

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**CHIPPEWA COUNTY**

and

**CHIPPEWA COUNTY DEPUTY SHERIFF'S ASSOCIATION  
WISCONSIN PROFESSIONAL POLICE ASSOCIATION/LAW  
ENFORCEMENT RELATIONS DIVISION**

Case 255  
No. 60038  
MA-11497

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Appearances:

**Ms. Victoria L. Seltun**, Weld, Riley, Prens, and Ricci, S.C., 3824 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of the County.

**Mr. Gary W. Gravesen**, Bargaining Consultant, Wisconsin Professional Police Association, Law Enforcement Employee Relations Division, 16708 South Lee Road, Danbury, Wisconsin 54830, appearing on behalf of the Union.

**ARBITRATION AWARD**

Chippewa County, hereinafter referred to as the County, and the Chippewa County Deputy Sheriff's Association, Wisconsin Professional Police Association/Law Enforcement Relations Division, hereinafter referred to as the Union, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to the parties request the Wisconsin Employment Relations Commission appointed Edmond J. Bielarczyk, Jr. to arbitrate a dispute over the suspension of an employee. Hearing on the matter was held in Chippewa Falls, Wisconsin on September 11<sup>th</sup>, 2001. Post-hearing arguments were received by the undersigned by November 16<sup>th</sup>, 2001. Full consideration has been given to the testimony, evidence and arguments presented in rendering this Award.

**ISSUE**

The parties agreed upon the following issue:

“Did the County have just cause to suspend the grievant for one (1) day without pay?”

"If not, what is the appropriate remedy?"

**PERTINENT CONTRACTUAL PROVISIONS**

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**ARTI CLE 7 – DISCIPLINE AND DISCHARGE**

Section 1 – Just Cause: The County will not discipline or discharge any employee without just cause. Warning notices shall be given when required by established approved County work rules. Copies of such warning notices shall be given to the employee, Personnel Director and the Department Head. The warning notice must be issued within 30 days of said complaint. (When a verbal reprimand is given to an employee and it is noted for the record, the employee and supervisor will be required to initial and date the incident.)

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**PERTINENT WORK RULES**

**4.62 WORK RULES**

An employee may be disciplined for just cause, including violations of County work rules. The following list provides some examples. Individual departments may have additional rules. Discipline for violations varies according to degree, but may include oral warning, written reprimand, suspension without pay, or discharge.

...

- (19) Reporting to work under the influence of drugs or alcohol.

...

## SHERIFF DEPARTMENT POLICIES AND PROCEDURES

803.10

- K. A deputy will not operate any sheriff's office vehicle if that deputy has consumed any amount of alcohol and will not be used when patronizing an establishment whose primary business is the sale of intoxicants. No office member will operate any sheriff's office vehicle with a (BAC) Blood Alcohol Concentration greater than .00.

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### BACKGROUND

Amongst its various governmental functions the County operates a Sheriff's Department wherein it employs Investigator Mark Martens, hereinafter referred to as the grievant. The grievant is a twenty-nine (29) year employee. On April 9<sup>th</sup>, 2001 the grievant was off duty. At 5:00 p.m. he received a call from Sergeant Kenneth Oemig requesting him to report to the scene of a burglary. The grievant declined based upon the fact he had been drinking. The grievant ceased drinking after the call and went to bed that night at approximately 10:00 p.m. At approximately 11:00 p.m. Captain Folska was contacted by the County's dispatch center informing him that there was a need for an investigator. Folska directed the dispatch center to go down the list of employees starting with the grievant. At approximately 11:15 p.m. the County's dispatch center contacted the grievant's residence where his son answered. His son informed the dispatch center his father was sleeping in bed. The son was directed to wake his father. When the grievant came to the phone the dispatch center requested he respond to the scene of a suicide. At this time the grievant believed he was in a position to take the call went to the scene.

When the grievant arrived at the scene Coroner Kay Gerrits and Sergeant Robert Cunningham were there. Gerrits noticed what appeared to be the odor of an intoxicant on the grievant and informed Cunningham of the matter. Cunningham contacted Lieutenant Gene Gutsch. When Gutsch arrived at the scene he also noticed the odor of intoxicant on the grievant. Gutsch requested the grievant accompany him to his squad car. Therein Gutsch requested the grievant to blow into a preliminary breath test device, (Portable Breath Testing or PBT device). The grievant agreed to do so and the device measured 0.04. Gutsch instructed the grievant to secure his squad car and gave the grievant a ride home.

On April 9<sup>th</sup>, 2001 the following disciplinary letter was sent to the grievant:

April 9, 2001

Mark J. Martens  
320 Portland Ave.  
Chippewa Falls, WI 54729

Re: Statement of Charges

Investigator Martens,

I am, by this letter, giving you formal notice of the summary of charges as follows:  
On Monday, April 9, 2001 you were called to the scene of a suicide at 3286 90<sup>th</sup> Ave in the township of Howard. While on the scene Coroner Gerrits thought you smelled of an intoxicant. She voiced her concern to Sergeant Cunningham who in turn contacted Lt. Gutsch. Lt. Gutsch proceeded to the scene. He spoke with you regarding the concern and asked if you would blow into a PBT which you agreed to do. The reading of the PBT at 12:58am on April 9, 2001 was .04. Lt. Gutsch instructed you to secure your car at the scene and he gave you a ride home.

County work rule 4.62 (19) states "An employee may be disciplined for just cause including, but not limited to, the following infractions of work rules: (19) Reporting to work under the influence of drugs or alcohol." In addition, section 803.10(K) of the Chippewa County Sheriff's Department policy and procedure manual states, "A deputy will not operate any sheriff's office vehicle if that deputy has consumed any amount of alcohol and will not be used when patronizing an establishment whose primary business is the sale of intoxicants. No office member will operate any sheriff's office vehicle with a (BAC) Blood Alcohol Concentration greater than (sic) .00"

I am recommending to the Grievance Committee you be suspended for 1 working day. If you choose to request a hearing within the allotted 3-week time limit per State Statute 59.26(8)(b) you may do so. Otherwise, the Grievance Committee will be hearing this case at a date chosen by the committee. At such hearing appropriate discipline action will be determined.

Sincerely,

Doug Ellis /s/  
Doug Ellis  
Sheriff

Cc: Personnel  
Vicki Seltun  
Gary Gravesen

Thereafter the matter was grieved and processed to arbitration in accord with the parties' grievance procedure.

At the hearing the grievant testified he did not want to remove a bullet from the ceiling at the crime scene while the family was present. At the hearing Gutsch testified he was unaware the grievant had turned down a previous call-in. The record also demonstrates that results of a PBT device can not be used in court, that extraneous factors such as: temperature of the device, volume of breath, medical condition, condition of the battery, radio frequency and cleaning from a previous test can impact on the device's results. At the time of the incident the Chippewa County Sheriff's Department did not have a procedure for regularly calibrating the PBT device. There is no evidence that since its purchase that the PBT device used by Gutsch had ever been calibrated prior to testing the grievant. Gutsch also testified he did not turn off his squad car radio when he tested the grievant.

### **County's Position**

The County contends it had just cause to impose a one-day suspension on the grievant for violation of County work rules of which he had adequate notice. The County asserts it had a legitimate disciplinary interest in the grievant's conduct on April 9, 2001. The County points out that County work rules expressly prohibit any County employee from reporting to work under the influence of drugs or alcohol. The County also points out that Sheriff's Department personnel are prohibited from operating any vehicle if the employee has consumed any amount of alcohol or with a blood alcohol concentration of greater than .00 (zero tolerance).

The County asserts the Grievant was not ordered to report and was under no obligation to report. The County argues that the grievant was asked to report and he indicated he would even though he had consumed lawful alcoholic products within the previous six hours. The County also asserts that the grievant exercised poor judgement on April 9, 2001 and that the County has a legitimate disciplinary interest in that conduct/poor judgement. The County stresses that the grievant's off duty conduct became a County disciplinary matter when the grievant reported to duty while still under the influence of alcohol and with the presence of alcohol in his system.

The County also argues that whether the grievant felt he was in a condition to respond is irrelevant. The grievant reported to work with alcohol in his system and he therefore violated the County's and Sheriff's Department work rules. The County also argues it is the Union's burden to demonstrate that the dispatch center was aware the grievant had turned down a previous call due to the fact he had been drinking. The County further argues that employees are well aware of the inappropriateness of reporting to work in a condition that is the result of the consumption of alcohol that impairs work performance. The County stresses the grievant was aware of, and understood, the work rules.

The County also asserts it did a thorough investigation, pointing out that Gutsch could personally detect the odor of alcohol, administered the PBT test, is certified to administer the test and that Gutsch concluded there was a presence of alcohol in the grievant's system. The County stresses that Gutsch, along with two other witnesses (Cunningham and Gerrits), together with the

PBT test result, concluded the grievant had violated County work rules. The County contends the Union has failed to demonstrate that Gutsch's investigation was flawed in any respect whatsoever.

The County also contends that there is no evidence introduced by the Union that would demonstrate the PBT device did not accurately detect alcohol on the grievant. The County also argues the level of intoxication is irrelevant. What is relevant is the fact the PBT device detected the presence of alcohol. The County, in acknowledging it did not perform a chemical test of the grievant's blood, argues a presumption can be made that any such test would of resulted in a reading in excess of .00. The County also points out it was not attempting to establish legal intoxication but whether the grievant had violated a clearly enunciated work rule.

The County also asserts the one (1) day suspension is a reasonable penalty given the nature of the grievant's actions.

#### **Union's Position**

The Union contends the County did not have just cause to suspend the grievant for one day. The Union argues the County failed to properly investigate the matter prior to taking disciplinary action and that the County failed to conduct a fair investigation. The Union points out the rule the grievant is alleged to have violated requires that the employee not have a Blood Alcohol Concentration (BAC) higher than 0.00. The Union asserts a PBT device cannot measure the BAC of an employee and points to the unrefuted testimony of Deputy Jeff Hanzlik in support of its position. The Union also points out that Gutsch acknowledged he did not require the grievant to take a blood test on April 9<sup>th</sup>, 2001.

The Union also argues that existing statues prevent the use of PBT devices in motor vehicle violation cases and such results cannot be used as evidence of legal intoxication. The Union points out the County's PBT devices are not calibrated on a regular basis. The Union points out Gutsch testified that it was possible to get a false reading on a PBT device if it had not been calibrated. The Union also points out that County witness Captain James Clark testified it was possible to detect the odor of an alcoholic beverage on someone's breath and still test at .00.

The Union stresses there is no evidence the grievant did anything but a professional job. The Union points out Gerrits testified the grievant did an appropriate investigation except for the removal of the bullet from the ceiling.

The Union also argues that it was reasonable for the grievant to assume that since the County had knowledge of his prior refusal the County was comfortable with his responding over six hours later. The Union points out that if the grievant had not felt he was fit for duty the second time he would of so told the dispatch center. The Union argues it was reasonable for the grievant to assume that information concerning his first denial would be passed on. The Union asserts the grievant was aware of the rules but that he also felt an obligation to the County so he responded to the second call because he believed he was fit for duty. The Union argues the County waived any right to discipline the grievant because the County was aware of the grievant's initial refusal to report to duty.

The Union would have the undersigned sustain the grievance, direct the grievant be made whole and cleanse his record.

### DISCUSSION

In determining to discipline the grievant the record demonstrates the County cites two work rules. Therefore, in order for it to prevail the County has the burden of demonstrating the grievant violated both. Thus, the County must demonstrate the grievant was under the influence of alcohol, and the County must demonstrate the grievant operated a squad car after consuming any alcohol. This matter arose when Coroner Gerrits smelled alcohol on the grievant's breath. She was also concerned because the grievant was not concerned about a bullet in the ceiling. She contacted Cunningham who contacted Gutsch. Gutsch relieved the grievant from duty and drove him home. While the County has clearly demonstrated the grievant smelled of alcohol, there is no evidence the grievant's conduct was influenced by alcohol. While Sheriff Douglas Ellis reported that the victim's daughter had informed him on June 28<sup>th</sup>, 2001 that the grievant had been rude, this differs from the written statements of the victim's sons. One of the sons of the victim wrote "... very consoling officer and telling us if we find any evidence to give him a call (Jt.7 A). Another son wrote... "The investigator was helpful however he smelled of alcohol." (Jt.7 B). The fact the grievant showed no concern to Gerrits about a bullet in the ceiling does not lead by itself to a conclusion that the grievant was under the influence of alcohol. Particularly when the grievant testified he did not want to remove the bullet in the presence of family members and he was relieved of his duties prior to the completion of the investigation.

The County does have, as it has argued, a legitimate disciplinary interest if employees report to work under the influence of alcohol. However, it has the burden to demonstrate the grievant's conduct was influenced by alcohol. The only evidence herein is he smelled of alcohol. That, in and of itself, is insufficient to establish the grievant was under the influence of alcohol. There is no evidence the grievant acted unprofessionally, slurred his words, or was clumsy in his actions. The only demonstrative evidence is that the grievant smelled of alcohol and tested 0.04 on the PBT device. This is insufficient to establish the grievant was under the influence of alcohol. The undersigned therefore concludes the County has failed to demonstrate the grievant reported to work under the influence of alcohol.

The record also demonstrates the grievant was aware of the work rule prohibiting the operation of department vehicles if the employee consumed any amount of alcohol. The facts are the grievant had consumed alcohol, his breath smelled of alcohol consumption, and he tested positive for alcohol on a PBT device. The standard the Sheriff has established is no consumption if you are to operate Sheriff's Department vehicles. Such a standard is not unreasonable given the type of work performed by department employees. No matter how lofty the grievant's motives for agreeing to respond to a call-in, or, no matter the County's failure to communicate the grievant's earlier denial communications center staff, the grievant was aware of the work rule and he opted to respond. There is no question he had consumed alcoholic beverages. The undersigned therefore concludes the grievant violated the work rule prohibiting the consumption of any alcohol and also operating a Sheriff's Department vehicle

The undersigned notes here that while the Union has gone to great lengths to challenge the veracity of the PBT device, the device does give an inference that there is alcohol in the blood system. Given this inference, the fact the grievant acknowledged he had been drinking, and the fact the grievant smelled of alcohol consumption, it is reasonable for the County to conclude there was alcohol in the grievant's blood. While the PBT device inference can not be used in evidentiary proceedings involving motor vehicle violations, the narrow use herein is in the determination of any consumption.

As noted above the County disciplined the grievant for violating two specific work rules. The County did not have just cause to discipline the grievant for reporting to work under the influence of alcohol. The County did not have just cause to discipline the grievant for operating a Sheriff's Department vehicle after he had consumed alcohol, even though this may have occurred several hours after the grievant had ceased drinking. The grievant was aware of the work rule, however, the County was aware the grievant had declined to come into work earlier because he deemed himself unfit for duty. The undersigned therefore concludes, based upon the above and foregoing, and the testimony, evidence and arguments presented that the grievant's discipline be reduced to a written warning for violation of section 803.10(K) and that he be made whole for any lost wages and benefits.

#### AWARD

The County did not have just cause to suspend the grievant for one (1) day.

The County is directed to make the grievant whole for any lost wages and benefits and to reduce the grievant's discipline to a written warning for violation of Sheriff's Department Policies and Procedures, Section 803.10(K).

Dated at Madison, Wisconsin, this 12th day of February, 2002.

Edmond J. Bielarczyk, Jr. /s/

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Edmond J. Bielarczyk, Jr., Arbitrator



