

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

WISCONSIN PROFESSIONAL POLICE
ASSOCIATION, LAW ENFORCEMENT
EMPLOYEE RELATIONS DIVISION

and

MANITOWOC COUNTY

Case 317
No. 53859
MA-9471

Appearances:

Mr. Gordon E. McQuillen, Cullen, Weston, Pines & Bach, Attorneys at Law, 20 North Carroll Street, Madison, Wisconsin 53703, appeared on behalf of the Association.

Mr. Robert Zeman, Attorney at Law, Corporation Counsel, Manitowoc County, Manitowoc County Courthouse, 1010 South Eighth Street, Manitowoc, Wisconsin 54220, appeared on behalf of the County.

ARBITRATION AWARD

On February 26, 1996, the Wisconsin Professional Police Association, Law Enforcement Employee Relations Division filed a request with the Wisconsin Employment Relations Commission to have the Commission appoint Jane B. Buffett, a member of its staff, to hear and decide a dispute between the Association and Manitowoc County. The matter was thereafter assigned to Ms. Buffett. Due to the subsequent unavailability of Ms. Buffett, the above-captioned parties, on March 25, 1996, requested the Commission to appoint William C. Houlihan, another member of its staff, to substitute for Ms. Buffett. The Commission, on April 1, 1996, appointed the undersigned to hear and decide the matter. A hearing was conducted on May 21-22, 1996 in Manitowoc, Wisconsin. A transcript of the proceedings was made and distributed. Post-hearing briefs and reply briefs were filed and exchanged by September 3, 1996.

This dispute involves the termination of Deputy John Branson.

BACKGROUND AND FACTS

As of the date of his discharge, John Branson had been employed by the Manitowoc County Sheriff's Department for just under five years as a Deputy Sheriff. The events immediately giving rise to his discharge occurred on September 3, 1995.

On September 3, 1995, Deputy Branson stopped a Mr. Gruber for speeding on Interstate 43. According to Branson, Gruber was intoxicated and was arrested for drunk driving.

There were three other individuals in Gruber's car, and Branson called for backup. Deputy Tackes came to assist. It was Branson's testimony that Gruber began yelling obscenities, claimed that he would kill himself, and began slamming his head against a cage in the squad car. As Branson and Tackes attempted to subdue Gruber, it is Branson's testimony that Gruber began to kick him, spit at him and attempted to bite him. According to Branson, Gruber hit his head on the metal cage divider and injured himself such that he was bleeding significantly. Tackes called for an ambulance. Gruber began to yell and claim that Branson had hit him with a flashlight. Ultimately, Gruber was placed on a gurney where he laid still with his eyes closed. Branson applied a gauze pad to the head injury. Ultimately, ambulance personnel came, put Gruber in an ambulance and took him to the hospital. Tackes, and others, corroborate Branson's description of the events described above.

Branson proceeded to the hospital. Upon his arrival at the hospital, he asked Tackes to borrow Tackes' tape recorder. Branson's squad car had been issued a tape recorder, however, Branson was out of tapes. It is his testimony that he borrowed Tackes' tape recorder in order to protect himself from allegations that he had abused Gruber. It is his testimony that he never laid the tape recorder down anywhere. He indicates that at all times he was in possession of the tape recorder, it was in his hand.

Once in the emergency room, Branson testified that a nurse (Ms. Pautz) advised the officers that Gruber had indicated he did not want the police in the room. The nurse asked if the officers would step outside, and Branson indicated a willingness to step outside but not to close the door. It is his testimony that given his physical proximity, he could hear everything that was being said between Gruber and the patient care personnel. Branson testified that he was unwilling to leave an individual who had previously been violent in a room alone with a nurse. It is his testimony that he subsequently determined that he would leave the scene and complete his paperwork on the matter, and he then gave the tape recorder back to Officer Tackes. He asked Tackes to do his best to tape record any outburst that might occur.

Gruber was subsequently taken to the X-ray room by Sharon Shaw, an X-ray technician. There are contentions that the Deputy's, and specifically Branson, engaged in efforts to tape record Gruber while in the Emergency Room, and while he was in the X-ray room.

Branson testified that he subsequently called the hospital, and spoke with Ms. Pautz for the sole purpose of getting names, addresses and phone numbers of attending personnel. Branson does not recall any substantive discussion with Ms. Pautz. The phone call came from the squad room of the Sheriff's Department whose phone line is taped on an ongoing basis.

On or about September 13, 1995, Sheriff Thomas Kocourek received the following letter from Sue Woepse, Director of Nurses, and Debra Frenn, vice-president of Holy Family Memorial Medical Center:

Dear Sheriff Kocourek:

The following events were reported to me by an RN regarding incidents that occurred September 3, 1995 (early Sunday morning). The RN was working the night shift in ER on that day.

A patient was brought in by ambulance with police escort, handcuffs intact. The patient told the ER nurse that the police officers had beaten him up. The nurse was asking the patient questions about his past medical history. The patient stated he would not answer the questions with the police officers present in the room. The officers stepped out of the room, and the nurse questioned the patient. The patient apparently was cooperative and answered the questions. After the interview, the RN noted the small tape recorder on the counter among other police items on the counter. The nurse questioned the police officer about the tape recorder and asked if they were taping the conversation. They responded affirmatively, but told the nurse the taping was not used to incriminate the nurse. The officer stated to the nurse that the purpose of the tape recorder was for "a memory problem". The X-ray technician on duty that night also reported that while taking X-rays of the same patient in the X-ray room, she noticed a small tape recorder on the counter. She noted it was turned on and running. She stated there were three County officers outside the X-ray room at the time; the Shift Commander, John Branson, and the K-9 Officer. She confronted them about the tape recorder. They stated they were taping the conversations of the patient, but the X-ray tech should not worry about it. Both the RN and the X-ray tech were very concerned about being taped without their prior knowledge of it, or their consent. The RN also voiced concern about the patient not having knowledge of being taped.

This matter is of great concern to me. I would appreciate you looking into this matter and responding as soon as possible.

Upon receipt of the letter, Sheriff Kocourek was concerned that, as described, the conduct constituted a potential violation of Wisconsin's criminal code. An investigation into the potential criminal behavior was initiated. In order to avoid the potential conflict of interest, the criminal investigation was conducted by the District Attorney for Milwaukee County. The investigation was initiated shortly after September 15, 1995, and concluded by summary letter dated January 3, 1996. One of the allegations was that Branson struck and choked the patient (Gruber) while Gruber was in his control. The District Attorney's office found that Gruber's allegations were

inconsistent with the testimony of both police officers who were present as well as paramedics called to the scene. There was physical evidence corroborating Branson's account of the events, and directly contradicting Mr. Gruber's contentions. Altogether, the physical evidence, the observations and the impressions of both Sheriff's Department deputies and both paramedics called to the scene support Branson's account of the events.

The Milwaukee County District Attorney also investigated the allegation that Branson had tape recorded Gruber while he was in the X-ray room and/or in the emergency room. In very conclusory fashion, the District Attorney indicates that while Branson did tape record a portion of the proceedings, that he thereafter turned the tape recorder off when requested to do so and thus lacked the requisite intent to intercept oral communications, an element of the criminal offense. The Milwaukee County District Attorney concluded that criminal charges were not warranted.

Sheriff Kocourek, assisted by Sergeant Hermann, conducted an investigation into this matter independent of that conducted by the Milwaukee County District Attorney. The Sheriff interviewed Gary Tackes, Kurk Bessler (a third deputy on the scene), Therese Pautz, and Sharon Shaw. His investigation is summarized by typewritten notes. His notes with respect to his interview of Tackes indicate that Tackes advised him that Branson had the tape recorder while the parties were in the emergency room and that when they left the emergency room, Branson handed the machine to Tackes. His notes further indicate that Tackes believes he carried the tape recorder to the X-ray room and laid it on the counter near the door. Tackes indicated that he did not turn the recorder on. The Sheriff's notes with respect to Bessler indicate that Bessler observed the tape recorder on a counter in the emergency room, next to where Branson was standing. The Sheriff's notes with respect to Pautz indicate that she observed what she believed to be a small tape recorder in the emergency room. She indicated that she was subsequently told by the X-ray technician that the tape recorder had been running while in the X-ray room. She further recounted her subsequent telephone conversation with Branson. The Sheriff's interview with Ms. Shaw indicated that Shaw observed the tape recorder on a shelf near the X-ray technician's booth. Shaw indicated that all three officers (Bessler, Branson, and Tackes) were near the doorway. Shaw also indicated that the machine was turned on.

As a part of the investigatory process, an administrative hearing was convened on February 6, 1996. Numerous people were in attendance. The Sheriff was asked to afford Deputy Branson his "Garrity" rights and declined. Branson was invited to explain his side of the story, and declined.

The investigation was concluded and the Sheriff determined to discharge Branson, and did so by the following letter, dated February 15, 1996:

Dear Mr. Branson:

In a 23-month period of employment with the Manitowoc County

Sheriff's Department you have been disciplined on two separate occasions.

On 10-27-93, you falsified a document involving attempted service of civil process. This resulted in a 12-day suspension for a violation of Sheriff's Department policy and procedure involving obedience to laws, falsification of a report and untruthfulness.

The second incident on 8-25-95 involved your violation of state law by speeding 28 miles an hour over the posted speed limit. This occurred while you were on duty in a marked Manitowoc County squad car, during the hours of darkness, while with a ride along passenger. You received a three-day suspension.

Now a third incident has occurred, which took place on September 3, 1995. A person in custody was transported to the Holy Family Memorial Medical Center emergency room for treatment. It appears, after a thorough investigation of the facts, that while at the facility you used a tape recorder to intentionally intercept and record oral communications in a manner inconsistent with the behavior expected of a law enforcement officer and in apparent violation of Wisconsin Statute 968.31(1).

This is the third incident in which you have shown total disregard for this Department's policies, mission and values. Attempts to correct this type of unacceptable behavior have failed. You continue to fail to meet this Department's expectations regarding your job performance. I have no choice but to terminate your employment with the Manitowoc County Sheriff's Department effective immediately.

Sincerely,

Thomas H. Kocourek /s/
Thomas H. Kocourek
Sheriff
Manitowoc County

Mr. Branson's previous disciplinary record contains a number of entries, the first of which involved an incident where Deputy Branson attempted to turn his vehicle around using the highway median, got stuck and had to be pulled out by a tow truck. He was given a verbal

reprimand for that incident.

The second of those entries involves an incident which occurred on or about July 22, 1993. Branson was called to the scene of an automobile accident. A large crowd had gathered and was interfering in the efforts of firefighters attempting to secure the release of a passenger trapped inside an overturned vehicle. Frustrated at his inability to get two individuals to give firefighting personnel sufficient working room, Deputy Branson, who was himself the subject of verbal abuse, yelled, "Get the f--- out of here!" at the two. A verbal confrontation ensued. Officer Branson was given a verbal warning for the use of inappropriate language.

The third disciplinary entry in Deputy Branson's record involved a serious matter which occurred on or about October 27, 1993. On that day, Branson, accompanied by a deputy in training, was given process to be served on an individual. Branson did not attempt to deliver the process, but indicated that he had made an unsuccessful attempt to do so. The Department charges a fee for service attempts. Branson was given a 12-day suspension for falsification of the report and untruthfulness.

On or about August 25, 1995, while on en route to Bonduel, Wisconsin to pick up an individual wanted on a warrant, Deputy Branson was clocked at 83 miles per hour in a 55 mile per hour zone. Branson, who was driving a Manitowoc County Sheriff's Department patrol car at the time, was ultimately given a three-day suspension for this offense.

Aside from the matters set forth above in which discipline was invoked, the County entered a number of exhibits reflecting citizen complaints against Deputy Branson. It is a fair summary of those exhibits that they indicate that Branson has a proportionately high number of citizen complaints filed against him. Most of the matters, not addressed above, were dismissed for lack of corroboration, or were dismissed because the Department concluded that the complaint was groundless and that Branson had acted appropriately. My review of the evidence causes me to conclude that Officer Branson was on the receiving end of a proportionately high number of citizen complaints for two basic reasons: The first is that he had a disproportionately high number of contacts with citizenry as he was aggressive in pursuing real and potential criminal activity. The second is that I believe that Officer Branson was at times abrasive with those he encountered.

Deputy Branson's performance evaluations were made a part of this record. In his February, 1992 performance evaluation, Branson was ranked as meeting standards in all but three criteria. In the criteria "Accepts Direction" his evaluation reflects a need for improvement. In the criteria "Public Contacts" and "Suspect Contacts" Branson was evaluated as exceeding standards. Narrative comment on the performance evaluation support the findings in these areas. In his April, 1993 performance evaluation, Branson was evaluated as meeting standards in all but six criteria. His evaluator indicated a need for improvement in the area of "Employee Contacts". The narrative comment on this deficiency provides the following: "John, at times has a problem

controlling emotions in respect to other officers; he believes working hard is the only way to accomplish a goal and cannot accept people not willing to give their all to this occupation." In the 1993 evaluation five areas are indicated as exceeding standards.

In his February, 1994 evaluation, Mr. Branson was graded as not satisfactory in the utilization of "judgements". He was graded as needing improvement in the criteria "Accepts Change". He was given an exceeds standards assessment in six different criteria. The narrative relative to his areas of deficiency provide as follows: "John's judgements in certain areas over the last year have gotten John into some difficult situations. John was reprimanded and received a suspension due to his poor judgement in certain situations. John also needs to spend more time covering his beat. John should become more informed about Department issues before voicing his opinions." The balance of the narrative describes him in very favorable terms with respect to his law enforcement activities. Branson was evaluated again in 1994, this time in December. His December evaluation led to three areas indicated as "unsatisfactory". Those areas include "Compliance With Rules", "Accepts Direction", "Responds To Supervision". He is rated as needing improvement in five areas including "Employee Contacts", "Judgement", "Accepts Responsibility", "Accepts Change" and "Coordination/Cooperation". Branson was evaluated as exceeds standards in five areas. The narrative accompanying his noted deficiencies provides as follows: "In the past year, he has exhibited a very poor response to supervision. He has been confrontational with his supervisors and fellow employees which has resulted in increased tension on the shift. He needs to spend less time in or around the City and I-43 and spend more time covering his beat. John tends to disregard rules he does not agree with and sometimes he has a problem realizing the concept in working with fellow officers." Branson contested certain of the evaluation conclusions and submitted a written comment attached to the evaluation.

Branson's final evaluation with the Department occurred on December 18, 1995 where four criteria, including "Judgement", "Accepts Responsibility", "Accepts Direction" and "Responds To Supervision" were evaluated as needing improvement. Four areas were noted as exceeding standards. The narrative accompaniment to his deficiencies provided: "John has improved somewhat in the area of response to supervisors but needs to continue to improve. John needs to be less confrontational and use more tact. John also needs to work on his judgement. He received a letter for speeding while on a transport which showed poor judgement." Throughout these evaluations, the narrative comment attached to the "Strengths" portion of the evaluations have consistently described Branson as hardworking, aggressive, and very effective in several substantive areas of the job.

Branson was given the opportunity to, and did attend a course dedicated to the improvement of his communication skills.

Each of the individuals interviewed by Sheriff Kocourek, Tackes, Bessler, Pautz and Shaw, testified at the arbitration hearing.

Therese Pautz, the Registered Nurse who worked in the emergency room, testified as follows with respect to the tape recorder incident:

Are you asking me - there was - I mean, the only thing that was unusual and - it was brought to my attention - was a tape recorder was there. And I don't know if I would - I'm not even 100 percent sure that I saw the tape recorder, so I shouldn't say - no. There isn't anything.

Ms. Pautz also testified to the subsequent telephone conversation she had with Branson:

Q: Would you describe, first of all, how that conversation took place?

A: How the conversation took place? You mean, like by phone, is that what you're asking me?

Q: Right.

A: By phone. He called by telephone to actually talk with another nurse, that he was talking with. I asked him if he was - if we were being taped. Because I was asked by an X-ray person in charge that evening. I asked him, basically, because I just wanted to know, for her sake, if that was indeed what was happening.

Q: What was Mr. Branson's response, if any?

A: Yes, we were; but it is nothing to incriminate you.

Q: Does that reflect the entire conversation that you had on the topic?

A: I think I said, "Can you do that?" And he said, "Yeah." And then I gave it to the other person.

Ms. Pautz went on to testify that the patient (Gruber) she was treating had asked her to ask the officers to leave the room.

Sharon Shaw testified that she came into the exam room, a part of the emergency room, to attend to and transport Gruber to the X-ray room. While in the X-ray room, she noticed a small black tape recorder on a shelf in the room. She looked at it and noticed it was running. It is her

testimony that when she noticed the running tape recorder she went into the hallway, and asked whose recorder it was. Her direct examination testimony is that Deputy Branson responded and "said it was either - I don't know - his or theirs." She testified that Branson removed the tape recorder from the room. On cross-examination, Ms. Shaw indicated that she did not know who placed the tape recorder in the room, nor did she know whose tape recorder it was. She could not recall what, if any conversation she had with the patient prior to the removal of the tape recorder. She further testified that she could not recall whether Branson, or another deputy removed the tape recorder.

Deputy Kurk Bessler, one of the Sheriff's Department officers present at Holy Family Hospital while Mr. Gruber was being treated, testified that he saw a tape recorder in one of the admittance rooms. Bessler believes the tape recorder was Branson's. Bessler did not touch the tape recorder, was not aware of whether or not it was running, and heard no conversation between deputies and hospital staff.

Deputy Gary Tackes testified that he arrived simultaneously with Branson at the medical facility. According to Tackes, as the two men approached the hospital from their separate squad cars, Branson asked for Tackes' tape recorder. It was Tackes' testimony that Branson lacked a tape recorder and that he (Tackes) handed Branson his own. The next time Tackes saw the tape recorder was when Branson returned it to him in the hallway of the medical facility. Tackes gave the following testimony:

Q: While you were at the hospital, as you stated, you were hanging around - was Mr. Gruber moved from the E.R. treatment -

A: Yes. He was moved to the X-ray room.

Q: Did you have the tape recorder at that time?

A: Yes. Officer Branson gave it to me.

Q: What did you do with it?

A: I put it on a shelf in the X-ray department.

Q: Was the tape recorder on or off when you put it on the shelf?

A: It was off.

Q: Are you certain of that?

A: Very certain.

Q: When is the next time you saw the tape recorder?

A: The next time, the X-ray technician asked - or the presence - I think I asked her, if it bothered her, I could put it away. So - I'm not sure - either I put it in my pocket or put it in my hand.

Q: Do you recall whether it was running or not when you picked it up?

A: No, it was not.

On cross-examination, Deputy Tackes was asked about his post-incident interview with the Sheriff.

Q: Now, you were interviewed concerning this incident by the Sheriff, were you not?

A: Yes.

Q: Did you inform the Sheriff as to who had put the tape recorder in the X-ray room?

A: Yes.

Q: And who did you tell the Sheriff had put it in the X-ray room?

A: Myself. I did.

Q: And it is your testimony you took the tape recorder out of the X-ray room?

A: Right.

Q: Did you go into the X-ray room to take it, or did she bring it out to you?

A: No. She never touched it. She wasn't even near it.

Q: Could you stand in the hallway, reach in and be able to reach that tape recorder?

A: No. You have to take a couple of steps in there.

Q: Let me show you what has been marked as County Exhibit 17. Do you recognize that as the X-ray room?

A: Yes.

Q: Do you see a small shelf there above a window of some sort?

A: Right.

Q: Is that where you would have put the tape recorder?

A: Right.

Q: And you went back in to get the tape recorder and then walked back out?

A: Right.

Q: Did - was Officer Branson with you when you went into that room?

A: No.

Q: Did you ever see Mr. Branson go into that room?

A: No.

Q: And the Sheriff asked you all of those questions, didn't he?

A: Yes.

It was Deputy Tackes' testimony that he was interviewed by the Milwaukee County District Attorney's office relative to this matter. According to Tackes, he was asked no questions about the tape recorder in the course of that interview.

ISSUE

The parties stipulated to the following issue:

Did the Manitowoc County Sheriff's Department violate the collective bargaining agreement when it terminated John Branson effective February 15, 1996? If so, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

AGREEMENT

. . .

Neither party to this agreement by such act at the time hereto or subsequent hereto agrees to, or, does waive any rights possessed by it or them under our state or federal laws, regulations, or statutes. Should any of the provisions of this agreement be found to be in violation of any law of the above-listed governing bodies, all other provisions of this agreement shall remain in full force and effect for the duration of this agreement.

. . .

ARTICLE III - MANAGEMENT RIGHTS RESERVED

Unless otherwise herein provided, management of the work and direction of the working force, including the right to hire, promote, transfer, demote or suspend or otherwise discharge for just cause, and the right to relieve employees from duty because of lack of work or other legitimate reason, is vested exclusively in the Employer. If any action taken by the Employer is proven not to be justified, the employee shall receive all wages and benefits due him or her for such period of time involved in the matter.

. . .

ARTICLE 5 - DISCIPLINARY PROCEDURES

A. Employees may be disciplined for just cause. It is understood and agreed that just progressive discipline shall be followed. The Employer shall provide the employee and Association with a letter setting forth the reason(s) for the disciplinary action.

B. Discharge

When an employee is discharged or terminated by the Employer, a written discharge or termination report shall be prepared stating the effective date and the reason(s) for the

discharge or termination. One (1) copy of the report shall be retained by the Employer, one (1) copy shall be given to the employee, and one (1) copy shall be filed with the Association. . .

POSITIONS OF THE PARTIES

The County, noting the collective bargaining agreement permits discharge for cause, cites authority in favor of the proposition that the Employer satisfied the contractual cause requirements in its discharge of Branson. Specifically, the County points to the Elkouri's How Arbitration Works, (BNA, Fourth Edition) and to Robert's Dictionary of Industrial Relations, and further points to Arbitrator Carroll R. Daugherty whose seven standards have proved a popular analytical framework in analyzing just cause dismissals. 1/ The County argues that Branson's version of the events at Holy Family Memorial Medical Center is not credible. The Employer points to the

1/ In Enterprise Wire Co., Arbitrator Daugherty posed the following seven questions:

1. Was the employee given advance warning of the possible or probable disciplinary consequences of the employee's conduct?
2. Was the rule or order reasonably related to the efficient and safe operation of the business?
3. Before administering discipline, did the Employer make an effort to discover whether the employee did, in fact, violate a rule or order of management?
4. Was the Employer's investigation conducted fairly and objectively?
5. Did the investigation produce substantial evidence or proof that the employee was guilty as charged?
6. Had the Company applied its rules, orders, and penalties without discrimination?
7. Was the degree of discipline administered in the particular case reasonably related to a) the seriousness of the employee's proven offense? and b) the employee's record of company service?

testimony of Therese Pautz to the effect that she saw a black object in the emergency room, and to the testimony of Bessler who indicated he saw a tape recorder in one of the admittance rooms at the hospital. The Employer also points to what it regards as a damning telephonic conversation between Branson and Pautz where he acknowledged taping the parties. The Employer contends that Branson's inability to recall any substantive component to that conversation is essentially an effort to avoid a significant admission that he surreptitiously recorded conversations. The County points to Sharon Shaw's testimony that she saw a tape recorder on the shelf of the X-ray room and that it was running. The Employer further notes that Shaw testified that she had a conversation with Branson and spoke with him about the running tape recorder. Her testimony, at least with respect to her conversation with Branson, is inconsistent with Branson's testimony that he was not present at the time this conversation would have transpired. The Employer contends that either Bessler, Pautz, and Shaw are all mistaken, or that Branson is untruthful, and concludes that Branson did attempt to intercept oral communications, a violation of criminal law.

The County contends that the principles of the Garrity case were not violated in connection with Branson's termination. Branson declined to answer questions at the administrative hearing on February 6, 1996. The only consequence of his refusing to participate in that proceeding was that the County was forced to proceed in the personnel matter without Branson's version of the events. The Employer argues that all Branson was asked to do at the administrative hearing was to tell the truth. It notes that Mr. Branson's version of the events at the arbitration hearing was entirely exculpatory. The County then argues that to the extent Branson was telling the truth it is impossible that he could reasonably believe that his truthful testimony could have or would have been used in any subsequent criminal proceeding.

The County argues that the Sheriff conducted a thorough and independent investigation of the events involving the September 3 incident. The County argues that the Sheriff's decision to discharge Branson satisfied the just cause and progressive discipline requirements of the agreement. The statutes make interception of oral communications by an electronic device a criminal offense, and Branson is or may reasonably be held to know that his use of a tape recorder to intercept these conversations was forbidden. The County contends that it is axiomatic that requiring its employees to obey the law is reasonably related to the safe and efficient operation of the Sheriff's Department. The evidence is overwhelming that prior to imposing discipline the Employer made an effort to determine whether Branson violated the law, and thereby Departmental rules, on September 3. The investigation was fairly and objectively conducted and led to substantial evidence, which amounted to proof, that Branson had intercepted conversations at Holy Family Memorial Medical Center.

The Employer argues that its disciplinary treatment of Branson is consistent with prior disciplinary treatment of other employees.

The Employer cites Branson's disciplinary history with the Department. It goes on to note his performance evaluations, which it characterizes as less than satisfactory. The Employer also

notes that Branson faced discipline arising out of the civil process incident in 1993, and escaped discharge only when the Department placed an enormous amount of faith in him. The County contends that he had ample reason to know the Department was not pleased with his job performance. The County notes that Branson was also the subject of an unusually high number of citizen complaints. It is in this context that the Employer urges that I consider its disciplinary decision. The Employer contends that it engaged in progressive discipline and that the discharge of Officer Branson is a logical culmination of his previous disciplinary and evaluative experience with the Department.

In its reply brief, the County takes issue with the Union's assertion that Section 59.21(5)(m), Stats., apply in this matter. It contends that Manitowoc County does not have an ordinance incorporating the statutory provisions. However, the County notes that a side-by-side comparison of the statutory standards and those that it contends apply through operation of the Daugherty standards renders this dispute a "tempest in a teapot".

The County contends that any Union claim that Branson was not properly instructed in the use of tape recorders is frivolous. The County describes such a contention as unrealistic, and the equivalent of sanctioning the watching of pornographic films on a Sheriff's Department VCR for a lack of training in the use of VCR's.

The County distinguishes its finding from that of the Milwaukee County District Attorney in that a criminal conviction requires proof beyond a reasonable doubt or a unanimous verdict of a 12-person jury. The civil/employment standard is quite different. The fact that the District Attorney chose not to prosecute Branson for criminal activity does not necessarily compel the Manitowoc County Sheriff's Department to overlook behavior violative of internal departmental policies. The County goes on to quote that portion of the Milwaukee County report that concludes that Branson did turn on, and subsequently turn off, the tape recorder. That conclusion stands in contrast to Branson's testimony that he did neither.

The Employer attacks the Union's characterization of the phone call between Pautz and Branson. It characterizes the Union's version of the testimony as the "brainstorm of counsel, and has no basis in Branson's testimony."

The Association notes that the grievant's employment is protected by the just cause standard in the collective bargaining agreement. The Association goes on to contend that deputy sheriffs in Wisconsin are covered by Section 59.21 of the Wisconsin Statutes. As such, they are subject to the seven cause inquiries set forth in that Statute, which are as follows:

1. Whether the Deputy could reasonably be expected to have knowledge of the probable consequences of the alleged conduct?

2. Whether the rule or order that the Deputy allegedly violated is reasonable.
3. Whether the Sheriff, before filing the charge against the Deputy, made a reasonable effort to discover whether the Deputy did in fact violate a rule or order.
4. Whether the effort described under subd. 5(m)(c) was fair and objective.
5. Whether the Sheriff discovered substantial evidence that the Deputy violated the rule or order as described in the charges filed against the Deputy.
6. Whether the Sheriff is applying the rule or order fairly and without discrimination against the Deputy.
7. Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the Deputy's record of service with the Sheriff's Department.

The Association contends that this section of the Statute is particularly relevant given the parties' contractual commitment to follow all statutes of the State. The Union contends that I am thus obligated to consider the seven tests of just cause set forth statutorily.

The Association contends that Branson could not reasonably be expected to have had knowledge of the probable consequences of the conduct "using a tape recorder to intentionally intercept and record oral communications", which he is alleged to have engaged. The Association contends there exists two significant policy or rule questions to be addressed. The first is the policy with respect to the supposed violation of law, and second, the policy with respect to the misuse of the Department's-issued tape recorder.

With respect to the first rule violation, the alleged violation of State law, the Association contends that that did not occur, and thus is no basis upon which to predicate discipline.

As to the second question, the Association contends there is no policy with respect to the use of a tape recorder within the Department. There has never been any training offered by this Employer as to the use or misuse of tape recorders. Branson could not have violated any Departmental policy with respect to the tape recorder since no such policy exists.

The Association notes the Sheriff's contention that there were numerous complaints against Deputy Branson but contends that those complaints resulted in no action being taken against

Branson, not even a verbal warning. Furthermore, the Association contends that since the Sheriff never advised Branson that he had a level of citizen complaints which exceeded that of other deputies, it cannot form a basis for his discipline. The Association contends that Branson's job evaluations fall far short of putting him on notice that his job was in peril. The Association brief reviews the various job evaluations and concludes that none of them put Branson on fair notice that his job was at risk. The evaluation received just before discharge was superior in many respects to the two preceding evaluations.

With respect to the second statutory question, whether or not the rule or order that Branson allegedly violated is reasonable, the Association demurs. It notes that the Sheriff made reference to no rule or policy in the discharge letter, thus making it difficult for the Association to address this issue on its merit.

The Association contends that it is clear that the Sheriff, before filing the charge against Branson, did not make a reasonable effort to discover whether Branson did in fact violate a rule or order. The Association describes the Sheriff's behavior at the February 6, 1996 investigatory meeting as essentially game-playing. During the course of that meeting, the Sheriff made a conscious decision not to extend Garrity protection to Branson. The Association argues the following:

On February 6, 1996, the Sheriff knew three things. First, he knew that Branson's situation was under investigation by the Milwaukee County District Attorney's office for possible criminal charges. Second, he knew that if Branson answered questions during the investigatory interview on February 6, 1996, without being afforded his Garrity protections, the answers he gave potentially could be used against him in a criminal proceeding. Third, and most importantly, he knew full well that the Milwaukee County District Attorney had already communicated to the Sheriff that the District Attorney's office did not think there was a basis for charging Branson with a crime. Moreover, the Sheriff had to have known that Branson did not have that latter information.

The Association contends that the investigatory effort described above was both unfair and subjective. It contends that the Sheriff, contrary to Department policy and contrary to common sense, did the investigation himself. Second, the Sheriff disregarded the results of the Milwaukee County District Attorney's investigation despite the fact that the case had been referred to the Milwaukee County District Attorney's office by the Manitowoc County District Attorney's office for the very purpose of avoiding just such bias in the investigation. Third, the Sheriff disregarded statements from his own deputies which were plainly exculpatory in nature. Fourth, when he presented the case to the Arbitrator, the Sheriff chose to present not a balanced picture of the case involving Branson, but only the negatives.

The Association points to a memo written to the Sheriff by Robert Beilke, in August of 1994, when Lieutenant Beilke notes, "I have noticed within the last year of increased attacks on myself and probably Officer Branson." When asked about the memo during the course of the arbitration hearing, the Sheriff replied that he had not inquired into its intent. The Association contends that this lack of curiosity on the part of the Sheriff underscores his bias toward Branson in this overall case. The Association contends that the Department has a policy dealing with internal investigations which provides expressly that such allegations are to be referred to the Deputy Inspector. The Union contends that Officer Tisler, not Sergeant Hermann or the Sheriff himself, should have conducted the investigation. However, the only two Department people involved in the investigation were Sergeant Hermann, who had recommended termination of Branson some years earlier, and the Sheriff. By so constructing the investigatory framework the Association contends that the Sheriff ran afoul of just cause by injecting his personal bias into the investigation.

The Association contends that the Sheriff disregarded the results of an impartial investigation performed by the Milwaukee County District Attorney's office. The Association contends there is no meaningful distinction between the investigation of the criminal matter and the investigation of the personnel matter. The Association contends that all facts are common, and notes that the letter of termination expressly states that Branson was being fired for violating that rule of the Department which prohibits violations of the law. The Milwaukee County District Attorney found there was no violation of any law because a key element of proof was absent. The Sheriff simply disliked the Milwaukee County District Attorney's finding.

The Association contends that the Sheriff did not discover substantial evidence that Branson violated the rule or order as described in the charges. The Association points to the testimony of Pautz and notes the considerable uncertainty as to what she saw. Pautz is the only witness who allegedly saw any tape recording device in the emergency room. The Association addresses Branson's subsequent telephone conversation with Pautz by noting that Branson was calling from the Sheriff's Department on a telephone line which is constantly being taped. To the extent his comments suggested the conversation was taped, it was the conversation in which he was immediately engaged with Pautz. Pautz' question arose from a conversation she had with an X-ray technician who asked her whether various conversations that occurred in the hospital were being taped. The Association contends that given the conversation between Pautz and Branson, there was no way for Branson to know that the reference of her question was concern over the taping of prior events.

The Association addresses the testimony of Sharon Shaw. What Shaw testified to was a tape recorder which was running, in the X-ray room. Shaw did not tie that tape recorder to Branson. Indeed, Tackes testified that he had placed the tape recorder in the X-ray room. He further testified that he was the individual who removed the tape recorder. By February 6, 1996, the Sheriff knew that Tackes, not Branson, was responsible for placing the tape recorder in the X-

ray room, yet the Sheriff issued the charges against Branson one week later. Furthermore, no charges were filed against Tackes.

With respect to the testimony of Bessler, the Association contends that Bessler recalled seeing a tape recorder in one of the examining rooms, that he believed was Branson's. Bessler could recall no more.

The Association points to the following testimony as evidence of the Sheriff's bias, and lack of objectivity in this matter:

Q (by Mr. McQuillen): Why did you think that Officer Tackes had done nothing wrong in the hospital when it was he who placed the tape recorder in the X-ray room?

A (by the Sheriff): The initial report that I got from the hospital was Officer Branson. That's why.

The Association goes on to contend that notwithstanding the fact that the Sheriff and other members of the Department knew of this incident the next day, no one made any effort to recover any tape from Branson or anyone else. The Association makes much of the fact that the County failed to call Mr. Gruber or to take statements from him with respect to this matter.

The Association argues extensively that Branson was subject to discriminatory or disparate treatment, both regarding the September 3 incident and prior discipline.

The Association argues that the discharge of Branson did not reasonably relate to the seriousness of the alleged violation and to his record of service with the County Sheriff's Department. In essence, the Association argues that Branson did not tape and/or intercept conversations. In this context, prior performance evaluations, discipline and complaints, are essentially irrelevant.

In its reply brief, the Association acknowledges the District Attorney's report which indicated that he did in fact have a tape recorder running in the hospital. It contends that Branson disagreed with that conclusion, but acknowledges that one of the problems with his having exercised his constitutional right not to be interviewed by the District Attorney's investigator is the possibility that the District Attorney could reach an erroneous conclusion. The Association goes on to note that notwithstanding that finding, the District Attorney concluded that there was no criminal behavior.

The Association appended a series of documents to its reply brief. Those documents

consist of a decision by the appeal tribunal of the Department of Workforce Development sustaining Branson's unemployment compensation, a performance report of Mr. Branson dated 9/7/92, a performance report of Mr. Branson dated 8/2/91, a letter of commendation dated 10/19/92, a letter of thanks dated 10/1/92, a letter of praise for Branson dated 10/28/91 and another letter of commendation dated 10/5/91. The County has objected to consideration of these matters. I agree with the County, and believe these matters should not be considered in this Award.

DISCUSSION

Branson's performance evaluations were not such that they independently put him on notice of his imminent discharge. In the early years, his performance evaluations were relatively favorable. Subsequent evaluations fell off. Specifically, Branson's evaluations in 1994 were critical in a number of areas. Those evaluations followed the service of process incident and an attempt to respond to what in general I believe was a supervisory concern over Branson's attitude and judgement. His December, 1994 evaluation is particularly critical. By December of 1995, Branson's performance evaluation had improved. The evaluation document contained significantly fewer negative remarks. More to the point, the narrative analysis found at the end of the evaluation suggests that Branson had responded to prior evaluations and to supervision and was working toward self-improvement. The evaluation continues to have critical commentary, but nothing in the evaluation suggests an officer facing discharge for continued underperformance.

The Employer notes and the record supports, a conclusion that Branson received a disproportionately high number of citizen complaints. There are a number of explanations advanced. The first explanation is that Branson had disproportionately high contact with the public; this appears to be true. One explanation is that a number of the complaints were not valid, and certainly the department treated many of these complaints as lacking substance. The Sheriff explains that in some of these matters there was an inability to confirm the complaints made. This also appears to be true. Finally, some of the complaints led to discipline, as noted above. In summary, while I agree that there were a large number of citizen complaints lodged toward Branson, I also note that the department did not treat these complaints as job-threatening. The evaluations note a need for Branson to improve in the area of his interpersonal skills. However, nowhere is Branson admonished to improve his citizen contact or face discipline. Significantly, there is no reference to citizen complaints and/or lack of interpersonal skills in the discharge letter.

The County notes that Branson has been the recipient of significant prior discipline. I agree. I regard the previous discipline as serious. The Union contends that the discipline has not been progressive in the sense of a series of gradually escalating sanctions. While that is true, I believe that the discipline was applied in response to the conduct for which it was imposed. I believe this is especially so of the service of process incident.

I believe that Branson has been subjected to prior discipline sufficient to warn him that the department has certain concerns over his performance, and also warning him that certain behavior will not be tolerated. My conclusion in this regard is in the context of this dispute, i.e., a discharge for an attempt to intercept communication, which the department regards as criminal behavior. Deputy Branson had received two prior disciplines for behavior which was arguably criminal. His speeding violation is behavior which would normally be subject to a police stop, the issuance of a ticket, and a fine. His failure to deliver process while claiming to have made an unsuccessful effort constituted behavior which the department regarded as potentially criminal. In summary, I believe that if Branson did that with which he was charged, he had a sufficient prior disciplinary background to know that he could be a subject to a significant level of discipline, up to and including discharge, for further transgressions.

Prisoner Gruber was admitted to an emergency treatment room and subsequently moved to an X-ray room. There are allegations of tape recording emanating from both rooms. The evidence with respect to the tape recording in the emergency room is inconclusive at best. Both Tackes and Branson testified with respect to the handling of the tape recorder. From their testimony it is unclear to me whether the transfer of the tape recorder occurred prior to or after Gruber was transported to the emergency room. It appears to me that Branson had possession of the tape recorder for at least some portion of the time that Gruber was in the emergency room. Bessler saw a tape recorder sitting on the counter. It also appears that Pautz saw a tape recorder in the emergency room. Neither Pautz nor Bessler were able to testify to much more. The Milwaukee County District Attorney evidently concluded that Branson had been responsible for some of the tape recording. The report of the Milwaukee District Attorney draws no distinction between the emergency room and the X-ray room incidents. That report appears to rely exclusively on interviews with Pautz and Shaw.

It appears to me that the two people who know the most about what, if anything, was tape recorded in the emergency room are Branson and Tackes. Neither of them provided information to the District Attorney. There is no evidence in this proceeding to suggest that the tape recorder was running, that it was consciously placed in the emergency room, or that Branson was engaged in any surreptitious taping. The most that can be inferred, by discrediting Branson, and by crediting Pautz and Bessler, is that Branson laid the tape recorder down in the emergency room.

Pautz had a subsequent telephone conversation with Branson, which tended to confirm that Branson was aware of tape recording. Branson essentially denies the substantive content of that conversation. The union offers an explanation of the conversation that suggests the two participants were drawing upon two very different contexts and were discussing two very different tapings. That is one possible explanation. A second equally plausible explanation is that Branson understood that Pautz was asking about a tape recording that occurred in either the Emergency Room, the X-ray room, or both. In any event, it cannot be said that Branson's discussion with Pautz is an admission that Branson placed a tape recorder in the emergency room, turned it on, and attempted to intercept Gruber's comments.

In summary, I do not believe there is sufficient evidence to conclude that Deputy Branson placed a tape recorder in the emergency room, turned it on, and attempted to intercept Mr. Gruber's comments. There is no record evidence the tape recorder was ever turned on in the emergency room.

The evidence with respect to what occurred in the X-ray room is different. It was Ms. Shaw's testimony that she saw a tape recorder, that she approached the recorder, and saw that it was running. She further testified that she asked the officers to turn it off and remove it. On direct examination, Ms. Shaw indicated that she asked Branson to remove it. Her testimony clouded considerably on cross-examination, to the point where she did not recall which of the three officers she asked to remove the tape recorder. Obviously, it was Ms. Shaw's statement that formed the basis of the Milwaukee County District Attorney's conclusions. Her testimony must be viewed in the context of that of Tackes and Branson. It was Branson's testimony, corroborated by Tackes, that Branson gave Tackes the tape recorder prior to Gruber being moved to the X-ray room. Tackes indicated to the Sheriff, and testified in this proceeding, that he put the tape recorder in the X-ray room. It was his further testimony that he removed it.

In summary, it appears the tape recorder was placed in the X-ray room. There is a dispute as to whether it was on or off. All record evidence suggests that Tackes, and not Branson, placed the recorder in the X-ray room. There is no record evidence that Branson did so. Tackes was not disciplined for his conduct. Obviously, the Sheriff believes that Branson placed the tape recorder in both rooms, and that Tackes is covering up for his friend. That explains the lack of discipline for Tackes. However, there is very little record evidence to support that conclusion.

My jurisdiction is restricted to the propriety of the discharge. There was an issue raised and briefed as to whether Branson's Garrity rights were involved, and compromised. That issue is not before me. The only Garrity-style question before me is whether or not Branson's due process rights were compromised by the timing of the hearing, or the refusal of the Sheriff to extend the Garrity shield to Branson in order to immunize him from the criminal process. I do not believe that Branson's due process rights were so compromised. The Sheriff did not compel Branson to answer. The arbitration hearing is *de novo*. Branson was afforded an opportunity to tell his side of the story in the proceeding before me. I will not draw an adverse inference from either the Sheriff's refusal to extend Garrity rights, the timing of the hearing, or Branson's refusal to participate in the investigatory hearing.

I believe that both parties engaged in deadly serious gamesmanship surrounding the administrative hearing. The timing was such that the Sheriff had to risk the very real possibility that Branson would refuse to participate in the investigation, and by so doing compromise the quality of that investigation. The Sheriff knowingly took his chances. Similarly, Branson had to weigh the exposure he faced testifying at the administrative hearing against the possibility that the pre-disciplinary investigation would proceed without his input, and without his version of the

events. Branson had to know that the likelihood of termination increased significantly by refusing to participate.

The parties disagree as to the applicable standard. The Employer notes Arbitrator Daugherty's "Seven Standards". The Union asserts that the police bill of rights standards ought to be applied. I regard the standards as so similar as to be substantively indistinguishable. My authority arises from the collective bargaining agreement. To the extent that I am to interpret the statute, it is as an aid to the construction of the words of the contract. In essence, I believe the parties have urged a common analytical approach.

The investigation in this matter was conducted by the Sheriff and by Sergeant Hermann. All record testimony is to the effect that Sergeant Hermann dislikes Deputy Branson. Departmental regulations provide that allegations suggesting potential criminal behavior are to be referred to the Deputy Inspector, Operations Investigation Division. It is unclear to me why the Sheriff conducted this investigation personally.

The Employer contends that Branson knew better than to intercept Gruber's treatment room conversation. The Employer goes on to argue that any rule proscribing such conduct is reasonable. I do not believe this dispute turns on the reasonableness of a rule proscribing criminal behavior by law enforcement deputies. Branson does not claim in this proceeding that he was unaware of any rule or law which prohibited him from attempting to intercept conversations that Gruber reasonably believed were private. Branson's defense is that he did not commit the offense.

The Union contends that Branson has been treated inconsistently with other departmental employees for similar conduct. Two incidents are noted. The first concerns the suspension Branson received for speeding. It appears that at one point Sergeant Hermann was also clocked speeding and received no discipline. The union notes the essentially parallel behavior and claims disparate treatment. I disagree. Branson's speeding occurred after his service of process offense. I believe that Branson had made himself the object of departmental sensitivity. His status explains the relatively harsh treatment he received for his subsequent speeding violation.

The real disparity in this proceeding is over the September 3, 1995 incident. Branson was fired for what the termination letter characterizes as criminal behavior. During the course of the investigation, Tackes came forward to admit he did at least as much, and perhaps more, as did Branson. No discipline ensued. For conduct as egregious as is described by the Sheriff it is hard to rationalize the lack of discipline for Tackes. As noted, I believe the Sheriff concluded that Branson had engaged in the conduct described, and that Tackes was lying to cover up for his friend. While this explains the widely-diverging discipline, there is very little record evidence to support the Sheriff's conclusion.

The Union contends that Branson received no instruction with respect to the use of the tape recorder. I believe that to be irrelevant. Branson does not claim that he was unaware that he was not to intercept ostensibly private conversations with Departmentally-issued equipment. Branson

claims that he did not do it.

The Union takes issue with the Sheriff's subsequent independent investigation, and his refusal to defer to the investigation conducted by the Milwaukee County District Attorney. I believe the Sheriff is entitled to do an independent investigation, notwithstanding the District Attorney's findings. The Sheriff has a department to run. Employee performance, and discipline are matters properly before the Sheriff. It is entirely possible that non-criminal behavior is sufficient to constitute cause for discipline. However, in this instance, the basis of discipline is the Sheriff's perception that Branson engaged in criminal behavior. In this context, I do not believe the Sheriff is free to simply reject the District Attorney's findings. The Milwaukee District Attorney was called in to depoliticize the investigatory process. It does not appear that the Sheriff's investigation unearthed facts missed by the District Attorney. To the contrary, the one fact in possession of the Sheriff, evidently overlooked by the District Attorney, was Tackes' statement that he, and not Branson placed a tape recorder in the X-ray room.

The discharge letter makes reference to an "intent" to intercept oral communication and makes further reference to the criminal statutes. The charges are serious. The Milwaukee District Attorney concludes that there was no such intent. The District Attorney does not conclude that there was a lack of evidence. There is very little evidence in the record to support these serious charges.

I do not believe the County has established that Branson placed the tape recorder in either room, or that he attempted to, or did, intercept any conversation of Mr. Gruber. Accordingly, I do not believe the Employer has sustained its burden of proof.

AWARD

The grievance is sustained.

REMEDY

The Employer is hereby directed to reinstate John Branson to the position he formerly held, within thirty (30) days of the date of this Award. Such reinstatement shall be consistent with Article III of the parties' collective bargaining agreement. The Employer shall expunge all reference to this as a discharge from Branson's personnel file. The Employer is entitled to offset its backpay liability by any interim unemployment compensation and wage and/or benefit earnings that Mr. Branson has had during the period of his termination.

JURISDICTION

I will retain jurisdiction over this matter for purposes of resolving any dispute as to the reinstatement and/or backpay order.

Dated at Madison, Wisconsin, this 6th day of January, 1997.

By William C. Houlihan /s/
William C. Houlihan, Arbitrator

