

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

SHEBOYGAN COUNTY

and

AFSCME LOCAL 110, AFL-CIO

Case 370

No. 64847

MA-13029

(Ariane Wartke Grievance)

Appearances:

Michael J. Collard, Human Resources Director, Sheboygan County, 508 New York Avenue, Sheboygan, WI 53081, appearing on behalf of Sheboygan County.

Helen Isferding, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1207 Main Avenue, Sheboygan, WI 53083, appearing on behalf of AFSCME Local 110, AFL-CIO.

ARBITRATION AWARD

Sheboygan County, hereinafter County or Employer, and AFSCME Local 110, AFL-CIO, hereinafter Union, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Union, with the concurrence of the County, requested the Wisconsin Employment Relations Commission to appoint a Commissioner or member of the Commission staff to hear and decide the instant grievance. Commissioner Susan J.M. Bauman was so appointed.

The County, by letter dated May 20, 2005, advised the Union that, in addition to confirming the waiver of Step 3 of the grievance procedure, the County preserved its right to argue the arbitrability of the grievance, under the condition that arbitrability be decided before the grievance would be heard on its merits by the Arbitrator. Pursuant to said understanding, the parties agreed to submit a written stipulation of facts and written argument, the last of which was received on September 12, 2005. On September 27, the undersigned issued a decision finding that the grievance was arbitrable.

A hearing on the merits was held on November 10, 2005, in Sheboygan, Wisconsin. The hearing was not transcribed. The record was closed on December 27, 2005 upon receipt of all post-hearing written argument.

Having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the undersigned makes the following Award.

ISSUE

The parties stipulated to frame the issue as:

1. Was there just cause for terminating the employment of Ariane Wartke?
2. If not, what is the appropriate remedy?

FACTS

In October 2002, Ariane Wartke applied for a position as a Correctional Officer (C.O.) with the Sheboygan County Sheriff's Department. After passing the written examination and oral interview, she was placed on the eligibility list. In March 2003, while still on the eligibility list for C.O., Wartke applied for a position as, and was hired as, a booking clerk with the Sheriff's Department. She started work in this capacity on June 23, 2003.

Effective January 19, 2004, Wartke was laid off from her position as a booking clerk as a result of a bumping by a more senior person whose position was eliminated. Wartke was unemployed and received unemployment compensation payments between January 18, 2004 and April 3, 2004. By letter dated March 26, 2004, Wartke was offered a position of Correctional Officer. She started work as a C.O. on April 7, 2004.

Sometime during the course of her employment as a booking clerk, Wartke and Lieutenant David Thurman, the senior lieutenant on the jail staff, became friends and, at some point, entered into a consensual sexual relationship. In October or November 2003¹, Wartke joined Thurman, Sgt. Culver and C.O. Lindstrom at a NAFTA pre-conference in Madison. At some point in the evening, Wartke was in the room that Thurman and Culver shared and offered the two men the opportunity to touch her breasts. She subsequently showered with Thurman.

Sometime in the fall of 2003, Wartke accompanied Thurman, C.O. Katie Curran, and Curran's significant other, Mary, to Appleton. Curran had made the arrangements for the four individuals to share a single room, with Wartke and Thurman sharing one bed and Curran and her partner sharing the other. Wartke and Thurman engaged in sexual touching while sharing the bed.

¹ Employer's Exhibits 2 and 3 reference this incident as having occurred in November 2003, although the letter of termination (Joint Exhibit 2) indicates that the NAFTA conference incident occurred in October, 2003.

At some unspecified times, Wartke and other personnel of the Sheboygan County Sheriff's Department were drinking at the Six Corners Tavern. Wartke removed her bra from underneath her clothing and threw it on a ceiling fan. In so doing, she may have, on at least one such occasion, exposed her breasts. C.O. Curran also engaged in this bra flinging behavior.

Wartke's relationship with Thurman was known to some members of the department. Thurman or Wartke told Beaton and Droessel about it. The nature of the relationship was suspected by others. In January 2004, two employees of the Department, C.O. Lindstrom and Rich Wassink, voiced concerns to the Sheriff about Lt. Thurman. They thought there was a conflict of interest and that Thurman was giving preferential treatment to Wartke, in particular with regard to some December schedule changes. They also felt that Thurman was having an intimate relationship with Wartke off duty, and referenced the NAFTO pre-conference.

These complaints were investigated by Capt. Scholke, who determined that the schedule changes had occurred with another booking clerk, Bonnie Kluck, who did not feel pressured into making the schedule changes, even though Thurman had requested them on Wartke's behalf. In his interview with Scholke, Culver denied having seen any sexual relationship between Thurman and Wartke, and did not feel that Thurman had acted inappropriately in any way at the NAFTO pre-conference meeting. Culver, however, acknowledged hearing rumors about such a sexual relationship.

Wartke and Thurman's relationship continued. They often telephoned one another when on duty, used the Department's phone system and e-mail system to contact one another and shared affectionate and personal comments. Wartke brought food to Thurman and others when he was on duty and she was off duty. Although they initially attempted to keep the relationship from Thurman's wife, they ultimately told her about it. Wartke spent time with Thurman at his home, and he at hers. On August 31, 2004, Thurman sent some e-mails, intended to go to Wartke, to another employee, Dave Wonder. These e-mails called the recipient "LOML" (love of my life). Wonder was concerned about the e-mails and talked to Thurman about them. Thurman, in turn, told Wonder to ignore the e-mails and to walk away from the matter.

Wonder, however, chose to report the e-mails to persons further up the chain of command. Lt. Mark Rupnik was assigned to investigate. The Department was concerned about sexual harassment, Thurman's conduct on duty, and other matters that unfolded as Rupnik interrogated Department employees about Thurman, including Thurman's relationship

with Wartke. Late in the investigation of Thurman, Wartke was interrogated on December 1, 2004. Prior to beginning the interrogation, which was video-taped, Wartke was provided was a Garrity warning as well as an "Informing the Member" form. These state as follows:

DEPARTMENT INVESTIGATION

NOTICE OF INVESTIGATION

You are being interviewed pursuant to an official Internal Investigation being conducted by the Sheboygan County Sheriff's Department. Questions which you will be asked will be narrowly related to the subject of the report or complaint which prompted this investigation.

A member of the Sheriff's Department is expected to respond truthfully to all such questions in an open manner. Failure to cooperate, whether by evasion, untruthfulness or choosing not to answer, may result in disciplinary action up to and including dismissal.

The Constitutions of the United States and of this State provide that any statement made by you during this investigation may not be used against you in criminal proceedings in any court of law. However, information provided by you may lawfully be used against you, should departmental disciplinary action be deemed appropriate.

ACKNOWLEDGED:

/s/ Ariane Wartke
Officer being interviewed

/s/ Lt. Mark Rupnik
Supervisor conducting interview

Date: 12/01/04
1505

SHEBOYGAN COUNTY SHERIFF'S DEPARTMENT

INTERNAL INVESTIGATION

INFORMING THE MEMBER

1.) The Sheboygan County Sheriff's Department is presently investigating you concerning possible violations of Department policies, Telecommunications policy 1-12-3, Conduct on duty 1-12-4, Conduct off duty 1-12-5 and any other applicable policies or procedures.

- 2.) Disciplinary action may result.
- 3.) This is an internal investigation, and the answers you give, or the fruits thereof, cannot be used against you in a criminal proceeding.
- 4.) Pursuant to Wis. Stat. 164.02 and/or 111.70(2), you are entitled to representation by a representative of your choice, who, at your discretion, may be present for consultation at all times during the interrogation.
- 5.) Refusal to respond during the interrogation, or any response which is untruthful, could result in your suspension or termination from the Sheboygan County Sheriff's Department.
- 6.) You will have to submit to a video taped interview. You may consult with your representative while being interviewed. Your presence at the interview is required.

December 1, 2004 @ 1500 hours

(immediately or specify date & time)

I hereby acknowledge that this form has been read to me by a supervisory officer and I have received a copy of the same.

Ariane Wartke

Department Member's Signature

Date 11/26/2004

Time 1510 HRS

Lt. Mark Rupnik

Supervisor's Signature

Steven Falk, Sgt.

Supervisor's Signature

At the conclusion of his investigation of Lt. Thurman, Rupnik prepared a report of his findings. This eventually led to the termination of Thurman. Rupnik considered Wartke to have been evasive, lying, untruthful and uncooperative during his interrogation of her. Rupnik prepared an additional report in which he indicated that his investigation of Thurman revealed issues of concern regarding Wartke's conduct. The Sheriff then appointed Captain Adams to investigate Wartke.

Adams interviewed Wartke on March 18, 2005. Prior to the interview, Wartke received a Garrity notice with the same language as that quoted above, as well as an "Informing the Member" form. This form was identical to the December form in all respects except that the first part stated:

The Sheboygan County Sheriff's Department is presently investigating you concerning misuse of electronic communications, sexual harassment, bringing discredit, dishonor or disgrace upon yourself or the department, untruthfulness regarding official Departmental business with a superior, being evasive with a superior during a garrity [sic] interview, conflict of interest.

After the interview, and after reviewing the records compiled by Lt. Rupnik, Captain Adams issued a report in which he found that the complaint of sexual harassment was founded in that Wartke harassed Sgt. Culver in November 2003 by offering him the opportunity to touch her breasts and by having consensual sexual contact with Thurman in the same hotel room being shared by Culver. Adams also found that Wartke sexually harassed C.O. Curran in fall of 2003 when Curran was exposed to Wartke's having consensual sexual contact with Thurman in the bed in the same room as Curran's bed.

Adams found that the complaint of misuse of departmental electronic communication was founded in that Wartke had personal e-mails and phone calls with Thurman and other employees that were not Departmental business, including flirting with and showing signs of affection to Thurman on the Department computer and phone system.

Adams also found that Wartke brought discredit, dishonor or disgrace upon herself or the Department by removing her bra and throwing in on the fan at the Six Corners Tavern on at least one occasion, with the knowledge that the patrons in the tavern knew she was employed by the Sheriff's Department.

The complaint of untruthfulness by an employee regarding official Department business with a superior was also founded in that Wartke stated to Rupnik that she was not having a sexual relationship with Thurman at the time Thurman was questioned by Captain Scholke. Later, Wartke admitted sexual contacts in the shower in October of 2003. Further, Rupnik asked when sexual relations between them had ended, Wartke initially stated she didn't know. She also initially stated that she did not know when was the last time she had sexual contact with Thurman. When asked if the sexual relationship was over, she said no, and then admitted that the last time she had sexual contact with Thurman was the preceding day. Further, during Rupnik's interview, Wartke initially stated that she never offered Culver and Thurman the opportunity to touch her breasts. She then said she didn't remember. When interviewed by Adams, she remembered it, said it was a joke, but nobody touched her breasts. Culver told Rupnik that he observed Thurman touch her breasts.

Adams also found that “Wartke was evasive on numerous questions with Lt. Rupnik and continued to change her answers when questioned further.”

Adams found that the complaint about the Department’s mission statement was founded, inasmuch as Wartke stated that she does not always agree with the Department mission statement.

The complaint of conflict of interest was also determined to be founded, as during her interview with Adams, Wartke admitted that her relationship with Thurman had affected the morale of other employees. The relationship prevented other supervisors of lower rank from properly supervising Wartke, who was having problems with other Correctional Officers, including Lindstrom, Longstreth, Ballantine and Curran.

Adams also found that Wartke had used Departmental computers and phone equipment to conduct her personal relationship with Thurman and others, and she did this while operating the Control Room rather than watching the monitors or cell blocks. Adams found this to be a violation of policy 1-12-4(18), employees shall not sleep, idle, loaf or otherwise deliberately waste time while on duty. This was also found to be a violation of 1-12-4(24), employees shall not conduct personal business while on duty or devote any of their on-duty time to any activities other than that which relates to law enforcement except for that which relates to meals or emergency needs.

On April 5, 2005, a Sheboygan County Employee Report was issued that terminated Wartke’s employment as a C.O. The report reads as follows:

NAME: Ariane N. Wartke

DEPARTMENT AND POSITION: Sheriff’s Department – Correctional Officer

DATE: April 5, 2005

Michael J. Helmke, Sheriff of Sheboygan County, believes and has determined that Correctional Officer Ariane Wartke has engaged in actions meriting dismissal from the Sheriff’s Department.

STATEMENT OF INCIDENTS

In late February 2005 Captain David Adams was assigned to investigate a compliant [sic] that Correctional Officer Ariane Wartke had been evasive and untruthful during a Garrity interview, participated in actions that brought discredit upon the Sheboygan Sheriff’s Department, and participated in conduct that was detrimental to job performance and morale. The findings of Captain Adam’s [sic] investigation are listed below.

During a Garrity interview, conducted by Lieutenant Rupnik, involving the investigation of Lieutenant Thurman, Correctional Officer Wartke was evasive to the point that her statements became untruthful. Correctional Officer Wartke continued her pattern of evasiveness in a second Garrity interview conducted by Captain Adams. The instances of evasiveness are so numerous that it precludes them from being listed here. Correctional Officer Wartke's evasiveness violated Garrity Warnings and Informing the Member. Garrity Warnings state "A member of the Sheriff's Department is expected to respond truthfully to all such questions in an open manner. Failure to cooperate, whether by evasion, untruthfulness or choosing not to answer, may result in disciplinary action up to and including dismissal." Informing the Member states "Refusal to respond during the interrogation, or any response which is untruthful, could result in your suspension or termination from the Sheboygan County Sheriff's Department." Both of these forms were used during the two Departmental investigations that involved Correctional Officer Wartke. Correctional Officer Wartke's evasiveness in the two separate Garrity interviews was also a violation of Department Policy 1-14-4(15), which states "Untruthfulness by any employee regarding official Department business with a superior or a prosecutor will not be allowed."

On one occasion, Correctional officer [sic] Wartke was a patron in the Six Corners Tavern and in the presence of the public she removed her bra from underneath her clothing. After removing her bra Correctional Officer Wartke then threw it onto a ceiling fan in the bar. On several other occasions Correctional Officer Wartke removed her bra at the bar of the Six Corners Tavern's [sic] in the view of other patrons. Correctional Officer Wartke stated she was aware that members of the public present in the bar knew she was a correctional officer when she engaged in this behavior. Correctional Officer Wartke's actions were in violation of Department policy 1-12-4(1), which states that "Employees shall not bring discredit, dishonor or disgrace upon themselves or the Department."

During the Garrity Interview [sic] with Captain Adams and Lieutenant Rupnik Correctional Officer Wartke admitted that on two occasions she engaged in sexually explicit behavior with another person, while in the presence of her co-workers. One occasion occurred in October 2003 in a motel in Madison the night before a NAFTA Conference. The second instance was in the fall 2003 at an Appleton motel. On both occasions her co-workers were disturbed by Correctional Officer Wartke's behavior. Correctional Officer Wartke's behavior negatively affected working relationships and overall morale. Correctional Officer Wartke's actions violated Department policy 1-12-5(2), which states "No employees of the Department shall engage in any activity which may be detrimental to job performance of the Department."

ACTION TAKEN: Immediate termination of probationary employment with the Sheboygan County Sheriff's Department and Sheboygan County as a whole.

The employee is reminded that Employee Assistance Program is available and may be reached by calling 1-800-752-2673.

Grievant Wartke acknowledged receipt of this letter by her signature dated April 6, 2005. A timely grievance was filed on April 11, 2005. This was processed through the grievance procedure, with a request to initiate grievance arbitration filed with the WERC by letter dated May 31, 2005. The County contested the arbitrability of the grievance, contending that Wartke was a probationary employee at the time of her termination. In an Award issued on September 27, 2005, the undersigned determined that the grievance was arbitrable.

Additional facts may be included in the Discussion, below.

RELEVANT CONTRACT PROVISIONS

ARTICLE 3

MANAGEMENT RIGHTS RESERVED

Unless otherwise herein provided, the Management of the work and the direction of the working forces, including the right to hire, promote, transfer, demote or suspend, or otherwise discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reason, is vested in the Employer.

...

POSITIONS OF THE PARTIES

The Employer contends that it had just cause to terminate Wartke's employment for three reasons, all of which are supported by Wartke's own testimony during the two videotaped interviews:

(1) She was untruthful and evasive during investigatory interviews, in violation of directions given during the Garrity warning and on the Informing the Member form, as well as Department Policy 1-14-14(15).

(2) She engaged in conduct that brought discredit, dishonor, or disgrace upon the Department when she removed her bra in front of member of the public who knew she was a correctional officer at the Six Corners Tavern, in violation of Department Policy 1-12-4(1).

(3) She engaged in sexually explicit behavior with another person in the presence of co-workers, which was detrimental to working relationships and morale in the Department, in violation of Department Policy 1-12-5(2).

In support of its allegation that Wartke was untruthful and evasive during investigatory interviews, the Employer points to the following 12 examples, which it says are either flatly untrue or extremely misleading:

1. She stated that the current perception of her relationship with Thurman was that of friends.

2. She stated that she had had a sexual relationship with Thurman in the past.

3. She stated that she honestly didn't know when her sexual relationship with Thurman had ended.

4. She stated that she did not remember the last time she had had sexual relations with Thurman.

5. She stated that she never had sexual contact with Thurman in front of any other employees.

6. She stated that she had never had sexual contact with Thurman while sharing a room with other employees.

7. She stated that she had not had sexual contact with Thurman while in the motel room in Appleton with another officer and another person.

8. She stated that Thurman did not give her money for the ring that was bought in Appleton.

9. She stated that there was not a sexual relationship between her and Thurman at the time of Captain Scholke's previous investigation.

10. She stated that her relationship with Thurman was that of very close friends.

11. She stated that the nature of her contacts with Thurman outside of work were usually just to talk.

12. She stated that when had contacts with Thurman outside of work their activities other than to talk were that they watched TV, watched movies, and played video games with the kids.

Wartke's untruthfulness cannot be excused because the questions concerned her personal sex life. The subject matter of the questions was determined by the nature of the allegations being investigated, combined with Wartke's failure to respond in a truthful and forthright manner. The sexual nature of Wartke's relationship with Thurman was the central issue in the Thurman investigation, which could not be completed without a full inquiry into that relationship. Had Wartke been truthful from the beginning, many of the subsequent questions would not have been necessary.

The County argues that Wartke's untruthfulness was because she did not want the Department to find out the truth, in order to protect Thurman. This is a malicious purpose, inconsistent with Wartke's duties towards the Department and cannot be countenanced.

With respect to the conduct at the Six Corners Tavern, the County contends that off-duty misconduct can justify disciplinary action if it negatively affects the employer's operations. Wartke's behavior, when known to be a member of the Sheriff's Department, negatively affects the image of the Department and the public trust therein.

Wartke's sexual conduct in the presence of other members of the Department was, according to the Employer, enormously destructive of proper working relationships in the department. In the presence of one of her direct supervisors, she engaged in sexual conduct with her supervisor's supervisor. The Department had good reason to question whether Sergeant Culver would ever be able to properly supervise Wartke after witnessing this behavior.

Finally, the County argues that the arbitrator should not substitute her judgment for that of the employer regarding the level of discipline to be imposed. The job of a correctional officer cannot be properly done unless the officer can be trusted to be truthful and complete in her reports with regard to important and sensitive matters. Accordingly, the grievance should be denied.

The Union initially argues that the letter of termination is too vague regarding the manner in which Wartke is alleged to have been evasive and untruthful. The Union contends that the County, arguing that Wartke was a probationary employee, did not state with specificity the nature of the alleged offenses that warrant termination. Such violates Wartke's rights under the just cause standard.

Further, the Union argues that the timeframe of the events and the length of time before it was brought to the employee's attention do not support any serious concerns on the part of management. The NAFTA pre-conference was in November 2003, the Appleton incident was in Fall 2003. Wassink and Lindstrom raised concerns in January 2004 that resulted in the Scholke investigation that month, but nothing was said to Wartke until December 2004. The LOML e-mails were sent to Wonder in August 2004, but nothing was said to Wartke until

December 2004. The Union argues that the Employer should have acted much sooner, if these actions of Wartke were of such concern to her fellow employees and management. In fact, Wartke was brought into her position as a correctional officer in April 2004, following the events in Madison and Appleton in 2003!

It is the Union's position that Wartke was verbally raped by agents of the Sheboygan County Sheriff's Department in that a relentless degradation of Wartke was undertaken. The questions went beyond the scope of the matters specifically referenced in the Inform the Member notice and were not narrowly tailored to the issues at hand. Wartke was questioned about her private sex life, when she last had sex, whether she had an orgasm. The questioning was degrading, unnecessary, and the nature of the questioning explains any perceived hesitation by Wartke in responding to the questions.

Because there were no citizen complaints emanating from the bra throwing at the Six Corners Tavern, the Union argues that there is no nexus between that behavior and Wartke's employment situation. With respect to the Madison situation, Wartke was not questioned about it until more than a year after the event. Sgt. Culver provided two different versions of the events, contending that nothing happened between Thurman and Wartke during the January investigation, but later claiming that Thurman touched Wartke's breasts during the later investigation. There is no evidence that Culver or Curran complained of sexual harassment, with respect to the Madison or Appleton events respectively.

Finally, it is the Union's contention that there was no testimony from first hand witnesses to support the discipline. Wartke had no prior disciplinary action taken against her, and was a promoted employee. The Employer failed to prove its case and the grievance should be sustained.

DISCUSSION

The issue to be decided is whether the County had just cause² to terminate Ariane Wartke from her employment as a Correctional Officer. The collective bargaining agreement³ does not define just cause, and neither side has defined the standard to be used. Accordingly, the just cause standard to be applied in this matter shall consist in a two-pronged analysis. First, the undersigned must address the question of whether the Grievant is guilty of the misconduct alleged. Second, if so, the arbitrator must determine whether the penalty is appropriate under the circumstances.

² The contractual language is "proper cause." The parties stipulated that the issue is whether just cause exists for the termination. Since neither party has argued that "proper cause" and "just cause" are different, I will assume that the terms have the same meaning.

³ Joint Exhibit 1 submitted at hearing is the Labor Agreement between Sheboygan County and Sheboygan County Health Care Facilities Employees, Local 2427, rather than the applicable agreement between Sheboygan County and Sheboygan County Supportive Services, Local 110, which was previously submitted as Exhibit A. Because both agreements contain the same management rights clause, and because the applicable agreement is part of the record in this case, this does not affect my ability to render a decision.

The County's notice of termination indicates three bases for the termination: Evasiveness and untruthfulness during investigatory interviews conducted by Lt. Rupnik and Capt. Adams; removing and throwing a bra onto a fan in a public establishment, the Six Corners Tavern; and engaging in sexual conduct in the presence of co-workers in both Madison and Appleton in late 2003.

There is no doubt that Grievant Ariane Wartke was engaged in a sexual relationship with Lt. David Thurman, although it is unclear when it began. It is also clear that the relationship, in and of itself, is not the basis for the disciplinary action against Wartke. A Department Directive was issued on May 3, 2005 that states "Supervisors with direct supervision over a subordinate shall not engage in romantic or sexual relationships." This was disseminated after both Wartke and Thurman had been terminated and, had it existed during the course of their employment, Thurman, not Wartke, would have been in violation of the Directive.

Wartke's termination, while not precipitated by her relationship with Thurman, was most definitely a by-product of that relationship. Two of the bases for the termination have to do with that relationship: Wartke was evasive and untruthful about the relationship during investigatory interviews, both when Thurman was being investigated and later when she herself was being investigated, and Wartke engaged in sexual contact with Thurman in the presence of co-workers in Appleton and Madison in 2003.

The analysis begins with the issue of Wartke's having removed her bra and thrown it at a ceiling fan while at the Six Corners Tavern. Wartke admits that she engaged in this action, perhaps even more than once. The County finds this to be a violation of Department policy 1-12-4(1), which states the "Employees shall not bring discredit, dishonor nor disgrace upon themselves or the Department." The County, while contending that members of the public who knew that Wartke was an employee of the Sheriff's Department witnessed this behavior, failed to establish when this behavior occurred, and also failed to establish that there were any complaints from the public or co-workers about this behavior.

The failure of the Department to establish a date, or even an approximate date, for this activity is significant. Wartke was initially hired as a booking clerk in June 2003. She held that position until January 19, 2004, when she was laid off. She was not an employee of the Sheriff's Department from then until she commenced employment as a Correctional Officer on April 7, 2004. It is possible that the events at the Six Corners Tavern occurred during the period between January and April 2004 when Wartke was not an employee of the Department. Of course, it is also possible that she was a booking clerk or a Correctional Officer at the time. The County, having not established that Wartke was an employee at the time of the incidents, cannot discipline her for them. Further, the lack of record evidence regarding complaints about the behavior is fatal to a contention that the behavior brought discredit, dishonor, or disgrace upon the Department. Accordingly, bra flinging, even though inappropriate behavior that was admitted to by Wartke, cannot form the basis for any discipline, and certainly not for termination.

Turning to the events of fall 2003 in Appleton and October or November 2003 in Madison, these situations present a closer question. The County contends that Wartke's actions in engaging in sexual contact with Thurman in the presence of C. O. Curran in Appleton and in the presence of Sgt. Culver in Madison are violations of Department policy 1-12-5(2) which states "No employees of the Department shall engage in any activity which may be detrimental to job performance of the Department."

The situation in Appleton arose when Wartke, Thurman, Curran and Curran's partner, Mary, went to Appleton together and shared a motel room. Curran made the arrangements, and knew that Thurman and Wartke would be in one bed while she and Mary would share the other bed. It is unreasonable to believe that Curran would not anticipate that there would be some interaction between Wartke and Thurman while they were lying in bed. Though Curran may have become upset upon hearing sounds emanating from the other bed in the room, and while this may have resulted in her having a different relationship with Wartke and/or Thurman subsequent to this event, it is difficult to find that Wartke was necessarily engaging in any activity that may be detrimental to job performance of the Department.

The situation in Madison arose when Wartke traveled there to join Lt. Thurman, C.O. Lindstrom, and Sgt. Culver at a pre-NAFTO meeting. It appears that the original plan was that Wartke would share a room with Lindstrom, and that Thurman and Culver would share a room. Some time during the evening, Lindstrom, who was intoxicated, indicated a sexual interest in Wartke which was not reciprocated. Wartke decided that she would not share a room with Lindstrom, but instead shared a room with Thurman and Culver. All had been drinking, perhaps to excess.

Wartke offered both Culver and Thurman the opportunity to touch her breasts.⁴ Wartke says that neither Thurman nor Culver touched her breasts in response to the offer. During an initial investigation in January 2004, Culver denied that this incident took place, but in the later investigation of Thurman, Culver indicated that it took place and that it was troubling. Culver did not testify at the arbitration hearing. Thus, Wartke's testimony in this regard is uncontested and must be accepted as true. In addition, Wartke and Thurman took a shower together, during which sexual contact took place. Wartke contends that Culver was unaware of this, as he was asleep at the time. Again, Culver's January 2004 statements during the investigation differ significantly from his later testimony about this event, though it is important to note, again, that Culver did not testify at the hearing, that Scholke's report of January 2004 is hearsay, and that there is no record evidence regarding complaints or concerns voiced by Culver.

Thurman was Culver's supervisor, and Culver was in the supervisory chain above Wartke. While it is difficult to accept the County's argument that Culver wasn't asked the proper questions during the January interview, rather than the fact that Culver was untruthful during that interview, it is possibly the case that Culver was initially untruthful in January 2004 because he was fearful of his relationship as Thurman's subordinate.

⁴ While Wartke admitted to this "offer," she also said that it was a joke.

Most importantly, other than the fact that there is no testimony to support the alleged complaint or concern voiced by Culver, is the fact that Wartke was a booking clerk at the time of these events. She did not become a Correctional Officer until April 2004. While Wartke may have violated the Department policy regarding activity which may be detrimental to job performance of the Department, her behavior as a booking clerk in late 2003 cannot be the basis of discipline or termination from her position of Correctional Officer in April 2005, a position that she assumed in April 2004.

Remaining is the County's contention that Wartke was evasive to the point of being untruthful during the interview by Lt. Rupnik on December 1, 2004 and the interview by Captain Adams on March 18, 2005. The Union argues that Wartke's due process rights were violated because the termination report does not enumerate the instances of Wartke's alleged evasiveness and/or untruthfulness but, instead, states "The instances of evasiveness are so numerous that it precludes them being listed here."

The purpose of a termination notice is to put the employee on notice of the offenses which the Employer believes form the basis of unacceptable behavior. Disciplinary action will not be upheld when the grounds for the discipline are not provided to the employee. This is a notice requirement, so that an employee is in a position to prepare a defense. The requirement does not demand that each instance of evasiveness or untruthfulness be spelled out. In its brief, the Employer has listed twelve statements (cited above) where it alleges Wartke was either untruthful or misleading. The failure of the County to enumerate these statements in its termination report does not warrant disregarding this allegation. Wartke knew what she had said and done during the interviews, and she knew the potential consequences of her failure to respond completely and honestly to the questions that she was asked.

Prior to the commencement of each interview, Wartke was provided with a Garrity notice and an Inform the Member notice. She was put on notice that she was required to answer all the questions posed to her honestly and truthfully. She was aware that failure to do so could result in discipline, up to and including termination. Although Wartke was aware of the potential consequences of her failure to answer completely and truthfully, Wartke failed to immediately provide honest, complete, and direct answers to the questions asked of her. Ultimately, however, she told the truth about her relationship with Thurman.

It is understandable that Wartke attempted to protect her relationship with Thurman, that she did not want to tell her superiors in the Sheriff's Department that she was in a sexual relationship with Thurman, and that she did not want to share intimate details with Rupnik or Adams. She argued with her interviewers that these were questions regarding her private life that had nothing to do with her employment by the Sheriff's Department. She appeared to be completely oblivious to the impact that her relationship with Thurman had, or could have had, on the other staff in the Sheriff's Department, although she did admit that she had problems with a number of employees and that there were morale problems. However, it is important to note that the notice of termination does not list conflict of interest as an element of the discharge. Accordingly, as Wartke was not put on notice that she was terminated for behavior that constitutes a conflict of interest, this will not be considered.

Wartke argues that the interviews constituted a verbal rape of her. The County admits that at least one question, relating to Wartke's having an orgasm, may have been over the line. The County also argues that had Wartke responded openly and truthfully at the beginning, many of the questions that she found to be objectionable would not have been asked. I agree with the County on this point. Not only did Wartke not comprehend why her sexual relationship was being questioned, or its relationship to her employment, but Wartke repeatedly sparred with her interviewers and forced them to ask very specific questions designed to force her to respond, rather than the general questions that she chose to counter. Particularly reprehensible was the series of questions in which she initially said that she didn't know when her sexual relationship with Thurman had ended, didn't remember when she last had sexual relations with him, followed a few moments later by acknowledging that she had intercourse with Thurman the previous day.

There is no doubt that being questioned about her relationship with Thurman was difficult for Wartke. However, that cannot stand in the way of following a reasonable directive from her superiors: to tell the truth. In January 2004, some employees of the Department were aware of Wartke's sexual relationship with Thurman, including Droessel and Beaton who had been told about it by Wartke and/or Thurman. Lindstrom and Culver suspected the relationship, or had heard rumors about it. For Wartke to attempt to hide it during the December 2004 interview made no sense at all, either from the perspective of keeping the relationship a secret, or from the perspective of risking her own position by failing to tell the truth.

Some of the questions asked of Wartke in either December 2004 or March 2005 related to events that had occurred in the fall of 2003. It is unreasonable of the Employer to expect that she would have total recollection of those events. Accordingly, some of the time that she responded "I don't remember" or "I honestly don't recall" may have been honest and truthful responses, not attempts to evade the question. In some cases, after repeated questioning, she eventually recalled the events.

I conclude that Wartke did violate Department Policy 1-14-4(15) which states "Untruthfulness by any employee regarding official Department business with a superior of a prosecutor will not be allowed." Wartke was evasive and untruthful during the interview by Lt. Rupnik on December 1, 2004 and during the interview by Captain Adams on March 18, 2005, in violation of both the Garrity and Inform the Member notices. While I find that Wartke's responses that were designed to conceal the nature of her relationship with Thurman were evasive and untruthful, by the end of the interview with Rupnik, she had acknowledged that she was engaged in a sexual relationship with Thurman that was on-going and she had acknowledged sexual contact with Thurman in Appleton and Madison. The County has not proven that Wartke was untruthful about being engaged in a sexual relationship with Thurman when Capt. Scholke conducted his investigation, as there is no evidence as to when the sexual

relationship began.⁵ The County has also not shown that Wartke was untruthful when she stated that Thurman did not give her money for the ring that was bought in Appleton. At most, there was an agreement that Thurman would contribute an unknown amount of money towards the ring, but there is no evidence that he gave her any money, at any time, to purchase the ring.

Having determined that Wartke is guilty of one of the three allegations of misconduct, evasiveness and untruthfulness, but to a lesser extent than argued by the County, it is necessary to determine whether the disciplinary action, termination, is appropriate under the circumstances. The Union contends that because the County believed Wartke to be a probationary employee, it decided to terminate her without just cause. This contention is unfounded. At the end of his investigatory interview, Captain Adams went through the seven just cause steps that are usually utilized by police departments. Had the Department felt that they could terminate Wartke without just cause because she was a probationary employee, Capt. Adams would not have gone through this exercise. In addition, the undersigned finds the testimony of Inspector Gary Ten Haken to be credible in that he and the Sheriff discussed whether to apply a just cause standard and concluded that there is just cause for termination. That is, even though the Employer considered Wartke to be a probationary employee, it evaluated the situation against a just cause standard.

According to Ten Haken, he and the Sheriff evaluated the reports and information they received from Lt. Rupkin and Captain Adams. The Sheriff reviewed the tapes of the two interviews. They decided that some of the allegations were not sufficiently proven, and some were not significant.⁶ The fact that Wartke was untruthful and evasive was the most important violation, because truthfulness is a staple of the job, the credibility of the department is based on the notion that its employees are truthful in the performance of their jobs. At times, Correctional Officers are called upon to provide sworn statements in support of applications for warrants. The fact that Wartke was untruthful in a situation where she had been provided with Garrity and Inform the Member notices, was put on notice that discipline, up to and including termination, for failing to be honest, makes it extremely difficult for the Department to rely on her veracity for sworn statements for any purpose. According to Ten Hanken, Wartke to return to work in the Sheriff's Department, it would present significant difficulties because there would always be questions about her truthfulness.

Ten Haken also testified about two other employees who had been terminated for untruthfulness, although no specifics were provided about those situations. The Union presented no evidence to contradict this, or in support of imposition of a lesser discipline.

⁵ In this context, sexual relationship means engaging in intercourse of some type, not merely engaging in sexual contact that Wartke admits to having engaged in with Thurman in late 2003.

⁶ Adams' report, Country Ex. 3, "found" many more allegations to be "founded" than were ultimately included in the termination report, Jt. Ex. 2.

Although not a probationary employee, Wartke was not a long-term employee of the Sheriff's Department. She had served as a Correctional Officer for a day less than a year.⁷ Though the fact that Wartke had not received any prior discipline would, generally, be a factor in her favor, the nature of the behavior engaged in, the fact that she was a short-term employee, and the fact that two other employees had been terminated for being untruthful, are all factors against her.

The County argues that the undersigned should not substitute her judgment for that of the County in determining whether the discipline was appropriate. Because I have found that two of the County's allegations in support of the termination cannot be sustained under the circumstances here, and because I find that all of the examples of evasiveness and untruthfulness relate to one issue, Wartke's relationship with Thurman, it is necessary for the undersigned to determine the appropriate level of discipline to be applied.

Although the evasiveness and untruthfulness all relate to one issue, the act of being evasive and untruthful during investigatory interviews is a very serious offense. Wartke purposefully and intentionally failed to provide complete and honest answers to the questions posed to her. While Wartke contends that many questions were inappropriate and delved into her personal rather than her employment related life, I find that with few exceptions, the questions were appropriate and pertinent to the investigation that the Sheriff's Department had undertaken. Accordingly, I find that the appropriate discipline is a 90 working day suspension without pay.

Based upon the above and foregoing and the record as a whole, the undersigned issues the following

AWARD

The grievance is denied in part and sustained in part. The Employer had just cause to discipline, but not terminate, Ariane Wartke. The Employer is order to (1) reduce the Grievant's termination to a 90 working day suspension; and (2) immediately reinstate the Grievant to her former position with all seniority and rights she has under the collective bargaining agreement and make the Grievance whole for all wages and benefits lost as a result of the discharge, minus the 90 days and all wages the Grievant earned in the interim that she would not have received except for her termination and any benefits she may have received from unemployment compensation.

⁷ The fact that Wartke started as a Correctional Officer on April 7, 2004 and was terminated on April 6, 2005, and that the County questioned the arbitrability of the grievance supports the Union's argument that the Employer believed Wartke to be a probationary employee. (Wartke acknowledged being probationary during the first interview.) Even though the Employer thought she was a probationary employee, this does not establish that the County did not utilize a just cause standard in its deliberations.

The Arbitrator will retain jurisdiction over the application of the remedy portion of the Award for at least sixty (60) days to address any issues over remedy that the parties are unable to resolve.

Dated at Madison, Wisconsin, this 1st day of February, 2006.

Susan J.M. Bauman /s/

Susan J.M. Bauman, Arbitrator

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