

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**AFSCME LOCAL 990 (JAIL STAFF),  
WISCONSIN COUNCIL 40, AFSCME, AFL-CIO**

and

**KENOSHA COUNTY**

Case 252  
No. 65739  
MA-13307

(Paul VanDuyn Discharge Grievance)

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**Appearances:**

**Mr. Thomas G. Berger**, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 044635  
Racine, Wisconsin 53404-7013, appearing on behalf of Local 70.

**Ms. Lorette Pionke**, Senior Assistant Corporation Counsel, County of Kenosha, Courthouse,  
912 - 56<sup>th</sup> Street, Kenosha, Wisconsin 53140, appearing on behalf of Kenosha County.

**ARBITRATION AWARD**

AFSCME Local 990 (Jail Staff), Wisconsin Council 40, AFSCME, AFL-CIO, hereafter Union, and Kenosha County, hereafter County or Employer, requested that the Wisconsin Employment Relations Commission appoint an arbitrator from among a list of staff members provided by the parties. Consistent with this request, the Commission appointed Coleen A. Burns as arbitrator to hear and decide the instant dispute. The hearing was held before the undersigned on October 4, 2006, in Kenosha, Wisconsin. The hearing was not transcribed. The parties submitted post-hearing briefs, the last of which was received on December 1, 2006. Based upon the evidence and arguments of the parties, the undersigned makes and issues the following Award.

**ISSUES**

The parties stipulated to the following statement of the issues:

1. Was Paul VanDuyn discharged by the County of Kenosha for just cause and did the County of Kenosha administer that discharge fairly?
2. If not, what is the appropriate remedy?

### **RELEVANT CONTRACT LANGUAGE**

#### **ARTICLE I – RECOGNITION**

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Section 1.2. Management Rights: Except as otherwise provided in this agreement, the County retains all the normal rights and functions of management and those that it has by law. Without limiting the generality of the foregoing, this includes the right to hire, promote, transfer, demote or suspend or otherwise discharge or discipline for proper cause; the right to decide the work to be done and location of work; to contract for work, services or materials; to schedule overtime work, to establish or abolish a job classification; to establish qualifications for the various job classifications; however, whenever a new position is created or an existing position changed, the County shall establish the job duties and wage level for such new or revised position in a fair and equitable manner subject to the grievance and arbitration procedure of this Agreement. The County shall have the right to adopt reasonable rules and regulations. Such authority will not be applied in a discriminatory manner. The County will not contract out for work or services where such contracting out will result in the layoff of employees or the reduction of regular hours worked by bargaining unit employees.

. . .

#### **ARTICLE III – GRIEVANCE PROCEDURE**

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Section 3.5. Work Rules and Discipline: Employees shall comply with all provisions of this Agreement and all reasonable work rules. Employees may be disciplined for violation thereof under the terms of this Agreement, but only for just cause and in a fair and impartial manner. When any employee is being disciplined or discharged, there shall be a Union representative present and a copy of the reprimand sent to the Union. After one (1) year, written reprimands shall not be considered in future cases to determine the level or progressive discipline, and will be removed to a closed file upon the employee's request.

The foregoing procedure shall govern any claim by an employee that he/she has been disciplined or discharged without just cause. Should any action on the part of the County become the subject of arbitration, such described action may be affirmed, revoked, modified in any manner not inconsistent with the terms of this Agreement.

. . .

### **BACKGROUND**

In 2005, the Sheriff's Department employed Paul VanDuyn, hereafter Grievant, as a Direct Supervision Officer (DSO) at the Kenosha County Detention Center (KCDC). Sheriff's Department Captain Gary D. Preston issued an Interdepartmental Memo to the Grievant notifying the Grievant that, on December 14, 2005, there would be a pre-disciplinary meeting to discuss the following charges:

#### **Kenosha County Uniform Work Rules Work Habits**

##### **Department**

#18 Unlawful or improper conduct during non-working hours, which affects the employee's relationship to his job, his fellow employees, his supervisor, or the County's reputation in the community.

#### **Sheriff Department Policy: 165 Work Rules**

##### **III Conduct**

A. Employees shall conduct themselves both on and off duty, in such a manner as not to reflect unfavorably on the Department. Unbecoming conduct shall include that which tends to bring the Department into disrepute or reflects discredit upon the employee as a member of the Department, or that which tends to impair the operation and efficiency of the Department or employee.

The attached "summary" sets forth Preston's findings and conclusions relating to the Grievant and states as follows:

On Sunday November 27<sup>th</sup> on or around 10 am, DSO Paul VanDuyn engaged in an argument with DSO (CJ) at their shared residence (address omitted) located in the City of Kenosha.

The argument escalated into a physical altercation in which DSO (CJ) received debilitating injuries to her left elbow as a direct result of the actions of DSO VanDuyn.

These actions are deemed to be in violation of Wisconsin State Statute 940.19(2), Substantial Battery/Domestic Violence.

DSO VanDuyn was placed under arrest by the Kenosha Police Department and subsequently transported to the Kenosha County Jail. DSO VanDuyn was booked and held in the County Jail on the charges.

At that time DSO VanDuyn was placed under administrative suspension.

On December 5, DSO (CJ) filed for and was granted, by Court Commissioner Greco, a Domestic Abuse Injunction against DSO VanDuyn. This injunction orders no contact between the two for a four- (4) year period.

It was clear to Court Commissioner Carl Greco that there were sufficient grounds to believe that an incident of Domestic Violence occurred and that for the safety of DSO (CJ) a four-year injunction was imposed.

The issuance of an injunction to protect one employee from the other is also clear evidence that there was a violation of County Work Rules, in that there was improper/unlawful conduct exhibited by DSO VanDuyn against DSO (CJ).

The schedules of KCDC and proximate locations of workers and the need for communication between workers makes continued employment of DSO VanDuyn a recipe for continued violations. The issuance of an injunction is also contrary to the County's mission of providing a harassment free work zone and would make it impossible for DSO VanDuyn to appear at work when DSO (CJ) is present without being placed under arrest for violation of the injunction.

It is the recommendation of the Detentions Division Commander that employment of DSO Paul VanDuyn be terminated with Kenosha County.

On December 14, 2005, a pre-disciplinary meeting was conducted by Chief Deputy Smith. The Grievant was in attendance, as were various Union representatives. During this meeting, Preston presented the results of his investigation and the Union and the Grievant were provided with an opportunity to respond.

On December 22, 2005, Smith issued a Memo to Union Representative Berger, with a copy to the Grievant, which included a notification that the Grievant's employment would be terminated effective December 31, 2005. Thereafter, a grievance was filed challenging this

termination. This grievance was processed through the grievance procedure and submitted to arbitration.

### **POSITIONS OF THE PARTIES**

#### **County**

Discharges as a result of misconduct must be supported by just cause. In the case of misconduct, there are two basic elements. Whether the employer proved the employee's misconduct and whether the employer established that the discipline which is imposed was justified under all the relevant facts and circumstances. In the case of off-duty conduct, there should be some demonstrable connection or nexus between the off-duty misconduct and the employment setting.

The record proves that the employee misconduct has occurred. The Grievant plead no contest to the charge of domestic abuse and is on probation for that charge. The Grievant acknowledges that there was pushing; that he had told his girlfriend to move out; and that he was angry because his girlfriend wished to visit her family at Thanksgiving. Medical records confirm CJ's statement to the doctor, as well as provide information on the extent of her injuries and the cause of these injuries. A court commissioner granted a TRO against the Grievant.

Although the Grievant was not previously disciplined, discharge is appropriate. The Grievant knew that his behavior on and off-duty was at issue in his employment. The Grievant had knowledge of the relevant work rules of the Department and County. The Grievant intentionally injured a co-worker, resulting in serious injury and then lied about his misconduct. Such conduct is inconsistent with the requirements of his position description and the relevant work rules.

There is a nexus between this off-duty conduct and the employment setting. The Grievant was a member of the Sheriff's Department, which has a duty to serve and protect the public; including a duty to control the jail.

The Grievant was jailed by the Kenosha Police Department. The Grievant's misconduct involves bullying and evidences lack of self-control and emotional instability. The Grievant's misconduct impacts upon his ability to maintain the trust and respect of his co-workers and jail inmates, some of whom are charged with the same offense, as well as raises legitimate concerns regarding his ability to safeguard inmates.

The TRO prevented the Grievant from working alongside and having contact with a co-worker. This co-worker was out of work as a result of her injuries; returned for a short time; took a leave of absence; and then left town.

The Grievant is known as a hothead. Another employee transferred as a result of the Grievant's conduct and threats. The Grievant separated CJ from those she loved; intimidated CJ and other co-workers and denied that there was a problem. He acknowledges that he sent an alarming letter to CJ's mother. He fits the profile of an abuser. The County has a duty to the public, its staff, and its inmates to employ trustworthy individuals.

An initial, impartial investigation was conducted by the Kenosha Police Department based upon information provided by a medical facility that is not affiliated with the Employer. The Grievant was placed on administrative leave by the Sheriff's Department pending investigation after being charged with Domestic Violence, False Imprisonment and Battery against his girlfriend and co-worker, CJ. Following this investigation, a Notice of a Pre-Disciplinary Meeting was sent to the Grievant alleging a violation of County Work Rules and Sheriff's Department Policy. At the pre-disciplinary meeting, Captain Preston presented his case for discharging the Grievant. Following this meeting, the Department's decision to discharge was made based upon the evidence presented in this case and affirmed by the County Administrative Committee. The investigation and decision-making process in this case is consistent with prior cases.

With respect to the just cause issue, the Daugherty tests are given as a guideline. The County's conduct in this case meets the Daugherty tests.

The County has proper cause to discharge the Grievant. The grievance should be denied.

### **Union**

The Grievant and CJ had met while working for the County and began their relationship in the spring of 2002. On November 23, 2005, CJ was invited to her sister's for Thanksgiving. At the time, CJ and the Grievant had plans to spend Thanksgiving with his family. When CJ advised the Grievant that her sister had invited her to Thanksgiving dinner, he told CJ that the continuing efforts of her family to break up their relationship was too much for him to continue putting up with; he asked her not to go; she refused; threw her engagement ring on the floor; and stated that they were done. She left the home they shared and the Grievant did not see her again until November 25, 2005.

When the Grievant tried to talk to CJ about their relationship, the discussion ended in an argument. CJ pushed the Grievant and he put his arms up to defend himself. The Grievant then left the room and later went to work. This was the only time that CJ and the Grievant made physical contact in an aggressive manner.

On November 26, 2005, the Grievant tried to discuss their relationship; stating that he still wanted to save it. Thereafter, the two went to bed. When the Grievant awoke, CJ was shoveling snow. CJ offered to prepare food for the Grievant. The Grievant ate and then went to work.

Although CJ never exhibited any problem with her arms, nor complained of pain, she went to a clinic on November 27, 2005 and complained of pain in her arm. A clinic doctor notified the police, but CJ never contacted the police to complain.

When the Grievant returned from work on November 27, 2005, he and CJ discussed their relationship; agreed that their relationship was over; and the Grievant offered to purchase CJ's share of the house. CJ threatened that the Grievant would lose everything. The Grievant became disgusted and went to bed.

When the Grievant awoke a few hours later, he observed CJ carrying groceries into the house and got up to help with the groceries. A few hours later, the Grievant was arrested for alleged Substantial Battery/Domestic Violence.

At the time of his discharge, the Grievant was a seven year employee, who had always received above average evaluations and had never been disciplined for any infraction of County rules. The Grievant was an excellent employee.

Chief Deputy Smith decided that the Grievant should be discharged for alleged violations of two County work rules; without ever investigating the alleged violations himself. Nor did he order that a thorough investigation be done. In order to sustain the discharge, the County must meet the requirements of the Daugherty Rules, which it has not.

The Grievant had no forewarning or foreknowledge of the possible or probable disciplinary consequences coming from off duty conduct occurring away from the workplace. In fact, correction officers have believed that this rule applied to sworn officers and not to them.

The County's rule or order is not reasonably related to operation of County business and the performance that the County might properly expect of the employee. The County states that correctional officers are not law enforcement officers and should not be treated as such. Therefore, off the job conduct, absent a conviction of criminal wrongdoing, should not be considered reasonably related to the operation of the business of KCDC or the jail.

The County did not make an effort to discover whether the employee did in fact violate or disobey a rule or order of the County prior to administering discipline. The County never bothered to interview the Grievant prior to terminating him or to learn what CJ had to say about the situation. Someone from the Sheriff's Department interviewed CJ but failed to record the interview or take notes during the meeting. Further, none of the substance of the conversation that the County had with CJ was ever offered as evidence.

The County's investigation was not conducted fairly and objectively. The County chose to take the word of CJ without ever asking the Grievant his side of the story. The County made a decision and then sought evidence to support its decision.

The County judge did not, at the investigation, obtain substantial and compelling evidence or proof that the Grievant was guilty as charged. In fact, the County discharged the Grievant before any Court of Law was able to rule on any of the charges levied against the Grievant.

The County did not apply its rules, orders and penalties evenhandedly and without discrimination to all employees. When the Sheriff's Department was faced with this kind of incident in the past, it did not impose the ultimate sanction. A sworn officer who pointed his gun at his wife is still working for the Department. Additionally, the County completely ignored the Grievant's spotless record.

The degree of discipline administered by the County is not reasonably related to the seriousness of a proven offense and the record of the employee in the service of the County. The County's lack of adequate investigation precludes any conclusion regarding what transpired between the Grievant and CJ. The County acted as judge and jury before doing a complete investigation.

The County has not established that the Grievant has engaged in any behavior that harms the employer's reputation or product. The Grievant is a non-sworn officer who has little contact with the public.

The County has not established that the Grievant engaged in behavior that rendered him unable to perform his duties or appear at work. The TRO was never a real issue because CJ never returned to work.

The County has not established that the Grievant engaged in behavior that would lead to refusal, reluctance or inability of other employees to work with the Grievant. The unchallenged testimony of two of the Grievant's female co-workers establishes that they would not have a problem working with the Grievant.

The County has not established that the Grievant engaged in behavior that undermines the ability of the employer to direct the workforce. The Grievant's behavior at work has been excellent and there is no reason to believe that anything has changed that would cause the Grievant to act differently.

Arbitrators have recognized that the connection between off-duty misconduct and an injurious effect upon the employer's business must be reasonable and discernible and not speculative. In this case, no reasonable and discernible connection has been established. In a case involving another employer, but similar circumstances, an arbitrator found that an employer did not have just cause to discharge.

The County has rules that require progressive discipline, but has ignored them. The County violated the labor agreement when it discharged the Grievant without just cause. The Grievant is entitled to be reinstated and made whole for all losses suffered as a result of the



unjust discharge. The County should be ordered to cease and desist from following the practice of assuming guilt and not innocence until proven otherwise.

### **DISCUSSION**

The relevant contract provisions refer to “proper cause” and “just cause.” The arguments of the parties establish that, for the purposes of this decision, these two terms are interchangeable.

Each party has referred to the Daugherty standards when arguing their respective positions. Accordingly, the undersigned has concluded that she should apply the seven standards of ENTERPRISE WIRE when determining the stipulated issue.

***Did the Employer give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee’s conduct?***

The Grievant was found to have violated the following:

#### **Kenosha County Uniform Work Rules Work Habits**

##### **Department**

#18 Unlawful or improper conduct during non-working hours, which affects the employee’s relationship to his job, his fellow employees, his supervisor, or the County’s reputation in the community.

#### **Sheriff Department Policy: 165 Work Rules**

##### **III Conduct**

A. Employees shall conduct themselves both on and off duty, in such a manner as not to reflect unfavorably on the Department. Unbecoming conduct shall include that which tends to bring the Department into disrepute or reflects discredit upon the employee as a member of the Department, or that which tends to impair the operation and efficiency of the Department or employee.

Chief Deputy Charles R. Smith made the decision to discharge the Grievant. According to Smith, he primarily focused upon the Sheriff Department #165 Work Rule violation because he considered the general County Department rule to be substantially similar.

According to Smith, the Grievant had prior knowledge of the #165 Work Rule because it is published in the personnel policy that is issued to each employee. The record does not demonstrate otherwise.

Section 3.5 of the parties' collective bargaining agreement expressly requires employees to comply with all reasonable work rules and expressly recognizes that employees may be disciplined for violation of such work rules. A reasonable employee would, or should, know that discipline includes discharge.

The #165 Work Rule at issue regulates on-duty and off-duty conduct which "tends to bring the Department into disrepute or reflects discredit upon the employee as a member of the Department, or that which tends to impair the operation and efficiency of the Department or employee." Inasmuch as this work rule regulates employee conduct that adversely impacts upon the employer's ability to operate its business and the employee's ability to perform his/her work for the employer, it is a reasonable work rule.

As reflected in Smith's Memo of December 22, 2005, his decision to terminate the Grievant was based upon his conclusions that, while off duty, the Grievant had placed himself in a confrontational situation with a fellow employee, causing physical injury to this employee as well as the loss of this employee's services to the County, and that the Grievant had provided the County with cause to suspect the Grievant's credibility if a fellow employee or inmate were to lodge a complaint that the Grievant used excessive force in the performance of his duties. Smith further concluded that such conduct would adversely affect the Grievant's working relationship with his fellow employees, including supervisors. A reasonable employee would, or should, know that this is the type of conduct that is regulated by the Department #165 Work Rule.

Notwithstanding the Union's argument to the contrary, the record does not establish that DSO's, such as the Grievant, had a reasonable basis to conclude that the #165 Work Rule did not apply to them. The Employer has given the Grievant forewarning or foreknowledge of the possible or probable disciplinary consequences of the conduct that was the basis for the Employer's disciplinary decision.

## ***II***

***Was the Employer's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of its business and (b) the performance that it might properly expect of the employee?***

The #165 Work Rule regulates on-duty and off-duty employee conduct that "tends to bring the Department into disrepute or reflects discredit upon the employee as a member of the Department, or that which tends to impair the operation and efficiency of the Department or employee." As discussed above, this work rule regulates employee conduct that adversely impacts upon the employer's ability to operate its business and the employee's ability to

perform his/her work for the employer. As such, it is reasonably related to the orderly, efficient and safe operation of the employer's business and the performance that the employer might properly expect of the Grievant.

### **III**

***Did the Employer, before administering discipline to the employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?***

Captain Preston, who is in charge of all detention facilities, brought the charges that were the subject of the December 14, 2005 pre-disciplinary meeting. Prior to issuing these charges, Preston was involved as follows:

- 1) On November 27, 2005, he received notice that a detention employee had been arrested by the City of Kenosha Police Department (KPD) and was likely to be placed in the County's jail;
- 2) He went to the jail and made arrangements to have this employee (the Grievant) segregated from the general jail population;
- 3) While the Grievant was being processed, Preston spoke with one of the investigating KPD officers, Detective Kopesky, and was verbally informed that the Grievant had battered another DSO at their shared residence and that the KPD had learned of this when the other DSO went to a medical center for treatment and reported the Grievant's conduct;
- 4) When Preston learned that the KPD had pressed charges and that the Grievant was being held without bail, Preston made the decision to place the Grievant on administrative leave
- 5) When the Grievant was booked, Preston advised the Grievant that the Grievant was being placed on paid leave; that the Grievant should not report to work; that the Grievant would be notified of his hearing and that the Grievant, with tears in his eyes, stated that he was really sorry. Preston did not ask the Grievant to make a statement at this time and the Grievant did not offer to make a statement.
- 6) Thereafter, Preston received and read the KPD arrest report and charging materials; a copy of the emergency room release report; pictures of CJ taken by KPD that showed bruising on the upper right arm and her left arm in a sling; and a copy of the hospital report that had been submitted to the Department by CJ which restricted her to light duty with a 5# restriction on her left arm with no repetitive left arm use and also contained a diagnosis of "Left

shoulder and elbow sprain and tendonitis.” The KPD arrest report and charging materials included detailed written statements of the Grievant and CJ, as well as KPD officer written statements reporting statements made by CJ and the Grievant.

7) Preston received notice that, on December 5, 2005, CJ had applied for and obtained a Domestic Abuse Injunction against the Grievant that was of four years duration; which injunction included a court order that the Grievant avoid any contact with CJ at work.

The written reports of KPD Officer Pederson and Detective Kopesky each report statements made by CJ which allege that she had been injured by the Grievant and recount the following: the Grievant woke CJ as she was sleeping in the spare/guest room; that the Grievant initiated a discussion; that the Grievant escalated the ensuing verbal argument when he pushed the Grievant into a wall; and that, when CJ attempted to defend herself, the Grievant threw her down onto the bed, pinned her to the bed by placing his knees on her shoulders/arms, and then pulled her hair and covered her mouth as she was screaming. CJ prepared a written statement that includes the following:

I was sleeping in the spare bedroom. Paul entered the bedroom, woke me up to continue a verbal argument. The argument escalated to when Paul pushed me against the wall and bed. I then pushed him back. He grabbed my arms, picked me up - - I was fighting back by scratching, kicking, screaming. He forcefully pushed me down on the bed. I continued to fight back - screaming at him to stop he's hurting me. He then placed both his knees on my left and right shoulders pinning (sic) me to the bed. He continued to hurt me by pulling my hair with his left hand and covering my mouth with his right to keep me from screaming . . .

Detective Kopesky reports that the Grievant stated that “he talked to Comp. in the spare bedroom and that it was Comp. who pushed him and he stated that he extended his arms out so Comp. wouldn't push him again. Suspect stated that Comp. did scream at him and he told her to stop. Comp. told Suspect to leave and he sat back down on the bed and told Comp. that she had to stop acting like he she was. Suspect stated that he left the bedroom, and went to his bedroom and watched TV and the got ready to work.” The Grievant's written statement includes the following:

On 11-25-05 at approx. 1800 hours (CJ) was home and she was sleeping in the spare bedroom. At approx. 1830 hours I went into (CJ)'s bedroom and woke her up. We started to talk again about our relationship. The talk ended up in an argument. We argued for approx. ½ hour. I told (CJ) that her kids were never coming back to her because she had given them up. (CJ) had gotten up off the bed and she pushed me, when she got out of the bed. I put my arms out and

had contact with (CJ)'s upper body and tried stopping (CJ) from pushing me again. (CJ) sat back down on the bed and screamed at me to get out of the bedroom and to leave her alone. I did sit back down on the bed and told (CJ) that this had to stop. I left the bedroom and went to the master bedroom and watched TV a little bit and then got ready for work. I did not talk to (CJ) at all before I left for work. I never hurt (CJ) in any way.

Following his receipt and review of above mentioned materials, Preston made the decision to bring charges against the Grievant. Preston provided the Grievant with a written notice that identified these charges, as well as basis for these charges. This written notice also notified the Grievant that the Grievant would have an opportunity to discuss these charges at a pre-disciplinary meeting. At this pre-disciplinary meeting, Captain Preston presented the results of his investigation and the Grievant, who was represented by the Union, was provided with the opportunity to respond to the charges.

Before administering discipline to the Grievant, the Employer made a reasonable effort to discover whether the employee did in fact violate or disobey a rule or order of management.

#### *IV*

#### *Was the Employer's investigation conducted fairly and objectively?*

The initial investigation was conducted by Preston as outlined above. It is not evident that Preston had any bias against the Grievant or for CJ.

It may have been preferable for Preston to have interviewed the Grievant and CJ prior to concluding his investigation. At that time, however, he had received and reviewed KPD materials that included detailed written statements of CJ and the Grievant; a detailed written report from KPD Officer Pederson relating statements of CJ; a detailed written report of Detective Kopesky reporting statements made by the Grievant and CJ; and documentation that CJ had sustained injuries consistent with her statements. Preston's conclusion that the statements that he had received were sufficiently clear is reasonable.

Lieutenant Schlecht met with CJ on December 7, 2005, when she had returned to light duty capacity. According to Schlecht, CJ informed Schlecht that she did not wish to discuss the incident; that she had obtained a domestic injunction against the Grievant; and that she was in fear of her safety from the Grievant.

At the pre-disciplinary meeting before Smith, the Grievant was provided with an opportunity to respond to the charges brought by Preston, as well to the case presented by Preston; which included the statements contained in the KPD reports. It is not evident that Smith had any bias against the Grievant or for CJ.

The Employer's investigation was conducted fairly and objectively.

V

*At the investigation did the “judge” obtain substantial evidence or proof that the employee was guilty as charged?*

In the present case, the “judge” is Chief Deputy Smith. Smith’s written Memo of December 22, 2005 reflects matters considered by Smith and his conclusions regarding the same. At hearing, Smith recalled that the Grievant spoke very little but did state that he did not do anything; that he was a family man; and that he would not do something this bad to throw away his career.

The fact that there were no witnesses to the altercation recounted by CJ in her statements to the KPD does not mean that Smith could not reasonably credit CJ’s statements regarding the altercation. Given the consistency of CJ’s statements, as well as the corroborating medical evidence, Smith’s decision to credit CJ’s statements regarding the altercation that occurred in the “spare bedroom” is reasonable.

Crediting CJ’s statements, Smith reasonably concluded that the Grievant, while off duty, placed himself in a confrontational situation with a fellow employee, causing physical injury to this employee that required medical treatment, as well as the loss of this employee’s services to the County. Smith also reasonably concluded that, as a result of his conduct, which included a consistent denial of CJ’s accusations, the Grievant’s credibility would be suspect anytime that an inmate or co-worker complained that the Grievant had used excessive force during the performance of his duties.

To be sure, the Union offered the testimony of two female DSO’s who indicated that they would not have a problem working with the Grievant. Nonetheless, other reasonable employees would not consider the Grievant’s treatment of co-worker CJ to be acceptable. Notwithstanding the Union’s argument to the contrary, it was not speculative for Smith to conclude, as he did conclude, that the Grievant’s conduct would adversely affect the Grievant’s working relationship with his fellow employees, including supervisors.

As the Union argues, Smith made the discharge decision prior to the time that the Grievant’s criminal charges were resolved in Court by the Grievant pleading no contest to misdemeanor battery and disorderly conduct. Work Rule #165, however, does not proscribe only that conduct which has been judged illegal by a Court of Law. Nor would it be reasonable to infer such a proscription.

In his memo of December 22, 2005, Smith did characterize the Grievant’s conduct as unlawful. However, a fair reading of Smith’s Memo of December 22, 2005, as well as his testimony at hearing, reasonably leads to the conclusion that Smith’s decision to discharge the Grievant was based upon his crediting CJ’s account of the altercation, rather than upon the conclusion that the Grievant had violated the law.

At the investigation, Smith obtained substantial evidence or proof that the Grievant had engaged in conduct that reflects discredit upon the Grievant as a member of the Department and which tends to impair the operation and efficiency of the Department or the employee and that the Grievant was guilty as charged.

## **VI**

***Has the Employer applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?***

Smith has been a Department employee for more than thirty-two years. During the past thirteen years, Smith has been the Chief Deputy. One function of the Chief Deputy is to receive notice of all disciplinary actions. According to Smith, there have been prior instances in which DSO's and Deputies have been terminated for off-duty conduct and there have been instances in which employees have been terminated for committing battery.

At the pre-disciplinary meeting, the Union stated that the County does not routinely dismiss employees who have altercations with their significant others while off duty. Smith stated that he is not aware of any instance of off-duty conduct in which one employee had battered another officer or co-worker. The record does not establish otherwise.

At hearing, the Union provided two newspaper articles reporting off-duty conduct of two other Department employees. Neither these articles, nor any other record evidence, warrant the conclusion that any other Department employee has engaged in the type of off-duty conduct for which the Grievant was discharged. Nor does the record otherwise establish that the Grievant has been the recipient of disparate treatment.

The Employer has applied its rules, orders and penalties evenhandedly and without discrimination to all employees.

## **VII**

***Was the degree of discipline administered by the Employer reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee in his service with the Employer?***

As the Union argues, at the time of his discharge, the Grievant was a seven year employee who had received above average evaluations. There was information in the Grievant's file that, in hind sight, raised a red-flag to Preston. The County, however, had not relied upon this information to discipline the Grievant. Nor had the County disciplined the Grievant for any other reason.

As the Union also argues, the “just cause” standard embraces the concept of progressive discipline. It also recognizes, however, that misconduct can be so egregious as to warrant immediate discharge.

As the Union argues, an Examiner in a case involving a different employer concluded that there was not sufficient nexus between a CNA’s off-duty misconduct in physically abusing his wife and the CNA’s job to warrant discharge. BROWN COUNTY, DEC. NO. 31476-B (Jones, 2/06) As a comparison to this case reveals, there are a number of relevant factual differences, not the least of which is that the CNA’s wife was not a co-worker and that, when interviewed by the police, the CNA readily admitted that, while he and his wife were arguing, he physically abused his wife by pulling her hair and that he regretted doing so.

As set forth in the Grievant’s position description, a DSO, such as the Grievant, is responsible for ensuring the safety and security of inmates and maintaining discipline and order in the Employer’s detention facilities. A DSO is expected to serve as a role model for desired behavior; stressing psychological controls and verbal skills as primary management skills.

Smith credibly testified that a successful DSO must have the respect of his fellow officers, as well as inmates, to maintain discipline and order within the detention facility. Preston credibly testified that the Department relies upon the reports of DSO’s and, therefore, the DSO’s must be trustworthy and credible.

The conduct for which the Grievant was discharged includes instigating a confrontation with a fellow co-worker; escalating that confrontation from verbal argument to physical assault; and causing significant physical injury to this co-worker, resulting in the loss of that employee’s services to the Employer. The conduct for which the Grievant was discharged provides the Employer with a reasonable basis to doubt the Grievant’s credibility and to question the Grievant’s ability to use good judgment under stressful situations; to control a situation without the resort to unnecessary force; and to accurately self-report his conduct. Given the nature of the Grievant’s job duties, as well as the nature of the conduct for which the Grievant was disciplined, the Employer reasonably concluded that immediate discharge is warranted.

The degree of discipline administered by the Employer is reasonably related to the seriousness of the employee’s proven offense and the record of the employee in his service with the Employer.

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



**AWARD**

1. Paul VanDuyn was discharged by the County of Kenosha for just cause and the County of Kenosha did administer this discharge fairly.

2. The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 21st day of March, 2007.

Coleen A. Burns /s/

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Coleen A. Burns, Arbitrator

