

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**WISCONSIN PROFESSIONAL POLICE ASSOCIATION/LAW  
ENFORCEMENT EMPLOYEE RELATIONS DIVISION  
for and on behalf of  
MONROE COUNTY PROFESSIONAL POLICE ASSOCIATION**

and

**COUNTY OF MONROE**

Case 184  
No. 65737  
MA-13305

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Appearances:

**Gordon McQuillen**, Director of Legal Services, Wisconsin Professional Police Association/LEER Division, 340 Coyier Lane, Madison, Wisconsin 53713, for the Monroe County Professional Police Association, referred to below as the Association.

**Ken Kittleson**, Personnel Director, 14345 County Highway B, Room 3, Sparta, Wisconsin 54656, for the County of Monroe, referred to below as the County or as the Employer.

**ARBITRATION AWARD**

The Association and the County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin to resolve Grievance number 05-204, filed on behalf of Jason Westpfahl. Hearing was set on Grievance 05-204 and two other grievances for June 13, 2006. On that day, hearing was conducted in Sparta, Wisconsin on Grievance 05-204. The hearing was not transcribed. After completing that matter, and after extensive discussion, the parties settled one of the remaining grievances and agreed to reschedule the third grievance.

Via e-mail on June 14, I advised the parties that the issue of post-hearing briefs on Grievance 05-204 had yet to be resolved. By June 30, the parties agreed to a briefing schedule, with a due date for the initial brief of July 28. The County filed its initial brief via e-mail on July 28, 2006. In an e-mail of August 29, 2006, the County noted that the Union

had not filed a brief and requested that the record be closed. After some discussion of the point, the parties agreed to an extension of time for receipt of the Union's brief, which was filed on October 16. Uncertainty over the filing of reply briefs prompted further discussion, and in a November 21 e-mail to the parties, I noted "that the record in the Westpfahl matter is closed."

### ISSUE

The parties stipulated the following issues for decision:

Did the County violate the collective bargaining agreement when it removed Jason Westpfahl from the CTU Team?

If so, what is the appropriate remedy?

### RELEVANT CONTRACT PROVISIONS

#### ARTICLE 2. MANAGEMENT RIGHTS

The County possesses the sole right to operate County government and all management rights repose in it, subject only to the provisions of this Agreement and applicable law.

These rights include, but are not limited to the following:

- A. To direct all operations of the County . . .
- C. To hire, train, promote, transfer, schedule and assign employees to positions within the County;
- D. To suspend, demote, discharge and take other disciplinary action against employees for just cause;
- E. To relieve employees from their duties because of lack of work or any other legitimate reason;
- F. To maintain efficiency of County government operations . . .
- L. To determine the methods, means and personnel by which County operations are to be conducted . . .
- N. No Article or Section of this Agreement shall be interpreted to abridge the duties or powers of the Sheriff as outlined in appropriate State Statutes relative to the operation of the jail, the service of papers, or any other statutory duties or powers of the Sheriff's Office.

The County's exercise of the foregoing functions shall be limited only by the express provisions of this Agreement. If the County exceeds this limitation, the matter shall be processed under the grievance procedure. . . .

### BACKGROUND

Grievance 05-204, dated March 3, 2005 (references to dates are to 2005, unless otherwise noted), asserts a "Violation of ARTICLE 2 (MANAGEMENT RIGHTS)" and seeks that the County, "Rescind Combined Tactical unit (CTU) Termination order dated February 7, 2005 (issued February 8, 2005) and reappoint Sergeant Westpfahl to active CTU status."

The order appears in a "Memorandum for record" dated February 7, from Monroe County Sheriff Peter Quirin to the Grievant and reads thus:

Conclusion: Sgt. Westpfahl, it is my determination that you are no longer a willing participant in the CTU program and that your present attitude toward Chief Kass could make a dangerous situation in a CTU call out even worse. I am therefore terminating you as a member of the Monroe County CTU, effective immediately.

...

This is not a disciplinary action. It is a summarized record of conversation between you, myself and Chief Kass. The conclusions I have made I believe are in the best interests of you and the members of the CTU. However I must advise that if you continue to exhibit the behavior and attitude I observed on February 3<sup>rd</sup> some form of disciplinary action could result.

This memorandum containing the order is referred to below as the Memo and is a two page document which highlights much of the relevant background. The balance of the Memo states:

The purpose of this memo is to summarize my conversation with you and Chief Mike Kass of the Sparta Police Department (SPD) on the afternoon of February 3<sup>rd</sup> 2005. The conversation took place at the SPD in the office of the chief. Chief Kass was part of the conversation, acting in his capacity as Commander of the Combined Tactical Unit (CTU), a unit of the Monroe County Sheriff's Department.

Prior to your arrival, Chief Kass and I had been discussing your non-attendance at CTU training for the past several months. I suggested that we should talk to you, to get your insight on what the problem might be. I asked the County Dispatcher to have you stop by the SPD on your way to the Sheriff's Department.

When you arrived, I asked you to sit down in a pleasant, conversational manner and voiced the concerns of Chief Kass and myself about your non-participation in CTU training. Essentially I asked if you were still interested in participating in the CTU Program.

You immediately became hostile and argumentative and stated that if there were no written training orders, you were not going to train. Chief Kass pointed out in a very professional, polite manner that other members were participating in the training and were concerned that if you were not training with them, your value to the team would be limited. After further polite and professional conversation from Chief Kass and myself, you continued to become more belligerent and defensive and refused to discuss the situation in any sort of professional manner. You continued to exclaim that you would not train without written orders and got up, opened the door and started to walk out of the room.

After I practically pleaded with you to calm down and let us discuss the matter, you stopped at the doorway, folded your arms and continued to demean and criticize Chief Kass and myself. For every suggestion we would offer, you would refuse to accept. You continued to remain hostile and belligerent and it was obvious that the conversation was going nowhere and that you were not willing to accept suggestions or compromise. Your criticism and lack of respect for Chief Kass were uncalled for, were unprofessional and have caused me to have concern about your leadership ability and your ability to participate as a CTU member.

Your lack of respect for me might be a bit more understandable since I am a new Sheriff of one month. However your statement to me while you were standing at the door with your arms folded that “you don’t know shit” was completely out of line, uncalled for and unacceptable.

. . . (Y)our participation in the CTU is voluntary and again I just want to emphasize that Chief Kass and I were just asking you to train with the team, withdraw yourself as a member or offer a viable solution to keep you involved. Lack of written orders is not a reason, it’s an excuse. If you were really interested in training with the team you would have kept track of training dates and reminded your supervisor of the need to create a training order.

In closing, I remember that we did recognize and discuss the fact that you were one of the original founding members of the team, that you have many unique skills that could make you a valuable trainer as well as a skilled participant and that perhaps you could work with the team in some sort of limited capacity. It became clear that you were not willing to accept any sort of compromise or solution.

The conversation was terminated when a County Dispatcher called me to request that you contact her reference an incident in progress.

These nine paragraphs of the Memo preceded the “Conclusion” section set forth above. The Memo concludes, “I am willing to discuss this matter with you at your convenience, provided you can remain rational, calm and open minded.”

As noted above, Westpfahl's removal from the CTU prompted the filing of Grievance 05-204. Quirin further articulated the concerns noted in the Memo in his March 7 written response to the grievance, which states:

The above referenced grievance is denied. The collective bargaining agreement has nothing to do with CTU membership. The CTU is a voluntary organization. If members do not attend training, CTU membership is terminated. The CTU commander and I wanted to know if there was an underlying reason why (he) was not attending training. When asked for a reasonable explanation, (he) refused to discuss the matter in a rational and reasonable manner . . . He attempted to intimidate the CTU commander and myself by being hostile and argumentative. He would not allow the CTU commander to even discuss the matter.

During this session, it was clear in my mind that (Westpfahl's) attitude indicated that he could not be a supporting viable member of the CTU. After later discussion with the team commander I decided that in the best interests of safety and cooperation that (he) be removed from the CTU.

At a meeting on February 8<sup>th</sup> . . . I agreed to have a further discussion with the CTU commander about this issue. After that discussion, the CTU commander came back to me with the reply that following a CTU team meeting it was the conclusion, at least for the time being, that (Westpfahl) should not continue to be a member of the CTU.

Quirin testified at hearing that he views the removal as permanent.

The CTU is a SWAT team, called in to act in special situations demanding a strong, armed presence. Prior to the creation of the CTU Team, the County had a similar unit assigned to narcotics enforcement. Members of law enforcement units within Monroe County, including the County Sheriff's Department and the police departments of Tomah and Sparta, created the CTU as a voluntary effort. The volunteers elected their command structure, including the Grievant as Commander. At the time of the creation of the CTU, there was no formal operational policy. Formal policy did, however, evolve as the CTU grew. The policy relevant to this matter consists of four pages, and is signed by then-incumbent Monroe County Sheriff Dale Trowbridge as well as the then incumbent Chiefs of the Sparta and the Tomah police departments. The final signer was the Grievant, as "CTU Commander". The relevant portions of that policy, referred to below as the Policy, read thus:

**PURPOSE:** To provide operational guidelines for supported law enforcement agencies of the Combined Tactical Unit (CTU).

**MISSION:** To support the Narcotics Enforcement Team (NET) and law enforcement agencies in Monroe County, or as directed by the Sheriff of Monroe County, or other authorized agency head. CTU will provide an organized response

with goals of containing and controlling a situation with the objective and goal of resolving the situation by the use of the minimum force necessary. Goals and objectives will be accomplished through use of trained tactical response teams utilizing specialized equipment.

## DEFINITIONS

. . .

CTU: Combined Tactical Unit comprised of members of the aforementioned law enforcement agencies. This is an additional duty assignment. . . .

## FUNCTIONS OF TEAM MEMBERS:

CTU Commander: acts under the direction and command of chief law enforcement authority or designee responsible for that jurisdiction. Supervises and controls personnel assigned to the CTU. Establishes CTU command post and maintains direct communications with CTU Team Leaders and Operations Commander of the situation, plans the methods to be utilized in situation. Disseminates all available information to Team Leaders. Coordinates and assists with the facilitation of CTU training. . . .

## TRAINING

Training will be planned and implemented by the CTU Commander and Team Leaders . . .

The training covered per the CTU SOG will be completed by each member to insure they are thoroughly familiar with the tactics concerned. No more than 2 unexcused absences will be allowed in any 6-month period. If 2 or more are accumulated, the following shall apply:

- 1<sup>st</sup> violation -- Member shall be placed on 1-month inactive status from the call out roster
  - Member shall receive counseling in reference to violation
  - No reduction in team position
  - Member must continue to attend training and maintain a perfect attendance for the month
  
- 2<sup>nd</sup> violation -- Member shall be placed on a 3-month inactive status from the call out roster
  - Member shall receive counseling in reference to violation loss of position on the team
  - Member will be eligible for the next position opening
  - Member must continue to attend training and maintain a perfect attendance or be excused

### 3<sup>rd</sup> Violation – Removal from the CTU

Disciplinary action may be imposed by members individual department head for violation of that department's rules and procedures as applicable to membership on the CTU. This policy shall in no way abridge or modify the management rights of any agency head.

The Grievant did not attend training on December 1, 2004, on January 19 and on February 2. He received no order to attend.

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

#### Jason Westpfahl

The Grievant has served the County for twenty-five years, the last ten as a Sergeant. He started as a sworn member of the County's jail staff and was promoted to Patrol Officer in 1985. Prior to becoming a Sergeant, he served as a Detective.

In August of 2004, the Grievant was summarily informed that Kass would take over the position of CTU Commander. While the Grievant served as Commander, the participating law enforcement agencies could implement their own policies, including training. Typically, an order to attend training was the implementing agency's commitment to pay for the training and to discipline, if necessary, to enforce attendance. In his experience, excuse from training was assessed on a case-by-case basis, and could reflect anything from the officer's lack of desire to attend to an inability of the department to cover the officer's absence.

In the Grievant's first year as CTU Commander, the CTU responded to roughly twelve calls. In his tenure, the CTU averaged eight to twelve calls per year. He estimated that he responded to fifty calls as Commander. The CTU has always been staffed by volunteers. The current practice is for an officer to request an appointment, with the Sheriff approving or disapproving the request. Prior to August of 2004, the Grievant, as CTU Commander, would be consulted regarding whether a specific applicant was a "good fit" for the CTU Team.

Prior to the February 3 meeting, no one informed the Grievant that he had two unexcused absences under the Policy. The dispatcher gave him no rationale for directing him to report to Kass' office on February 3. The meeting started with Quirin questioning why the Grievant did not attend CTU training. The Grievant responded that he had not received an order to do so. Quirin responded that he did not think the absence of an order reflected the true reason. The meeting lasted roughly ten minutes, ending with a dispatcher request that the Grievant respond to an incident involving a man brandishing a knife.

The Grievant did not dispute the accuracy of the Memo regarding his conduct on February 3. He acknowledged he became belligerent, "like I always do", adding that he told

Quirin “you don’t know shit about training orders.” He stated that he was frustrated because he was not being listened to. He felt the meeting was another example of the County “blindsiding” him regarding the CTU Team. He saw himself as taking a stand on an important issue on February 3 and did not view his conduct as threatening. He is known to argue his positions forcefully and has not received discipline in the past for doing so. In his view, he could discuss any issue after he was allowed to “vent a bit.” Profanity is commonplace in the worksite.

When the parties discussed the grievance, Quirin did not mention training as the basis for the removal, but repeatedly stated that it reflected his belief that the Grievant would not obey Kass’ orders. Quirin also stated that the suspension was temporary and could be discussed in the future. The Grievant has attended no training since the February 3 meeting. The requirement of an order to attend training predates Quirin’s assumption of the Sheriff position.

### Peter Quirin

Quirin had thirty years of military experience, including a variety of command positions, prior to taking a part-time County jail position in the Fall of 1998. He became a full-time jailer in the Fall of 2001 or early in 2002. On January 1, he became County Sheriff. Sometime in January, Kass contacted him, advising him that the Grievant had missed the last three training sessions with the CTU team, and had been something other than a full participant in the last training session that he attended. This prompted the February 3 meeting.

At the meeting, the Grievant would not calm down and was “yelling and loud” throughout the meeting. He asserted that he had no training order, and Kass responded that other officers had attended without an order. The Grievant consistently tried to leave the meeting, and ended in the doorway to Kass’ office, arms folded, in a belligerent posture. A dispatcher call terminated the meeting, with the Grievant reporting to an incident involving a weapon.

Quirin viewed the Grievant’s assertion of the need for a training order as a rationalization for his dissatisfaction regarding his removal as CTU Commander. Quirin asked a lieutenant informally regarding the need for such an order, and understood that a training order was not necessary to participate in training. Quirin did not further investigate the point. Quirin knew from past experience that the Grievant could be loud and belligerent, and that he would typically calm down after venting. However, on February 3, he would not calm down. The Grievant has no history of disobeying an order, but Quirin was convinced that he could not work as a member of a team commanded by Kass. The purpose of the February 3 meeting was to determine why the Grievant did not attend training, and to keep him on the team. However, his conduct made it impossible. Quirin concluded that conduct made the Grievant a poor fit on the CTU Team.

As County Sheriff, Quirin is the head of the CTU Team. He agreed that his actions are subject to the Policy, which is being revised. Participation in the CTU Team is voluntary, and all appointments are subject to his approval. On the recommendation of the CTU Commander, he can remove a CTU member. Kass did not seek the Grievant’s removal from the team prior to the February 3 meeting. Quirin viewed the removal as a non-disciplinary removal from the Team for safety-related reasons.



## Mike Kass

Kass has served as Sparta's Chief of Police since September of 2003 and has served as CTU Commander since the Fall of 2004. Following his replacement of the Grievant as CTU Commander, Kass viewed the Grievant as an unenthusiastic participant in Team activity. With his failure to attend training sessions on December 1, 2004, on January 19 and on February 2, Kass' concern grew. He discussed the matter with Quirin and agreed to the February 3 meeting. The purpose of the meeting was to find out if the Grievant was upset regarding the loss of Commander status and, if so, how to address his concerns.

The February 3 meeting went well until Quirin began the hard questioning regarding the Grievant's failure to attend training. The Grievant could not remain seated after this questioning began and became increasingly belligerent. Kass noted that other officers attended without training orders, then the Grievant responded that Kass did not know "shit" about him or his department. The meeting ended with a dispatcher call, summoning the Grievant to an incident. By the time the Grievant left the meeting, Kass became convinced that he was not a good fit for the CTU Team.

Kass knew the Grievant prior to the meeting, knew he could be boisterous, but thought he was a valued member of the CTU Team. His removal from the Team reflected that his conduct on February 3 demonstrated that he could not reliably take orders, and showed no respect for Quirin or Kass. Quirin made the removal decision. Quirin and Kass did discuss after February 3 whether the Grievant could be "salvaged" to play any role on the CTU Team.

Kass did not know of the Policy until CTU Team training in November of 2004. The Grievant attended that training, but Kass believed that his participation belied little enthusiasm. In preparation for the arbitration hearing, Kass prepared a memo for Ken Kittleson, dated June 7, 2006, which summarized his recollection of the circumstances surrounding the Grievant's removal. That memo states:

. . . I want to make you aware of how I became the . . . (CTU) Commander; a position previously held by Sergeant Westpfahl. In the summer of 2004 then Sheriff Amundson, Tomah Chief Anderson and I met to discuss the status of the CTU. All of us had been receiving complaints from various CTU members regarding training and attendance issues. The CTU members were about to address the leadership issue by having a vote of who should be in charge. Sheriff Amundson, Chief Anderson and I became aware of this and were concerned by the fact that leadership may be based solely on popularity versus ability.

Sheriff Amundson and Chief Anderson asked that I intervene on behalf the Department heads and take over the Commander position. I had previously served as a Tactical Commander for several years while working for the Menomonie Police Department. At a scheduled training session in mid 2004 I pulled aside Sergeant Westpfahl and Detective Eric Matson and advised them that

the Department Heads had met discussed the leadership issues and decided that I would Command the CTU. This appeared to meet with the approval of the majority of CTU members; however, there were some who later resigned.

From this point forward I noted a lack of appearance and/or participation on the behalf of Sergeant Westpfahl. It became apparent that Sergeant Westpfahl had little desire or train or be an active member of the CTU. In November of 2004 at an extended 3 day training session, Sergeant Westpfahl stood in the background and had little or no direct involvement with any of the team members. That was the last training session he attended prior to our meeting on February 3, 2006. Typically, the CTU trains twice a month for four (4) hours. My records indicate he missed scheduled training on December 1 2004, January 19, 2005 and February 2, 2005. He did not attend any training after the February 3, 2005 meeting.

My recollection of the February 3, 2005 meeting is basically the same as Sheriff Quirin. . . . I specifically remember him yelling at Sheriff Quirin and telling him he did not know “shit”. Sergeant Westpfahl’s demeanor in this meeting was unwarranted and his open hostility towards me and Sheriff Quirin demonstrated a clear lack of respect, was insubordinate and unprofessional given his status as a supervisor within the Sheriffs Department.

Enclosed is the original CTU agreement signed by representatives from all three host agencies along with Sergeant Westpfahl. The agreement clearly points out that CTU is an additional duty assignment. This stated; it is my belief that the Authorized Department Head retains the authority to eliminate this additional duty assignment for what ever cause they feel is warranted. Being a member of CTU is strictly voluntary and no one has been assigned this additional duty that has not been assigned this additional duty that has not asked to be part of the CTU. Additionally, this document established criteria for attendance. Three (3) unexcused absences in a six month period are listed as cause for removal from CTU.

I fully support Sheriff Quirin in this matter and believe he acted appropriately by removing Sergeant Westpfahl from the CTU. . . .

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

## **THE PARTIES’ POSITIONS**

### **The Association’s Position**

After a review of the record, the Association contends that the grievance questions the Grievant’s involuntary removal from the CTU Team. The removal, “notwithstanding the

contentions of the Sheriff and of the County . . . was discipline and without a legitimate basis.” The evidence establishes that the removal “was a direct consequence imposed on him . . . for his conduct” at the February 3, 2005 meeting.

The Memo confirms this, in spite of the Sheriff’s assertion, “This is not a disciplinary action.” The Memo is clear that the removal rests on the Grievant’s conduct and on his attitude toward Kass. Kass’ letter confirms this, by characterizing the Grievant’s conduct at the meeting as “insubordinate and unprofessional.”

The removal reflects the Sheriff’s attempt “to avoid the formality required by both the Agreement and Wisconsin law”. Because the Sheriff sought to rest his action “on the management rights retained by the County” which are set forth in Article 2, the grievance cites Article 2 as its contractual basis. Examination of the evidence, including the grievance process, establishes that County concern with the Grievant’s attendance at CTU training prompted the February 3, 2005 meeting. Those concerns gave way to concern with his conduct at the meeting and that concern prompted his removal from the CTU Team.

The assertion that the “strictly voluntary” nature of CTU participation cannot support the removal, for the Grievant “never voluntarily relinquished his position on the Team.” More significantly, the Policy provides a procedure for the involuntary removal of a team member who violates training requirements. The Policy also reserves to local management “the ability to discipline members of the local law enforcement agency for conduct related to the CTU.”

In any event, the County must comply with Article 2. If the removal constitutes discipline, under Article 2, Section D, then the County must demonstrate just cause for it. If the County views the action as a release from CTU duties, then it must demonstrate “legitimate reason” under Article 2, Section E.

If the removal is traceable to the Grievant’s conduct at the February 3 meeting, then it is discipline. If the removal is traceable to the asserted failure to attend training, then it “falls flat”. The Policy governs this point, and provides for a progressive series of sanctions. The County employed none of them, preferring immediate removal.

Since the County asserts the action was not disciplinary, it cannot claim to have shown just cause. It did not employ any of the required procedures. As the remedy to the County’s improper actions, the “Arbitrator should enforce the Operational Guidelines as a policy of the Sheriff’s Department and order that Sgt. Westpfahl be reinstated to the CTU unless and until those Guidelines are followed for his suspension or removal from the CTU.”

### **The County’s Position**

After a review of the record, the County contends that the grievance’s citation of “the management rights clause as the basis of the grievance is a clear indication that the grievance is on shaky ground.” Article 2 grants the County the ability to exercise its rights as limited “only

by the express provisions” of the Agreement. The grievance’s failure to specify such a limitation indicates its weakness.

Recourse to the Policy will not support the Association, since its guidelines provide that “three unexcused absences from CTU training mandate removal from the CTU team”. The Grievant is well aware of this mandate, since he signed the Policy. His unexcused absence from three training sessions in fact prompted the February 3 meeting.

Examination of the facts against the authority of Article 2 confirms that the Sheriff acted within contractual bounds. The Grievant was unhappy with his removal as CTU Commander and boycotted training. When confronted by management, the Grievant “was openly hostile and profane”. Knowing that CTU team members must “follow orders and perform in a cooperative and cohesive manner”, the Sheriff made “the management decision” that the Grievant was incapable of serving “in this team environment and removed (him) from the CTU team.” This falls within Sections A, C, E, F, L, and M of Article 2 as well as the Policy.

Review of the evidence establishes that the Grievant was “probably fortunate that he was only removed from the CTU team and not disciplined for insubordination”. Since the CTU Team is “a voluntary multi-jurisdictional unit . . . not covered by the seniority and posting provisions of the collective bargaining agreement”. Since the Grievant is “a disgruntled and uncooperative employee”, reinstatement to the CTU Team “would be tantamount to assigning a non-swimmer to the Dive Team based upon his seniority.” Thus, the grievance must be denied.

## DISCUSSION

The stipulated issue questions the propriety of the Grievant’s removal from the CTU Team, which focuses the dispute on Article 2. The arguments on Article 2 further focus the issue, questioning whether Section D or E can constitute “express provisions of this Agreement” that limit the Sheriff’s ability to remove the Grievant from the CTU.

Interpretation of Article 2 is less difficult than its application to the facts. As the County points out, the rights granted under Sections A, C, F, L and M of Article 2 are sufficient to permit the removal unless Section D or E expressly limits them. The provisions cited by the County are general grants of authority for the County to manage its business. The specific action at issue, however, questions coercive authority directed against an individual employee. The Association and the County agree that on the most general level, this implicates Section E, which grants the County the authority to “relieve” the Grievant from CTU “duties”, based on “lack of work or any other legitimate reason.”

Of the general provisions cited by the County, Section E is the best fit. The Policy makes the CTU Team “an additional duty assignment.” The singular reference is not a perfect fit for the relief from “duties” under Section E, but CTU service involves many duties and Section E more specifically applies than the general assignment rights granted under the other sections cited

by the County. Section E is the best fit among the general provisions cited by the County since it expressly governs coercive authority taken against an individual employee.

Because the Memo asserts the removal is “not a disciplinary action”, the County does not cite Section D. Even though Section E can be read to govern the Sheriff’s acts, Section D is the better fit. Section E does not apply specifically, since there is no dispute that there was no “lack of work” for the CTU Team, unless “lack of work” is taken to mean no work for an officer who behaved as the Grievant on February 3. This view, however, strains “lack of work” well beyond its normal meaning, and points to the Memo’s disciplinary nature. At best, Section E applies through the “other legitimate reason” reference. However, this reference, as the reference to “lack of work”, broadly applies to concerns not tied to a single employee’s conduct. There is little reason to force the events of February 3 into the general references of Section E. Kass’ and Quirin’s memos summarizing the February 3 meeting make it clear that the removal was prompted by the Grievant’s “insubordinate” and “unprofessional” conduct. This makes the removal a specific sanction tied to the inappropriate conduct of an individual employee. Thus, the reference to “demote, discharge and take other disciplinary action against employees” under Subsection D specifically governs the grievance, since the County’s coercive action sanctioned inappropriate conduct of an individual employee.

The Memo’s terms confirm that it was discipline. The Memo is entitled “Memorandum for record”, documents inappropriate behavior, states the sanction of removal from the CTU Team and advises the Grievant that if he continues the behavior of February 3, “some form of disciplinary action could result.” Memo reference to “for record” means it was meant to be filed for future reference, presumably in the Grievant’s personnel file. At a minimum, the document is a reprimand, which notes the existence of inappropriate conduct, cautions against its repetition and advises that repetition could bring further discipline. The Memo can also be read to state a demotion, to the extent it permanently denied the Grievant access to a duty he voluntarily sought. It can also be considered a suspension from that duty. In any event, in form and in substance, notwithstanding the assertion that the Grievant’s removal from the CTU Team was non-disciplinary, the Memo is disciplinary action. Section D thus governs it.

Section D requires “just cause” for “disciplinary action”. In my view, unless the parties stipulate otherwise, two elements define just cause. The first is that the County must establish conduct by the Grievant in which it has a disciplinary interest. The second is that the County must establish that the discipline imposed reasonably reflects its disciplinary interest.

The Memo removed the Grievant from the CTU Team for “the behavior and attitude” Quirin observed on February 3, which the Memo characterizes as “hostile . . . argumentative” and “unprofessional.” The Grievant acknowledged that the Memo accurately described his behavior. Against this background, the first element demands little discussion. The County can reasonably expect a subordinate officer to discuss a significant job performance matter with superior officers without recourse to yelling that the superior officers “don’t know shit.” Without regard to the personal relationships involved, the substantive issue or the knowledge level of any participant, the County has a disciplinary interest in assuring competent, professional communication of disagreement between law enforcement officers.

The issue thus turns to the application of the second element. Threshold to application of this element is the determination of the sanction involved. At hearing, Quirin confirmed that the Grievant's removal from the CTU Team is permanent. This is not clear on the face of the Memo, and was not clarified during the grievance procedure, since Quirin's March 7 response intimates that the suspension could be temporary.

The lack of clarity regarding the sanction is a troublesome preface to application of the second element. As noted above, the Memo constitutes a reprimand at the least. Also as noted above, there is no reasonable basis to doubt that the Grievant's conduct on February 3 was inappropriate. Thus, there is no reason to question the reasonableness of the Memo as the statement of a written reprimand for the Grievant's role in turning the discussion of a training issue into personal, verbal combat with superior officers.

This poses the closely disputed point whether the removal from the CTU Team is a reasonable sanction for the Grievant's February 3 conduct. The evidence will not support the County on this point. It is difficult to pinpoint the precise rationale for the removal, which is a troublesome preface to examination of its reasonableness. Quirin and Kass justified the suspension as the enforcement of Policy training requirements. The evidence affords no support for this. The Policy clearly states a progressive system, which neither Kass nor Quirin invoked.

More significantly, the assertion that the Grievant missed three training sessions is unproven. At a minimum, the Policy demands a case-by-case determination whether an absence is "unexcused." Kass' records, never shown to the Grievant prior to the hearing, show that the Grievant was one of six officers to miss the December 1, 2004, training. Those records show he was one of three officers to miss the January 19 training and one of four to miss the February 2 training. It is not clear what, if any, action was taken regarding any of the non-attending officers other than the Grievant. The e-mail documenting the Grievant's absence from the February 2 training notes that two of the missing officers were "working and unable to attend." There is no evidence on whether the Grievant had a similar conflict or on what, if any, steps the County took to determine fact on this point.

Even if Kass' records prove unexcused absences, there is no evidence that Quirin advised the Grievant of any of the absences prior to February 3. Quirin acknowledged that the Policy, pending revision, binds him, yet the evidence documents no effort to enforce its terms. Even though the evidence tends to support Quirin's conclusion that the Grievant used the absence of a training order as a rationalization, there is no evidence to undercut the Grievant's assertion that such an order was necessary and reflected past practice. The Policy affords no basis to hold this against the Grievant. Had Quirin or Kass enforced the Policy's training requirement, there would be no issue regarding a training order. Quirin acknowledges that he made no effort to investigate the issue, beyond asking a lieutenant's opinion. The failure to apply Policy provisions eliminates absence from training as a basis for the Grievant's removal from the CTU Team.

The remaining rationale is variously described in the evidence, ranging from poor attitude to a level of unprofessional conduct warranting a conclusion that the Grievant could not function

under Kass' command. Quirin and Kass each describe the Grievant's February 3 conduct as a form of insubordination, which has been defined thus:

A worker's refusal or failure to obey a management directive or to comply with an established work procedure. Under certain circumstances, use of objectionable language or abusive behavior toward supervisors may be deemed to be insubordination because it reveals disrespect of management's authority. Insubordination is considered a cardinal industrial offense since it violates management's traditional right and authority to direct the work force. Roberts' Dictionary of Industrial Relations, (BNA, 1994) at 349.

This definition highlights the considerable persuasive force of Quirin's and Kass' view.

That persuasive force is greater as a matter of argument than as a matter of fact. The February 3 meeting did not involve refusal to obey an order. There was no order. Nor did the meeting involve failure to comply with established work procedure. As noted above, neither Quirin nor Kass sought to apply the Policy. The assertion that the counseling and suspension requirements of the Policy could be met by an after-the-fact meeting to confirm three absences reads the Policy out of existence.

More to the point, the context of the meeting confirms it was something other than "an established work procedure." Testimony confirms that the Grievant's removal as CTU Commander was summary, without any explanation. That tension would exist between Kass and the Grievant after this is not remarkable. Quirin confirmed in testimony that he thought the transition between CTU Commanders, undertaken before he became Sheriff, had not been handled well. It was against this background that the Grievant, on February 3, was summoned to a meeting in Kass' office. He received a dispatch call to report to the meeting without being given any reason for it. He had not received any notice of unexcused training absences, much less the three demanded by the Policy to warrant removal. The Grievant's testimony that he felt blindsided for a second time cannot be dismissed as oversensitive. He had been blindsided.

The context of the meeting cannot, then, be viewed as an established work procedure. The absence of established procedure is a troublesome undercurrent to the County's actions. The Grievant's removal as CTU Commander set aside the past way to select a Commander. Kass' testimony highlights that CTU supervisors viewed this as necessary to avoid a personality contest. This makes Quirin's March 7 response difficult to understand. When asked if the removal was permanent, Quirin sought Kass' input. Kass, in turn, put the matter to the CTU team. It is not evident when or how, between the Grievant's removal as Commander and his removal as a CTU Team member, the votes of CTU members became meaningful.

The attempt to explain the Grievant's frustration cannot be made a justification for his choice to display it. However, it is a consideration in assessing the reasonableness of Quirin's conclusion that the Grievant displayed on February 3 a level of conduct so insubordinate as to be a safety consideration for CTU Team membership.

Ultimately, the evidence will not support the County's view of the Grievant's conduct. Most significant is the response to the Grievant's February 3 call out. It is impossible to reconcile the concerns regarding his conduct in future CTU call outs with the willingness to permit him to leave the stress of the February 3 meeting to respond to an incident involving a weapon. The Grievant has no history of disobeying an order and served as CTU Commander for roughly fifty call outs. It is unpersuasive to conclude that his use of "shit" in one animated discussion can stand as a reasonable basis to conclude that he could not take orders from Kass. The March 7 response is incomprehensible if the Grievant's February 3 conduct, standing alone, establishes inability to take orders. Thus, his removal from the CTU Team can not be grounded on his past conduct; on his asserted failure to train; or on the asserted severity of his conduct on February 3. Against this background, the evidence will not support a conclusion that his permanent removal from the CTU Team reasonably sanctioned his February 3 conduct.

In sum, the County has proven that the Grievant, on February 3, acted with sufficient disrespect toward Kass and Quirin to warrant a reprimand. The Award entered below states a remedy which seeks to reasonably tie the County's proven disciplinary interest with the Grievant's conduct. The Award establishes the disciplinary significance of Quirin's actions by permitting him to revise the Memo to reflect a written reprimand to the Grievant for his conduct on February 3. The reprimand must expunge references to a permanent termination of CTU Team membership but can highlight the specific behavioral excesses by the Grievant, including his use of profanity; his use of a raised voice toward Kass and Quirin; and his failure to remain seated to discuss CTU Team training requirements on February 3. The Award permits the County to use the reprimand to specify to the Grievant whether and how training orders will be used regarding future CTU Team training. Beyond this, the Award permits the reprimand to specify that the Grievant's repetition of the February 3 conduct can result in further discipline, including removal from the CTU Team. The Award requires that the Grievant be reinstated to his former position within the CTU Team, provided that: (1) he specifically states his willingness to serve as a CTU Team member, including compliance with CTU policy and with CTU command staff directives; and (2) he successfully completes training required to qualify him for CTU call outs. Required training must not single the Grievant out, but must assure that he meets the requirements demanded of all CTU Team members.

There is no make-whole component to the remedy because the Grievant did not suffer any monetary loss due to the removal. Coupled with the reprimand noted above, this permits the Grievant's suspension from the CTU for a considerable period of time. There is no way to avoid this. However, the temporary suspension is appropriate here as a cooling off period that should ease the process by which a past CTU Commander and its present Commander forge a working relationship. It also eliminates any possible question regarding the application of the Policy to any training missed prior to February 3.

Before closing, it is necessary to tie the conclusions stated above more closely to the parties' positions. I do not dispute the County's view that Quirin behaved with some restraint regarding his exercise of the authority granted in Article 2. There is considerable personal tension surrounding the dispute. The Sheriff was new to his position on February 3, having



moved from Jailer to Sheriff. His concern for the respect of road Deputies is understandable. By the same token, the Grievant approached the February 3 meeting as an individual who had, without explanation, lost a command position in the CTU Team he helped to create. Beyond this, his status as a CTU Team member was about to be questioned, without any benefit of Policy procedures that Kass and Quirin acknowledge bound them. Quirin's perception that the Grievant used training orders as a rationalization is well-founded, as is his perception that the Grievant's venting was disrespectful. No less well-founded is the Grievant's perception that he was blind-sided and shown little respect for his contributions to the CTU Team. Mutual respect lies at the core of effective working relationships and was in short supply in February.

To whatever degree these considerations explain the events of February 3, they afford no basis on which to apply Article 2. The grievance demands that whatever underlies the personal conflict of February 3 be addressed as a matter of contract. Quirin exercised considerable personal restraint on February 3, but the contractual weakness of the County's position is that his post-meeting response recognizes no contractual restraint. The Memo's assertion that the Grievant's termination from the CTU Team is non-disciplinary reads Section D out of existence. The assertion that the removal violated training requirements reads the Policy out of existence, eviscerating Sections D and E. That the County possesses general rights under Article 2 that can warrant the Grievant's removal from the CTU Team cannot obscure that Quirin's response to the February 3 meeting cannot be affirmed without reading those sections of Article 2 that bear specifically on the grievance out of existence.

As noted above, Section D specifically governs the grievance. As the County notes, Section E could be applied. Doing so does not change the conclusions stated above. The Grievant's permanent removal from the CTU Team cannot be made "other legitimate reason" under Section E for the reasons noted in the application of the cause analysis. The assertion that his presence on the CTU Team poses a safety issue is not reconcilable to Kass' or Quirin's willingness to let him respond to an incident involving a weapon on February 3, nor to the Grievant's work record, nor to the Grievant's history as CTU Commander. The asserted failure to train cannot explain the failure of the County to apply the Policy. To read "other legitimate reason" to support the County's post-February 3 response strains those terms beyond limit.

The parties do not argue and this decision does not address the Sheriff's constitutional or statutory authority. Subsection N of Article 2 points toward potential statutory issues. In the absence of argument from the parties, there is no reason to address the point. This is not to imply neglect on the parties' part. There is no reason to believe the facts posed here raise broader issues, see, for example HEITKEMPER v. WIRSING, 194 Wis. 2D 182 (1995); BROWN COUNTY SHERIFF'S DEPT. v. EMPLOYEES ASS'N, 194 Wis. 2D 265 (1995); and EAU CLAIRE CTY. v. TEAMSTERS UNION 662, 235 Wis. 2D 385 (2000).

### AWARD

The County violated the collective bargaining agreement when it removed Jason Westpfahl from the CTU Team.

As the remedy appropriate to the County's violation of Article 2, Section D, the County shall expunge from the Grievant's personnel file(s) any reference to his permanent removal from the CTU Team. The County may, however, revise the Memo to reflect a written reprimand for his conduct on February 3. The reprimand can specify the behavioral excesses by the Grievant at the February 3 meeting, including his use of profanity; his use of a raised voice toward Kass and Quirin; and his failure to remain seated to discuss, in a professional manner, CTU Team training requirements. The written reprimand may also specify how, if at all, training orders will be used regarding CTU Team training attendance. The written reprimand can also note that repetition of the Grievant's February 3 conduct can result in further discipline, including removal from the CTU Team.

The County shall reinstate the Grievant to the CTU Team position he occupied prior to the issuance of the Memo, but the County may require, as a condition of such reinstatement, that: (1) the Grievant specifically state his willingness to serve as a CTU Team member, including compliance with CTU policy and with CTU command staff directives; and (2) the Grievant successfully completes training necessary to qualify him for CTU call outs.

Dated at Madison, Wisconsin, this 7th day of February, 2007.

Richard B. McLaughlin /s/

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Richard B. McLaughlin, Arbitrator

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