BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between MILWAUKEE COUNTY DEPUTY SHERIFFS' ASSOCIATION and MILWAUKEE COUNTY (SHERIFF'S DEPARTMENT)	Daniel Nielsen, Arbitrator Case 425 No. 54256 MA-9603 Robert J. Kraus Suspension Case 426 No. 54257 MA-9604 Steven Karabon Suspension

Appearances:

Gimbel, Reilly, Guerin & Brown, Attorneys at Law, 2400 Milwaukee Center, 111 East Kilbourn Avenue, Milwaukee, WI 53202 by Mr. Franklyn M. Gimbel, joined by Ms. Kathryn A. Keppel on the brief, appearing on behalf of the Union.

Mr. Timothy R. Schoewe, Deputy Corporation Counsel, Milwaukee County Courthouse, Room 303, 901 North 9th Street, Milwaukee, WI 53233 appearing on behalf of Milwaukee County.

ARBITRATION AWARD

The Milwaukee County Sheriff's Association (hereinafter referred to as either the Association or the Union) requested that the Wisconsin Employment Relations Commission designate a member of its staff to serve as arbitrator of a dispute between the Association and the Milwaukee County Sheriff's Department (hereinafter referred to as either the County or the Department) over the suspensions of Deputies Robert J. Kraus and Steven Karabon. The undersigned was so designated. A hearing was held on January 9, 1997 at the Milwaukee County Courthouse in Milwaukee, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. The parties submitted post-hearing briefs and reply briefs, and the record was closed on February 27, 1997.

Now, having considered the evidence, the arguments of the parties, and the record as a whole, the undersigned makes the following Award.

I. Issue

The parties stipulated that the following issues should be determined herein:

(1)Did the employees violate the rule(s) as alleged by the Sheriff? If so,

(2) What discipline, if any, should be imposed?

II. Pertinent Contract Provisions

The contract contains a Management Rights Clause, reserving to the Department the right to make and enforce reasonable rules and regulations, and to impose discipline upon employees. There is also a provision for arbitral review of suspensions of ten days or less.

III. Pertinent Department Rules and Policies

JAIL POLICY AND PROCEDURE MANUAL - OPERATIONS

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OP6 - PRISONER TRANSPORTATION

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OP6.1.2 - UNIFORM/EQUIPMENT REQUIREMENTS

Transport deputies will wear the prescribed MCSD uniform and carry a standard set of department issued handcuffs and keys. Additional sets or other types of approved handcuffs are optional. All transport deputies will wear MCSD body armor. See MCSD uniform regulations.

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OP6.4.1 - SEARCH

ALL inmates transported outside the secure perimeter of the MCJ will be pat searched. However, the Watch Commander may order another type of search. See Policy and Procedure Section SC6.2.

Inmates from a Pod.

Before moving them, transportation/movement deputies will pat search inmates, and their property, at Floor Control.

IV. Background

The County provides general governmental services, including law enforcement, to the people of Milwaukee County, in southeastern Wisconsin. Robert Kliesmet was, at all relevant times, the Sheriff. The grievants, Robert Kraus and Steven Karabon are Deputy Sheriffs assigned to Detention Services. They have grieved five day suspensions that each received for events surrounding an escape attempt during a prisoner transport assignment in March of 1996.

Stipulated Facts:

On March 8, 1996, the grievants were assigned to transport inmates between the Milwaukee County Jail and multiple state correctional institutions, The "trip sheet" detailing the stops and trip itinerary is attached and incorporated herein by reference.

On that date, at approximately 7:15 PM., an escape from custody took place in Lake Mills, Wisconsin. The escape occurred while the jail transport van was being refueled. At the time of the escape, Deputy Karabon was attempting to provide sandwiches to the inmates, who were seated in the caged area of the van. The inmates were assisted in their escape effort by being provided with a handcuff key sometime prior to the stop in Lake Mills.

The internal affairs investigation included reports from the grievants, the Lake Mills Police Department, the Jefferson County District Attorney's Office, the Milwaukee County Sheriffs Department Criminal Investigation Bureau Shooting Team, reports from any Sheriff's Department personnel assigned to the incident, and personal interviews of the grievants.

During the earlier portion of the trip, which ultimately went as far afield from Milwaukee as Sawyer County, the deputies stopped at the Columbia Correctional Institution in Portage, to pick up the two inmates who later attempted the escape. The grievants effected the pick up earlier because past experience had shown them that it took longer to pick up prisoners on the second shift. Deputy Kraus observed a strip search of both inmates, conducted by state prison personnel, just prior to turnover to the deputies.

During the balance of the trip, neither grievant physically inspected any of the restraints after they had been applied to the prisoners. Although Kraus did indicate that the restraints looked all right when he visually inspected them in Sawyer County, neither deputy visually inspected the restraints during the time the van was moving.

Kraus indicated that he periodically checked the inmates by looking in the rear view mirror. However, he could only see them from mid-chest and up on their bodies. Kraus observed Karabon looking into the rear of the van on numerous occasions.

Once the van stopped at Lake Mills for refueling, Kraus, who was driving, exited the van and left the engine running. Kraus claims he was told that on previous trips turning the engine off

for short periods damaged the diesel engine's glow plugs. Vehicle maintenance personnel for Milwaukee County indicate that there is no merit to the glow plug issue. Kraus also stated he left the engine running to keep the inmates warm.

In order to escape, the two inmates forced their way between the cage and a partially opened access door, where Karabon had been standing to pass out sandwiches. The cage area and door have been subsequently modified. The inmates assaulted Karabon by punching and kicking him, then stole the van, which contained two additional inmates. These other inmates were not involved in the escape. After overcoming Karabon, the two escaping inmates took control of the still running van and began driving it out of the filling station lot. Karabon fired six shots with his department provided weapon at the moving van in an attempt to disable the van. At the time Karabon shot at the van, it was moving away from him.

There was considerable publicity and public comment surrounding the escape attempt. The matter was reviewed by the Jefferson County District Attorney. She determined, following investigation by the Lake Mills Police Department and the Jefferson County Sheriff's Department, that criminal charges would not be filed against either deputy.

Following the completion of the internal investigation, then-Sheriff Robert Kliesmet determined that both grievants should be suspended for a period of five (5) working days. From that order of suspension Kraus and Karabon bring the instant grievances.

Additional Background:

On June 5th, Deputy Kraus was suspended for violating:

Milwaukee County Sheriff's Department Rules:

- Rule 1.05.03 Violation of Policy
- Rule 1.05.08 Knowledge of Rules and Regulations
- Rule 1.05.14 Efficiency and Competence
- Rule 1.05.69 Personal Safety Conduct
- Rule 1.05.75 Neglect of duty

Milwaukee County Civil Service Rule VII, Section 4(1):

- Violation of rules or practices relating to safety.
- Refusing or failing to comply with departmental work rules, policies or procedures.
- Failure or inability to perform duties of assigned position.
- Substandard or careless job performance.

On June 17, 1996, Deputy Karabon was suspended for violating:

Milwaukee County Sheriff's Department Rules:

- Rule 1.04.14 Uniform Requirements
- Rule 1.04.16 Manner of Wearing Uniform
- Rule 1.07.20 Firearms and Credentials
- Rule 11.27 Deadly Force
- Detention Services Bureau Policy OP6.4 - Search of Inmates
- Detention Services Bureau Policy OP6.1.2 - Uniform / Equipment Requirements
- Rule 1.05.08 Knowledge of Rules and Regulations
- Rule 1.05.14 Efficiency and Competence
- Rule 1.05.69 Personal Safety Conduct

Milwaukee County Civil Service Rule VII, Section 4(1):

- Violation of rules or practices relating to safety.
- Refusing or failing to comply with departmental work rules, policies or procedures.
- Failure or inability to perform duties of assigned position.
- Substandard or careless job performance.

Grievances were filed challenging the suspensions. They were not resolved in the lower steps of the grievance procedure, and were consolidated for arbitration.

At the hearing in this matter, Deputy Karabon testified that in addition to the physical check of the restraints conducted at Flambeau in Sawyer County, he visually observed the inmates from time to time during the trip, and that they seemed to be secured. When he was jumped by the two inmates in Lake Mills, he did not know whether all four of them in the van were involved in the escape attempt. Despite having been trained not to fire at moving vehicles, he fired six shots at the van's tires because his training had also included the Greater Danger Theory, which holds that a "shoot-don't shoot" decision is controlled by which course of action poses the greater danger to the public. In this case, the escaping inmates were dangerous, and he subjectively believed that they were committing a felony, posed a risk to the public and to himself and that there was little danger to the public if it went out control. Karabon testified that he also feared for his personal safety when he fired, as the van was moving away but could have veered back at him. He stopped firing when he saw a motor home parked in the line of fire. Karabon acknowledged that the van was going at a high rate of speed when he fired his sixth shot.

Deputy Kraus testified that he had been trained as a recruit in 1993 not to fire at moving vehicles. Sergeant Brian Mascari, a firearms instructor and training officer, testified that departmental rules forbid shooting at a moving vehicle unless three conditions are met: (1) the vehicle is being used in a felony involving the use of deadly force; (2) the possible loss of control of the vehicle does not pose an undue threat to the public; and (3) there is a substantial risk of death or great bodily harm if apprehension is delayed. He expressed the opinion that Karabon's decision to shoot at the van

did not meet these criteria. Mascari also testified that he had worked transporting prisoners from 1978 to 1984, and saw other officers removed their Sam Brownes while transporting prisoners, although he did not do so himself.

Lieutenant Mark Steiber testified that he was assigned to the Office of Professional Standards and was the lead investigator in this case. Steiber said he had personal knowledge of only one other case in which discharge of a weapon led to a suspension, a two or three day suspension of Deputy Nicholas Schwartz. He admitted that he had heard rumors that John Tobias, the second in command of the department had once fired at a fleeing vehicle, but he was not aware of any discipline in that case. Steiber said that he had learned during his investigation of this case that it was not unusual for deputies to remove their Sam Brownes when interacting with prisoners, so long as another deputy was present to cover for them. Thus there would have been no charges for uniform violations against Karabon had Kraus been present when he tried to feed the prisoners.

Deputy Sheriff I Larry Brenneman testified that he had worked in prisoner transport for four years, and had observed many officers remove their Sam Brownes during transport. He said that he never knew there was a rule against this. Brenneman stated that he knew of no rule governing choice of route, sequence of picking up prisoners or whether to shut the van off during refueling. All of these matters had always been left to the discretion of deputies. Brenneman expressed the opinion that the gap between the door and the cage in the van was very hazardous, and noted that it was covered with mesh immediately after this incident. Finally, he said that handcuff keys were very easy to obtain, and that prisoners frequently carried paper clips for use in picking the locks on handcuffs.

Additional facts, as necessary, will be set forth below.

V. Arguments of the Parties

A. The County's Brief

The grievants were disciplined for violating departmental rules, and neither testified that their actions were appropriate. Instead, both tried to blame the design of the van for leaving too much room between the cage and the door. However, this was but a minor factor in the events of March 8th, and by far the greatest part of the blame should be laid to their inattentiveness and carelessness. Kraus conceded that he did not personally strip search the inmates, nor did he do a check of their hair or mouths, even though he knew that handcuff keys could be hidden there. Both deputies were responsible for the decision to stop at Columbia at the beginning of the trip, thus allowing the two prisoners nine full hours to free themselves of their restraints. Neither deputy checked the restraints during the trip to be sure that they remained secure. At Lake Mills, Kraus chose to leave the van running even though this posed an obvious risk, both from explosion

during refueling and from escape. For his part, Karabon removed his belt and his weapon, and then attempted to feed the prisoners while he was unarmed and his partner was inside the gas station. When the two prisoners attacked him, he managed to retrieve his weapon and then fired six shots at the van -- a van that contained two other prisoners who were not trying to escape, and which was moving through a parking lot at a busy convenience store located in a residential area.

This litany of errors makes it clear that both deputies engaged in negligent work and violation of the rules governing work performance, uniforms, and discharge of a weapon. Five day suspensions are amply justified, and if the arbitrator is to review the appropriateness of the penalty, he should consider increasing the length of the suspensions.

B. The Association's Brief

While the grievants were allegedly disciplined for violating departmental rules, the fact is that only one rule violation took place -- Deputy Karabon's decision to remove his weapon before attempting to feed the prisoners. On closer review, however, this was a reasonable decision, given that there is a greater hazard in interacting with inmates while armed. The possibility always exists that a prisoner will grab the weapon, creating a dangerous situation. Deputy Karabon's decision was not the only one that could have been made, but it was reasonable under the circumstances and should not result in a five day suspension.

The Association asserts that the choice of a five day suspension for these deputies was completely unwarranted. It points to a 1988 case decided by Arbitrator McLaughlin, in which two deputies were arrested in Mississippi while on a prisoner transport assignment. One deputy was charged with driving while intoxicated, running a light and speeding. He was subsequently given a five day suspension. His partner, who was not charged, was given a reprimand. The arbitrator voided the suspension on the grounds of disparate treatment, and his award was sustained by the circuit court. Thus a five day suspension was found to be inappropriate in a case where a deputy on an out of town prisoner transport assignment was guilty of intentional misconduct and criminal activity, yet in this case the grievants have been assessed that same penalty for conduct which was obviously unintentional and clearly not criminal. The five day suspension in this case cannot stand, given the disciplinary precedent set by Arbitrator McLaughlin's decision.

C. The County's Reply Brief

The County reiterates the arguments made in its initial brief, and denies that Deputy Karabon's decision to remove his weapon was reasonable under the circumstances. The only circumstances in which a deputy removes his weapon is inside a correctional facility, when he is covered by another officer. Here Karabon took his weapon off outside of the secure confines of a

prison, and did so while his partner was inside paying for gasoline.

The case cited by the Association is beside the point. It is distinguishable and does not stand for any relevant proposition. The Association's suggestion that Karabon's intentionally discharging his weapon six times at a van containing two innocent inmates is somehow less serious than another deputy's drunk driving is ludicrous and should be rejected by the arbitrator.

D. The Association's Reply Brief

The Association rejects the County's claim that the defect in the design of the cage and the door in the van was only a minor factor in the escape attempt. Clearly it was the primary factor, since had the van been properly designed, the inmates could not have jumped Deputy Karabon. Moreover, the litany of alleged mistakes the deputies made during the course of the trip is irrelevant. For example, Kraus's failure to personally search the hair and mouths of the inmates does not represent any rule violation, nor does it show any neglect of duty. The inmates were searched by others. The claim that refueling while the van was running constituted an unsafe practice is mere speculation. Likewise the County's claim that the deputies' selection of a particular route contributed to the escape is nothing more than after the fact speculation. The escape was caused by someone giving these two inmates a handcuff key, and it is patently unfair for the County to lay the blame on these two deputies simply because it wishes to deflect the embarrassment it suffered from the escape. Given the insufficiency of the County's arguments, Deputy Kraus's record should be cleared, and Deputy Karabon's suspension should either be completely erased from his record, or reduced to a reprimand.

VI. Discussion

The issues in this case are (A) whether Deputy Karabon violated departmental rules; (B) whether Deputy Kraus violated departmental rules; and (C) if either or both deputies violated departmental rules, whether the five day suspensions are appropriate discipline.

A. Deputy Karabon

Deputy Karabon concededly violated the rule requiring him to wear his prescribed uniform when he removed his weapon and belt. The Association urges that this was a purely technical violation, and that it was safer for him to interact with prisoners without his weapon than to give them any chance of seizing the weapon from him. This argument would have more persuasive force if he had not undertaken to interact with the prisoners while his partner was inside the gas station. There is a substantial difference between approaching prisoners unarmed, and approaching them unarmed but covered by another armed deputy. Overall, the justification suggested by the Association simply does not make sense as applied to what Deputy Karabon actually did.

By far the more serious matter is Deputy Karabon's decision to discharge his weapon at the fleeing van. He concedes that he is aware of the rule against firing at moving vehicles. His testimony that this case fell within the exceptions -- i.e., that the vehicle was being used for a felony involving the use of deadly force, the possible loss of control of the vehicle did not pose an undue threat to the public, and there was a substantial risk of death or great bodily harm if apprehension was delayed -- is just not credible. The van was not being used in a felony involving the use of deadly force. It was being used for a jail break. When he fired six shots from his

weapon, the van was moving away from him and picking up speed. His claimed fear that they might turn around and run him over cannot be reconciled with what was happening in the parking lot. The prisoners had succeeded in escaping. Karabon was shooting at them. There was no reason for them to interrupt their escape and drive back towards the armed officer, and they never gave any indication that they were going to do so. Moreover, even under his Greater Danger justification, it seems that discharging a pistol at a moving target in the parking lot of a convenience store poses a substantially greater danger to the public than allowing the prisoners to get away with the van. It must also be noted that two of the four men in the van -- a 75 year old mental patient and a juvenile -- were not involved in the escape. By firing at the van, Karabon ran a substantial risk of wounding or killing the two innocent inmates. This is not a close or arguable violation. There is no way of looking at these facts that brings Deputy Karabon's actions within the scope of the rules or the realm of reasonable conduct.

B. Deputy Kraus

Deputy Kraus's conduct is a different matter. The only actions by Kraus identified by the Department as inappropriate are:

1. Not personally searching the inmates' hair and mouths when they were picked up at Columbia;

2. Participating in the decision to pick up the two inmates at Columbia on the first portion of the trip, rather than on the way back;

3. Not inspecting the restraints after they were initially applied, other than a visual inspection in Sawyer County;

4. Leaving the van running when he refueled in Lake Mills.

There are no rules specifically covering any of these actions. If the suspension is to be sustained, it must be because this conduct was inherently unreasonable and constituted negligence which materially contributed to the escape. As to three of the four charges, no such finding is possible on the state of the record. The choice of route and the decision to leave the van running are matters within the employees' discretion, and Kraus offered plausible explanations for both decisions. Neither action was inherently unreasonable. As for his failure to personally search the inmates' mouths and hair, Kraus personally observed the two being strip searched by guards at the correctional center right before they were loaded into the van. He also testified that he patted them down at the correctional center. 1/ OP6.4.1, which governs searches but which he was not even

1/ Kraus further testified that he felt the braids of one prisoner, but this statement is inconsistent with his statements to investigators shortly after the incident, and I therefore

charged with violating, requires only a pat search unless otherwise ordered. If the department wishes to specify more intrusive searches in all cases it is free to do so, but current regulations do not mandate more than what Kraus did, and there was nothing to indicate that more was necessary. 2/

The most substantive of the charges against Kraus is that he and Karabon failed to inspect the restraints after they left Flambeau. While they observed the prisoners on a regular basis, they did not specifically examine the restraints themselves during the five hour trip from Sawyer County to Lake Mills. The Department's Policies and Procedures call for a "periodic" inspection of restraints on "longer trips." 3/ The Department could reasonably conclude that a five hour drive constitutes a "longer trip" and both Karabon and Kraus concede that they did not inspect the restraints while the van was moving or when it stopped at Mendota. Thus there is sufficient evidence to conclude that both deputies violated this standard.

C. Appropriateness of the Penalties

Both parties raise arguments about the appropriateness of the discipline imposed. The County invites the arbitrator to increase the level of discipline, while the Association urges that the discipline be reduced to a reprimand. The Employer has the right in the first instance to determine the severity of a penalty, and its decision is entitled to deference. The arbitrator sits in a reviewing capacity, and it is commonly understood that an arbitrator has the inherent authority to modify the penalty if circumstances warrant and the contract does not forbid such modifications. 4/ Such a modification is not an act of leniency, since leniency is within the province of an employer. Instead it turns on mitigating factors and such fundamental notions of fairness as equality of

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give it no weight.

2/ In retrospect, more was required, since one of the men had a key to the handcuffs hidden somewhere on his person. Deputy Kraus's conduct cannot be judged in retrospect. Whether he acted reasonably depends upon what he had reason to know at the time he acted.

3/ Chapter 71.00, Section 71.64, TRANSPORTING FELONS TO PRISONS, INSTITUTIONS, ETC., Subsection (C): "Prisoner will be kept under observation during transit. On longer trips, restraints should be checked periodically."

4/ City of Detroit, 76 LA 213 (Roumell, 1981) at page 220; Fairweather, PRACTICE AND PROCEDURE IN ARBITRATION, 2nd Ed. (BNA 1983), at pages 501-503; Elkouri, at pages 667-688; Hill & Sinicropi, REMEDIES IN ARBITRATION, (BNA 1981), Chapter 4, pages 97-105.

treatment and proportionality. 5/ While the arbitrator may review the penalty for appropriateness, he does not sit in the capacity of a personnel director, making disciplinary decisions on a de novo basis. The bounds of this dispute are set by the County's action and the grievances challenging the action. Given the arbitrator's limited role as a reviewing authority, the County's invitation for him to expand the bounds of the dispute by increasing the level of discipline is not conceptually sound.

The Association cites the case of Deputies Johns and Pinter for the proposition that a five day suspension is disproportionately harsh, and constitutes a form of disparate treatment. In that case, Arbitrator McLaughlin found that two officers who went to Mississippi on a prisoner transport assignment, then got drunk and were arrested by the local police, were similarly situated for the purposes of discipline. One received a five day suspension and the other a written reprimand. Arbitrator McLaughlin found the disparity in penalties unjustified and reduced the five day suspension to a written reprimand.

Contrary to the Association's argument, the cited case has no value for determining some set rule that a written warning is the only appropriate response to out-of-town misconduct by transport deputies. It stands instead for the proposition that similarly situated employees who engage in essentially identical misconduct must be treated to essentially identical levels of discipline. That is a proposition that is beyond serious dispute in labor relations. The Johns and Pinter case is relevant to this dispute only for the corollary point -- that an equitable system of discipline does not impose equal sanctions on a person who engages in minor misconduct and another who engages in more serious misconduct. The case of Kraus and Karabon is striking in that Deputy Kraus, who is at most guilty of a breach of the procedure for periodically checking restraints was assessed the same penalty as Deputy Karabon, who violated the same procedure, but also clearly violated the rule on wearing his uniform and, most importantly, fired six shots at a moving vehicle containing two innocent parties, in the parking lot of a convenience store located in a residential area -- a clear violation of both departmental rules and common sense.

Neither deputy has any relevant past disciplinary record. Notwithstanding his serious lapse in judgment in this case, there is no basis for concluding that Deputy Karabon is not an otherwise competent and hardworking member of the department. However, his conduct in firing at the van is hardly a minor matter, and a five day suspension certainly cannot be said to have been out of proportion to his actions. Contrary to the Association's arguments, the County's decision to impose the suspension on Deputy Karabon appears to have been motivated by the potential for liability and the threat to public safety posed by his conduct, rather than the public embarrassment the escape caused to the Sheriff. By contrast, there is no reasonable basis for also assessing a five day suspension on Deputy Kraus for his part in this incident. He played no role in creating a

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5/ City of Detroit, 76 LA 213 (Roumell, 1981) at page 220; Elkouri, at pages 669-670.

threat to public safety, and only a minimal role in allowing the escape. His violation of procedures is technical in the sense that there is no evidence of when the two prisoners unlocked their restraints. Thus it cannot be said that a check of the restraints halfway through the drive from Flambeau to Lake Mills would have prevented the escape. While he is exposed to discipline for this violation, there is nothing in the record to suggest that the Department needed to skip over the normal progression of corrective discipline in order to
correct his behavior. Accordingly, I conclude that the appropriate penalty for Deputy Kraus is the first step in the normal progression of discipline. The record is silent as to the use verbal reprimands in the Department, but there is evidence that the Department has used written reprimands. Deputy Kraus's discipline should be reduced to either a verbal reprimand or a written reprimand, whichever is customary in the Department for a first offense of violating procedures.

On the basis of the foregoing, and the record as a whole, the undersigned make the following

AWARD

1. Deputy Kraus is guilty of violating the procedure for periodically checking restraints on longer trips.

2. Deputy Karabon is guilty of violating the procedure for periodically checking restraints on longer trips, violating the rule requiring members of the Department to wear their uniforms, and violating Departmental rules on the use of deadly force.

3. The five day unpaid suspension imposed on Deputy Kraus is not an appropriate penalty for his conduct. His grievance is granted insofar as the level of discipline is concerned. The appropriate penalty is instead either a verbal reprimand or a written reprimand, whichever represents the customary first step in the discipline process. The County is directed to make Deputy Kraus whole for any losses suffered by reason of the five day suspension, to remove any reference to the suspension from his record, and to replace it with the appropriate reprimand.

4. The five day unpaid suspension imposed on Deputy Karabon is an appropriate penalty for his conduct. His grievance is denied.

Dated at Racine, Wisconsin this 5th day of June, 1997.

By Daniel J. Nielsen /s/
Daniel J. Nielsen, Arbitrator