BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MARATHON COUNTY PROFESSIONAL EMPLOYEES IN THE COURTHOUSE AND AFFILIATED DEPARTMENTS, LOCAL 2492-D, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO

and

COUNTY OF MARATHON, A MUNICIPAL CORPORATION IN THE STATE OF WISCONSIN

Case 245
No. 54750
MA-9779

Appearances:

Mr. Phil Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 7111 Wall Street, Schofield, Wisconsin 54475, for Marathon County Professional Employees in the Courthouse and Affiliated Departments, Local 2492-D, American Federation of State, County and Municipal Employees, AFL-CIO, referred to below as the Union.

Mr. Dean R. Dietrich, Ruder, Ware & Michler, S.C., Attorneys at Law, 500 Third Street, Suite 700, P. O. Box 8050, Wausau, Wisconsin 54402-8050, for County of Marathon, a Municipal Corporation in the State of Wisconsin, referred to below as the County, or as the Employer.

ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of Richard J. Weinreis, referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held on April 25, 1997, in Wausau, Wisconsin. The hearing was not transcribed, and the parties filed briefs and reply briefs by July 2, 1997.

ISSUES

The parties stipulated the following issues for decision:

Whether the County violated the labor agreement when it terminated the Grievant from employment as a Children's Court Intake Worker on September 25, 1996?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

Article 2 - Management Rights

The County possesses the sole right to operate the departments of the County and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this contract. These rights include but are not limited to the following:

. . .

D. To suspend, demote, discharge and take other disciplinary action against employees for just cause . . .

BACKGROUND

The grievance questions whether the County had just cause to terminate the Grievant. His termination letter, dated September 25, 1996, [references to dates are to 1996, unless otherwise noted] was signed by his supervisor, Marvin Andersen, the Children's Court Center Director, and states:

> I have decided to terminate your employment as a Dispositional/Intake Worker based upon your direct involvement in two domestic incidents, one occurring on 9/2/96 involving an armed 9mm handgun. I have also considered your conduct in failing to cooperate with the Sheriff's Department in their response to the 9/2/96 event by hanging up the telephone after your wife placed the 911 call and by refusing to take an alcohol test when requested to do so by the arresting officer and an employee of the Jail. Additionally, your conduct of identifying yourself as being with juvenile intake when you received a call back from the 911 Dispatcher improperly involved your employment with Marathon County in this incident.

> During the predetermination meeting, you indicated that you had no memory of any handgun being involved in the 9/2/96 events. However, our investigation has confirmed that a handgun was involved in the 9/2/96 disturbance - in fact, after learning that your wife is pregnant, you went into a bedroom to find the weapon, you loaded the weapon, and you attempted to place the loaded weapon in your wife's hand. Your alleged loss of memory of this one very important factor has lead (sic) to the conclusion that you have not been completely honest and forthcoming during the internal investigation of the facts and calls into question your sincerity in resolving your personal problems and your trustworthiness in your position with the Children's Court Center. Additionally, we have to question how much we can rely upon your other assertion that the initial disturbance, which was not reported to the Sheriff's Department, was limited to grabbing your wife's arm and your statement that while you had a few drinks on the evening of 9/1/96 and the early hours of 9/2/96, you were not intoxicated at the time of the disturbance.
>
> The domestic disturbance and your failure to fully cooperate with law enforcement during their response to the event have resulted in substantial damage to your work relationship with the Court system and with law enforcement. Your work as a Dispositional/Intake Worker involves regular contact with the Courts and with law enforcement. Your conduct in creating the disturbances and your failure to be fully forthcoming in the internal investigation sets a poor example for the young people who you serve and has damaged the reputation of the Children's Court Center as a service organization. Additionally, your involve-ment in the criminal justice system has created substantial doubt about your ability to be effective and impartial in making recommendations to the Court on the rehabilitation, treatment, care and restitution for juvenile offenders.
>
> For the reasons described in this letter, I find that your personal conduct has resulted in you being unable to be effective in your job as a Dispositional/Intake Worker. Thus, your employment is terminated effective immediately.

Andersen worked with the County's Personnel Director, Brad Karger, to prepare this termination letter. Karger further articulated the basis for the discharge in his written denial of the grievance. That denial is dated October 24, and states:

> . . .
>
> The decision to terminate . . . came as the result of a careful analysis of relationship of the off-duty misconduct to his position as a Dispositional/Intake Worker. That analysis resulted in these conclusions:

> * (The Grievant) did not cooperate with the police. He hung up Pamela's 911 call and later tried to tell the dispatcher that everything is fine. He also twice refused to take an alcohol test when requested to do so.
>
> * (The Grievant) improperly involved his employment with Marathon County when (sic) identified himself as being with juvenile intake when he received a call back from the 911 dispatcher.
>
> * (The Grievant) was not honest in our internal investigation when he denied having any memory of a handgun being involved in the incident. This calls into question his trustworthiness in his position with the Children's Court Center.
>
> * (The Grievant's) involvement in the criminal justice system creates doubt as to his ability to be effective and impartial in making recommendations to the Court as the rehabilitation, treatment, care and restitution for juvenile offenders. . . .

The overview of the evidence submitted at the hearing will initially focus on the September 2 incident, then the events following the incident and finally the Grievant's work history.

The Grievant was, in August and September, separated from his wife, Pamela Van Rixel Weinreis, who is referred to below as his wife. On September 1, he visited his wife's sister and brother in law. He helped them cut some wood. He brought a handgun with him which he intended to use for some target-shooting. His brother in law, however, offered him a drink early in the afternoon and they did not target-shoot after that. After eating, he drove to the Outback Tavern, which was located near the home which he and his wife shared prior to their separation. She had remained at the residence during the separation, while he had moved to an apartment. The Grievant parked his truck at his former residence, and proceeded to the Outback, where he met members of his horse-shoe team.

He entered the Outback at roughly 9:00 p.m. At roughly the same time, his wife arrived. For perhaps one half hour, they avoided each other. The Grievant, however, approached her, hoping to get her to discuss their marital problems. They spoke for a time among mutual friends. The Grievant ultimately left her to shoot pool. He did so until the bar closed. He estimated he had four to five beers and maybe two shots while he was at the Outback.

He left the Outback, but did not go back to his truck. Rather, he walked to his residence, found the door unlocked and entered. He approached his wife and asked her to talk with him about their problems. She tried to leave. He blocked her path and put his hand around her arm to stop her. She responded by kicking him in the shins. He then grabbed her.

She responded by biting him in the shoulder and again kicking him in the shins. He then pushed her to the floor, and pinned her there. He continued to try to get her to talk to him about their marriage. She refused. He would not, however, release her. She ultimately told him she was pregnant and he was not the father. What happened after this is not readily apparent, except that she separated from him long enough to dial 911. The balance of the background from the 911 call turns, then, on the 911 tape and witness testimony.

The 911 Tape

The contents of the 911 dispatch tape are difficult to summarize. The Dispatcher, after receiving the call from the Grievant's wife, attempts to respond. The Dispatcher can hear the line is open, but cannot get a response. She repeatedly and unsuccessfully tries to get a response, then dispatches a squad. After the line is disconnected, she makes three attempts to establish a connection at the number of the phone from which the Grievant's wife made the 911 call. She succeeds only in reaching the Grievant's wife's answering machine. On the fourth try, the Grievant answers, and she asks the Grievant to identify himself. He responds thus: "This is Rick from Juvenile Intake."

With the Grievant's wife crying and shouting in the background, this dialogue follows:

Dispatcher:	OK, what's going on out there?
Grievant:	Well, I think my wife wants a squad.
Dispatcher:	OK, is everything OK out there Rick?
Grievant:	No, it's not. It’s really not. She wants me to leave and I guess I'm going to have to.

The Dispatcher then advises the Grievant that Deputy Sheriffs have been dispatched. He responds, "OK." She then again asks him to identify himself, and he does so. She then asks if his wife is OK, and he responds “Yeah, she’s fine.” At this point the Grievant’s wife can be heard to cry out that she is not fine. The Grievant then responds, “Well, maybe she’s not fine.” The Grievant then offers to meet the Deputies at the front door, with his hands on his truck. The dialogue is difficult to separate as it closes, but closes, roughly, thus:

Dispatcher:	OK, all right . . . Sounds good, Rick.
Grievant:	OK, thank you . . . bye.

The Grievant's Testimony

The Grievant testified that he effectively blacked out when his wife told him of the pregnancy. He could not recall how long he restrained her on the floor, but he guessed it may have been from fifteen to forty-five minutes. The next event he can recall is that he grabbed a telephone from her hands. Shortly after that, the Dispatcher called back. Thinking he was being asked about a case, he answered by identifying himself as a Juvenile Intake Worker. When the Dispatcher asked him if things were all right at the house, he realized the situation. With his wife screaming at him, he advised the Dispatcher that she needed a squad and he noted that he would wait outside by his truck. He then left the house and waited by his truck for the arrival of the Deputy Sheriffs. When the first squad arrived, he placed his hands on his truck to demonstrate he would not resist.

He did recall that sometime during the incident he said to his wife, "why don't you just kill me, it would hurt a whole lot less." He could not recall giving her a gun or asking her to kill him or to hurt him. He acknowledged he refused to take a breathalyzer test, and that one of the Deputies who responded to the call, James Brown, was an acquaintance. He asked Brown not to get involved, and understood Brown felt he had no choice but to assist in the arrest.

September 1 was a Sunday, and the Grievant was not on-call. He acknowledged that when he and his wife separated, he gave the Sheriff's department the phone number of his apartment.

Roger Modrzejewski

Modrzejewski is a Deputy Sheriff, and was the first officer to respond to the Grievant's wife's 911 call. His written report of the September 2 incident states:

> On 09-02-96 at approx. 0234, Dep. Brown, Dep. Marsolek and myself were dispatched to T9263 Quarry Rd., for a report of a 9-1-1 hang up call with what sounded like a female on the phone, trying to get her breath. While enroute, we were advised that contact had been made with a male subject at the residence who advised that his wife was requesting an officer at the house and that he will be outside with his hands on his vehicle. We were also advised that the female came on the phone and stated that there was a loaded Rugar on the floor.
>
> As I arrived at the scene, I found a male subject laying on the hood of a small truck. As I stopped my squad, he got off the truck, bent over and put his hands on the hood. This subject identified himself as (the Grievant, who) was then handcuffed and placed in the rear of my squad.

> Dep. Marsolek then arrived and we had the female open the door to let us in. She identified herself as (the Grievant's wife). (She) stated that (the Grievant) and her are married, but have been separated for a short time. At approx. 0130, (the Grievant) came into the house and started pushing her around. (The Grievant) kept putting her on the floor and holding her down. While he held her down, he kept telling her to hit him, and kill him. This took place downstairs as well as upstairs. (She) stated that this went on for approx. one hour, and (the Grievant) kept repeating hit me, hit me, hit me, kill me, kill me, kill me. (The Grievant) then went into the bedroom where a 9mm hand gun is kept, and brought it out to where (she) was. At this time (she) grabbed the phone and dialed 9-1-1. (The Grievant) then placed a magazine into the gun and again began telling (her to) kill me, kill me, kill me. (She) does not recall if the gun had been pointed at her or not, she just stated that she was very nervous when (the Grievant) loaded the gun and does not remember where it was pointed.
>
> When dispatch called back the number that came in on the 9-1-1, (the Grievant) picked up the phone and stated that everything was alright. At this same time, he pulled the magazine out of the gun, threw it onto a table and threw the gun on the floor. This is when he advised dispatch that he would be waiting outside.
>
> The only injuries that (she) had other than being very shaken and nervous, were scraps (sic) to her arms and elbows from being held down onto the floor.
>
> Speaking with (the Grievant), there was no firearm used. When I asked him to submit to a portable breath test, he asked what the reason was. When I told him the a firearm had been displayed and that he was very intoxicated, he stated that there was no gun involved. He also refused to take the portable breath test in my squad, and again later at the jail.
>
> On the front floor of the vehicle that (the Grievant) had been laying on, was a gun case. Inside this case was a 9mm handgun with two magazines, loaded, and a partial box of shells. The gun that had been used inside of the house was picked up, along with the magazine. This gun is normally kept on the dresser in (her) bedroom as she stated that she lives alone and needed it for her safety. The firearms were brought to this department, and (the Grievant) was taken to the jail.

Modrzejewski was not aware the Grievant was a County employe until Brown so advised him during the arrest. Modrzejewski noted that the Grievant's wife was crying when he entered the house, and that she smelled of alcohol. The Grievant neither sought nor received preferential treatment as a County employe.

Daniel Marsolek

Deputy Marsolek arrived at the Grievant's home shortly after Modrzejewski. When he arrived, he saw Modrzejewski placing handcuffs on the Grievant. After the Grievant had been placed in a squad, Modrzejewski and Marsolek approached the house. The Grievant's wife met them. She was crying and had scratches on her arms. Marsolek obtained the Grievant's wife's account of the incident, and asked her to confirm that account in writing. She agreed, and prepared the following statement:

> (The Grievant) came to this address at approx. 1:45 p.m. He held me down on the floor or upright for approx. 1 hour. He repeatedly asked me to hit him or to kill him. Eventually he loaded a clip in a firearm kept in the household and told me to kill him. At about the same time I reached the phone and called 911. He hung up the phone and they rang back. He picked up the phone on the call back and indicated everything was alright and he was with juvenile intake. I sustained minor scrapes on my left elbow while being held down.

The Grievant's wife told Marsolek she was concerned the Sheriff's office might let the Grievant off lightly because he worked with Deputies on a regular basis. Marsolek did not, prior to this incident, know the Grievant. He assured her that the Grievant would not receive special treatment.

James Brown

Brown was the third Deputy to respond to the September 2 incident. When he arrived, the Grievant had been handcuffed and placed in the back seat of a squad. Brown had met the Grievant several times in the course of their professional duties. They spoke briefly, then Brown went into the house. After speaking briefly with the Grievant's wife, Brown returned to the squad and asked the Grievant about the gun he had observed in the house. Brown testified the Grievant either denied a gun was involved or stated he did not know what Brown was referring to. Brown then asked the Grievant to lock his truck. At this point, the Deputies discovered the Grievant's handgun.

After his arrest, the Grievant was taken to the Marathon County jail. The incident was reported in the September 3 edition of the Wausau Daily Herald thus:

> **Endangering safety,** a 32-year old Wausau man was arrested early Monday morning on preliminary charges of endangering safety by intoxicated use of a firearm and domestic disorderly conduct after a 35-year-old Wausau woman told deputies her estranged husband came to her home in the T9200 block of Quarry Road, town of Texas, then threatened her and himself with a loaded pistol.

While in jail, the Grievant phoned his supervisor, Marvin Andersen, to inform him that he could not report for work. Andersen came to the jail on September 3, and informed the Grievant he would be suspended pending a predetermination hearing.

Andersen issued the Grievant a memo confirming his suspension with pay and setting a date for a predetermination meeting. The notice stated:

. . .

> During the predetermination meeting, you will be asked about the events on 9/2/96 which lead (sic) to your arrest and incarceration for domestic disorderly conduct and endangering safety by use of a dangerous weapon. We will be assessing the impact of this event on your ability to be effective in the performance of your job duties:
>
> 1. Any negative impact upon your work relationships with the Courts and other County workers as a result of this incident.
>
> 2. Any negative impact on your ability to effectively and impartially review and make recommendations on the misconduct of juveniles. . . .
>
> The findings of the internal investigation could result in disciplinary action being taken against you including the termination of your employment. . . .

The predetermination meeting was conducted on September 9.

The County's Personnel Director, Brad Karger, Andersen, the Grievant and the Union's Staff Representative, Phil Salamone, attended the predetermination meeting. At that meeting, Karger and Andersen obtained the Grievant's account of the September 2 incident. The Grievant stated that he had been married for roughly three years until early August, when he and his wife separated. Sometime prior to the September 2 incident he and his wife had a heated argument concerning whether she would get rid of the Grievant's dogs. He grabbed her arm during this altercation, but did nothing further. He eventually agreed to leave the house and not to return. The Grievant advised Karger and Andersen that he had sought counseling after the September 2 incident and had voluntarily sought an AODA assessment. The Grievant acknowledged he refused the breathalyzer test, but felt that such a test was not warranted since no gun had been involved in the incident.

Following the predetermination hearing, Karger attempted to interview the Grievant's wife. She, however, would not consent to an interview. Karger sought the assistance of the County's Victim Witness Coordinator, Geri Heinz. Heinz did speak with the Grievant's wife,

who affirmed the accuracy of her September 2 statement, but would not agree to be interviewed by Karger or to offer testimony against the Grievant. Heinz understood the Grievant's wife to be following the advice of the attorney who was handling her divorce action. Heinz understood the Grievant's wife had been advised that offering testimony against the Grievant might result in court-ordered payments to the Grievant under a then pending divorce action.

After reviewing the 911 tape, interviewing the Deputies, reviewing the Grievant's account from the predetermination hearing, reviewing the Grievant's personnel file, and reviewing Heinz' confirmation of the Grievant's wife's September 2 statement, Karger and Andersen met to discuss the appropriate response. They agreed that the Grievant had not credibly denied that a gun was involved in the incident. They further agreed that the Grievant had damaged his credibility within the law enforcement and juvenile justice community and had failed to assume responsibility for his actions. They agreed termination was the appropriate response, and Andersen issued the September 25 termination letter set forth above. Neither Karger nor Andersen interviewed the Grievant's co-workers to determine if they would be willing to work with him.

The Grievant was hired as a Shelter Home Youth Worker, effective July 26, 1988. He received satisfactory or better evaluations in that position. The Grievant successfully posted for the position of Assistant Juvenile Intake Worker effective December 14, 1992. It is undisputed that he received this job because he was considered to have worked beyond the requirements of his position as a Shelter Home Youth Worker. He then successfully posted for the position of Dispositional/Intake Worker, effective January 2, 1995. Andersen performed the Grievant's six month evaluation in that position, and found his performance "fundamentally sound," and "very productive." The Grievant's personnel file contains no evidence of discipline prior to the September 2 incident and includes several letters of appreciation.

The position description for Dispositional/Intake Worker defines the classification thus:

> This is professional work with juveniles for Court Services. Employees in this class are responsible for providing professional assistance to the Juvenile Court in interviewing and counseling juvenile offenders and their families, both before and after adjudication and sentencing, making an effort to obtain necessary or desired services for the child and the child's family and investigating and developing sources toward that end. Work extends to developing background and biographical data of juvenile offenders, screening out those whose offenses do not warrant official Juvenile Court action, and providing ongoing counseling and assistance to those offenders sentenced by Juvenile Court to supervision. Work is performed in accordance with professional dictates of the area of sociology and psychology with the employee expected to exercise some discretion and professional judgment in solving problems that arise with the juvenile client. Work originates either through taking a juvenile into custody and referral of a juvenile to the Juvenile Court by a police department or through the disposition

> of a juvenile to supervision by a Juvenile Court judge. Work is regularly supervised by the Supervisor of Court Services who assigns case loads, monitors and evaluates work progress, and is readily available for consultation and guidance with difficult cases. Work of this class may involve irregular hours and on-call in accordance with the needs of the Dispositional Worker's clients.

The position description calls for the following "Knowledge, Skills and Abilities:"

> Some Knowledge (sic) of the philosophies, techniques, practices, and principles of sociology and psychology, particularly as it applies to adolescents and the problems of juvenile supervision.
>
> Some knowledge of the philosophy and principles of supervisory dispositions, with special emphasis on juvenile supervision.
>
> Knowledge of interviewing techniques and practices.
>
> Knowledge of interrogation techniques and practices.
>
> Ability to establish rapport with juvenile offenders and to establish a relationship based upon confidence.
>
> Ability to maintain effective working relationships with the parents of juvenile offenders, with fellow employees, and with other employees of the judiciary system.
>
> Ability to write clear and concise reports.
>
> Ability to investigate incidents in a logical manner and develop orderly procedures for gathering and reporting facts.

The Grievant's prosecution was handled by the Portage County District Attorney's Office to avoid any conflict of interest. That prosecution resulted in the execution of a Deferred Prosecution Agreement which included the following provisions:

> . . .
>
> (3) The defendant shall participate in a 20 week Domestic Abuse Alternative Program similar to the one offered by the Family Crisis Center in Portage County. The defendant further agrees to pay any applicable fees for this program and to attend at the times and places arranged for each session.
>
> (4) If the defendant successfully completes this agreement, the case will be closed by the District Attorney's Office. . . .

Further facts will be set forth in the DISCUSSION section below.

THE PARTIES' POSITIONS

The County's Brief

After a review of the evidence, the County contends that the "(a)pplication of relevant arbitral law to the evidence in this dispute demonstrates" that it had just cause to discharge the Grievant. Arbitral precedent establishes that cause "simply means that an employer, acting in good faith, has a fair reason for disciplining an employee which reason is supported by the evidence." Such precedent does not limit the authority to discipline to on-duty conduct. Since the evidence shows that the Grievant's conduct "harmed the County's reputation and . . . undermined his ability to perform his duties . . . and has resulted in the reluctance of certain employees to work with him," it follows that the County's disciplinary interest extends to his misconduct.

Due to "his duties as a Dispositional Intake Worker," the County argues that "the Grievant should be held to a higher standard of conduct than an ordinary employee." The position places the Grievant in a position of trust within the juvenile justice system. The Grievant identified himself to the 911 Dispatcher as a County Intake Worker, denied to County Sheriffs that a gun had been involved in the incident, and refused to submit to a breathalyzer test. The Grievant then lied to departmental officials in his post-incident account for his behavior.

The testimony of the Grievant's supervisor establishes that the Grievant had lost the trust of departmental and law enforcement personnel. Witness testimony establishes the reluctance of co-employees to work with him, and the risk that the Grievant has yet to accept responsibility for his mistakes. Even though newspaper accounts did not specifically identify the Grievant, those accounts made it apparent to the community that a County employe was the subject of the incident. Court appearances further cemented the notoriety surrounding the incident. Against this background, the Grievant's ability to serve in his position had been irreparably compromised.

Arbitral precedent requires that "an arbitrator should not substitute his discretion for that vested with the employer to determine the proper penalty to be imposed for an employee's misconduct." Because the misconduct here is egregious, the evidence will not support a conclusion that the County acted in an arbitrary or capricious fashion in discharging the Grievant. It necessarily follows, according to the County, that the grievance should be dismissed.

The Union's Brief

After a review of the evidence, the Union notes that the consequences of this discipline put the Grievant's "professional career and reputation" at stake as well as his position with the

County. Under arbitral precedent, the burden of proof in this matter is on the County and it follows that "the County should be expected to prove its allegations with a considerable degree of certainty." The considerable uncertainty surrounding the facts underlying the grievance thus assume dispositive significance regarding proof of the alleged misconduct as well as the penalty imposed for those allegations.

That the alleged misconduct is for off-duty behavior demands "standards to evaluate it (which) are quite distinguishable from misconduct which occurs at work." More specifically, the Union argues the off-duty misconduct must have a "'nexus' with the employment setting." The most persuasive statement of the standards relevant to off-duty conduct is stated in W.E. CALDWELL CO., 28 LA 434, 436-437 (KESSELMAN, 1957), thus:

> The Arbitrator finds no basis in the contract or in American industrial practice to justify a discharge for misconduct away from the place of work unless:
>
> 1) behavior harms Company's reputation or product . . .
> 2) behavior renders employee unable to perform his duties or appear at work, in which case the discharge would be based upon inefficiency or excessive absenteeism.
> 3) behavior leads to refusal, reluctance or inability of other employees to work with him . . .

A review of the evidence, according to the Union, will not support a conclusion that the relevant nexus has been established. More specifically, the Union argues that there was little publicity surrounding the incident and the Grievant "does not hold a position of high public visibility." Beyond this, the Union contends that the Grievant is prepared to work and can be expected to effectively perform his duties. That he volunteered for counseling and underwent an alcohol assessment further corroborates this conclusion.

While the underlying incident is egregious, the Union argues that it is personal and was "directly provoked by a unique and extraordinary set of highly stressful personal circumstances" which "would unnerve the most stable of individuals." Since "(i)t is nearly impossible to envision circumstance(s) at work which could rise to such a personally upsetting level," the Union concludes the Grievant's fitness for work has not been meaningfully called into question. His work record underscores this conclusion, and establishes the Grievant's ability to capably perform under the stress of work. The complicating role alcohol played in the incident has no demonstrable impact upon the Grievant's ability to perform his job.

The record on the third of the Kesselman criteria is somewhat mixed, but would indicate that unit employes are prepared to take the Grievant back, particularly in light of his willingness to undergo counseling. The Union concludes that the standards governing a discharge for off-duty

conduct have not been met by the County.

The Union then contends a number of mitigating factors further undercut the County's position. Initially, the Union points to the uncertainty underlying the events which led to the 911 call. The conduct of the Grievant's wife cannot be meaningfully evaluated, and may have provoked the Grievant. The County's failure to secure her testimony should not be overlooked. Beyond this, the Union points to the Grievant's "long and unblemished record with the County." The discharge letter is itself a flawed document, according to the Union. A careful review of that document will not support the assertion that the Grievant was dishonest or uncooperative with investigating officials. A review of the County's case in light of arbitral precedent, especially COUNTY OF ORANGE V. ASSOCIATION OF ORANGE COUNTY DEPUTY SHERIFFS, 90 LA 117 (BRISK, 1987), will not support a conclusion that the Grievant was discharged for just cause. The Union concludes by requesting that "the Grievant should be reinstated with full back pay and benefits."

The County's Reply Brief

The County argues that the "Union has mischaracterized and misstated the facts in this matter." More specifically, the County asserts that the Grievant entered his wife's home without permission, and did not attempt to "discuss" their marital problems. Rather, he "erupted," and assaulted her. Beyond this, the County contends the Union has failed to show the Grievant blacked out, and cannot show any justification for the Grievant's hanging up on the 911 Dispatcher or for identifying himself as a County employe. The facts manifest no reason to question why only the Grievant was tested for alcohol consumption, and manifest no reason to believe the Grievant's wife did anything to provoke the Grievant. Nor can the Union's assertion that the misconduct cannot reasonably be expected to recur be accepted. The Grievant and his wife may have reconciled.

Nor can the County be faulted for not producing the Grievant's wife as a witness. She has been advised by her attorney not to testify in this proceeding, and has eluded the County's considerable effort to subpoena her. Beyond this, the County urges that the Union's view of the evidence overlooks the egregious nature of the Grievant's proven misconduct.

The County then contends that the Union's evaluation of the evidence is as flawed as its analysis of the facts. The Grievant's work record is neither as long nor as distinguished as the Union asserts. Beyond this, the assertion that the events the County seeks to hold the Grievant responsible for are firmly rooted in the Grievant's testimony and that of the arresting officers. The nexus between the Grievant's conduct and his employment has also been established. Testimony that he will remain able to perform those duties rests on the testimony of Union officers, whose bias is apparent. That the Grievant testified he submitted himself to alcohol assessment and to counseling falls short of establishing those efforts have demonstrated his fitness to work. That he may have performed his work in the past says nothing about his ability to work after September 2, 1996.

A thorough review of the ORANGE COUNTY case demonstrates that it is factually distinguishable to this matter. Unlike that case, the discipline posed here addresses an employe with a proven impairment regarding his ability to continue to perform his job. A review of the evidence fails to establish, according to the County, solid reason to believe the Grievant shows any remorse for his conduct. The Union's brief reflects that view, and thus understates the significance of the County's concern. Viewing the record as a whole, the County concludes that the grievance must be dismissed.

The Union's Reply Brief

The Union asserts that "the employer brief is factually incorrect on a number of points." Initially, the Union contends that the Grievant is divorced from his wife. From this, the Union concludes that a repetition of the stress which provoked the September 2 incident is impossible. Beyond this, the Union questions Employer allegations regarding the severity of the Grievant's conduct. There is, for example, no evidence he bruised his wife. The confusion surrounding the Grievant's marital status and whether the County based the discharge on one or two alleged instances of abuse demonstrates either acts of omission in investigation, or commission in acting upon the results of the investigation.

A careful review of the evidence manifests several instances where County assertions are not reconcilable to the facts. For example, the Union questions how the Grievant could not have had permission to enter his own house. Beyond this, the Union questions how the Grievant can be discharged for lying to law enforcement officials, but not charged by those officials with obstruction of justice. Other County assertions regarding the Grievant's honesty rest on no more than "(t)hin air."

The Union contends that a careful review of the precedent cited by the Employer will not support the applicability of those cases to the grievance. For example, at least two of those cases address suspensions. At least two other cases do not involve the application of a contractual just cause standard. None of the cases cited by the County can, according to the Union, obscure the fundamental arbitral tenet that the burden of proof in a just cause for discharge case lies on the employer. That the Union failed to demonstrate a medical basis for the Grievant's "blackout" during the incident cannot, the Union concludes, be held against it.

In light of the factual inaccuracies highlighted in its reply brief, and based on its review of the evidence, the Union concludes that "(t)his case represents a gross miscarriage of justice." It necessarily follows, according to the Union, that "(t)he Grievant should be reinstated with a make-whole remedy."

DISCUSSION

The stipulated issues question whether the Grievant's termination meets the just cause

standard stated at Article 2, Section D. Because the parties have not stipulated the standards

defining just cause, the analysis must address two elements. First, the County must establish the existence of conduct by the Grievant in which it has a disciplinary interest. Second, the County must establish that the discipline imposed reasonably reflects that interest. As preface to the application of these two elements, it should be noted that off-duty conduct is at issue here. Although each party phrases the implications of this point differently, both agree that just cause requires a meaningful connection between the Grievant's off-duty conduct and the County's disciplinary interest. Application of the two elements must account for this connection.

The County has persuasively demonstrated conduct by the Grievant in which it has a disciplinary interest. The extent of that interest poses the fundamental difficulty in resolving the grievance. This point is, however, more appropriately addressed in the second element.

Karger's October 24 letter states, in four paragraphs, the areas of conduct in which the County claims a disciplinary interest. The final paragraph is less a statement of conduct than an evaluation of the disciplinary significance of the conduct isolated in the three preceding paragraphs. To varying degrees, the County has established a disciplinary interest in each area of conduct.

The first area of conduct concerns a lack of cooperation with law enforcement, reflected by the Grievant's interference with the 911 call and his repeated refusal to submit to a breathalyzer. The Grievant's testimony acknowledges that he took the phone from his wife on one occasion and that he declined two requests to submit to a breathalyzer test. The County can legitimately claim an interest in this conduct. The Grievant must work in cooperation with law enforcement officials and must be relied upon to guide juveniles through the criminal justice system. In each area, he serves as a role model. The County's contention that his conduct sends a flawed signal to the law enforcement, judicial and juvenile community is persuasive.

The Grievant's testimony and the 911 tape establish that the Grievant identified himself to a County Dispatcher as "Rick from juvenile intake." This was either an inadvertent error in judgment or a deliberate attempt to use his employment status to personal advantage. In either case, the appearance of the conduct is improper, and the County can claim a disciplinary interest in that impropriety. The Union cannot claim both that the County has no disciplinary interest in the Grievant's personal life and that it can claim no interest in his personal use of his employment status.

The final area of conduct concerns the Grievant's honesty, and poses the most troublesome issue regarding the first element of the cause analysis. There is a meaningful connection between the Grievant's conduct in the investigation of his personal conduct and his involvement in the investigation of the conduct of juveniles swept into the criminal justice system. From a punishment perspective, the issue the County poses is whether the Grievant can be permitted to lie to save himself from prosecution, then counsel juveniles facing prosecution to honestly communicate with law enforcement and judicial officials. From a rehabilitation perspective, the issue the County poses is whether the Grievant can be permitted to fail to

acknowledge the full impact of his own behavior, then counsel juveniles to be accountable for their own. Whatever is said of this dilemma, it is apparent that these facts pose a meaningful link between the Grievant's off-duty and on-duty conduct.

The difficulty with the County's position is that the lie is unproven. The evidence is troublesome, since there are indications the Grievant's recall is selective. He testified that he did not agree with the statement, from the police report, that he restrained his wife for an hour. How he could disagree with this statement given his blackout is not immediately apparent. Similarly, he recalled statements made to his wife when, by her statement, he was forcing the handgun on her. How he could recall the statement but not the handgun is not immediately apparent. Finally, his demeanor as a witness poses troublesome issues. His testimony, in significant part, was read and appeared staged. Viewed together, these considerations point toward a difficulty, on his part, to acknowledge the full impact of his behavior. Presumably, these considerations were as apparent at the predetermination hearing as at the arbitration hearing.

The difficulty is that these considerations fall short of proof that he lied. To establish the lie, it must be presumed that his wife's statement is accurate and that he fabricated a memory lapse. The second presumption is unprovable in any meaningful sense. Who but the Grievant can know if he blacked out or pretended to? This does not preclude concluding he lied, but does clarify that inferring he did requires solid proof from other sources. Such proof is lacking, and there is reason to believe such proof does not exist.

The most compelling fact concerning the Grievant's lapse of memory is that he gained nothing by fabricating it. On a criminal level, the memory lapse dubiously shielded him from prosecution. His wife could conceivably be compelled to testify and the gun presumably bore his prints. The memory lapse did no more than refusing to confess to the charge did. As an employment matter, the memory lapse offered him no apparent protection. How is his failing to recall forcing a gun into his wife's hand preferable to forcing a gun into his wife's hand? His memory lapse left her statement unrebutted.

On balance, the evidence demonstrates support for the County's assertion that the Grievant has not acknowledged the full impact of his misconduct. It falls short of establishing he lied. This remains conduct in which the County has a disciplinary interest. Presumably, modification of behavior requires an acknowledgment of the impropriety of the behavior to be modified. This is, however, a lesser degree of misconduct than asserted in Karger's October 24 letter.

This poses the second element of the cause analysis and the most troublesome aspect of this case. The issue is whether discharge reasonably reflects the County's disciplinary interest in the Grievant's misconduct. Viewed as a whole, the record will not support this conclusion. This is, however, a difficult determination. Contrary to the Union’s assertion, the record will not support characterizing the discharge as “a gross miscarriage of justice.” If the evidence supported the factual assertions of Karger’s October 24 letter, the discharge would stand. The evidence does not do so, but the flaws in it are far from glaring.

As preface to an examination of this conclusion, it should be stressed that the County did not base the discharge on the severity of the Grievant's conduct toward his wife. The October 24 letter notes that the Grievant had been charged with a significant offense. The charge, however, ultimately led to the execution of a deferred prosecution agreement calling for counseling. More significant than the agreement to use counseling in place of jail time is that the severity of the Grievant's conduct toward his wife has never been established. She refused to respond to Karger's request to discuss the incident, and successfully avoided service of a subpoena to testify at the arbitration hearing. What evidence there is on this point would indicate her reasons focused not on personal safety, but on economic advantage. The significance of her refusal to testify should not be overstated, but does underscore that basing the discharge on the severity of the Grievant's conduct rests on an undetermined foundation.

More significantly, the link between the September 2 incident and the Grievant's work place conduct is not as strong as asserted in Karger's October 24 letter. The link asserted by Karger is logical. Neither he nor Andersen asked law enforcement or social service employes if they would, in fact, object to working with the Grievant. Rather, they determined that the nature of his conduct was sufficiently egregious to warrant a conclusion that it would, or should, have that effect. This approach is not, standing alone, objectionable. It is, arguably, the essence of managerial discretion. That Brown, Wadzinski or Schroeter testified that they were willing to work with the Grievant does not address the logical point advanced in Karger's and Andersen's testimony.

The logical point assumes, however, that the Grievant's conduct was as egregious as the County asserts, and that it is inextricably tied to his employment status. The evidence will not unequivocally support these assumptions. The first paragraph of Karger's October 24 letter focuses on the Grievant's failure to cooperate with law enforcement officials. That he pulled the phone from his wife, initially advised the Dispatcher things were OK, and refused to take a breathalyzer test are undisputed. This conduct is egregious, but its severity must not be overstated. The first two points focus less on his professional than his personal conduct. As noted above, the discharge rests on his professional conduct. He retracted his assertion that his wife was OK in response to her sobbing. He promised to leave the house and meet the Deputies with his hands on his truck. He did so. This cannot be characterized as failing to cooperate. It is not necessarily improper for the County to hold the Grievant to a higher standard of cooperation with law enforcement than the constitution requires. However, the link between his assertion of his personal rights and his duties as a Dispositional/Intake Worker is less than evident. That a worker within the judicial system might be willing to assert an individual right is less than shocking. That a worker within that system might counsel a juvenile to assert their constitutional rights is similarly less than shocking. These considerations do not rebut, but limit, the disciplinary interest asserted in the first paragraph of Karger's October 24 letter.

The extent of the disciplinary interest asserted in the second paragraph of that letter is even more circumscribed. The evidence will not support a conclusion that the Grievant meaningfully tried to use his job to shield himself from prosecution. Identifying himself as an

intake worker was a significant error. The significance of the error should not be minimized. He was not on call, and was not in any event on call at that number. At best, the utterance was inadvertent. Even if inadvertent, it was egregious. The misconduct should, however, not be exaggerated. The evidence will not support a conclusion that he, in any meaningful sense, sought to use his job status to personal advantage. He never asked for preferential treatment. He pleaded with Brown not to become involved in the investigation. The evidence establishes Brown is the only Deputy with whom he could have sought favor based on professional or personal acquaintance. The misconduct, although noteworthy, is not as egregious as the County asserts.

The extent of the disciplinary interest asserted in the final paragraph of the letter is attenuated. As noted above, the asserted lie is unproven. There are troublesome undertones to the Grievant's account of his actions. Those undertones turn, however, on personal accountability. The discharge is based on lying.

Beyond this, the Union has persuasively asserted mitigating circumstances. The September 2 incident did not become, as the County initially feared, a widely publicized scandal. This point has limited significance, but does undercut the contention that the notoriety of the incident might make it impossible for the Grievant to successfully perform his work. The Grievant has a solid, long-term work record, unblemished by any discipline other than the discharge at issue here. His more recent evaluations put him well above satisfactory performance. Here too, the significance of this point should not be over-emphasized. Andersen authored his most recent evaluation and Andersen was willing to discharge him. Finally, the factual impact of the incident on his work performance remains debatable. It is not unheard of for employes in counseling roles to benefit from personal mistakes.

On balance, the County has demonstrated a substantial disciplinary interest in the Grievant's conduct. That interest is not, however, sufficiently well founded in the evidence to support his discharge.

Determination of the remedy appropriate to this violation poses another troublesome issue. The record poses a series of, in many ways, irreconcilable dilemmas. The County's asserted interest in the Grievant's lying, for example, has not been proven. This points away from discharge. However, troublesome issues remain. The evidence, although not establishing lying, does establish reason to question whether the Grievant has assumed full responsibility for his conduct. Beyond this, the misconduct at issue here is difficult to address. Subjecting his errors of judgment to some form of warning serves no evident purpose. Should the Grievant be warned, in writing or through a suspension, not to identify himself as a County worker when a County Dispatcher calls during a domestic abuse incident? More subtle than this is that the implications of his errors of judgment have not yet been determined. The conclusions reached above note only that Karger's and Andersen's concern with the Grievant's acceptability rest on an uncertain factual basis. It remains to be seen if law enforcement, judicial or social service personnel will have difficulty working with the Grievant. Beyond this, it remains to be seen if juveniles or their parents will have difficulty working with him.

Against this background, the Award entered below returns the Grievant to work without any make-whole component. This remedy, although not unprecedented in arbitration, [See, generally, LABOR AND EMPLOYMENT ARBITRATION, (MATTHEW BENDER, 1997) AT CHAPTER 14; or, for example, SHEBOYGAN COUNTY, MA-7593 (NIELSEN, 6/93) and KRC HEWITT, INC., A-5478 (GRECO, 11/96)] is unprecedented for me. It reflects the only resolution I can see to address the dilemmas touched upon above, and the remedy mirrors the fundamental difficulty this record poses. The County's sanction rests on a sound basis, but not on as sound a basis as asserted in the discharge documentation. The evidence will not support the conclusion that the Grievant behaved as egregiously as the County asserts or that his personal misconduct is as closely tied to his professional status as the County asserts.

The Award entered below balances these considerations by affording the Grievant the opportunity to restore his blemished reputation as a Dispositional/Intake Worker without penalizing the County. Beyond this, the Award recognizes that the effects of the Grievant's misconduct may yet have ramifications. The only expungement of his personnel file required by the Award is that references to the imposition of a discharge be removed or amended to clarify his reinstatement consistent with the terms of the Award.

Before closing, it is necessary to touch on certain arguments posed by the parties. The fundamental strength of the County's case is that an arbitrator should not substitute his judgment for that of an employer. The force of this point should not be obscured, and is the primary reason for the denial of a make-whole remedy. Neither Karger's nor Andersen's views are illogical or unfounded. Their action was, in a restricted sense, precipitous. The passage of time has made the arbitration record more substantial than the predetermination record.

The denial of a make-whole remedy can appear less a reflection of the evidence than of an arbitrator's desire to offer something to each party. I cannot dispel this appearance. However, I can state that I view the remedy to reflect the underlying difficulty of finding and evaluating the facts relevant to the grievance. The remedy seeks to balance conflicting, but legitimate and proven interests.

AWARD

The County violated the labor agreement when it terminated the Grievant from employment as a Children's Court Intake Worker on September 25, 1996.

As the remedy appropriate to the County's violation of Article 2, Section D, the County shall offer to reinstate the Grievant to the position he occupied at the time of his termination. If the Grievant accepts this offer, the County shall determine his seniority and any other benefits consistent with the labor agreement and his actual time of County service. The County is under no obligation to pay him for any wages or benefits which he would have received in the period between the effective date of his discharge and his reinstatement consistent with the terms of this

Award. The County shall expunge references to the discharge from the Grievant's personnel file(s) or amend such references to clarify that the Grievant was reinstated consistent with the terms of this Award.

Dated at Madison, Wisconsin, this 30th day of October, 1997.

Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

RBM/mb

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