the Grievant did not have reasonable notice that his gambling at the Casino would result in his discharge since his activities there followed Department policy for undercover assignments, and the circumstances at the Casino warranted undercover conduct. The Union again attacks the County's failure to make a reasonable effort to discover whether the Grievant violated Department policy by gambling on-duty or to prove he lacked an undercover justification for gambling on duty.

The Union further argues that the success of the County's MEG unit demonstrates the Grievant's competency to manage the unit.

Based on the above, the Union requests that the Arbitrator sustain the grievance and reinstate the Grievant and make him whole for all compensation lost as a result of the County's action. The Union also requests that if he finds the County did not have just cause to discharge the Grievant, the Arbitrator retain jurisdiction over the matter until the County complies with the Award.

Conversely, the County maintains that the Grievant was discharged for just cause. In this regard, the County first argues that the Grievant violated work rules and standards by gambling while on duty at the Casino. The County opines that the Grievant engaged in improper conduct while at the Casino because in effect the Grievant had "decided to stretch what was at best a minor operation into an excuse for overtime and a paid trip to the Casino," and because the Grievant was not engaged in any operation while at the Casino since neither Albers nor Thurley regarded the time which the Grievant was gambling as paid work time and the Grievant did not act like he was undercover when greeting Cottingham and Czys at the Casino.

The County next argues that the Grievant's inability to account for more than $1,000 of cash entrusted to him also constituted just cause for discharge. In this regard the County maintains that the Grievant should have exercised due care to assure that no funds were lost. The County maintains that the Grievant's contention that since many officers had access to the buy bag it is impossible to pin the rap on anyone ignores the fact that the Grievant was responsible for MEG unit operations. The County notes that when the buy bag first came up short in 1990 it refinanced the cash fund, and warned the Grievant "to have the cash and receipts, or not to have the bag at all." The County adds that it has a right to expect employes to account for cash which has been furnished them in the course of their official duties. In conclusion, the County opines that what is most troubling in this case "is the clear absence of integrity on the part of the Grievant" suggesting the Grievant had "gone over the line" by acting more like a criminal than a law enforcement

officer and by relying on his defense in this case on "not what is right or wrong, but rather, what can be proven."

In its reply, the County argues that the Union's reliance on a lack of criminal charges is irrelevant because the filling and adjudication of criminal charges are governed by a different standard than the instant proceeding, because it would be illegal to base employment decisions on an arrest record citing Sec. 111.31, Stats., and because although the Grievant may have escaped criminal prosecution for his actions "that's not the same thing as a determination that he did nothing wrong."

The County also rebuts the Union's contention that the timing of the Grievant's termination undermines its validity because at the time of discharge it was aware of two grounds, at issue herein, for terminating him.

The County further argues that the Grievant cannot escape responsibility for the buy bag by arguing that he was just one of the team. The County notes that as a police officer he had a special responsibility to prevent property from disappearing.

In addition, the County argues that the Grievant's conduct at the Casino bordered on the criminal. The County decries the Grievant's loss of an internal moral compass and claims the Grievant's entire conduct went over the line from necessity to evil. The County opines:

> The Rainbow Casino incident is a paradigmatic example of how the necessary evil of undercover drug enforcement can suffer from a blurring of the line between necessity and evil. . . . Strompolis is clearly a person who lost all perspective in the process and began to define propriety by his own internal compass, unaware how far he had drifted from true north.
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> Such an attitude can rationalize charging the County for two hours of overtime pay to gamble in a casino. It leads to constructing stories of undercover scams where there were no scams and to invention of back-up tactics where there were no operations in which they needed to be employed. . . .
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> The Union's elaborate rationalization of the events at the casino simply do not rebut the plain facts. Strompolis was not on the payroll and at the Casino to back up Thurley or Albers. He was there to amuse himself and bank a little extra overtime in the bargain. By coincidence, he ran into other deputies who related to management what they saw. That resulted in this small segment of Strompolis' web of deception being uncovered.

The County concludes by stating: "The saddest commentary of all concerning Strompolis is that he apparently does not believe he has done anything improper."

The County asks that the Arbitrator deny the grievance.

DISCUSSION:

Just Cause

At issue is whether there is just cause to terminate the Grievant.

The County argues that there was just cause for the Grievant's discharge while the Union takes the opposite position.

The Union applies "the seven tests" standard. This is an analytical framework devised by the late Carroll R. Daugherty, a Professor of Labor Economics and Labor Relations at

Northwestern University and well-established arbitrator. It was his attempt at defining just cause. His approach has its critics 1/ and its shortcomings.

The Union also argues that Wisconsin law protects deputy sheriffs against unjust discharge by adopting the seven tests for just cause. 2/ Sec. 59.21(8)(b)5m., Stats. provides:

> 5m. No deputy may be suspended, demoted or discharged by the grievance committee under subd. 3. or 5., based on charges filed by the sheriff, undersheriff or a majority of the members of the civil service commission for the selection of deputies unless the committee determines whether there is just cause, as described in this subdivision, to sustain the charges. In making its determination, the committee shall apply the following standards, to the extent applicable: (Emphasis added)

However, the Grievant was not discharged by a County grievance committee pursuant to this statute (Joint Exhibit No. 5), nor did the Union make any persuasive argument that the Grievant is covered by the aforesaid Wisconsin law adopting the "seven tests of just cause" protecting deputy sheriffs from unjust discharge in certain instances. Therefore, the Arbitrator finds that Sec. 59.21(8)(b)5m., Stats. does not apply to the Grievant herein.

The County "agrees that this case is governed by the familiar 'just cause' standard for evaluating progressive discipline," but makes no reference to any specific tests or standards for the Arbitrator to apply for deciding the just cause of the Grievant's termination herein.

Since it is unclear that the parties share an understanding on the use of the Daugherty or any other just cause standards, the Arbitrator will apply his own test.

This Arbitrator believes there are two basic and fundamental questions in any case involving just cause. One is whether the employe is guilty of the actions complained of, which the County herein has the duty of so proving by a clear and satisfactory preponderance of the evidence. If the answer to the first question is affirmative, the second basic question is whether the punishment is contractually appropriate, given the offense.

Applying the above standard to the instant case, the Arbitrator first turns his attention to

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1/ See, for example, John E. Dunsford, "Arbitral Discretion: The Tests of Just Cause," Proceedings of the 42nd Annual Meeting, National Academy of Arbitrators, ed. Gladys W. Gruenberg (Washington, D.C.: BNA Books, 1990), 23.

2/ Sec. 59.21(8)(b)5m., Stats.

the question of whether the Grievant is guilty of the actions complained of.

MEG Unit

The County first charges the Grievant for his failure to account for missing MEG unit funds in the amount of $1,031. However, a criminal investigation into the matter by the Department of Justice requested by the Sheriff failed to produce evidence of criminal wrongdoing. Special Prosecutor Barrett's assessment of the proof against the Grievant included these observations: one, nothing in the investigation indicated the Grievant "failed or refused to perform any known mandatory non-discretionary ministerial duty of his employment with the Juneau County MEG Unit"; two, there is no evidence the Grievant "performed any act which he knew was in excess of his lawful authority or was forbidden by law to do in his official capacity in handling the MEG Unit funds", and, three, there is no evidence he "exercised any discretionary powers in a manner inconsistent with the duties of his employment on behalf of Juneau County with the intent to obtain a disadvantage for himself."

In a non-criminal area, a DIHLR ALJ(Unemployment Compensation) concluded with respect to the missing MEG monies that there was no evidence the Grievant "was responsible for any such loss."

Two County audits found no evidence of wrongdoing.

The County argues, contrary to the above, that the Grievant should have exercised due care to assure that no funds were lost. However, the Grievant followed all the rules and regulations pertaining to the handling of the buy bag. There is no evidence in the record, nor does the County allege, that the Grievant was deliberately or grossly negligent in his handling of said bag. The County does argue that the Grievant "failed to monitor the bag's fiscal condition, thereby permitting the fund to become more than $1,000 out of balance." However, the County offered no persuasive evidence or testimony in support of same. To the contrary, the record indicates, as noted above, that the Grievant followed the prescribed procedure for handling the buy bag. 3/ He always cooperated with Lori Chipman, County auditor accountant who was responsible for auditing funds which financed the operation of the MEG unit. 4/ The Grievant provided to Chipman receipts and other information about the buy bag on a regular basis. 5/ The Grievant filed quarterly reimbursement reports to the Office of Justice Assistance on a timely basis. 6/ He filled out Cooperative Investigation Data Report forms on nightly MEG unit

3/ Tr. Vol. I at 207.

4/ Supra, at 206.

5/ Supra, at 197.

6/ Tr. Vol. II at 10.

operations as required. 7/ The Grievant replenished the buy bag as needed. 8/ He filed and submitted receipts. However, he did not evaluate them. 9/ While he was responsible for the safety of the buy bag, particularly when it was in his possession, 10/ the Grievant had no way of knowing for sure whether the money was accurately accounted for when the bag was out of his possession. 11/ He would rely on the receipts that the officer would turn in. 12/ The Grievant accumulated and submitted receipts, but basically relied on Chipman to assure the money was accurate. 13/ Chipman did not discover money was missing during her monthly audit, or in her year end review only becoming aware of the missing money when asked to do a special audit in March, 1995. 14/ Based on all of the foregoing, the Arbitrator finds that the Grievant monitored the buy bag as per the practice and procedure of the County. Contrary to the County's assertion, there simply is no persuasive evidence that the Grievant was responsible for the missing funds.

The County argues, however, that the Grievant was in charge of and responsible for MEG operations, and cannot avoid culpability by saying that he was just one of the team.

The record is undisputed that the Grievant was the MEG unit coordinator. Indeed, Undersheriff Robert Tyler testified that the Grievant had a good reputation as the MEG unit head. 15/ His unit had made a lot of arrests. 16/ According to former Sheriff Orlando Bellini the MEG unit was one of the best in the state. 17/

7/ Supra, at 12.

8/ Supra, at 72.

9/ Supra, at 58.

10/ Supra, at 26.

11/ Id.

12/ Supra, at 27.

13/ Supra, at 25.

14/ Tr. Vol. II at 193.

15/ Tr. Vol. I at 120.

16/ Id.

17/ Supra, at 168.

However, Undersheriff Tyler had overall responsibility for the MEG unit. 18/ Chipman provided assistance to the Grievant for managing the MEG fund, and functioned as a "double-check" on the MEG accounts. 19/ Tyler also exercised financial control over MEG unit funds, 20/ reviewing matters on a monthly basis. 21/ All members of the MEG unit had access to the buy bag at various times.

Because at least three people -- Tyler, Chipman and the Grievant -- shared financial authority and/or responsibility with respect to the finances of the MEG unit; because so many people had access to the buy bag and because the County did not offer any persuasive evidence that the Grievant was directly responsible for the missing funds, and based on all of the above, the Arbitrator finds it reasonable to conclude that the County did not prove charge number one against the Grievant that he failed to account for missing MEG unit funds. The Arbitrator next turns his attention to the Rainbow Casino matter.

Rainbow Casino

The County makes a number of arguments in support of its charge that the Grievant violated work rules and standards by his conduct at the Rainbow Casino. In particular, the County charges the Grievant decided to stretch a minor operation into an excuse for overtime and a paid trip to the Casino, that the Grievant was not working undercover or in an operation at the Casino, that it was improper to charge the County overtime for the time in question, that he improperly gambled while on work time and that the undercover operation in Juneau County later that evening did not warrant the resources committed to it.

The County, however, does not offer any persuasive evidence or testimony to support these claims. To the contrary, the record indicates that the Grievant acted within his authority as a deputy sheriff and MEG Unit member on the date in queston.

In this regard, the Arbitrator first points out that Undersheriff Tyler approved the operation, even when he was informed of the potential for overtime.

Detective Albers, not the Grievant, suggested meeting at the Casino because it was a convenient meeting place for the undercover operation which followed.

18/ Tr. Vol. II at 79.

19/ Tr. Vol. I at 186.

20/ Supra, at 108.

21/ Supra, at 106.

There is nothing in the record to support a finding that the Grievant engaged in any improper activities prior to arriving at the Casino. The Grievant met Coronado in Mauston, prepared for the undercover operation later that night, moved some police cars, and drove to the Casino stopping along the way to do some surveillance at businesses which would be investigated later.

Upon arriving at the Casino, the Grievant and Coronado drove through the parking lot two times in an unsuccessful attempt to identify vehicles that might contain Detective Albers or Detective Thurley. They then went into the Casino in an attempt to locate said officers. 22/

While the Grievant and Coronado arrived early at the Casino pursuant to their obligation as the "host" County, Albers and Thurley were late. 23/ Since the Grievant and Coronado could not locate Albers and Thurley in the Casino, they split up with the Grievant sitting at a blackjack table near the main entrance with a good view of Casino patrons. The record does not support a finding that this violated Department procedure.

The Grievant proceeded to play blackjack which the County objects to. However, there was no Department rule or regulation prohibiting same. To the contrary, Undersheriff Tyler admitted that the County policy against drinking and gambling while on duty did not apply to MEG unit members. 24/ In fact, there is no dispute in the record that undercover officers are permitted to engage in typically prohibited conduct so as to facilitate their undercover identity and blunt any suspicions by parties under investigation. 25/ Such activities include gambling such as playing blackjack. "If you're in a Casino and you're not gambling", you don't look normal. 26/

The County argues, contrary to the above, that the Grievant was not involved in any operation or investigation at the Casino that night. It is true, as pointed out by the County, that Albers and Thurley did not go to the Casino on February 24, 1995 for the purpose of working an

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22/ The County suggests that the Grievant and Coronado should have remained in their car in the parking lot to wait for the other MEG unit members. However, it was preferable for them to go inside rather than wait outside. Tr. Vol. I at 33. In fact, if they stayed in the parking lot they ran the risk of being contacted by casino security, and having their cover blown. Supra, at 61.

23/ Tr. Vol. I at 23.

24/ Supra, at 170.

25/ Tr. Vol. I at 38-39, 69 and 170. Tr. Vol. II, at 31.

26/ Tr. Vol. I at 60.

undercover drug investigation. 27/ However, the Grievant and Coronado were unaware of this. To the contrary, Albers testified unrefuted by the County that the Grievant was under the impression which Albers did not have the opportunity to correct when she arrived at the Casino and saw the Grievant that he was providing backup for her investigation of a female subject who was selling drugs. 28/ Albers testified that no one from the Sheriff's Department contacted her prior to the Grievant's termination and that when she attempted to explain this apparent "misunderstanding" to the Department immediately after his discharge she was told "they were too busy" to listen. 29/ Based on all of the foregoing, particularly Albers' testimony that the Grievant assumed we were working and that he was providing back-up 30/ as well as the Grievant's responsibility as the host county for being there early which was approved by the Under-Sheriff 31/ the Arbitrator finds it reasonable to conclude that the Grievant was properly engaged in MEG unit operations on February 24, 1995.

27/ Supra, at 49.

28/ Supra, at 63-65.

29/ Supra, at 66.

30/ Supra, at 53.

31/ It is undisputed that time spent waiting for someone from another county to come and perform undercover work is time spent working. Supra, at 72.

The County claims it was unnecessary to have four officers involved in the disputed operation. However, it was standard operating procedure to work in at least a team of two for backup, and in dangerous situations there could be as many as four as backup. 32/ Officers who are actually working undercover try to work in pairs for safety purposes. 33/

The County also attacks the undercover operation which occurred later that evening at two Juneau County bars as a "scam," designed to serve as an excuse for the Grievant to have a paid trip to the Casino to play blackjack. However, as noted previously, Undersheriff Tyler approved those operations, which included investigation of drug dealing as well as video poker machines. 34/ The County does not argue, nor does the record support a finding, that investigating illegal drug sales and illegal gambling are not proper law enforcement goals. For these reasons, the Arbitrator rejects this argument of the County as well.

Finally, the County argues that the casino incident is a blatant attempt to defraud the County of overtime money. However, the record does not support a finding regarding same. To the contrary, as noted above, the record indicates the Grievant was involved in proper law enforcement duties on the night in question. A conclusion that the County did not prove the Grievant violated any Department rules and standards by gambling while on duty at the Rainbow Casino is supported by the record and is consistent with the findings of the criminal investigation, Special Prosecutor Patricia Barrett, Juneau County District Attorney Dennis Schuh and the aforesaid Administrative Law Judge.

32/ Tr. Vol. II at 24.

33/ Supra, at 31.

34/ Tr. Vol. I at 102.

Based on all of the above, and the record as a whole, the Arbitrator finds that the County did not sustain its burden of proving that the Grievant was guilty of failing to account for the missing MEG unit funds or that he improperly gambled in the Rainbow Casino while on duty and falsely reported his time. To the contrary, the record indicates that the Grievant followed Department policy, procedure and practice regarding the matters in dispute. 35/ Consequently, the Arbitrator concludes that the County did not have just cause to discharge the Grievant, Deputy Kim Strompolis, and that the County violated the parties' collective bargaining agreement by doing same. Inasmuch as the County has not proven that the Grievant is guilty of the actions complained of, it is unnecessary to address the Union arguments with respect to the other elements of just cause such as proper notice to the Grievant that his conduct placed him at risk for discharge or that the County conducted a proper investigation prior to discharge. It will also be unnecessary to look at other elements of just cause not cited by the Union like consideration of the Grievant's prior work record.

In light of the foregoing and the record as a whole, and in the absence of any persuasive evidence or argument to the contrary, it is my

AWARD

The grievance of Kim Strompolis is sustained. The County is ordered to immediately reinstate the Grievant, restore to him all his rights under the collective bargaining agreement, remove from his employment record all references to the subject termination and take whatever other steps are necessary to adjust its records so that they do not contain any reference to the discharge and make the Grievant whole for the loss of wages and benefits he experienced as a result of the County's action, less any interim earnings. Pursuant to the Union's request, and absent an objection from the County, the Arbitrator will retain jurisdiction over the application of the remedy portion of the Award for at least sixty (60) days to address any issues over remedy that the parties are unable to resolve.

Dated at Madison, Wisconsin this 1st day of August, 1996.

By Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator

35/ Given the buy bag's history, the County might want to implement a new system of controls/oversight in order to avoid future losses of public monies.