BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

EAU CLAIRE COUNTY JOINT COUNCIL OF UNIONS, AFSCME, AFL-CIO, LOCAL 2223

and

EAU CLAIRE COUNTY, WISCONSIN

Case 207
No. 60802
MA-11729

Appearances:

Mr. Steve Day, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 318 Hampton Court, Altoona, Wisconsin 54720, appearing on behalf of Eau Claire County Joint Council of Unions, AFSCME, AFL-CIO, Local 2223, referred to below as the Union.

Mr. Keith R. Zehms, Corporation Counsel, Eau Claire County, Eau Claire County Courthouse, 721 Oxford Avenue, Eau Claire, Wisconsin 54703, appearing on behalf of Eau Claire County, 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 grievance filed on behalf of Georgene Britton. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing was held on April 24, 2002, in Eau Claire, Wisconsin. The hearing was not transcribed. The parties made closing statements at the hearing, and waived the filing of written argument.

ISSUES

The parties stipulated the following issues:

Did the County have just cause to give Georgene Britton a written warning for her conduct on October 11 and 12, 2001?

If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE I
RECOGNITION AND MANAGEMENT RIGHTS

. . .

1.06 The Employer shall have the right to:

. . .

C. Suspend, discharge or take other appropriate disciplinary action against the employee for just cause . . .

BACKGROUND

The grievance form, dated November 13, 2001 (references to dates are to 2001, unless otherwise noted), states the "Circumstances of Facts" thus:

> Employee was issued a written warning after meeting with management on October 29, 2001. Employee reported a physical act against her by Deputy James McQuillan in her office. Management alleges employee was partially at fault in this action.

The grievance form seeks the following remedy:

> Remove written warning from any and all employee personnel files. Make employee whole. Consider relocation or repositioning of file holding papers to avoid blocking of access by employee to and from her desk by other staff.

Sheriff Ron D. Cramer denied the grievance, in writing, on November 16. The Committee on Personnel issued a written denial of the grievance dated December 17, which states that: "The denial is based upon your striking the documents held by Deputy McQuillan; raising the issue the following day with Deputy McQuillan; and your refusal to apologize as ordered by Sheriff Cramer."

Georgene Britton has worked for the Sheriff's Department for fourteen years. She currently works as a Civil Process Coordinator, classified as an Office Associate 4. James McQuillan has served as a Deputy Sheriff for nineteen years, and currently serves as a process server. Roughly speaking, Britton prepares the papers necessary for legal notice to litigants, or persons affected by litigation. McQuillan is one of the deputies who serves the papers. Included in the papers is a form which a deputy must complete and return to the Grievant's office, and place in a filing box, referred to below as the service box, that rests on top of a filing cabinet. Deputies, including McQuillan, use Britton's office on a daily basis.

Britton's office has a single door that opens onto a common hallway. Within the office, directly across from the door, is her desk. Upon entering the office from the common hallway, to the right of the door, parallel to her desk, is a row of furniture including a chair, then a table, then another chair, then the filing cabinet on top of which sits the service box. Between this row of furniture and Britton's desk is an aisle, which is twenty inches wide at its narrowest point. At the right (from the perspective of a person entering from the common hallway) end of her desk, the aisle widens into an open area. The open area leads into the workspace behind the desk in which sits her desk chair. The filing cabinet that supports the service box is located at a diagonal from the edge of the desk, facing the open area. There is less than two feet separating the filing cabinet and the desk at the narrowest point. A person standing by the chair or end of the filing cabinet closest to the desk effectively blocks access to the open area that permits access to the Britton's desk chair and work area.

Immediately adjacent to Britton's office is the office of Pat Scherer. A common area that houses a printer and a fax machine is located across the hallway from these offices. On the same wall along which sit these machines is the doorway to the process servers' office.

Sometime in the early afternoon of October 11, McQuillan left the process servers' office, carrying papers. Britton was in the area of the fax machine and either placed a paper on top of the pile being carried by McQuillan or tossed it at the pile. McQuillan either ignored the toss, letting the paper fall to the floor, or deliberately tossed it onto the floor. McQuillan then proceeded into Britton's office in front of the filing cabinet that supports the service box. Britton finished her work in the fax area, and went to her office to find the aisle permitting access to her work area blocked by McQuillan. The bulk of what happened as she moved toward her desk chair is disputed. It is, however, undisputed that McQuillan brushed her aside and left her office.

After composing herself, Britton went into Scherer's office to discuss the incident. She decided not to immediately report it. While commuting on October 11 and 12, she decided to prepare a statement to make to McQuillan the following day.

Early in the work day on October 12, McQuillan approached his supervisor, Ed Asselin, to describe the incident of October 11, and to get Asselin to speak with Britton. Sometime around noon, she noticed McQuillan entering her office, and determined to make her statement to him. She did so, but McQuillan did not respond as she had hoped.

Sometime after this conversation, McQuillan encountered Asselin and thanked him for speaking with Britton. Asselin had yet to do so, but McQuillan assumed that Asselin prompted the earlier conversation. Before Asselin could speak to Britton, he fortuitously met Cramer. After learning of the confusion regarding the incident, Cramer directed Asselin to speak to Captain David Shultz, and to allow Dianne Hughes, Britton's direct supervisor, to speak with Britton. Asselin fortuitously met Britton on his way to speak to Schultz. She then relayed to Asselin her view of the events of October 11 and 12.

Cramer directed Schultz to compile an investigative report. Schultz acquired a written statement from McQuillan and from Britton. He interviewed other employees, and compiled the results of his investigation in a memo to Cramer dated October 24. Schultz concluded his memo thus:

. . .

> I believe that at the time of this incident, there was tension on both their parts and that they should have just walked away from each other before this incident escalated. However, this incident did not justify the use of physical violence by Deputy McQuillan against Georgene Britton, no matter how slight of push he gave to her, Deputy McQuillan should not have touched Georgene Britton. There is no call for this type of behavior between employees.
>
> I recommend that some sort of discipline action be taken against Deputy James McQuillan for his part in this incident. The type of discipline is yet to be determined. I further recommend that there also be some sort of discipline against Georgene Britton for her part in agitating the situation.
>
> As an added recommendation, I believe that both of these individuals should apologize to each other for their unprofessional conduct in reference to this incident.

Cramer reviewed the memo and determined to discipline McQuillan and Britton. He stated the discipline in letters dated October 26. McQuillan's reads thus:

> I have received reports from Captain Dave Schultz indicating that there was an incident on October 11, 2001. It is alleged that you and Georgene Britton had an incident in her office where you placed your hands on her with some sort of characterization of either nudging, pushing or shoving. Your action resulted in Georgene Britton falling onto a chair.
>
> After reading the reports and statements, I am concluding that disciplinary action is to be taken on both individuals. For your part in this incident, I am suspending you for (1) day. . . . As this is a very serious issue, I can not condone any characterization where you physically put your hands on another employee and that employee ends up falling. I understand that there was some agitation on Georgene Britton's part, which is also being dealt with.
>
> Within one week of receipt of this letter, I expect a verbal apology from you to Georgene Britton, apologizing for your actions. As employees, we need to perform collectively, cohesively, and in harmony with one another. I can not tolerate an employee's refusal to work as a team. I expect a lot out of you and Georgene, as you both have served Eau Claire County for some time.
>
> I will be checking with you both to make sure that the implications of this letter are understood. This correspondence will be placed in your Personnel File indicating that will have a one-day suspension, as a result of inappropriate action, as outlined in the Eau Claire County Sheriff's Policy #1 dealing with courtesy and unbecoming conduct; and, with your job description, that you must be able to work with fellow employees as well as the public.

Britton's reads thus:

> Captain Schultz has provided me with written documentation of an incident that happened on October 11, 2001. Based on both written statements and Captain Schultz's investigation, I am forced to take disciplinary action on both parties involved in this unfortunate incident.
>
> One of the most basic work rules in the Sheriff's Department is that you get along with co-workers. This did not happen, and if there had been a prior problem, it was not reported to your direct supervisor or Captain Schultz. It is, therefore, my decision to give you a written warning. This warning will be placed in your Personnel File for inappropriate action taken on your part of this

> incident. I do this for the purpose of having documentation and to see that this type of incident does not occur again between you and Deputy McQuillan.
>
> Secondly, I am advising you that both parties in this situation must verbally apologize for their actions and come to an understanding that you two will be able to work with one another in the future. I expect the verbal apologize to be taken care of within a week of receipt of this letter.
>
> All employees need to work together in a team effort. We need to be courteous, not only to the public we serve, but also to fellow-employees.

The balance of the background is best set forth as an overview of witness testimony.

Ron D. Cramer

Cramer has served as Sheriff for roughly five and one-half years. He relied on Schultz's findings and conclusions. He determined a one day suspension for McQuillan was appropriate because the shoving incident was without precedent in his experience. Britton's written warning reflects a number of concerns. Cramer views his management to have an open door policy regarding employee concerns, and he did not think Britton made appropriate use of management. Beyond this, her comments to McQuillan on October 12 were, at a minimum, ill-advised and arguably provocative. He viewed the apologies to be an appropriate way to clear the air between them. They were, however, to be voluntary rather than the reflection of a direct order. Neither employee has apologized. The discipline underscores the departmental interest in having employees work together, without regard to their personal feelings.

He did not think the incident manifested sexual harassment.

James McQuillan

McQuillan's statement to Asselin is dated October 17, and reads thus:

> On 10-10-01 I got a phone call from Georgene Britton in regards to a standby on a property case. I was too busy that day to take care of it.
>
> On 10-11-01 the lady involved with that case called me at the office. She agreed to bring down copies of her legal papers & then a plan would be set up. I told Britton of this & her reply was that she didn't give a shit.

> At noontime I came out of the process servers' office & Britton threw a set of papers at me. I ignored this & went into Britton's office to do some returns. Britton came into the office & put some papers on her desk. Britton stated that she didn't give a shit & that this was all she was going to do. Britton then left the office.
>
> A few seconds later Britton came back into the office & walked up to me as I was reading a paper. Britton started striking the back of the paper so that I couldn't read it. I tossed the paper into the air, said "pardon me" . . . put my right hand on her left shoulder & nudged her out of my way. Britton put her right hand on the wall as I passed. Britton did not fall down, cry out in pain, or give any indication of a physical problem.
>
> On Friday morning, 10-12-01, I informed Sgt. Asselin of the prior days events . . . At noon time I was in Britton's office doing returns when Britton came into the office. Britton stated that I didn't scare her, that she's been a under-sheriff for 22 years, had to deal with guys like me before, didn't care if I hated her or not, etc. . . . She was still talking like this when I walked out of the office.
>
> The only other encounter with Britton was this morning. She was in the process server's office & cheerfully said "good morning" to me.

McQuillan testified that he has "good days and bad days" in his relationship with Britton.

He stated that he was upset with her for perhaps a minute or two after she threw the papers at him, but was not upset when he entered her office. She did not upset him in her office until she tapped on the papers he was attempting to read. She simply stood before him and stared at him, tapping at the back of the papers. He could not recall what the papers were. He did not know whether or not she wanted to get by him. She did not ask him to move. He acknowledged that she could not get around him unless he moved. When he placed his hand on her arm, she stood by the chair next to the filing cabinet.

The following day, sometime around noon, he filed forms in Britton's office. She was in the office when he entered, and made the statements noted in his October 17 statement. He responded that she was not an undersheriff, but a secretary. He was, by that point, fed up with her badgering him.

He noted he had filed a grievance, but did not pursue it to arbitration because he had touched her. He stated it is "absolutely correct" that he had done nothing wrong.

Ed Asselin

Asselin has served as the supervisor of the Court Services Division since May of 1985. He has served the County as a Deputy Sheriff since September of 1980. He has known McQuillan for longer than he has served the County.

McQuillan is a strong-willed, but not a sociable individual. McQuillan first approached Asselin on October 12 to give his account of the incident on October 11. Asselin suspected there was more to the incident than McQuillan acknowledged, and understood McQuillan to want him to speak to Britton so that they could get along as workers.

Asselin attempted to speak with Britton, but found she had left the building for a doctor's appointment. He learned her account of the events later in the day. Asselin understood that Britton and McQuillan had a difference of opinion on when McQuillan should respond to a request to seize some property. McQuillan thought he lacked necessary papers, and those papers were the ones Britton attempted to get to him on October 11.

Asselin understood Britton to first allege that McQuillan had hit her. This surprised him, and he informed her that she should have immediately reported an assault. Her later accounts of the incident characterized the contact as a "push" or a "shove." Asselin noted that she was particularly upset that McQuillan used the term "secretary" as an insult.

Asselin believed the incident was more significant that McQuillan initially reported. He also believed that McQuillan had difficulty communicating with Britton. He felt McQuillan often chose not to speak to Britton and other employees, even if it was appropriate. He also believed Britton knew how to push "the buttons" that angered or upset McQuillan. He was disappointed that the employees chose not to apologize to each other, and stated that he expected a higher level of conduct from his adolescent children. He did not see the incident to involve sexual harassment, and he believed McQuillan's conduct toward Britton paralleled his conduct toward other deputies.

Patty Scherer

Scherer has worked for the County for fifteen years. She stated she knows McQuillan "pretty well" and Britton "very well." Scherer prepared the following statement regarding the October 11 incident:

> At around 12:30 pm John Strand, Georgene, and myself were standing in front of the fax machine having a conversation. Jim McQuillan walked out of his office and as he walked past the three of us Georgene had a paper in her hand and put it on the papers in Jim's hand and said "this is the paper you need". At

> that point, Jim didn't look at it, and in one gesture he tossed the paper on the floor, didn't acknowledge Georgene or her comment and kept walking.
>
> John picked the paper up and handed it to Georgene, at which time she went into Jim's office and put it on his desk. None of us said anything to each other; we just looked at each other, kind of rolled our eyes and shook our heads in disbelief.
>
> A short time later (within 20 minutes) Georgene came into my office and sat down in front of my desk (not a common occurrence). I could see she was very upset and visibly shaking. I asked her what happened to precipitate it and she said she had gone in her office and tried to pass him as he was pulling paperwork (out of an alphabetical mailbox of sort) and he didn't move so she kind of tapped the bottom side of the papers he had in one hand. She said at that point he shoved her and she fell into a chair that sits very close to that area. As she was talking she pulled her shirt back near the upper arm-shoulder area and looked to see if he had left a mark.
>
> As we talked about the incident I told her about a phone call I had made to his cell phone the previous day and that he had hung up on me in the middle of it.

She testified that she did not hear any voices during the October 11 confrontation. She first learned of the incident when Britton came into her office and sat down. This was unusual, since Britton typically spoke to Scherer while standing in the doorway. Britton repeatedly said that McQuillan had "pushed" her, forcing her to fall into a chair. Scherer counseled Britton to take the matter to a supervisor, and stated she would have done so. She added that all departmental employees have "run ins" with McQuillan.

Georgene Britton

> Britton's written statement for October 11 and 12 reads thus:
>
> Thursday, October 11, 2001
> I received Response to Order to Show Cause . . . This was put on Process Desk – James McQuillan. When I believed him to be going out after he had been in about noontime, in the "big room", without saying anything, he threw the paper. Pat Scherer and I were standing by the fax machine and he threw this behind us. John Strand was somewhere behind us, as he picked up the papers and gave them to me. I do not know if he knew what was happening but do know he came along and picked up the papers and gave them to me. I finished doing what I was doing at the fax machine and went into my office.

> When I went in, I asked James McQuillan something about letting me by to get to my desk. He was definitely standing squarely in the way of my getting to my desk, taking up the whole room between the files and my desk. He had a set of papers in his hand and to alleviate the tension that he had caused by throwing the other papers in the big room, I tapped the bottom of the papers he had in his hand. He then let go of the papers he had in his hand, and gave my left upper arm a push. I landed in the chair closest to the file and if there had been no chair there, would have gone to the floor. The pain remained in my arm for some time. He continued out of the room. I picked up the papers.
>
> Friday, October 12, 2001
> In the a.m. when he came in, there were people in the process office, and when he went out, he went out over by the wall by John Strand.
>
> At noontime, there were others in the process office when he was there. Later, about noontime . . . he went into my office. I then . . . went into my office, went by him as he let me by to my desk and told him that I was not afraid of him; that no sane prisoners had ever touched me and no deputy had ever touched me. One of the things I was going to tell him was that one female who wasn't sane had kicked me in the leg but that if she had been sane or knew what she did, she would have been mortified. I told him that I had been in law enforcement all my life; that I had been undersheriff. He talked the whole time that I was talking to him. One of the things he said was that I was not undersheriff anymore but that I was a secretary.
>
> He continued out of the room.

On October 11, she was working at the fax machine, when McQuillan came out of his office. Scherer stood next to her. She did not throw any paper at McQuillan, could not recall if she said anything to him, and could not recall taking the paper to his office after Strand picked it up. She testified she "would have finished what I was doing" at the fax, and then "would have gone into my office." She did not know McQuillan was there, and proceeded directly toward her work space. McQuillan was reading a paper, and looked up to see her, then looked back down at the paper. She asked to get by, but McQuillan said nothing and did not move. She lightly pushed up on the paper to get his attention, and said something to the effect of "aw, c'mon" to get him to let her by. McQuillan responded without words, but with a shove from his right hand just under her left shoulder. He pushed her sufficiently hard that without the chair, she would have fallen to the floor.

She was surprised, but got up, went to her desk chair and composed herself. She then went to Scherer's office. She declined to follow Scherer's advice because she did not want to see anything happen to McQuillan. She let the matter go, but thought often about it on her long commute home and then back to work on October 12. She decided that she would compose a statement to make to McQuillan, consisting of no more than three short sentences.

She saw McQuillan in a common area early in her shift on October 12, but did not want to talk to him in front of other employees. Sometime around noon, she saw McQuillan go into her office. She followed him in, finding him again in the aisle by the filing cabinet. This time, he let her by when she asked. When she got behind her desk, she attempted to make her statement. McQuillan talked over every attempt on her part to make the statement. She kept trying, but McQuillan talked over her until he abruptly left. He made no attempt to apologize.

She was sufficiently upset at his response that she determined to tell Asselin of the matter when he walked by her office later that day. Schultz was the only member of management to talk to her. She did not apologize because she did nothing wrong.

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

THE PARTIES' POSITIONS

The County's Closing Argument

The County contends that McQuillan and Britton are strong personalities, and that each understates their role in the confrontation. Neither accepts responsibility for their actions, even though the confrontation can be characterized as childish.

More specifically, the Grievant was an active participant in the events of October 11 and October 12, because she "pushed McQuillan's buttons." His conduct on October 11 cannot be justified, but the Grievant responded to the events by preparing a detailed statement that she intended to read to him on October 12. Her comments were, however, offensive even if she thought they should elicit an apology. Ignoring McQuillan's wrongful conduct, any reasonable person would have been offended by the Grievant's comparison of McQuillan to prisoners or to the insane.

The conduct at issue does not constitute a complaint of sexual harassment in any sense. McQuillan's fiery response to the Grievant on each day is not appropriate, but the discipline reflects that the Grievant poured fuel on the fire. The written warning is an appropriate exercise of the Sheriff's discretion and can withstand scrutiny under the Daugherty standards. It follows that the County had just cause to discipline the Grievant and that the grievance should be denied.

The Union's Closing Argument

The Union stresses that a grievance concerning a written warning is extremely rare in the parties' bargaining relationship. This grievance reflects, however, that the discipline is egregious, lacking any cause. The dispute can not be analogized to a fight between children. Rather, it should be analogized to a domestic disturbance. No husband who assaults his wife should expect an inquiry into causes. Rather, he should expect to be arrested. Britton did all she could to diffuse the situation.

The evidence shows McQuillan was in a foul mood on October 10, 11 and 12. When Britton passed him a piece of paper in the fax area, he threw it down, then angrily proceeded into her office. Britton went into her office, only to find her path to her desk blocked by McQuillan. After requesting him to move, then tapping his papers, McQuillan shoved her into a chair and left the office. She could have justifiably responded aggressively. She did not, preferring to try to defuse the situation in a one-to-one context. This avoided embarrassing McQuillan or causing him trouble. She did no more than to tell McQuillan "this is not appropriate . . . this is not right." McQuillan, however, again responded inappropriately by talking over Britton and declining the opportunity to apologize.

Although this is not necessarily sexual harassment, the County's policy on sexual harassment is an appropriate guide, and Britton responded precisely as the policy instructs. She attempted to defuse the situation with the aggressor, then reported it to management when her attempt failed. She did nothing wrong, and her disciplinary record should be cleared.

DISCUSSION

The stipulated issue questions whether the County had just cause to issue Britton a written warning. In my opinion, two elements define "just cause" where the parties have not stipulated standards to define it. First, the employer must establish conduct in which it has a disciplinary interest. Second, the employer must establish that its discipline reasonably reflects the interest. This does not state a definitive analysis to be imposed on contracting parties, such as the seven tests posited by Arbitrator Carroll Daugherty in ENTERPRISE WIRE CO., 46 LA 359 (Daugherty, 1966). It does state a skeletal outline of the elements to be addressed and relies on the parties' arguments to flesh out that outline. As the County notes, the Daugherty standards offer guidance. In the absence of a stipulation, however, they are not binding.

Application of the first element demands the isolation of conduct in which the County has a disciplinary interest. The identification of specific behavior is essential to progressive discipline. To be effective, discipline must identify the conduct that, if repeated, will provoke discipline. Ideally, it will identify the appropriate behavior.

The County's statement of a disciplinary interest evolved over time. Cramer's October 26 letter focuses on "an incident that happened on October 11", adding that Britton failed to get along with a co-worker and failed to report "a prior problem" if one existed. The Personnel Committee's December 17 response is more specific and includes the events of October 12. It specifies that Britton contributed to the October 11 confrontation by "striking the documents held by" McQuillan. It adds that she aggravated the problem by raising it with McQuillan on October 12, and further aggravated the problem by not apologizing "as ordered" by Cramer. The stipulated issue states a disciplinary interest spanning October 11 and 12.

Of the asserted misconduct, three plausibly support a disciplinary interest. The parties agree that the October 11 incident is sufficiently significant to support a suspension. The County thus plausibly asserts a disciplinary interest in the prompt reporting of the incident. Britton's "striking" the papers held by McQuillan arguably contributed to the confrontation on which the suspension rests and thus plausibly supports a disciplinary interest. Similarly, Britton's recounting of the incident on October 12 arguably prolonged the confrontation and thus plausibly supports a disciplinary interest.

The remaining allegations cannot plausibly support a disciplinary interest. The assertion that Britton failed to get along with McQuillan on October 11 is too broad and indefinite to support a disciplinary interest. It is too broad because it fails to isolate specific behavior. That employees should get along states a legitimate employer interest. It is not, however, a statement of improper conduct by Britton. The evidence indicates that the County felt Britton "pushed McQuillan's buttons" regarding a request for assistance in a property seizure. Absent from the documentation of the discipline, however, is specific identification of behavior by Britton to push McQuillan's buttons or to fail to get along with him.

The allegation is too indefinite because it has no factual focus. If McQuillan's conduct is properly characterized as an assault, is Britton obligated to get along with him? The October 26 letter makes no factual conclusions regarding the confrontation. Egregious conduct does not warrant cooperation, and thus some statement of fact is necessary to focus how or why Britton is to get along with McQuillan.

The October 26 discipline imposes an obligation to apologize, as the Personnel Committee's December 17 response reflects. Cramer testified he did not order the apologies, thus disavowing a disciplinary interest in them.

It thus must be determined whether the conduct that plausibly supports a disciplinary interest has a proven basis. This is best examined by a review of the events of each day.

The Events of October 11

In my opinion, the County has no proven disciplinary interest in Britton's conduct on this date outside of her failure to report the incident. The County has not specifically tied her failure to report to October 11, thus it is addressed below.

Analysis of the events of October 11 must start with McQuillan's use of force. At most, the County's asserted disciplinary interest in Britton's conduct is that she provoked the use of force. Britton's and McQuillan's testimony vary on the amount of force.

There is no need to make a credibility determination to establish a significant and unwarranted use of force. Under McQuillan's view, he placed his right hand against her left shoulder, said "pardon me" and moved frontally past her. She used her right hand and arm to brace herself against the wall, but did not fall and did not manifest pain. That he chose to touch her arm is noteworthy standing alone. Ignoring this, his acknowledgement that she had to brace herself with her right hand establishes, without regard to any other testimony, that the act was forceful. Beyond this, no recourse to Britton's testimony is necessary to establish that the use of force was significant. McQuillan's view, including his at-hearing demonstration, presumes he lightly brushed past her side-to-side. McQuillan would not have to be the large man he is to make it physically impossible for him to move past Britton side-to-side in an aisle as narrow as that in Britton's office. The act of moving past Britton necessitated one or both of them turning their side to the other. McQuillan's view implausibly asserts this did not happen. Simply by moving frontally toward the door, McQuillan would have pivoted Britton's body to some degree perpendicular to his passage. Put more plainly, under McQuillan's testimony, his movements had to pivot Britton roughly ninety degrees, forcing her into a chair.

Even ignoring that this confirms Britton's testimony, it establishes a notable use of force. Whether or not Britton showed pain and whether or how McQuillan said "pardon me" cannot obscure that the force involved is remarkable.

Nor is there a defense for it. The County asserts Britton played some causal role in the confrontation. None, however, is proven. There is evidence that Britton and McQuillan disagreed on when McQuillan should act to assist a woman involved in a divorce. The paper allegedly thrown at McQuillan documented the basis for him to act. Assuming McQuillan's view of the incident, he ignored Britton's attempt to toss the paper on a stack he was carrying, allowing it to fall to the floor. There is no dispute it was a public document, necessary to the performance of his duties. It is not apparent how his deliberate action to leave the paper on the floor is to be held against Britton, however she chose to deliver it. Assuming it should be held against her cannot, however, explain his conduct in her office. Under his view, she came into the office, muttered some obscenity, left, then returned to stand before him. She then interrupted his reading by tapping the papers. Ignoring that he was in her office; ignoring that

he chose to read in an aisle that blocked her access to her desk; ignoring that he chose not to back up a step or two to avoid the confrontation; and ignoring that he chose not to ask what she wanted cannot obscure that he chose to again permit public documents necessary to his job to fall and remain on the floor. This time, however, he acknowledges he threw them. If McQuillan were a secretary, these two incidents would support a disciplinary interest based on his disregard of documents necessary to his job. That he is a deputy is no defense.

More to the point, the dispute is not about handling paper, but about a deputy's use of force. It is untenable to conclude that a deputy is privileged to use the degree of force manifested by McQuillan based on no greater provocation than the existence of a work-related disagreement coupled with a mild obscenity. A law enforcement officer is entrusted with the authority to arrest and to use force in the public interest. The use of discretion in implementing this trust is a law enforcement officer's stock in trade and the core of his value. At no point in his confrontation with Britton on October 11, did McQuillan manifest any understanding of this fundamental point. The public documents necessary to his job evidently had no meaning to him beyond being tools to express personal dissatisfaction with Britton. The conclusion that Britton provoked his conduct, even assuming the credibility of his account, would justify behavior that could not be directed toward any member of the public.

The County can assert a greater interest in Britton's behavior than in that of a member of the public. She is an employee, and can reasonably be expected to act more responsibly. This makes a credibility determination necessary. That determination is not difficult. Scherer's credible testimony corroborates Britton's. None corroborates McQuillan's. More significantly, his account, standing alone, is internally inconsistent and unreliable. His assertion on smaller details is no more reliable than his account of the amount of force he used. His contention that she braced herself with her right arm while he passed is troublesome in light of Britton's undisputed testimony that he never looked back. More to the point, it confirms her testimony. It is apparent he rested his conclusion that she experienced no pain on sound alone. He would have to do so if he never looked back.

Viewed as a whole, his testimony fails to account for undisputed fact. At most, his testimony establishes he briefly viewed her as he passed. As noted above, this account ignores that much of the force he exerted would have occurred in the act of passing, after the initial push. He asserts he was not upset with Britton until she tapped the papers and that he was engrossed in reading until her tapping made it impossible. This asserts that he was undistracted while reading papers that demanded complete attention. This would explain his blocking the aisle and his inattention to Britton's presence on the way to her work area. It would not, however, explain why papers demanding this level of concentration needed to be thrown into the air to fall to the floor unattended. Nor will it explain why he cannot recall what the papers were that demanded his complete attention. His conduct throughout that morning is more readily explained by Britton's account. He was upset with her and responded with tantrums. There is no proven basis to doubt the reliability of her account.

It is impossible to establish the precise level of force employed by McQuillan. It is, however, evident that it was sufficient to force Britton perpendicular to him and into a chair. This is a significant use of force by any definition. There is no proven provocation. His conduct was egregious.

To conclude the use of force is egregious establishes the County's disciplinary interest in it. It also establishes a disciplinary interest in Britton's failure to report it. This turns the discussion to the events of October 12.

The Events of October 12

In certain respects, these events are the reverse of October 11. It is not necessary to weigh McQuillan's testimony to establish the County's disciplinary interest in Britton's. The Union asserts Britton carefully assessed the time and the need to respond to McQuillan, and informed him that his behavior of the prior day was unacceptable. If the evidence supported this view, I would agree that the County has no disciplinary interest in her conduct.

The evidence, however, will not support this view. Her decision not to make a statement to McQuillan in front of other employees cannot persuasively be viewed as an act of restraint. The evidence points more to retaliation than to restraint. If her testimony that she did not report the incident on October 11 to avoid causing the Grievant trouble is credited, then why did she report it on October 12?

The County's view of the events of October 12 has solid evidentiary support. Britton testified she had sixty miles of driving time to consider what she intended to be a three sentence statement. That reflection produced a provocative and retaliatory response. Whether she intended to label McQuillan insane cannot obscure that her statement can be taken that way. McQuillan's use of the title "secretary" as an insult cannot obscure Britton's use of the title "undersheriff" as a means to assert authority.

This is not to excuse McQuillan's conduct, but to focus on Britton's. Viewing her statement as retaliatory can account for her behavior where the Union's view cannot. She did not make her statement to McQuillan in the hearing of others to spare his feelings, but because she wanted to settle a personal account. She reported the incident after the conversation because her attempt to personally settle the score failed. Recourse to higher authority thus became necessary. Viewed in the light most favorable to Britton, the statement sought the same apology as Cramer's October 26 letter.

There is, however, a less favorable view of the statement, and that view supports the County's disciplinary interest. As noted above, McQuillan's behavior of October 11 was egregious. At a minimum, this demands the reporting of the incident. Britton's avowed

attempt to shield McQuillan worked a disservice to her fellow employees, to Cramer and to the County as her employer. Scherer's advice was sound, and is supported, as the Union notes, by the County's reporting protocol under its sexual harassment policy, which states:

> **REPORTING PROCEDURE**
>
> An employee who believes he or she has been sexually harassed shall contact the person responsible for the offensive act and inform them of the objection. If the conflict is not resolved, the employee shall contact his or her immediate supervisor. A report of the incident shall be forwarded to the sheriff.
>
> Allegations of unwelcome sexual harassment shall be reported by the employee immediately.

This policy is not before me for interpretation, nor is it necessary to determine whether the October 11 incident constitutes sexual harassment. Sexual harassment is less an issue of sex than of force, and the egregious nature of McQuillan's conduct turns on his use of force. This invokes the County's disciplinary interest without regard to its characterization.

The policy can be read to be inconsistent by mandating in the first paragraph direct inter-employee contact, while in the second paragraph implying a need for an immediate report to management. However the two paragraphs are read, the policy permits inter-employee contact, but demands immediate reporting. Whether directly applicable here or not, the policy is appropriate, and Britton's failure to report the incident will support a disciplinary interest. Without regard to any conflict between the paragraphs, Britton's obligation was to "inform (McQuillan) of the objection."

This statement establishes the weakness of Britton's chosen means of reporting to McQuillan. It calls for a statement of the objection. Absent from her statement is a declaration to the effect that "I object to your touching me," or that "I object to your pushing me," or that "I object to your blocking my access to my desk." This point is underscored by the document entitled "Preventing Sexual Harassment/A Fact Sheet For Employees" introduced into evidence by the Union. This document, posted by the County, includes the following passage, which is highlighted by the Union:

> (I)f you find gender-based or sexually oriented conduct offensive, you should make your displeasure clearly and promptly known. Remember that some offenders may be unaware of how their actions are being perceived. Others may be insensitive to the reactions of fellow workers. Tell the harasser that the behavior is not acceptable and is unwelcomed by you.

This underscores the need to establish necessary personal boundaries with another employee by stating what conduct is impermissible. The focus on identifying behavior is noteworthy, as is the absence of mention of personal animus or venom. Such animus or venom may be understandable, but the cited passage highlights the need to set boundaries dispassionately rather than to respond in kind. A response in kind is less the establishment of a boundary than a call to combat.

Britton's October 12 response was, as the County asserts, a call to combat. Nowhere did she attempt to isolate the specific behavior she objected to. Even though she did mention that no one had ever touched her on the job, this was not expressly linked to McQuillan. Rather, she linked it to "no sane prisoners" and to "no deputy." McQuillan reasonably perceived the remark as a personal insult and responded in kind. In light of his response from the prior day, this was an improvement. This cannot, however, obscure that Britton did not identify what he had done that was inappropriate, and said far more than that his prior conduct was inappropriate. That excess supports a County disciplinary interest.

Thus, the County has demonstrated a disciplinary interest in Britton's failure to promptly report the October 11 incident and in the insulting tone of her October 12 response. Had her response been as measured as the Union's closing statement asserts, the County would have no disciplinary interest in her conduct. Her failure to report the incident until after a provocative personal response failed establishes a County disciplinary interest.

The written warning implies Britton played a causal role in the events of October 11. The evidence does not support this, and thus the written warning must be viewed as excessive. The Award reduces it to an oral warning. This clears her personnel file of the written warning, and permits the County, Cramer or his designee to verbally counsel Britton on the appropriate reporting protocol and the appropriate means to establish, or to have established, the bounds of her personal integrity. In my view, this reflects more a need to counsel than to punish. To a degree, it reflects Cramer's attempt to clear the air through mutual apologies. His suggestion and Union suggestions made on the grievance form and at hearing have much to commend them, but the authority to review discipline does not imply the authority to compel a meritorious suggestion. Whether specific delineation of improper behavior assists in clearing the air must be left to the parties. In any event, there is no just cause to impose a written warning on Britton.

Before closing, I view it as appropriate to tie this conclusion more closely to the arguments. The County is correct that Cramer should have considerable latitude in enforcing cooperation. However, his discretion must have a basis in fact, and the flaw with the October 26 discipline regarding Britton is that it fails to identify inappropriate behavior and to establish fact on which the discipline rests. Viewed under the Daugherty standards, this would fall under Question 5. The significance of the flaw in this case is that Britton cannot

reasonably be expected to get along with or to apologize to a deputy in the use of excessive force. The Award entered below does not alter Cramer's determination that action toward each participant is necessary, but attempts to clarify the behavioral basis for the action. It also denies the written statement of a causal role by Britton in McQuillan's conduct on October 11.

This is an adolescent dispute if the dialogue of October 12 is viewed standing alone. The dialogue must, however, be related to the October 11 incident. From Britton's personal perspective or from the County's perspective as an employer, the unwarranted use of force by a law enforcement officer is not an adolescent dispute. The trust granted a deputy through the power of arrest and the power to use weapons imposes responsibility. The most chilling aspect of this dispute, in my view, is McQuillan's testimony that he did nothing wrong on October 11. This manifests a fundamental misunderstanding of the use of force by a deputy.

AWARD

The County did not have just cause to give Georgene Britton a written warning for her conduct on October 11 and 12, 2001. The County did, however, have just cause to orally counsel Britton regarding her failure to promptly report McQuillan's inappropriate physical contact with her on October 11, and regarding the content of her verbal response to McQuillan on October 12.

As the remedy appropriate to the County's violation of Section 1.06 C, the County shall expunge Britton's personnel file(s) of any reference to the October 26 written warning.

Dated at Madison, Wisconsin, this 29th day of April, 2002.

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

RBM/gjc
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