BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SAWYER COUNTY LAW ENFORCEMENT DEPARTMENT, LOCAL 261, WISCONSIN PROFESSIONAL POLICE ASSOCIATION/LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION

and

SAWYER COUNTY

Case 140
No. 61875
MA-12091

Appearances:

Mr. Paul M. Moldenhauer, Paul M. Moldenhauer, S.C., Attorney at Law, 1517 Belknap Street, Superior, Wisconsin 54880, appearing on behalf of Sawyer County Law Enforcement Department, Local 261, Wisconsin Professional Police Association, Law Enforcement Employee Relations Division, referred to below as the Union, or as the Association.

Ms. Kathryn J. Prenn, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of Sawyer County, 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 Union and the County jointly requested the Wisconsin Employment Relations Commission to appoint an Arbitrator to resolve a grievance filed on behalf of Don Miller, who is referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing was held on April 29, 2003, in Hayward, Wisconsin. The hearing was not transcribed. The parties filed briefs and reply briefs by July 28, 2003.

ISSUES

The parties stipulated the following issue:

Does the County have just cause to terminate Deputy Don Miller?

RELEVANT CONTRACT PROVISIONS

ARTICLE 2 – MANAGEMENT RIGHTS

The County possesses the sole right to operate the Law Enforcement Department and all management rights repose in it, subject to the provisions of this contract and applicable laws. These rights include the following:

. . .

L. To suspend, demote, discharge or take other disciplinary action against the employees for just cause.

The reasonableness of County action taken pursuant to this Article is subject to the grievance procedure.

. . .

ARTICLE 9 – DISCIPLINARY PROCEDURE

A. Purpose. The following disciplinary procedure is intended as a legitimate management device to inform employees of work habits, etc., which are not consistent with the aims of the Employer's public function, and thereby to correct those deficiencies.

B. Disciplinary Action. An employee may be demoted, suspended or discharged or otherwise disciplined for just cause. The sequence of disciplinary action shall be oral reprimands, written reprimand, suspension, demotion, and discharge. A written reprimand or other disciplinary action sustained in the grievance procedure or not contested shall be considered a valid warning. Any disciplinary action shall be grievable. For grievances involving the review of a suspension, a demotion, or a dismissal, the affected employee shall have the option of having the disciplinary action reviewed under the grievance procedure set forth in this agreement or under the procedures set forth in Sec. 59.26, Wis. Stat., but not both.

C. Immediate Suspension or Suspension Pending Discharge. The above sequence of disciplinary action shall not apply in cases which are cause for immediate suspension or suspension pending discharge. Theft of personal or public property, drinking on the job, being drunk on the job or other incidents of similar gravity are hereby defined as cause for immediate suspension pending discharge.

BACKGROUND

The grievance challenges charges filed by County Sheriff Donald W. Sheehan against the Grievant. Sheehan stated the charges in a letter dated November 8, 2002 (references to dates are to 2002, unless otherwise specified), which reads thus:

> Pursuant to Section 59.28(8)(b) (sic), Wis. Stat., this letter shall serve as formal complaint against (the Grievant). The Specific charges are as follows:
>
> 1. On September 26, 2002, (the Grievant) filed and (sic) Employee Injury Report Form and an Employer's First Report of Injury or Disease form for an injury which allegedly occurred in the afternoon of December 31, 2001.
> 2. The Department's investigation has revealed that the alleged injury could not have occurred on that date and time as represented by (the Grievant).
> 3. Subsequent to the submission of the initial forms, (the Grievant) submitted a second set of Employee Injury Report and Employer's First Report of Injury or Disease forms on October 28, 2002, again stating that the injury occurred in the afternoon of December 31, 2001, but approximately on hour earlier than stated on the initial set of forms submitted by him. Again, the Department's investigation has revealed that the injury, if it occurred, could not have occurred on that date at that time.
> 4. Through the submission of these forms, (the Grievant) has failed to comply with departmental policy regarding the timeline for reporting work-related injuries, i.e. within 72 hours after the injury occurs. The Department's investigation revealed that the injury, if it occurred, did not occur as represented by (the Grievant) on official document prepared by him and submitted by him to the County and that he misrepresented the circumstances of his injury and falsified the report forms filed with the County regarding the circumstances of his injury.
>
> By such conduct, (the Grievant) violated the following work rules and policies:

A. Work Rule: All work related injuries must be reported within 72 hours.
B. Sawyer County's Personnel/Administrative Policies provide:

1. Section 2(b): All employees shall comply with departmental work rules. (p.25).
2. Section 2(d): Employees shall not make false or malicious statement, either oral or written, concerning any employee, the County or its policies. (p.25).
3. Section 5(a): Employees shall not falsify, modify or make any other unauthorized alterations of any County record.

Based on the foregoing, I am recommending to the Grievance Committee, comprised of the members of the Public Safety Committee and the Personnel Committee, that (the Grievant) be terminated. I am also hereby placing (the Grievant) on suspension beginning November 8, 2002, with pay, pending final action by the Grievance Committee in this matter.

The County's Personnel/Administrative Policies are referred to below as the Policy. There is no dispute the Grievant received a copy of the Policy. Section 2 of the Policy is entitled "Insubordination". Section 5 is entitled "Records". The Association requested a hearing on the charges. The Grievant ultimately waived his right to a hearing under Sec. 59.26, Stats., and requested that the matter proceed directly to arbitration. The parties agreed to the arbitration procedure and submitted a request for arbitration by early December.

The Grievant filled out the September 26 form referred to in the November 8 letter. The section of the form entitled "Employer's First Report Of Injury Or Disease" (First Report) contains a form entry for "Injury Date" that the Grievant completed with "12-31-01", and a form entry for "Time of Injury" that the Grievant completed with "2 PM". He entered no response to the form entry "Date Employer Notified". He listed "Washing Squad Car" in response to the form entry for "Injury Description"; listed "Slipped" in response to the form entry for What happened to cause this injury or illness? (Describe how the injury occurred)"; and "Left Shoulder Partial Dislocate" in response to the form entry for "What was the injury or illness? (State the part of the body affected and how it was affected)". He also completed the section of the September 26 form entitled "Employee Injury Report Form." He responded, "Sheriff's Dept Garage" to the form entry "Where Did This Accident Occure (sic)"; "Slipped While Washing Squad + Popped Left Shoulder" to the form entry "Describe The Accident"; "Left Shoulder Partial Dislocate" to the form entry "Please Describe Your Injury"; "Slippery Floor" in response to the form entry "Causes"; and "Use Car Wash" in response to the form entry "Corrections".

The Grievant filled out the October 28 form referred to in the November 8 letter. The responses are identical to those set forth in the preceding paragraph from the September 26 form, with two exceptions on the First Report section of the form. The Grievant stated "Approx: 1PM" in response to the "Time of Injury" form entry, and "10-28-02" in response to the "Date Employer Notified" form entry.

The date of injury entry on the September and October forms refers to an incident that brought the Grievant to the emergency room of the Hayward Area Memorial Hospital. At roughly 2:30 p.m., within an hour of an investigatory interview at the Sheriff's Department, the Grievant checked himself into the emergency room. Marsha Zeier, a Registered Nurse, first examined him. Her notes state the "Chief Complaint" as "Lt shoulder popped out, while working 1300 today." Robert Swenson, M.D., was the treating physician. His notes state the Grievant fell "in garage slipped while washing squad card & felt it pop out & pain -- faint-like (therefore) to ER." Swenson also noted a "Dislocated Shoulder" that had "reduced spontaneously" and was traceable to a 1996 dislocation. Swenson immobilized the shoulder, prescribed Vicodin for the pain, directed the Grievant not to work, and discharged him to return home at roughly 3:15 p.m.

The 1996 dislocation occurred during the Grievant's response to a domestic disturbance on May 2. During the altercation, the Grievant was thrown against a wall, dislocating his left shoulder. Later that day, with the assistance of Julie Hofer, the County's Deputy County Clerk/Financial Coordinator, he filled out a First Report.

The County did not contest that the 1996 dislocation was work related, but over time the extent of the Grievant's claim became a disputed point between the Grievant and the County's then-incumbent insurer, Wausau General Insurance Company (Wausau). Attorney Melissa A. Kirschner, then employed by Liberty Mutual Insurance Company, represented Wausau, and Attorney David M. Erspamer represented the Grievant. Ultimately, the Grievant underwent an Independent Medical Evaluation (IME) with Stephen E. Barron, M.D., to assess his permanent partial disability. Barron issued a report dated December 9, 1999. The history section of the report noted that the Grievant had returned to work in June of 1996, "with no limitations" and worked without problems from July through October of 1996. In November of 1996, he returned to his doctor, Scott Warren, complaining that the shoulder had come out of place while he stretched it. Between then and November of 1998, he experienced numerous similar instances of "subluxation with spontaneous reduction" of the left shoulder, i.e. a partial dislocation that he could reset by himself. None occurred at work. The Grievant and Warren began, during this period, to consider surgery. Warren rated the Grievant, in July of 1999, "at 8 percent permanent partial disability."

Barron's IME summarized his view of the Grievant's injury thus:

> It is my impression that (the Grievant) has recurrent subluxation of his left shoulder. . . . (T)here is evidence of tear of the anterior glenoid labrum. He also has a positive apprehension test for instability of his left shoulder.

Barron concluded that the Grievant's "healing period ended regarding any industrial injury aggravation . . . three months following the incident", and that "he has sustained a 2 percent permanent partial disability to the left upper extremity."

In May of 2001 the County switched Worker's Compensation insurers from Wausau to Aegis. The switch impacted the payment for the Grievant's December 31, 2001, emergency room visit, and posed potential issues regarding funding surgery to repair the shoulder. If the injury was work related and traceable to the 1996 shoulder separation, then treatment bills would be Wausau's responsibility to pay. If a distinguishable work-related injury, then the bills would be Aegis' responsibility. The consequences of this dispute ultimately prompted the filing of the September and October forms.

Both Wausau and Aegis sought to have injury claims filed within 72 hours of an occurrence. The County, in May of 2001, posted in the Squad Room, the Communications Center and the Jail Office, the following notice:

REMINDER TO ALL EMPLOYEES

> IF YOU ARE INURED (sic) ON THE JOB YOU MUST TELL A SUPERVISOR AS SOON AS THE INJURY OCCURS. LAST YEAR, THE SHERIFF'S DEPMARTMENT FAILED TO REPORT 3 INJURIES WITHIN THE 72 HOUR TIME LIMIT AND THAT HAD A BIG EFFECT ON THE WORK COMP RATES FOR THE COUNTY.
>
> EVEN IF YOU DO NOT SEEK MEDICAL ATTENTION RIGHT AWAY OR THERE IS NO LOSS OF WORK TIME, YOU NEED TO REPORT THE INJURY AND FILL OUT THE APPROPRIATE FORMS SO WE CAN REPORT WITHIN THE 72 HOUR TIME LIMIT.
>
> IF YOU HAVE ANY QUESTIONS, PLEASE ASK ROSE.
>
> THANK YOU.

"Rose" is Rose Lillyroot, then Secretary to the Sheriff. The County had posted notices regarding the need to report within 72 hours since at least June of 1997.

The background set forth to this point is essentially undisputed. The balance of the background is best set forth as an overview of witness testimony.

Robert Swenson

Swenson treated the Grievant prior to the December, 2001 incident. The first occasion was the 1996 separation. He saw the Grievant about one and one-half hours after the incident, after the Grievant had put it back in place. He also treated the Grievant when, in the line of duty, he was almost struck by a car driven by a person seeking to avoid arrest.

Swenson was "100% certain" that the 2001 injury was a recurrence of the shoulder problem dating from 1996. Nevertheless, he prescribed Vicodin for the injury, because he felt the injury demanded that serious a pain-killer. He viewed the Grievant as "very much a man" and as "stoic as they come" in light of his prior observations of the Grievant's pain threshold. This, coupled with his direct observation of the Grievant's response to the December 31, 2001 examination and the Grievant's elevated blood pressure, convinced Swenson that the Grievant was experiencing significant pain. That the Grievant reported feeling faint at the point of injury convinced him that a significant pain medication was needed, even at the risk of its potentially addictive effect. He did not believe the Grievant lied to him about the injury, and knew of no reason to doubt the truth of the Grievant's account of the injury.

Melissa Kirschner

Kirschner took the position the December 31, 2001 injury was a new injury, traceable to the Grievant's fall while washing the squad. She and Erspamer discussed dating the injury, but could reach no agreement. She informed Erspamer that Wausau wanted to send an investigator to determine the facts, and understood Erspamer's position to be that he would neither commit to a specific date for the injury nor assist her in Wausau's attempt to determine one. As she understood it, Erspamer left it to Wausau alone to find proof that the December 31, 2001 injury was a new injury. That he had better access to the Grievant's condition made it troubling to her that he would make no representation of fact regarding the December 31, 2001 injury. She felt that the Grievant should have filed a new First Report.

The Grievant filed a Hearing Application on January 8, 2002. The form listed "5/24/96" as the "Date of Injury", and "8% shoulder" as the "Permanent Partial Disability". The Grievant responded to the "Describe the nature of the disability" entry thus: "Employee severely injured his arm/shoulder during an arrest." Kirschner's answer to the application did not challenge that the accident causing the injury was work related, but did challenge the extent of permanent disability, based on Barron's December 9, 1999 IME.

Wausau sought another IME from Barron, who examined the Grievant on October 16, and issued a "Comprehensive Evaluation", dated October 24, that reads thus:

. . .

HISTORY AND REVIEW OF RECORDS

(The Grievant) . . . injured his left shoulder on May 24, 1996, while . . . involved in a domestic arrest. . . . He told me subsequent to his first injury, his shoulder has subluxed three to four times. His last subluxation occurred on December 31, 2001, when he slipped in his garage while washing his squad car. He followed up with Dr. Sauer. Surgery was discussed. He sought treatment with Dr. O'Connor in June of 2002, and he felt that surgery was indicated.

(The Grievant) was seen at Hayward Area Memorial Hospital Emergency Room, on December 31, 2001. "His left shoulder popped out while working at 1300 today."

In a letter of January 15, 2002, Dr. Sauer indicated he thought his initial assessment of 8 percent permanency reflects the ongoing recurrent nature of his shoulder subluxation. . . . With regard to the question of whether the recurrent dislocation stemmed from the original May 24, 1996, injury, he would answer in the affirmative.

. . .

(The Grievant) saw . . . an orthopedic surgeon on June 10, 2002. He discussed surgery with him. He agreed with Dr. Sauer that surgical intervention would likely give him the best opportunity to improve in terms of stability.

. . .

IMPRESSION

It is my impression that (the Grievant) has recurrent subluxation of his left shoulder.

SPECIFIC INTERROGATIVES

In my opinion, his current left shoulder diagnosis and his current need for surgery is directly related to the May 24, 1996 work incident. . . . In my

> opinion, the injury of May 24, 1996, from which he initially dislocated his shoulder, caused the tear of the glenoid labrum, and as a result, his current need for surgery is directly related to the May 24, 1996, work incident.
>
> . . .
>
> In my opinion, his current left shoulder diagnosis and his current need for surgery is not the result of a traumatic injury that precipitated, aggravated or accelerated a preexisting condition beyond normal progression.
>
> . . .
>
> In my opinion, the proposed surgery is reasonable and necessary to cure and relieve the effects of (the Grievant's) May 24, 1996, work injury. In my opinion, it is not the result of some other injury or exposure. . . .

After receiving this report Wausau agreed to pay for the Grievant's shoulder surgery.

Kirschner stated that a First Report is expected to be filed shortly after an injury, but a reoccurrence of an injury does not necessarily demand the filing of a First Report. First Reports can be amended after the initial filing.

Rose Lillyroot

Lillyroot has been a County employee since 1995, and currently serves as a Dispatcher. While Secretary to the Sheriff, she was responsible for supplying Worker's Compensation forms to employees, and then returning the completed forms to Hofer.

Lillyroot was a Sheriffs' Secretary on December 31, 2001. Early in the afternoon, the Grievant reported to the Sheriff's Department in a squad car. After a meeting with the Sheriff, the Grievant asked Lillyroot for a ride to his home, which was roughly five miles away. They left the Department at roughly 1:45 p.m., and she returned to the Department a little after 2:00 p.m. While on the ride home, the Grievant did not complain of pain or call any attention to his shoulder. He was in uniform, and Lillyroot did not recall observing that it was wet. The Grievant did not mention falling and did not mention washing his squad. He did, however, mention that he hoped he had not lost his "fucking job" or his "fucking stripes." She perceived him to be upset, but not necessarily mad.

Lillyroot first learned of the Grievant's December 31, 2001 emergency room visit when either Hofer or the Hospital called her regarding payment for the bill. She thought this happened in September. She contacted Aegis, who informed her there was no record of injury

for that date. She then contacted the Grievant, and supplied him a packet of blank Worker's Compensation forms, instructing him to fill them out. He said he would speak to his attorney, then returned them on or about September 26. She showed the forms to Rick Chambers, the Chief Deputy, and noted that she did not believe that the time of injury could be correct.

Lillyroot typically handled twenty such forms per year, but this is the first that she encountered that appeared suspicious. She did not know if the claim was fraudulent, and did not rule out the possibility it reflected a mistake, but knew he was not washing a squad car at that time of day on December 31, 2001. She acknowledged the Grievant's uniform could have been wet, and denied that Sheehan or Chambers were out to get the Grievant.

Julie Hofer

Hofer coordinates the processing of all County Worker's Compensation claims. She estimated that the County handles thirty-five to forty claims annually. She noted that while Wausau was the County's insurer, it paid a dividend to promote prompt filing of claims. Under that program "prompt" meant filed within 72 hours of the injury. The policy, including the 72 hour requirement, was posted in all County departments. She estimated the County had perhaps one untimely filing annually.

She testified that the Grievant called her in early January, perhaps on January 2, to report an injury. She referred him to Lillyroot. Perhaps as early as February, the Hospital began to phone Hofer concerning payment for the Grievant's December 31, 2001 emergency room visit. By February 8, Wausau had mailed her a form indicating that it could not process the Hospital bill due to "incorrect or insufficient information." Hofer responded on February 15 by mailing Wausau the 1996 First Report. This did not stop the Hospital from seeking payment through the County. Hofer and the Hospital tried to have the County's health insurer pay the claim. Wausau responded to Hofer's inquiries by saying it had not decided whether to pay. Aegis did the same. Hofer and Lillyroot discussed the matter on and off, and ultimately Lillyroot gave the Grievant blank forms to file another First Report. Hofer cannot recall asking the Grievant to file the First Report. Lillyroot informed her that the Grievant declined, but said he would refer it to his attorney.

The Grievant filed the September 26 form with Hofer. Later, he asked for another form, saying that he had to change the September 26 form. He then filed the October 28 form. Hofer supplied the form to Chambers, who instructed Hofer not to file it with the insurer. He did not give her a reason. This was the first time she handled a Worker's Compensation form that the County did not promptly file with the insurer.

Hofer testified that Aegis did not increase the County's premium and that she had no reason to believe the Grievant's September and October forms were fraudulent.

Rick Chambers

Chambers served as Chief Deputy from May 20, 1993 until his retirement on January 11, 2003. The County hired him as a Deputy in 1977. He served as a Patrol Deputy and as a Road Sergeant prior to becoming Chief Deputy. He was the Grievant's immediate supervisor.

As of December 31, 2001, the Grievant was a Sergeant and his shift on that day started at 4:00 p.m. Sheehan summoned him to a meeting. At 12:50 p.m., the Grievant called in a code indicating that he was on duty. He pulled his squad into garage stall 3 at 1:00 p.m. Routing the Grievant to that door required that he check in his weapons before entering the jail area. In light of a prior confrontation with the Grievant, the Sheriff determined it would be best that he not be armed during the meeting. Sheehan and Chambers perceived the Grievant to have problems with anger management. The Grievant reported to Chambers' office, stood in the doorway and asked "what's the deal with my squad?" Chambers told him the Sheriff wanted to meet with him, but was then meeting with the Union representative. The Grievant then went to the lobby to wait. Chambers testified the Grievant did not leave the lobby, although Chambers walked through the lobby area only once during this time period.

At 1:29 p.m., the meeting began. The meeting was investigatory. Prior to any discussions, Chambers gave the Grievant a formal "Internal Investigation Warning", and informed the Grievant of his right to Union representation. The Grievant requested and received Union representation. The purpose of the meeting was to determine if the Grievant had, while on duty, driven to a subordinate officer's home to inform him of a then pending investigation of the officer's conduct concerning an intradepartmental theft. Chambers stated that the Grievant operated a tape recorder during the meeting. He neither complained of pain, nor showed any observable sign of pain prior to or during the meeting. The meeting ended at 1:45 p.m., with the Grievant being placed on Administrative Leave pending the completion of the investigation. Chambers took the Grievant's keys to County property. Sheehan asked the Grievant whether he had any personal property in the squad. The Grievant responded uncertainly, and Sheehan directed Chambers to inventory the squad's contents.

Chambers walked to the garage, removed the Grievant's personal property and placed it in a cardboard box that he ultimately took to the Grievant's office. Chambers testified that the squad was filthy inside and out. The floor of the garage was dry. He reported to Sheehan that the car was "absolutely filthy" and had fast food garbage strewn throughout it.

Sometime in late September, Lillyroot showed Chambers the September 26 form. Chambers recognized the date of injury as the date of the investigatory meeting, and reviewed his notes of the meeting. He then phoned the County's labor counsel. Sheehan was, at that time, on medical leave due to injury from a car accident. Chambers phoned Sheehan, who directed him to investigate the matter.

Chambers met with the Grievant, two Union representatives and Lieutenant Barthel on October 28. The meeting was investigatory, and turned on County concerns with the veracity of the September 26 forms and with sick leave abuse. The Grievant taped the meeting. Chambers supplied the Grievant with the September 26 forms and with a detailed account of his reasons for believing the stated time of injury could not be correct. The Grievant responded that Erspamer had instructed him not to discuss the matter, which was being litigated. Chambers then detailed the County's concern that his work attendance record was deteriorating, and that the Grievant would claim sick leave if denied a day off, causing the County and unit members problems in filling the vacant shift. Chambers' notes state, "(the Grievant) stated these days has (sic) to do with my shoulder, and I can't discuss this by my attorney's advice." Chambers responded that the County had no documentation and no report of his shoulder difficulties. The Grievant declined to discuss the shoulder problems.

The meeting ended with Chambers stating that he would report the matter, including the Grievant's responses, to the County's labor counsel and Sheehan.

Sometime after the close of the meeting, Miller phoned Chambers. Chambers' notes document the discussion thus:

> I made contact with my attorney and told him that you had documentation showing I was in a meeting at the time I indicated my injury happened so I guess it couldn't have happened at that time. My attorney said to just get another set of papers and just write the correct time and re submit them.

Chambers responded that this was between the Grievant and his attorney.

The Grievant then filed the October 28 forms. Chambers did not believe the asserted time of injury. After discussing the matter with Sheehan and the County's labor counsel, Chambers recommended termination, since the injury could not have happened at that time, and as a police officer, the Grievant should be "held to a little bit higher standard than the average person." This was, to Chambers, so egregious an offense that recourse to progressive discipline was inappropriate. The circumstances were unprecedented in his experience.

He specifically denied colluding with Sheehan to terminate the Grievant. In his view, the Grievant brought the termination on himself. He declined to approve mailing the forms to the insurer because he was unwilling to sign the forms. He could not recall the condition of garage stall 3 on any date other than December 31, 2001. That was the only date that he had to check a squad, inside and out, for a deputy's personal property. He described it as an "unusual and unpleasant" experience. He acknowledged that the County has not filed criminal charges against the Grievant.

Donald W. Sheehan

Sheehan served the County as Sheriff for twenty years, retiring in January of 2003. He was seriously injured in a car accident in September. Sheehan directed Chambers to inspect the Grievant's squad on December 31, 2001. After hearing Chambers' report of its condition, Sheehan inspected it for himself. The car was not clean, and showed no sign that it had been recently washed. At no point during the December 31, 2001 meeting did the Grievant complain of an injury or show any evidence of pain.

Sheehan stated that he had the "final say" on the termination decision. He relied on Chambers' investigation. He viewed the September and October forms as a lie, and a fundamental breach of the trust and honesty essential to the performance of law enforcement, particularly from a sergeant. Termination was, in his view, appropriate without regard to the Grievant's service record. He would have fired a deputy with an unblemished record, and the Grievant's was not unblemished. He never colluded with Chambers and neither requested the Grievant to file the forms nor advised him on how to complete them.

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

THE PARTIES' POSITIONS

The County's Initial Brief

After a review of the evidence, the County notes that it "has the burden of establishing that the grievant engaged in the conduct which served as the basis for the recommendation of termination." Under arbitral precedent, however, this burden "is something less than beyond any reasonable doubt" and does not require establishing "criminal intent" or the existence of pending criminal charges.

The evidence establishes that "the grievant failed to comply with departmental policy regarding" the 72 hour "timeline for reporting work-related injuries." The evidence establishes the existence and the general publication of this timeline. There is "no evidence in the record that the grievant was not aware" of the requirement, and in fact the "evidence is to the contrary." Beyond this, the County has established that the Grievant "submitted two fraudulent workers' compensation reports." The Grievant's September 26 claim alleges the injury occurred at 2:00 p.m. However, when confronted on October 28 regarding the veracity of this claim, the Grievant responded by moving the date of the alleged injury to 1:00 p.m. on December 31. Witness testimony establishes that this claim is untenable, since it fully accounts for the Grievant's activities from slightly before 1:00 p.m. until sometime after 2:00 p.m. The "brevity of his on-duty time on December 31, 2001, precludes any possibility that" the injury occurred as the Grievant alleges. Swenson's testimony cannot rebut this, since it is based "solely on what the grievant told him" and on Swenson's desire to help him.

Other explanations beyond that offered by the Grievant to Swenson must account for the injury. There is no reliable evidence that he injured the shoulder while in work status. He noted his fear for his job to Lillyroot, and this means he "may well have faked an injury in an effort to avert what he believed was his immediate termination." Another "possible explanation . . . is that he injured his shoulder after he was dropped off at home." Given the Grievant's history of managing anger, it is "entirely possible that upon being dropped off at home that the grievant, in a fit of anger, injured his shoulder." Whatever may have occurred, it is evident he failed to "follow the 72 hour rule and that he submitted two fraudulent workers' compensation claims."

The evidence warrants termination for this misconduct. Arbitral precedent demands that an employer's discretion over the appropriate sanction for misconduct be respected absent clear evidence of an abuse of that discretion. Even if the Grievant had "an otherwise stellar work record" termination was appropriate. Arbitral precedent establishes that falsification of employment records is sufficiently egregious to warrant summary termination, without regard to an employee's length or quality of service. Here, however, the Grievant did not have "a stellar work record" and never acknowledged the misconduct. The misconduct at issue impacts the County's workers' compensation premiums and undercuts the integrity of its law enforcement efforts. The Grievant' rank of sergeant underscores the significance of his misconduct as a departmental matter.

The County concludes by requesting that "the Arbitrator uphold the termination."

The Association's Initial Brief

The Association states the issue for decision thus:

> Whether the Sawyer County Sheriff's Department has demonstrated just cause to terminate Deputy Don Miller based upon the allegations of the complaint pursuant to Wis. Stat. 59.26(8)(6)5m?

After an extensive review of the record, the Association contends that "no Wisconsin deputy sheriff may be discharged based on charges filed by the Sheriff unless it is determined that there is just cause, as described in the statute, to sustain the charges." Just cause is defined as a matter of law and contract by the Daugherty standards, noted in ENTERPRISE WIRE CO., 46 LA 359 (Daugherty, 1966).

The 72 hour rule and Section 2(b) of the Personnel Policies fail to support the termination. The December 31, 2001 injury was one of a series of "subluxations over the years" that trace back to the injury of May 25, 1996. This is a recurrence, not an original injury, and thus the rule and the Policy have no bearing on it. Even if it could be concluded that they did, Chambers' order precluding the submission of the Grievant's claims undercuts

any County disciplinary interest: "what good does it do to require a form when the supervisor does not submit it anyway?"

The evidence confirms this. Hofer submitted the claim under the original claim number traceable to the 1996 injury. The County suffered no loss or penalty traceable to the allegedly untimely claim. It follows from this that the Grievant could not "reasonably be expected to have knowledge of the probable consequences of his allegedly untimely filing of a Report of First Injury". Nor can it be said that Sheehan or Chambers made a reasonable effort to investigate a violation of the 72 hour rule. Sheehan relied on Chambers, and the evidence establishes that Chambers was neither fair nor objective toward the Grievant.

The County's failure to submit the claim forms establishes an unfair and discriminatory application of the 72 hour rule. That the County required the Grievant to submit a form it declined to present to an insurer "is undeniable discrimination and lack of fair treatment". Hofer's testimony establishes that the County uniformly files First Reports.

Nor does Section 2(d) of the Policy call for the Grievant's termination, since nothing "in the County's case demonstrates to the degree necessary to show just cause for termination that (the Grievant) made any false statement." Swenson's testimony establishes the existence of real pain, traceable to a real shoulder injury suffered by a man not known to complain. The Grievant promptly reported the injury in January, only to be required to re-submit a claim roughly ten months later. The County forced the Grievant to submit an amended claim, then forced him to amend it again. In each case, the Grievant acted in good faith. "Mistaken time entries . . . do not rise to the level of fraud or a false statement."

The evidence establishes that the County's investigation "of the car washing incident defies belief". The County did not contact Swenson and failed to make any serious inquiry for evidence beyond Chambers' recall. His recall, however, is "self serving" and "literally begs the question: who is really lying here?" Chambers' vivid recall, in October, of events from December of 2001, cannot be reconciled to his inability to recall any other events from that period. A review of the Grievant's reports of these incidents establishes a "far more credible" account than Sheehan's or Chambers' investigative reports.

The evidence makes it fair to presume that the Grievant could not have known that filing the October amendment to the injury report could result in his termination. Chambers and Sheehan put the Grievant in an untenable situation, for if he stood by the September report he would be accused of lying, yet by honestly amending the report he stands accused of an improper amendment and falsification.

The County's insurer's counsel acknowledged that "it is not illegal to amend" First Reports. Sheehan and Chambers failed to consult her. Viewed as a whole, the evidence demonstrates that they neither fairly nor objectively investigated the Grievant's alleged misconduct. It follows that the County has failed to prove the charges against the Grievant. From this it follows that the Grievant "should be re-instated with back-pay."

The County's Reply Brief

The County contends that the Union's brief "is laced with hyperbole, relies on irrelevant information and entirely misses the point." The point is that the Grievant failed to report an injury within 72 hours and then filed "not one, but two fraudulent reports of injury." Beyond this, the Association ignores that the Grievant, in choosing arbitration, specifically rejected the standards of Sec. 59.26, Stats.

The "remarkable" feature of the grievance is "that the grievant chose not to offer any sworn testimony." This is consistent, for "the grievant has steadfastly refused to answer questions from the County regarding the events between 1:00 p.m. and 2:00 p.m. on December 31, 2001." Beyond this, the Grievant exaggerates the significance of Swenson's testimony, which establishes only that the Grievant "went to the emergency room". The testimony "sheds no light on how the alleged injury happened, if it happened at all." Swenson's testimony that the Grievant was in pain on December 31 only underscores the mystery surrounding why he showed no sign of it while on duty that day. The County "believes that the Arbitrator is entitled to draw negative inferences from the fact that the grievant made no such statements on December 31, 2001, that he refused to answer questions about the alleged injury when asked on October 28, 2002, and that he chose not to offer any testimony at the arbitration hearing."

The Union's use of medical records, Kirschner's testimony and County demands to fill out the Work Injury Report is misplaced, but cannot obscure "the point that when the forms are filled out, they are to be filled out truthfully." Nor can the assertion that an insurer may not require the filing of serial forms for the same injury obscure that the Policy demands a report of each injury within 72 hours. The evidence establishes that the Grievant chose not to. That Chambers chose not to pass the forms to the insurer establishes no more than Chambers' view that the forms were inaccurate. His recall of the events of December 31, 2001 is not remarkable given the fact that the meeting was prompted by disciplinary matters that led to the Grievant's loss of sergeant status. Sheehan did not investigate the matter because he was on medical leave. The most remarkable fact of the hearing was the Grievant's choice not to testify, "perhaps because he did not want to commit perjury . . . (p)erhaps . . . because he did not want to be confronted with his prior disciplinary record."

The Union's case rests "on irrelevant information and hollow attacks" while the County's rests on direct testimony. The weight of the evidence "necessarily tips toward support of the recommendation for termination."

The Association's Reply Brief

The Association argues that the "most important question behind the main issue of . . . 'just cause' . . . is that of who bears the burden of proof." The answer "falls squarely and absolutely upon the employer." The appropriate burden is "such clear and convincing evidence as would warrant his termination", but the County's proof will not meet even a "preponderance of the evidence" standard.

Only "unsupported conclusions" support the County's arguments. The County's conduct in effect puts the Grievant in a "lose/lose/lose/lose" situation by demanding a First Report for a reoccurrence of an already reported injury, then by demanding the report within 72 hours, then by demanding two subsequent filings, the last of which reflects emergency room records. The County's decisional process does not manifest an investigation, but a hunt "for any excuse (whether justifiable or not) to terminate him." There is no support for this attack, which constitutes "clear discrimination".

More specifically, the County's assertion that it has accounted for all of the Grievant's on-duty time on December 31, 2001, ignores "an entire ten minute window of opportunity for 1:00 p.m. to 1:10 p.m. approximately during which (the Grievant) could have tried to wash his squad car". That the Grievant did not complain of an injury to Sheehan or Chambers on that date does no more than confirm Swenson's view of his pain threshold. That Chambers thought the squad was "filthy, inside and out" does no more than establish why the Grievant would have chosen to wash it. The amount of time necessary to aggravate the shoulder injury is miniscule, and the evidence shows no reason or gain to account for the Grievant's choice to report the injury to the emergency room.

The County exaggerates the testimony of its witnesses to conclude the Grievant's uniform was dry. At best, the testimony establishes it was not wet. Similarly, the County misstates the evidence concerning the Grievant's workers' compensation attorney. At most, the comments attributed to him show only that he underscored the view of others that the December 31, 2001 injury was traceable to the original 1996 injury. The County's acceptance of Swenson's testimony establishes that the Grievant "was not a malingerer and . . . not the type to lie about his injuries". Swenson's testimony regarding the pain the Grievant suffered on December 31, 2001 "is enough to sink the County's alleged case." That the injury would have been traceable to the 1996 injury establishes that the Grievant had no incentive to lie to Swenson. Swenson's testimony compares favorably to the "equivocal and self-refuting" testimony of Chambers and Sheehan.

The County's arguments regarding Sec. 59.26, Stats., are misplaced. The statute "is at the very least a clear and strong advisory as to what constitutes 'just cause' for the termination". An examination of the arbitral precedent cited by the County has no factual bearing on this grievance. The record, viewed as a whole, shows no violation of "any rules whatsoever" and demands that the Grievant "be reinstated with back-pay."

DISCUSSION

The issue is stipulated, and questions whether the County had just cause to terminate the Grievant. The parties also stipulated that if I found no just cause then I should retain jurisdiction to address the issue of remedy. The Association, in its brief, altered the statement of the issue from the hearing to highlight the application of Sec. 59.26(8)5m, Stats. The County's reply brief contends that the Grievant's selection of arbitration waived the standards of Sec. 59.26(8)5m, Stats.

This dispute is arguably fundamental. It may question the agreement to arbitrate as well as the stipulation of the issue. Further complicating the point are the standards I have applied in prior arbitration cases. Subsections a through g of Sec. 59.26(8)5m, Stats., which set out standards defining "just cause, as described in this subdivision", draw heavily from the "Daugherty standards" established through a series of arbitration cases including ENTERPRISE WIRE CO., 46 LA 359 (Daugherty, 1966). I typically apply the DAUGHERTY standards only if the parties agree to them; SHEBOYGAN COUNTY, MA-11905 (MCLAUGHLIN, 12/02, and WINNEBAGO COUNTY, MA-11252 (MCLLAUGHLIN, 06/01), and do not interpret statute unless the labor agreement demands it or the parties mutually request it; CITY OF MENASHA, (MA-7361, MA-7362 & MA-7363, McLaughlin as panel chair, 4/97).

The dispute is, however, more academic than fundamental. The agreement does not demand the application of external law. Sections 2L, 9B and 9C set out the just cause requirement. Section 9B establishes the "procedures set forth in Sec. 59.26, Wis. Stat.", as "the option" of a disciplined employee, and specifies the option includes arbitration or the statutory procedures, "but not both." Thus, the agreement does not require the interpretation of Sec. 59.26, Stats. Nor have the parties agreed to it. The County opposes the application of the statutory standards. The Association does not request a statutory analysis, but the use of the seven standards to define "just cause."

As a practical matter, however, the statutory standards serve as a vehicle to address the parties' arguments. This does not bind the County to a contractual definition of "just cause" that includes the Daugherty standards or those of Sec. 59.26(8)5m, Stats. Rather, it reflects their significance to the arguments of the Association, and their utility in addressing those arguments. Application of the standard I have used in the past, which the County cites, SCHOOL DISTRICT OF NEW RICHMOND, MA-8376 (McLaughlin, (07/94), would not produce

different ultimate conclusions than those stated below. Thus, the parties' dispute on the issue is more academic than fundamental. The analysis now turns to the standards of just cause listed at Sec. 59.26(8)5m, a - g, Stats.

a.
Whether the deputy could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct.

This subsection demands a two-fold determination. The first aspect is the determination of conduct supporting the discipline. The second is the disciplinary ramifications of the conduct -- its "probable consequences". Each must be tied to the Grievant's knowledge. Generally, the charges assert two areas of conduct. The first is failure to comply with the 72 hour rule and the second is misrepresentation of fact.

There is no dispute that the 72 hour requirement was published throughout the Department over a considerable period of time. Nor is there a dispute that the Grievant was aware of the Policy, which, under Section 2(b), requires adherence to departmental policies. There is, however, dispute as to whether the Grievant could be expected to know the existence and extent of the disciplinary ramifications of a violation of the rule. The evidence does not indicate that the Grievant was obligated to file a First Report concerning a subluxation of the 1996 separation. Beyond this, Hofer testified that the Grievant spoke with her perhaps as early as January 2 concerning the injury. This limits, but does not eliminate the County's disciplinary interest in the application of the 72 hour rule. The rule is not restricted to the filing of a First Report, and seeks that employees "tell a supervisor" about a work related injury. Hofer is not a supervisor, nor even a departmental employee. The Grievant had to have known this. Whether or not the subluxation was an original injury, the County has a disciplinary interest in its prompt reporting to a supervisor. The assertion that the Grievant cannot be expected to understand that a supervisor has an interest, potentially disciplinary, in employee failure to report a significant work-related injury is unpersuasive.

The significance of the County's interest is, however, debatable. The citation of Section 2(b) of the Policy does not establish a specific County interest in the Grievant's failure to report the injury to a supervisor. The section is a catchall provision that adds nothing to the 72 hour rule. On balance, the evidence falls short of establishing that the Grievant could reasonably be expected to understand that the failure to report to a supervisor exposed him to summary termination under Section 9C of the labor agreement. Rather, the evidence points to conduct that could invoke progressive discipline under Section 9B.

The County's interest in the Grievant's filing of the September 26 and October 28 forms is a separate point. The alleged conduct is misrepresentation of fact. The entry of false information on a Worker's Compensation document is "so serious that any employee . . . may

properly be expected to know already that such conduct is offensive and heavily punishable." ENTERPRISE WIRE, 46 LA at 363. The County points to the provisions of Sections 2(d) and 5(a) of the Policy, but in their absence the Grievant can reasonably be expected to know that the falsification of a record is an offense falling more within Section 9C than 9B.

b.
Whether the rule or order that the deputy allegedly violated is reasonable.

The reasonableness of the rules asserted against the Grievant is not seriously disputed. The 72 hour rule had a direct fiscal impact on the County while Wausau paid a compliance dividend. Even in the absence of the dividend, the prompt reporting of a work-related injury can affect insurance rates and treatment options. The reasonableness of an order enforcing the honest reporting of injuries stands without codification as a rule. The County's citation of Sections 2(d) and 5(a) of the Policy is thus persuasive. As noted above, Section 2(b) is too broad to afford specific guidance.

That Chambers instructed Hofer not to file the September and October forms does not detract from the reasonableness of the rules. The instruction reflected his conclusion that the forms included a misrepresentation of fact that he could not support, individually or on behalf of the County. The reasonableness of his conclusion is best addressed in the application of the remaining standards.

c.
Whether the sheriff, before filing the charge against the deputy,
made a reasonable effort to discover whether the
deputy did in fact violate a rule or order.

The Association accurately notes that Sheehan relied on Chambers to investigate. Thus, the operation of this standard turns on the reasonableness of that effort.

The Association's arguments have force regarding the investigation of the violation of the 72 hour rule. There is no persuasive evidence that Chambers considered what type of report was necessary. If a First Report was necessary, Chambers did not order one. If something less formal was necessary, there is no persuasive evidence that Chambers investigated whether the Grievant made one. Hofer's testimony that the Grievant approached her on January 2 does not appear to have been discovered prior to the filing of charges.

The force of these arguments, however, falls short of demonstrating an unreasonable effort to find fact prior to filing charges. As noted above, the 72 hour requirement does not specifically demand the filing of a First Report, but an injury report to a supervisor. That a First Report may not have been necessary for the December 31, 2001 subluxation cannot

obscure that Chambers, as the Grievant's immediate supervisor, was one of two people who could have conclusively known if a report had been made. The Grievant was the other, and Chambers attempted to obtain the Grievant's view of the matter. More significantly, the September 26 form acknowledges that the Grievant did not notify the County. The October 28 form states a "Date Employer Notified" response of "10-28-02". The Grievant, however, filed this with Hofer.

That Chambers declined to file the September and October forms has no bearing on the investigative effort. That action reflected a conclusion that the investigation was to test. On balance, the evidence establishes that Chambers' investigation of compliance with the 72 hour rule was reasonable.

Chambers' investigation of the alleged misrepresentation of fact on the September 26 and October 28 forms is difficult to fault. Fundamental to this is that the initial suspicion regarding the September 26 form was traceable to direct participants in the events of the asserted time of injury. Lillyroot took the Grievant home and noted the alleged time of injury to Chambers, who personally participated in the interview that took from 1:29 p.m. until 1:45 p.m. Beyond this, Chambers spoke with the Grievant prior to the interview. Prior to addressing his concerns to the Grievant, Chambers reviewed his own reports and the tapes of communications between the Grievant and the Communications Center. He discussed the events of the day with Lillyroot and Sheehan. Ultimately, he approached the Grievant, who declined to offer any information on the events of December 31, 2001. This cannot be held against Chambers.

Chambers did not interview Swenson to determine the existence or extent of the symptoms reported by the Grievant on December 31, 2001. However, this standard does not demand a flawless effort, but a reasonable one. Chambers' investigation was reasonable.

d.

Whether the effort described under (in the preceding section) was fair and objective.

The Association's arguments on this standard have considerable persuasive force. Chambers served as investigator and witness. Daugherty's description of the operation of this standard is ambivalent on this point. This ambivalence is, however, dissipated to the extent these roles join with that of a prosecutor, see ENTERPRISE WIRE 46 LA at 364.

The force of the Association's arguments is traceable to the prosecutorial-like aspects of the investigation. The evidence indicates that when Lillyroot expressed concern with the date of injury stated on the September 26 form, Chambers viewed the statement as a misrepresentation. His failure to speak to Swenson or to examine Hospital records makes his inquiry look less like fact-finding than a search for evidence to corroborate his conclusion.

Swenson and the records were directly relevant to a concern that the Grievant faked the injury. That the investigation showed no evident interest in testing what the Grievant stood to gain by misrepresenting the time of the injury is also troublesome. That Chambers did not retain the dispatch tapes he reviewed is also troublesome. The investigation, to a troubling degree, represents less a search for fact than for corroboration of an already-reached conclusion.

Against this, however, must be weighed the nature of the conduct being investigated. Only the Grievant had direct access to the most crucial data regarding the incident. Whether, when and how the injury occurred are ultimately knowable only to the Grievant. After compiling the information that confirmed his conclusion, Chambers called in the Grievant for an investigatory interview on October 28. The Grievant had the assistance of Union representatives. Chambers freely disclosed the information he had and offered the Grievant the opportunity to respond. The Grievant taped the interview. Chambers did not act at the close of the interview. He freely advised the Grievant on how he was about to proceed, including reporting the Grievant's responses. Even if the Grievant chose not to immediately respond, the interview gave him a basis to provide information to the County concerning the questioned conduct. The Grievant responded by asserting his counsel directed him not to respond. There were no criminal charges pending, and no discussion of the point with the County.

The Grievant ultimately responded with a phone call later that morning, indicating that his attorney had advised him to amend the First Report. He did so, substituting "approx: 1 PM" for "2 PM". He did not afford any meaningful information to the County. The revised form did nothing to address any County concern, for the time alleged still fell within the period of time covered by the investigatory interview.

The persuasive force of the Association's arguments breaks down on this point. Testing whether Chambers had become unduly prosecutorial fell within the Grievant's control. He had only to supply sufficient information to challenge that already disclosed by Chambers. Chambers did not oppose the amendment, which could have clarified the suspicions surrounding the form. The reference to "approx: 1PM" did not.

More to the point, Chambers' open disclosure of the information must be considered objective, even if the investigation was incomplete. Beyond this, his open disclosure of the action he anticipated taking in response to the October 28 meeting, his willingness to consider the amendment and the delay between the investigatory meeting and any final decisional process must be considered fair. The Grievant could have supplied information to test the extent of the fairness. Chambers' conduct was not that of a prosecutor.

Although the Association's arguments have persuasive force, the evidence establishes the investigation was fair and objective.

e.

Whether the sheriff discovered substantial evidence that the deputy violated the rule or order as described in the charges filed against the deputy.

Application of this standard is the most troublesome issue in the grievance. It poses contractual and factual difficulty. In WINNEBAGO COUNTY, at 22, I addressed the contractual difficulty with the comparable Daugherty standard thus:

> The standards themselves are stated, but cannot be applied, as if they are purely procedural. Strictly read, the seven requirements focus on the employer's investigation to the exclusion of whether the grievant committed a disciplinable offense. ENTERPRISE WIRE itself falls short of this mark, since it is apparent the testimony at hearing turned on whether the alleged offenses occurred as alleged. This tension between a purely procedural analysis of the employer's investigation and a substantive analysis of the allegations is reflected in the seven standards. The fifth standard, for example, turns on whether the investigation provided "substantial evidence" of guilt. . . . To my experience, an employer investigates an offense to the point that it is convinced prompt action is necessary. Assuming this comports with the "substantial" requirement of standard 5, should an arbitrator ignore evidence discovered or presented after the employer's investigation? It is at least arguable that an employer could acquire "substantial" evidence of an offense a grievant did not commit.

The final sentence points to the strength of the County's case under a strictly procedural application of the standard. Because of the nature of the dispute regarding the time of the December 31, 2001 injury, Chambers' investigation had obtained full responses from all of the witnesses to the events between "approx: 1PM and 2PM" except one. That one was the Grievant, who declined to contribute any substantial information. By any view of the term, this is "substantial" evidence.

The analysis cannot, however, end there. As noted above, a purely procedural review of the investigation falls short of what is demanded in a "just cause" determination, which must account for evidence produced at hearing concerning whether the alleged misconduct actually took place. On this record, this is a difficult matter. The difficulty is traceable to the way the Association tried the grievance. It rested on the completion of the County's case. This is not to fault the Association's tactic. The grievance was well-tried, and the Association's choice starkly poses the issue whether the County met its burden to prove conduct that warrants termination. It effectively argues that the County's proof cannot establish a deliberate misrepresentation of fact.

This argument has a substantive and a technical aspect. The technical aspect concerns burden of proof issues, and the substantive is that the evidence falls short of establishing misrepresentation. While the force of the Association's position must be acknowledged, it does not, in my opinion, establish a County violation of this standard.

As preface to a review of the record, it is necessary to define the specific conduct at issue. The Association's position is strongest regarding proof of the intent to deceive. The weakness of this position is that the intent to deceive is not a necessary element of the County's charges. There are no pending criminal charges against the Grievant, and this is not a criminal or a quasi-criminal proceeding concerning fraud. Chambers' testimony succinctly summarized the County's view of the Grievant's conduct in response to a question regarding how he could know whether the September 26 form was no more than a mistake. He responded: "I would not have any way of knowing . . . I just know it did not happen."

This response points to something distinguishable from criminal or civil fraud. It points directly to the core of the employment relationship, and to a course of conduct that fundamentally breached the standards that can reasonably be expected of a law enforcement officer. With this as background, it is necessary to review the evidence.

Contrary to the Association's forceful arguments, there is no reliable evidence to undercut the credibility of County witnesses. The initial suspicion concerning the alleged time of injury came from Lillyroot, whose credibility is unchallenged. She stopped short of testifying that the Grievant sought to deceive. Rather, she testified that the injury could not have come as asserted in the September 26 First Report. Hofer was similarly unwilling to speculate regarding the Grievant's intent in filing either form. Nor will the record support questioning Chambers' or Sheehan's credibility. There is no persuasive evidence their recommendation is traceable to personal as opposed to departmental concerns. Rather, the evidence is that their testimony reflects work-based concerns with significant issues of misconduct. There is no evidence either had anything to gain personally from the recommendation. The assertion they were looking for an excuse to terminate him by any means breaks down with regard to the events of January 23 and 24, 2001. On January 23, 2003, Sheehan issued the Grievant a written reprimand. The Grievant confronted Sheehan and Chambers, contending they sought his stripes. Chambers' notes of the meeting indicate the Grievant tossed his badge and stripes onto Sheehan's desk, then angrily denounced Sheehan's conduct. The Grievant submitted a letter of resignation before leaving the office that day. The following day, the Grievant relented, apologized for his behavior and asked to rescind the resignation. That he ultimately kept his stripes is impossible to reconcile with an assertion that Sheehan and Chambers were out to terminate him by any available means.

As witnesses, nothing in Sheehan's or Chambers' demeanor indicated anything other than an effort to bring about a necessary, but distasteful result brought on by the Grievant's conduct. Their reticence to say whether the Grievant wore a jacket or whether it was wet enhances, rather than undercuts their credibility. Their responses were not combative.

More specifically, this underscores the significance of their testimony concerning the condition of the squad car on December 31, 2001. There is no basis to question this testimony. That Chambers would write a report on it, or remember it the following fall is not inherently suspect. The day was the first time he had to inventory a squad for a deputy's personal effects. He stated the experience was distasteful to him. Memory is inevitably colored by interest, but there is no reason to doubt that the events of the day were memorable to Chambers as they occurred and as they were recalled.

More significantly, the evidence supporting the termination is ultimately traceable to the Grievant's conduct. Swenson's testimony that the Grievant was in great pain when examined on December 31 is credible. His prescription of Vicodin confirms this. However, it highlights the questions underlying the events from "approximately" 1:00 p.m. through 2:00 p.m. Crediting Swenson's testimony means that the Grievant reported to and completed an investigatory interview, during which he operated a tape recorder, then rode home without displaying any evident sign of pain. Even ignoring the difficulty of accounting for why he would not tell anyone during this period of time what had happened to him, this course of conduct poses serious questions.

Other evidence only compounds these questions. Barron's October 24, 2002 report states: "His last subluxation occurred on December 31, 2001, when he slipped in <u>his</u> garage while washing his squad car" (emphasis added). Whether or not Barron accurately recorded what the Grievant said need not be decided to note that significant questions surround the Grievant's conduct on December 31, 2001.

Against this background, when specifically confronted with evidence questioning the time of injury, the Grievant did no more than change it to "approx: 1PM." He did not then and does not now assert his failure to respond more completely is privileged. It is difficult to believe he could advance a Worker's Compensation claim and refuse to respond to questions concerning causation. Even if he could, as a contractual matter, it is evident that he chose to respond to the October 28 meeting. He asserted the alleged sick leave problems were traceable to his shoulder difficulties, then declined to offer detail. He amended the September 26 form, without prompting and without pressure from the County. Chambers and Sheehan perceived the response as inadequate. It was.

Under any view of the evidence, the County raised substantial questions regarding the Grievant's conduct. It is not necessary to determine his motive in not responding to conclude that faced with these questions, he chose to respond with something less than candor. The determinative issue is not whether this lack of candor constitutes fraud or misrepresentation. Rather, it is whether Sheehan could reasonably conclude that the lack of candor fundamentally breached the standards for honesty to be expected from a law enforcement officer. His and Chambers' view that it did is reasonable and rests on substantial evidence.

The difficulty with the Association's view is that it effectively asserts that if the Grievant cannot be found guilty of fraud, he must keep his job. I am unwilling to conclude that the County cannot reasonably ask more. His conduct in responding to the investigation is as fundamental to the termination decision as the observations of Sheehan and Chambers. Not only does that conduct not refute the charges against him, it supports them.

Viewed as a technical matter, the County presented a case that stood in the absence of rebuttal. In the absence of credible evidence rebutting it, the County met its burden of proof. Quantum of proof is not an issue. This is not a criminal matter, and no standard of proof cited by either party undercuts the conclusion stated above. It is not necessary to take "an adverse inference" based on the Grievant's decision not to testify at the arbitration hearing. His course of conduct throughout the investigation, including the refusal to testify at the arbitration hearing left the significant charges against him unanswered. This conduct speaks for itself.

f.
Whether the sheriff is applying the rule or order fairly
and without discrimination to the deputy.

This standard poses no issue beyond those already addressed. The Association urges that the Grievant is the only deputy whose First Report was not filed with the insurer. This is accurate, but fails to establish discrimination. The Grievant is also the first deputy suspected of falsifying such a form. In any event, Chambers' conclusion to halt the processing of the First Report has no bearing on the absence of any report of the injury to a supervisor. Beyond this, further processing the form would have had no bearing on the County's concern with the candor displayed by the Grievant in reporting the injury.

The Association has advanced forceful arguments, but the evidence establishes that the Grievant was offered the information that might prompt charges and afforded meaningful opportunity to respond. He was treated fairly.

g.
Whether the proposed discipline reasonably relates to the seriousness
of the alleged violation and to the deputy's record
of service with the sheriff's department.

As noted above, the violation of the 72 hour rule cannot be considered serious enough to warrant anything beyond progressive discipline under Section 9B. Fraud is sufficiently egregious to warrant summary termination under Section 9C. However, as noted above, the record does not concern fraud. Rather, the record questions the Grievant's lack of candor in addressing significant work-related issues. Whether or not this warrants termination poses a closer issue which does call in his record of service.

Swenson had a high opinion of him. The Grievant attended to the arrest in 1996 before seeing Swenson, who added that he treated the Grievant on another occasion for injuries sustained while being struck by a car while attempting to make an arrest. No arbitrator can judge the quality or difficulty of a law enforcement officer's performance, and I make no pretense of doing so. The review of a Sheriff's determination is difficult enough.

More to the point, the evidence shows that the Grievant received a verbal reprimand on May 13, 1994 for "attitude"; on March 27, 1997 for "attitude"; on October 15, 1998 for "attitude" and "conduct"; on March 15, 1999 for "substandard work"; and on November (unspecified day), 2001 for "evidence left on his desk and not being entered into evidence". He received a written reprimand on June 12, 2000 for "conduct". He received a one-day suspension on January 23, 2001 for "conduct" which is touched on above. He received a two-day suspension on June 28 for "pulled self from training/sick leave abuse". He received a five-day suspension on October 31, 2002 for "sick leave abuse".

Similar to the questions posed regarding the December 31, 2001 injury, this record stands without rebutting testimony. This has contractual significance under Section 9B, which makes a "not contested . . . disciplinary action . . . a valid warning." There is no persuasive basis to question Chambers' conclusion that the Grievant's lack of candor would have provoked the termination of an employee with a spotless record. Whether or not this is true, the Grievant's record is not spotless, and fails to undercut the reasonableness of Chambers' recommendation and Sheehan's decision to terminate. The charges against the Grievant concerning misrepresentation are significant, and his response to them, directly and through his work record, is insufficient to undercut them.

The County has, then, proven just cause to terminate the Grievant's employment.

AWARD

The County has just cause to terminate Deputy Don Miller.

Dated at Madison, Wisconsin, this 16th day of September, 2003.

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

RBM/gjc
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