

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

ROCK COUNTY SHERIFF'S DEPARTMENT

and

ROCK COUNTY DEPUTY SHERIFF'S SUPERVISORS ASSOCIATION

Case 372
No. 66002
MA-13401

Appearances:

Eugene R. Dumas, Rock County Deputy Corporation Counsel, 51 South Main Street Janesville, Wisconsin, appearing on behalf of the Department

Cullen, Weston, Pines & Bach, LLP, by **Jordan C. Loeb**, 122 West Washington Avenue, Suite 900, Madison, Wisconsin, appearing on behalf of the Association

ARBITRATION AWARD

Rock County Deputy Sheriff's Supervisors Association, herein referred to as the "Association," and Rock County Sheriff's Department, herein referred to as the "Department," jointly selected the undersigned from a panel of arbitrators from the staff of the Wisconsin Employment Relations Commission to serve as the impartial arbitrator to hear and decide the dispute specified below. The parties stipulated to the submission of documentary evidence and otherwise waived formal hearing. Each party filed post-hearing briefs; the last of which was received December 8, 2006.

ISSUES

The parties stipulated to the following statement of the issues:

1. Did Rock County violate the collective bargaining agreement when it reprimanded the Grievant?
2. If so, what is the appropriate remedy?

RELEVANT AGREEMENT PROVISIONS

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ARTICLE II – MANAGEMENT RIGHTS

- 2.01 The management of the Department and the direction of the working force is vested exclusively in the Sheriff, including, but not limited to the right to hire, or appoint; suspend, or demote, discipline or discharge for cause (all pursuant to the provisions of Wis. Stats. 59.26); to transfer or layoff for economic or other legitimate reasons, to determine the type, kind and quality of service to be rendered to the citizenry, to determine the location, operation and type of any physical structures or facilities of any division or shift within a division, to plan and schedule service, work shifts and training programs, to establish reasonable work rules, to determine what constitutes good and efficient County service and all other functions of management and direction not expressly limited by the terms of this Agreement. The Association expressly recognizes the prerogative of the County and the Sheriff to operate and manage its/his affairs in all respects in accordance with its/his responsibilities.

ARTICLE III – PROBATIONARY PERIOD

- 3.01 Length. All personnel promoted to higher classifications shall serve a probationary period of twelve months. At the sole discretion of the Sheriff employees deemed to not be performing satisfactorily during the probationary period shall retain the right to return to the position held prior to the instant promotion.
- 3.02 Seniority Date. Upon successful completion of the probationary period, the employee seniority date shall be their initial date of hire with the department.

. . .

ARTICLE X – GRIEVANCE PROCEDURE

- 10.01 Definition. Any dispute which may arise from a complaint by an employee or the Association with respect to the interpretation of the terms and conditions of this Agreement, shall be subject to the following grievance procedure unless expressly excluded from such procedure by the terms of this Agreement. Grievances resulting from discipline shall begin processing at Step 2. Time limits set forth herein may be extended upon mutual agreement of the parties.

10.02 Procedure.

Step 1. The employee and/or the Association Committee shall present the grievance orally or in writing involving matters of interpretation of the terms and conditions of this Agreement to the most immediate supervisor who has the authority to make adjustments in the matter within 14 calendar days of the alleged grievance or the time the employee can reasonably have been expected to have knowledge of said grievance.

The supervisor shall respond within 7 calendar days. If the grievance is denied, said denial shall be in writing.

Step 2. If the grievance is not resolved at Step 1, within 7 calendar days from the date of the written denial in Step 1, the employee and/or the Association Committee shall present the grievance in writing to the Sheriff or his/her designee, shall meet with the employee and/or the Association representative within 7 calendar days following receipt of the written grievance. The Sheriff, or his/her designee, shall provide a written response to the employee, or Association representative, within 14 calendar days of the meeting.

Step 3. If a satisfactory settlement is not reached in Step 2, it shall be presented in writing to the Human Resources Director by the employee or the Association Committee and/or the Association representative no later than 7 calendar days after receipt of the Sheriff's decision. Within 14 calendar days, the Human Resources Director shall meet with the parties to discuss the grievance and attempt to settle the matter. If there is no settlement, the Human Resources Director shall provide a decision in writing to the Association within 14 calendar days following the meeting with the parties.

Step 4. If a satisfactory settlement is not reached in Step 3, within 14 calendar days after the date the Human Resources Director's written response is due, the County or the Association may serve written notice upon the other that the grievance issue shall be arbitrated.

Within 7 calendar days thereafter, the parties shall meet and attempt to agree upon an arbitrator. If the parties fail to agree upon an arbitrator within 14 calendar days following said notice of arbitration, the parties shall request the Wisconsin Employment Relations Commission to submit a panel of 5 arbitrators. In the event the parties do not agree upon one of the 5 arbitrators, the moving party shall strike two names and the opposing party shall strike 2 names and the individual remaining shall serve as arbitrator to hear the dispute. The arbitrator shall have jurisdiction and authority to interpret the specific provision aggrieved

and shall not amend, delete, or modify any of the express provisions of this Agreement.

- 10.03 Costs. The decision of the arbitrator shall be final and binding upon the parties. The cost of arbitration shall be borne equally by the parties, except that each party shall be responsible for the costs of any witnesses testifying on its behalf. Upon mutual consent of the parties, more than one grievance may be heard before one arbitrator.

RELEVANT PORTIONS OF GENERAL ORDER 4.060
- GENERAL RULES OF CONDUCT

“ . . .

5. Conduct Toward the Public

. . .

B. Employees shall treat violators with respect and courtesy and guard against employing an officious or overbearing attitude, using language that may belittle, ridicule or intimidate the individual or acting in a manner that unnecessarily delays the performance of their duty.

. . .

18. Leaving Duty Post

Employees shall not leave their assigned areas or duties during a tour of duty unless directed or permitted to do so by the dispatcher, central control officer, authorized ranking officer or in immediate pursuit of a law violator or as the result of other urgent need.

. . .

20. Unsatisfactory Performance

Employees will maintain sufficient competency to properly perform their duties and assume the responsibilities of their positions. Employees will perform their duties in a manner that will maintain the highest standards of efficiency in carrying out the functions and objectives of the Department. Unsatisfactory performance may be demonstrated by a lack of knowledge of the application of laws required to be enforced; an unwillingness or inability to perform assigned tasks; the failure to conform to work standards established for the employee's rank, grade or position; the failure to take appropriate action on the occasion of a crime or disorder or other condition deserving of police attention; or absence

without leave. In addition to other indications of unsatisfactory performance the following will be considered evidence of unsatisfactory performance; repeated poor performance evaluations or a written record of repeated infractions of rules, regulations, directives or orders of the Department.

...

65. Rules and Regulations for Supervisory Personnel

...

(C) Supervisors are responsible and accountable for the maintenance of discipline and will provide leadership, supervision and an example to ensure the efficiency of Department Operations.

...

(E) Supervisory personnel are responsible for all job related failures on the part of their subordinates when the supervisor was aware or reasonably should have been aware of the failure or the potential for failure and did not take the appropriate action to correct the deficiency.

66. Reporting Without Unreasonable Delay

Employees of the Department shall make prompt official written reports. If sent upon any investigation, they shall report, as soon as possible, what action was taken in the matter as required by current departmental reporting regulations.

....."

FACTS

Rock County operates a sheriff's department, herein Department, headed by an elected sheriff. The professional protective aspect of the sheriff's department is organized as follows. The rank and file deputies of the Department are represented by a labor organization. Deputy Shawn Natter was a deputy in the bargaining unit represented by that labor organization at all material times. The supervisory professional protective employees of the Department are represented by the Rock County Deputy Sheriff's Supervisory Association, herein Association.. The supervisory unit includes lieutenants and sergeants. Sergeant Michael Mugnani was a sergeant in the bargaining unit represented by the Association. Neither party submitted evidence as to whether or not Sgt. Mugani was a supervisor for over one year.

Sgt Mugnani was given discipline which ultimately took the form of a written confirmation of an oral warning for the failure to properly supervise a subordinate and for various improper actions in connection with a child custody exchange, all occurring on September 18, 2005. The warning is the subject of this grievance.

The background of the domestic relations incident is as follows. There is a domestic relations court order covering M and her ex-husband, Q. The domestic parties have a court-ordered detailed standard operating procedure for making the exchange. There has been a long history of disputes and disturbances between the two around custody exchanges. Q lives with K, in a marriage like relationship. The exchanges occur on Friday and Sunday.

Sgt. Mugnani was regularly off on Sundays August 14, though September 11, 2005. His first Sunday back was September 18. On Sunday, September 18, 2005, two sergeants were assigned to the shift on which the incident occurred. Sergeant Christiansen and Sgt. Mugnani were assigned to the Sunday shift on which the incident occurred. Sgt. Christiansen was responsible for the south half of the county. Sgt. Mugnani was assigned to fill in for the lieutenant who normally supervised the evening shift and was apparently shift commander. Deputy Natter was one of the deputies assigned to the shift.

Sgt. Mugnani was not aware of the background of the custody exchanges between Q and M prior to September 18, 2005, other than the fact that the exchanges had been supervised by the Department on some occasions.

It is the policy of the Department to supervise child custody exchanges only where there is serious potential for a disturbance of the peace. The Department had supervised numerous exchanges between the two for the last two years. It chose to do this because it was easier to supervise them than it was to deal with the aftermath if it did not. There had been numerous disturbances from the two but no physical violence when the exchanges had been unsupervised. The behavior of the two is exceedingly argumentative and childish. The Department was regularly supervising the Sunday exchanges as of the summer of 2005. The City of Janesville Police Department may have supervised the Friday exchanges on some occasions, but the Department was not supervising the Friday exchanges. By the middle of the summer, Deputy Natter had positioned himself during his Sunday shifts so as to be close to the areas of the exchanges at the time they were to occur. Thus, he became the person to regularly handle those exchanges and was familiar with the situation between the two.

On Sunday, September 18, 2005, the custody exchange was scheduled to take place at its customary time, 7:00 p.m. The court-ordered procedure specified that M was to arrive at 7:00 p.m. at the pick-up address occupied by Q and K in lot 55 of a mobile home park. M was to remain in her car and sound her horn. The children were then to be sent out. The record suggests a belief by M that Q and K have used various tricks to undermine the effectiveness of the procedure. M stated during the Department's investigation that at about 5:30 p.m., on this day, K had left a message on M's cell phone that Q wanted to drop the kids off at M's house at 7:00 p.m. M stated that K then made phone contact and confirmed the same. M stayed home at 7:00 p.m.¹ She stated that she stayed home until 7:15 p.m. when she called Deputy Natter because she believed that the calls had been a "set up." Deputy Natter stated in the internal Department investigation that Q called him at 6:30 p.m. and wanted to change the location, but not the time, of the custody exchange. Deputy Natter stated he

¹ Lieutenant Harper did acknowledge that he had heard the cell phone message on M's cell phone.

contacted M who declined to change the location. Deputy Natter stated that he then called Q and confirmed that the exchange was to take place at the time and place regularly scheduled per the court order. It appears that Q and K stayed home with the children. Deputy Natter arrived at Q's home at 7:00 p.m. to supervise the exchange, but M did not come. Deputy Natter talked to M by phone at 7:19 p.m. and stated he was with the children at Q's house. M told him she would be there in few minutes to get the children.

At about the same time Sgt. Mugnani was dispatched to the scene of a traffic accident which occurred at a location not far from where Deputy Natter was located. One of the drivers was intoxicated and fled on foot. Rock County Deputy Wescott was enroute to the accident scene from a remote part of the county. Town of Beloit Police Officer Jeff Winarski was near the location of the accident and volunteered to help. Sgt Mugnani arrived on the scene at 7:25 p.m. and gave chase. He reported that the he was seeking one of the drivers who had appeared intoxicated and had fled the scene, on his portable radio to dispatch which transmission was heard by Deputy Natter. At 7:32 p.m. Deputy Natter transmits the following statement to dispatch:

"I'm done waiting here for this stand-by. Clear it out and I'll go down and help [at the accident scene]."

At 7:32 p.m. Sgt Mugnani accosted the fleeing driver and a physical struggle took place while he attempted to arrest him. The transmission by Deputy Natter was heard by Sgt. Mugnani while he was subduing the suspect.

Sgt. Mugnani was supervising the accident scene when dispatch relayed the fact to Deputy Natter that Q had called and said M was at the scene of the custody exchange and causing a disturbance. Deputy Natter was frustrated with having waited so long at the custody exchange. He responded to the first call saying "I got a major traffic accident here in Rockvale. They'll have to deal with it. I sat there a half hour." Shortly, thereafter, Sgt. Mugnani talked briefly with Deputy Natter who told him that he had waited 30 (possibly 40) minutes at the scene of the custody exchange and M did not show up. He did not tell him about the evening's events and Sgt. Mugnani did not make a further inquiry. Sgt. Mugnani assumed that M had been late without a reason.

Sgt. Mugnani decided to go the custody exchange and take Officer Winarski as a back up. Sgt. Mugnani could have sent Deputy Natter back to the custody exchange, but did not do so.

When Sgt. Mugnani and Officer Winiarski arrived, M was seated in her van. She was very upset. Sgt. Mugnani told her that she should be on time and that he left an scene of an accident with an injury to come to her custody exchange. M continued to yell and Sgt. Mugnani told her to get back in her vehicle and pull up. He completed the exchange and talked to Q and K. M continued to yell. M put the children in her van and complain that "this isn't right." Sgt. Mugnani told her that she was causing a disturbance ever since he arrived and that he was going to issue her a citation for disorderly conduct. He ultimately issued the citation.

After the incident, Sgt. Mugnani directed Deputy Natter to contact Q and K. Based upon Deputy Natter's report of that discussion, Sgt. Mucnani determined to issue M another citation for trespassing. Sgt. Mugnani contacted M by telephone about one week after the incident and told her he was going to issue another citation. M complained about his conduct and became upset. Sgt. Mugnani never asked her for her side of the story and she never volunteered it. Sgt. Mugnani issued the second citation for trespassing.

On September 27 or October 6, 2005, M filed a formal citizen complaint against Sgt. Mugnani. Essentially, she claimed Sgt. Mugnani arrived at the scene of the custody transfer and was unaware of the events that had transpired relating to that days transfer. She alleged that he "laid into her" because she was not there at 7:00 p.m. even though that was the fault of Q. She essentially argued that Sgt. Mugnani became overbearing. She tried to explain the situation, but Sgt. Mugnani would not listen and Sgt. Mugnani pounded on her van and proceeded to arrest her for disorderly conduct.

The citizen complaint was assigned to Lieutenant Harper and Lieuteant Gary Groelle to investigate. They reviewed the records of the Department, including the dispatcher tapes, and interviewed M, Sgt. Mugnani, Deputy Shawn Natter and Beloit Police Officer Jeff Winiarksi. They provided a summary on November 2. Thereafter, they re-interviewed some of the witnesses and issued a revised report November 16, 2005, in which they concluded in substance that:

1. Violation of General Order 4.060(5)(B) – Conduct Toward Public. They found that M's complaint that Sgt. Mugnani was unprofessional at the scene of the exchange in not finding out her side of the story, striking her van with his hand and issuing her a second citation, were not sustained. They concluded that Sgt Mugnani's explanation that M was so agitated by the time he arrived that his priority was to keep the parties separated and facilitate the exchange of the children. They accepted Sgt. Mugnani's explanation that he intended to contact her after the exchange and get her side of the story.
2. Violation of General Order 4.060(66)(C & E) – Rules and Regulations for Supervisory Personnel. The investigators concluded that the Department had not provided an acceptable level of service to the parties to the custody transfer. Sgt. Mugnani had admitted that prior to September 18, he had been aware that the Department had been routinely supervising custody exchanges between M and Q; however, he was not aware of the history of those exchanges until September 18, 2005. They concluded Sgt. Mugnani “. . . failed in his supervisory responsibility by not becoming more familiar with the on-going conflict prior to it getting out of hand.” It concluded that had he been more aware of the circumstances, he might have supervised Deputy Natter more closely. It also concluded that it was Sgt. Mugnani's responsibility to ensure that Deputy Natter had not responded to the accident before completing the

exchange assignment. They noted that Sgt. Mugnani acknowledged that if he had known that M was on the way to pick up the children, he probably would have sent Deputy Natter back to the exchange.

3. Violation of General Order 4.060(20) – Unsatisfactory Performance. The investigators held Sgt. Mugnani to the standard of care of an ordinary deputy with respect to his handling of the exchange. It noted that Sgt. Mugnani acted based on his knowledge of the facts at the time. It noted that Deputy Natter had not informed Sgt. Mugnani of the relevant facts. It concluded that the statements made to M that she: “. . . should have been there at 7:00 PM and that Sgt. Mugnani had been required to leave an injury accident because of her situation . . . “ were factually correct. However, it is unacceptable for a deputy to make someone feel that their situation was not important or that they are interfering with other complaints. When Sgt. Mugnani re-contacted M after the incident, he did not ask her about her side of the story and merely told her she was receiving two citations. The investigators concluded he should have asked her about her side of the story. They concluded had he done so, he should not have issued the second citation (trespassing). They concluded that while M was disorderly, the Department had contributed to the situation.

Sgt. Mugnani reacted to those conclusions by memorandum dated November 22, 2005. In short, he answered that he was so busy apprehending the traffic accident suspect that he did not have time to evaluate Deputy Natter’s radio call that he was “. . . through waiting for (his) stand-by . . . “ He said he understood this as a statement of completion of the call. He stated that after he was informed by the second call from the exchange participants that he talked to Natter (then at the accident scene) and asked stated that: “. . . I thought you were through with that call.” He stated that Deputy Natter replied that: “. . . I waited 40 minutes for M [last name omitted] to show up and she did not.” He also stated that these exchanges took place on Sundays and this was the first relevant Sunday he had worked. He reiterated that she was out of control when he arrived at the exchange. He also said that when he did the follow call with her, he was “upfront” about the two citations and that she “blew up” at him.

On November 23, 2005, the investigators concluded that the response did not change their conclusions. The matter was referred to Commander Gehl who reviewed the report and supporting documents and directed that a written reprimand be issued to Sgt. Mugnani. This was done December 2, 2005.

The Association filed a step 2 grievance and properly processed the same to arbitration. The written warning was reduced to an oral reprimand reduced to writing on or before March 6, 2006.

POSITIONS OF THE PARTIES

Employer

The collective bargaining agreement does not contain a single reference to discipline. This is perhaps due to the supervisory status of the employees. Perhaps this reflects the paramilitary nature of the department which flows initially from the constitutionally protected powers of the sheriff. It is well-settled law that the constitutionally protected powers of the sheriff cannot be abridged by a collective bargaining agreement. The management rights clause of the collective bargaining agreement maintains County's right to promulgate, enforce, and interpret its own reasonable work rules. The Sheriff is accountable to the voters. Holding deputies within the department responsible for their actions and inactions when adverse results occur is what this case is about.

The Employer does not contend that Grievant is not a talented and generally well-performing officer. A reprimand is the lowest possible level of discipline. The Grievant's actions on September 18, 2005, do not measure up to what is required of a person in Grievant's position.

Any accepted approach to a just cause standard proceeds on a case-by-case basis. Under any circumstances, the arbitrator should defer to the expert judgment of experienced supervisory officers who did the investigation. The complaining witness had reason to be upset and if Grievant had obtained that information, he would have understood why the complaining witness was upset. There is no evidence any of the investigating supervisory officers considered anything other than relevant factors.

In reply, the Employer argued as follows. The Grievant only acknowledges the relevance of how M's conduct affected her and the operations of the department, and the degree to which her conduct violates state statutes. M's first complaint was about Deputy Natter not allowing her to share with him the evidence of calls she received from K which led to the confusion about the pick up of the children. M later complained about what she thought was unfair treatment by Sgt. Mugnani. She felt that Deputy Natter and Sgt. Mugnani made her troubles concerning getting compliance with the court's custody orders worse.

The Employer's internal investigation rejected M's charge that Sgt. Mugnani had acted unprofessionally in not listening adequately to her upon arrival, slapping her vehicle and telling her he was issuing her a second citation in retaliation for threatening to file a complaint. However, M's complaint brought to light shortcomings in two separate areas. First, Sgt. Mugnani, as a supervisor, failed to ensure an adequate level of service to the public by failing to adequately inquire as to the circumstances abandoned by Deputy Natter. Second, Sgt. Mugnani failed to adequately investigate what was going on before he injected himself into the custody exchange. The failure to do so contributed greatly to the situation which occurred. A review of the radio conversations from Exhibit I, pp. 2-3, shows that Sgt. Mugnani asked the right questions of Deputy Natter, but did so after the negative interaction at the scene. He should have asked the questions before taking over the scene. The record shows good cause to believe that Sgt. Mugnani and Deputy Natter did not help the situation, but, rather, contributed to the situation deteriorating.

The Association's arguments directed toward the level of service which ought to be provided in custody exchanges, is beyond the arbitrator's authority. Grievant should have known that the Employer considers supervising child custody exchanges where there has been a history of violence to be appropriate law enforcement services, provided manpower is available. Accordingly, the grievance should be denied.

Association

The Employer disciplined Sgt. Mugnani for two policy violations. The first was for failing to supervise Deputy Natter properly. As to the first incident, the applicable policy provides that: "supervisors are responsible for all job related failures on the part of their subordinates when the supervisor was aware or reasonably should have been aware of the failure" The sheriff's department believes Deputy Natter should not have left the custody exchange. However, it is not improper for Deputy Natter to have left the scene to assist with a felony arrest.

Alternatively, Sgt. Mugnani was pursuing a suspect when Deputy Natter reported off the scene. Sgt. Mugnani could not have reasonably been monitoring Deputy Natter's activity while arresting a suspect. Further, Sgt. Mugnani heard Deputy Natter's radio call. Deputy Natter's radio call incorrectly implied that the custody exchange was done. There is nothing in the record to suggest that this interpretation was unreasonable. The Association contends that it is an unreasonable application of the Employer's rules for supervisors to have expected Sgt. Mugnani to be able to monitor radio traffic and discern the nuances of communication while he was actively in pursuit of a felony suspect or overcoming a suspect resisting arrest.

When the parent arrived late at the custody exchange, the other parent called the dispatcher. Sgt. Mugnani checked with Deputy Natter and learned he had left the scene before the exchange took place. This is the first he reasonably could have known that. Sgt. Mugnani was told by Deputy Natter that he had waited 30 minutes for M and Sgt. Mugnani went to handle the exchange. He did nothing wrong.

The second reason the Department disciplined Sgt. Mugnani was his alleged improper performance at the custody exchange scene. It believes that Sgt. Mugnani improperly intervened in the custody exchange situation and reacted improperly when he issued a citation to M D for disorderly conduct. The basis for this discipline is that the Department believes that Sgt. Mugnani should have had a working knowledge of the custody exchange history and should have obtained more information from Deputy Natter before going to the exchange. Further, the Department believes that Sgt. Mugnani acted in an unprofessional manner by causing M to believe she was interfering with other complaints and also because Sgt. Mugnani never got M's side of the story.

The Association contends the Employer has failed to show just cause for its discipline of Sgt. Mugnani for the above conduct. Specifically, M was out-of-control at the time Sgt. Mugnani arrived at the custody exchange. Even Officer Winiarski explained that he would have issued M a disorderly conduct citation. There is no basis to believe that Sgt. Mugnani's knowledge of the situation would have affected the result. There is no basis to believe that he

could have said or done anything different than taking charge of the situation. When Sgt. Mugnani re-contacted M a week later, she became hostile. It is unreasonable to expect him to have gotten her side of the story. In any event, there is no policy of the Department requiring him to get her side of the story before issuing a citation. While the Employer may have wished to have the custody situation handled differently, it has failed to prove Sgt. Mugnani violated a rule or engaged in improper conduct.

Sgt Mugnani could not have reasonably been expected to be familiar with the custody situation. There is no evidence of a policy to stand by for custody exchanges in Rock County. There are no specific rules on how a deputy should handle child custody exchanges. The Employer's contention that Sgt. Mugnani should have been familiar is conclusory and unreasonable.

The Department is holding Sgt. Mugnani to a standard not uniformly required or enforced within the Department. There is another sergeant on duty that evening, Sgt. Christiansen. Sgt. Christiansen was on duty and would have heard Deputy Natter's radio transmission. Sgt. Christiansen has worked the same shift as Deputy Natter for over five years. He should have been expected to have the same knowledge of the custody exchange as Sgt. Mugnani. No inquiry was made about Sgt. Christiansen's knowledge or actions.

Sgt. Mugnani's statement to M about having been at the accident scene was in response to her inquiry as to why a deputy had not been standing by. There is no basis for disciplining him for making this comment.

The reprimand states that the Department allowed the situation to deteriorate. This conclusion is outrageous. The parents are adults. It is not the duty of the Department to stop their behavior.

In reply, the Association notes that the discipline imposed was not the lowest level of discipline, an oral reprimand. Instead, it was the next higher level, a written recording of an oral reprimand. This will be preserved in Sgt. Mugnani's personnel file and form the foundation for progressive discipline.

The Employer's brief lacks an explanation as to why Sgt. Mugnani is being disciplined. The Department argues that had Sgt. Mugnani had more information about the history of the couple's bad behavior and the miscommunication on the night in question he would have understood why M was so upset. Maybe so, but that understanding would not have changed how M was behaving. Sgt. Mugnani observed M yelling, carrying on, and generally behaving in a disorderly fashion. Whatever knowledge he could have had, he still was proper in dealing with her behavior.

The fact that the Employer has historically dispatched a deputy in custody exchanges does not create an on-going responsibility for the Department. The absence of a deputy during an exchange does not constitute neglect. The Employer has failed to articulate a rational and specific basis for disciplining Sgt. Mugnani. The grievance should be upheld and the reprimand removed from his personnel file.

DISCUSSION

1. Arbitrability

The Employer's argument that the collective bargaining agreement does "not contain a single reference" to discipline is unclear. The agreement clearly does contain a reference to discipline and to a "cause" standard of review. I address this argument both as a challenge to arbitrability of this grievance and as a challenge to the applicable standard of review.

Specifically, Section 2.01, Management Rights, vests exclusively in management the right to ". . . suspend, or demote, discipline or discharge for cause (all pursuant to the provisions of Wis. Stats. 59.26).² Even though the terms of this provision occur in the

² Sec. 59.26, Stats. provides the standards for serious discipline of deputy sheriffs. Subsection 59.26(8),(9) Stats. read in relevant part:

(b)1. The persons appointed shall hold the office of deputy sheriff on good behavior. In any county operating under this subsection, but not under s. 59.52(8), whenever the sheriff or undersheriff or a majority of the members of a civil service commission for the selection of deputy sheriffs believes that a deputy has acted so as to show the deputy to be incompetent to perform the duties of a deputy sheriff or to have merited suspension, demotion or dismissal, the sheriff, undersheriff or civil service commission shall report in writing to the grievance committee setting forth specifically the complaint against the deputy, and, when the party filing the complaint is a sheriff or undersheriff, may suspend or demote the officer at the time such complaint is filed. The grievance committee shall be appointed in the same manner and at the same time as standing committees of the board are appointed. The committee may be made up of members of the board or other electors of the county, or both. Such members shall be paid in the same manner as members of other board committees.

2. The grievance committee shall immediately notify the accused officer of the filing of the charges and on request furnish the accused officer with a copy of the same.

3. The grievance committee shall, if the officer requests a hearing, appoint a time and place for the hearing of the charges, the time to be within 3 weeks after the filing of such request for a hearing and the committee shall notify the sheriff or undersheriff or the members of the civil service commission, whichever filed the complaint with the committee, and the accused of the time and place of such hearing. If the accused officer makes no request to the grievance committee, then the committee may take whatever action it considers justifiable on the basis of the charges filed and shall issue an order in writing as provided in subd. 5. The committee may take testimony at the hearing, and any testimony taken shall be transcribed. The chairperson of the committee shall issue subpoenas for the attendance of such witnesses as may be requested by the accused.

4. At the hearing the chairperson of the committee may maintain order and enforce obedience to the chairperson's lawful requirements. If a person at the hearing acts in a disorderly manner and persists after notice from the chairperson, the chairperson may order the person to leave the hearing. If the order is refuted the chairperson may order the sheriff or other person to take the disorderly person into custody until the hearing is adjourned for that day.

5. At the termination of the hearing the grievance committee shall determine in writing whether or not the charge is well-founded and shall take such action by way of

suspension, demotion, discharge or reinstatement as it considers requisite and proper under the circumstances and file the same with the secretary of the committee.

5m. No deputy may be suspended, demoted or discharged by the grievance committee under subd. 3. or 5., based on charges filed by the sheriff, undersheriff or a majority of the members of the civil service commission for the selection of deputies unless the committee determines whether there is just cause, as described in this subdivision, to sustain the charges. In making its determination, the committee shall apply the following standards, to the extent applicable:

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

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

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

d. Whether the effort described under subd. 5m.c. was fair and objective.

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

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

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

6. The accused may appeal the order to the circuit court by serving written notice of the appeal on the secretary of the committee within 10 days after the order is filed. Within 5 days after receiving written notice of the appeal, the board shall certify to the clerk of the circuit court the record of the proceedings, including all documents, testimony and minutes. The action shall then be at issue and shall have precedence over any other cause of a different nature pending in the court, which shall always be open to the trial thereof. The court shall upon application of the accused or of the board fix a date of trial, which shall not be later than 15 days after such application except by agreement. The trial shall be by the court and upon the return of the board, except that the court may require further return or the taking and return of further evidence by the board. The question to be determined by the court shall be: "Upon the evidence is there just cause, as described under subd. 5m., to sustain the charges against the accused?" No costs shall be allowed either party and the clerk's fees shall be paid by the county. If the order of the committee is reversed, the accused shall be forthwith reinstated and entitled to pay as though in continuous service. If the order of the committee is sustained it shall be final and conclusive.

(9)(a) A deputy sheriff in any county may not be suspended or dismissed under sub. (8) or 59.52(8) or 63.10 without pay or benefits, for any action taken that is within the scope of the deputy's employment, until the matter that is the subject of the suspension or dismissal is disposed of by the grievance committee or civil service commission or the time for appeal of that matter passes without an appeal being made.

(b) An ordinance of any county or a collective bargaining agreement may not diminish or abridge a right of a deputy sheriff that is granted under par. (a). An ordinance of such a county

Management Rights provision, the use of the term “cause” in the context of a management rights provision is customarily viewed in labor relations as a restriction on the authority of management to discipline only when cause is present. The absence of cause is generally treated as a subject for grievance arbitration.

There are three relevant ambiguities in this agreement provision. First, there is some ambiguity as to whether the restriction to take action only for “cause” applies to discipline other than discharge. The fact that the parties enumerated each type of potential discipline suggests that the “cause” requirement is applicable to all of the forms of discipline. Further, the parties used the term “all pursuant to Wis. Stats. 59.26.” Sec. 59.26, Stats, does contain a procedure for dealing with suspensions and discharges, but does not have provisions dealing with "discipline" such as oral or written warnings. The better view of the use of the word “all” here is an indication that the parties intended each of the forms of discipline to be subject to the “cause” standard of the agreement even though discipline short of suspension is not covered by the statutes. Finally, Section 10.01 of the agreement makes “discipline” subject to the grievance procedure at Step 2. If the parties had intended to have the Employer have unilateral discretion in discipline short of suspension, demotion or discharge, they would have used the latter specific terms in Section 10.01. Accordingly, the agreement limits the employer from warning employees unless it has "cause" to do so.

The second ambiguity occurs from the parenthetical provision quoted above. Section 59.26, Stats, provides a procedure for the handling of suspensions and discharges, as well as specific statutory standards for review of the discipline. While it is unclear how the parties intended the two procedures to interface, it is not necessary to address the procedural issue in this case because the discipline imposed here, written confirmation of an oral warning, is not subject to the procedures of Sec. 59.26, Stats. Section 10.01 of the agreement expressly makes “discipline” subject to the grievance procedure at step 2. This term includes warnings. Absent some specific exclusion, the same would be subject to an appeal to arbitration. Warnings issued without “cause” are issues arising under the interpretation of the collective bargaining agreement.³

2. Applicable Standard of Review

The third ambiguity is the meaning of “cause” in the agreement. Labor arbitration’s use of the term “cause” is somewhat broader than the statutory standards.⁴ Both concepts require that the employer bear the burden of proof to establish that it had "cause" to discipline the employee. Both require that an employee have a reasonable forewarning that his or her

or a collective bargaining agreement may supplement and expand such a right in a manner that is not inconsistent with par. (a).

³ Neither party submitted evidence as to whether Sgt. Mugnani has passed the probationary period specified in Article III, nor has any party addressed that issue in its factual statements. Both parties appear to assume that Sgt. Mugnani is not probationary. None of the answers in the grievance procedure suggest that the issue was raised. I assume that he is not probationary

⁴ Ted St. Antoine, Ed., *The Common Law of the Workplace: The Views of the Arbitrators*, National Academy of Arbitrators (BNA, 2d Ed.), Ch. 6, p167, et seq.

conduct violated the employer's norms. However, the standard of "cause" applied by labor arbitrators ordinarily involves a *de novo* hearing and broader range of inquiry than the statutory standards. Section 59.26, Stats, does not preclude the parties from agreeing to have an arbitrator hear discipline issues involving deputies *de novo* and applying the labor arbitration version of the cause test.⁵

I have decided that it is appropriate to use the statutory standards for this case. No decision is expressed or implied as to whether or not in other cases, the broader application of the labor arbitration "cause" principles are appropriate under this agreement.

3. Merits

a. *c. Violation of General Order 4.060(20) Making Improper Statements While At Custody Exchange*

There are "three" separate issues supporting the discipline imposed.⁶ The first is the allegation that Sgt. Mugnani violated General Order 4.060(5)(B) by the statements made by him to M at the scene of the transfer that she: ". . . should have been there at 7:00 PM and that Sgt. Mugnani had been required to leave an injury accident because of her situation" The report states that Sgt. Mugnani acknowledged the statement. The report states a valid reason for imposing a warning on this basis: it is improper to demean a suspect or minimize his or her situation.

Sgt. Mugnani reasonably should have known that his statements would demean M. Therefore, the consequences of his actions are easily foreseeable. This is a reasonable interpretation of the rule in that the conduct tended to discourage M from relying upon Department services rather than resorting to her immature and disruptive behavior. The Department met the procedural requirements of the standards. Accordingly, this charge is sustained.

b. *Failure of Supervisor to Provide Acceptable Level of Service in Violation of General Order 4.060(65)(C&E)*⁷

The report concludes Sgt. Mugnani violated General Order 4.060(65)(C&E) in that he failed to insure that the Department provided an acceptable level of service in the custody exchange. There is disagreement between the parties as to the specific violations found. I conclude from a reading of the investigatory conclusions that there are three operative specific acts which the investigators concluded would have prevented the failure. They are that Sgt. Mugnani:

1. Should have had a working knowledge of the background of the custody exchanges prior to the start of his shift on September 18, 2005.

⁵ BROWN COUNTY SHERIFF'S DEPARTMENT V. EMPLOYEES' ASSOCIATION, 94 Wis.2D 182 (1995); EAU CLAIRE COUNTY V. TEAMSTERS UNION 662, 235 Wis.2D 383, 404 (1999)

⁶ There are two separate aspects to the failure to have sufficient knowledge, making the total actually four.

⁷ The report refers to 4.060(66)(C&E). The reference is incorrect. It is 4.060(65)(C&E)

2. Should have obtained between the time Sgt. Mugnani gained control of the accident scene and the confrontation with M the background knowledge of that day's events in the custody exchange.
3. Did not get facts sufficient and/or otherwise improperly made the decision to not send Natter back to the custody exchange.⁸

Rule 65 (C) is a broad general statement that supervisors "are responsible for the job performance of all subordinates assigned to them." There could be a question as to whether this rule violates the statutory standard 5m a which requires the decider to determine:

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

The Department interpreted its rules in a way to incorporate a standard of foreseeability. It applied rule 65 (E) as the rule which explains rule 65 (C). As it was interpreted, it is the rule controlling the discipline in this case. Rule 65 (E) provides that supervisors are responsible for failures ". . . when the supervisor was aware or reasonably should have been aware of the . . . potential for failure" This interpretation is consistent with 5m a.⁹

The core of 1, 2 and the knowledge part of 3 is the allegation that Sgt. Mugnani should have had the knowledge necessary to handle the custody situation and to make the decision as to sending Deputy Natter back. The better inference from the report of the Department is that the Department interpreted its rule to mean that a supervisor violates its policy with respect to situational knowledge only if he reasonably knew or should have known of the facts. As such, these principles are consistent with 5m a.¹⁰

I address allegation number 1, knowledge of the custody circumstances before start of the shift September 18. I conclude the Department has failed to meet its burden to show that Sgt. Mugnani reasonably should have known of those circumstances.

Much of the issue raised by Sgt. Mugnani concerns the relative priority and level of service police authorities do accord and/or ought to accord to custody exchanges. The Department correctly argues that level of service is not an issue properly before me. However, the nature of Sgt. Mugnani's position goes beyond the level of service and implies that the discipline was imposed based upon assumptions about a higher level of service than was actually expected by the Department at the time. Accordingly, Sgt. Mugnani's argument is that the practice under the policy at the time did not require him to have the level of knowledge the Department is now alleging that he should have had. In other words, the policy is being applied inconsistently, reasoning from hindsight.

⁸ The investigators concluded that if he had had this information, he would have sent Deputy Natter back to the exchange.

⁹ However, its application in this case is inconsistent with 5m a, as explained *infra*.

¹⁰ See note 8.

The facts relating to the Departments' policy and practice, as stated in the Employer's report and the omnibus exhibit are as follows in this paragraph. It is the policy of the Department to supervise custody exchanges only where there is a serious potential for a disturbance of the peace. Supervision is done only when manpower permits. It is unclear how often the Department actually supervises custody exchanges in general. When the Department does supervise exchanges, it ordinarily does this on an occasional basis with respect to a family. It is rare that it regularly supervises custody exchanges for one family. It is very rare that custody exchanges between specific parties are regularly assigned to one deputy.

The better view of the record is that Sgt. Mugnani would not ordinarily be expected to have factual knowledge about a situation in which the Department supervised an isolated custody exchange. The position of the Department is that the facts and circumstances surrounding these specific exchanges should have led Sgt. Mugnani to seek to acquire more background information about these specific exchanges. The only facts offered by the investigating supervisors to support their conclusion were the following:

1. Deputy Natter said it was "common knowledge" that the relationship between the parents was so volatile that it was better to supervise their exchanges than to have to deal with the complaints made of the conduct which occurred when they were not supervised.
2. This situation was unusual. By midsummer the Department was taking the unusual step of supervising the custody exchanges every other Sunday.
3. Deputy Natter was taking steps to insure that he was the one performing the supervision every Sunday.

The Department bears the burden of proving cause. In that regard, it bears the burden of documenting during its investigation how it expected Sgt. Mugnani should have gained the knowledge of one of the three facts. It has failed to do so.

There is no foundation in the record to indicate that the investigating supervisors ever were in a situation in which they personally had been in similar circumstances. The record indicates that this was an unusual situation. Accordingly, this is not a situation in the record supports reliance on the experience of the investigators and/or their expert judgment..

There is no indication in the record that the investigators made any inquiry into Deputy Natter's statement that it was "common knowledge." Accordingly, the record does not reflect whether or not it really was common knowledge, to whom it was common knowledge or when it was common knowledge. It is particularly troubling in this record because if it became "common knowledge" after August 14, Sgt. Mugnani would not have been on duty on Sundays. The record is insufficient to conclude that the "common knowledge" should have triggered a supervisory inquiry by Sgt. Mugnani.

Similarly, there is no documentation in the record as to why Sgt. Mugnani should have known that the custody exchanges were being regularly supervised. There is no documentation from the investigators based on their experience that a sergeant would have learned they were being regularly supervised. There is no indication in the record that regular supervision of custody exchanges was so common in the Department that there was some policy or practice among supervisors to obtain supervisory background information in those situations. There is no indication in the record that the regularity of the supervision would come to Sgt. Mugnani's attention during the regular course of his duties.¹¹ There is no documentation in this record as to why Sgt. Mugnani would have been expected to have learned about the regularity of the exchanges or that Deputy Natter was unilaterally making sure he was the person to do them. Accordingly, the Department has failed to establish that it was reasonable for Sgt. Mugnani to have recognized from circumstances which reasonably came to his attention that he should obtain supervisory background information about these specific exchanges. The discipline as to this point violates the "reasonably expected to anticipate the consequences" standard of 5m a.

I address sub-issue number 2 and 3 from above, gaining knowledge of the background of the day's events and gaining sufficient knowledge to make a proper decision about sending Deputy Natter back. The facts are not in dispute. Sgt. Mugnani was aware Deputy Natter had been assigned to supervise the exchange. He was aware that Deputy Natter left the scene and learned while conducting the accident investigation that there were calls about a disturbance at the scene of the exchange involving a disturbance between the parties to the exchange. Sgt. Mugnani should have been aware that the exchange was not completed. Those facts alone are sufficient to support the judgment that Sgt. Mugnani should have recognized at the time that he made the decision as to who should respond to the custody exchange, that the exchange had not been completed.

The record also supports the judgment of the investigating supervisors that Deputy Natter should have been sent back to the exchange. It is obvious that Deputy Natter was somewhat frustrated with having to wait for M. It appears from Sgt. Mugnani's comments to M at the time of the exchange that he assumed that frustration. Sgt. Mugnani acknowledged in the investigation that he could have sent Deputy Natter back. The investigating supervisors' judgment that Sgt. Mugnani should have sent Deputy Natter back irrespective of that frustration is supported by the record.

The investigation documents the investigating supervisors' conclusion that Deputy Natter misled Sgt. Mugnani to some extent by incorrectly implying that M was unreasonably late. It is not unreasonable to have expected Sgt. Mugnani to inquire further as to what happened. Radio transmissions demonstrate, however, that Deputy Natter answered Sgt.

¹¹ One of the fundamental purposes of discipline, particularly at the warning level, is to provide guidance to the disciplined officer as to how to avoid a similar situation in the future. Documenting the record in this matter would be necessary to fulfill this purpose.

Mugnani's inquiries honestly and fully when asked specific questions. It is not necessary to address how much more questioning Sgt. Mugnani should have done. The record supports the judgment of the investigating supervisors that Sgt. Mugnani should have sent Deputy Natter back because the assignment was not completed.

There are facts sufficient to support the supervisory judgment that Sgt. Mugnani should have obtained sufficient knowledge at that point to make a decision to re-assign Deputy Natter to the exchange. The record was less clear as to whether Sgt. Mugnani could reasonably have been expected to get more information from Deputy Natter. The report supporting discipline of Sgt. Natter, Omnibus exhibit pages 59-60, indicates that Deputy Natter was frustrated that he had waited so long and resistive to going back. Radio transmissions demonstrate, however, that Deputy Natter answered Sgt. Mugnani's inquiries honestly and fully when asked specific questions. The record supports the judgment of the investigating supervisors that Sgt. Mugnani could reasonably have been expected to get adequate background information as to the events at the exchange of that evening.

Even though the evidence is insufficient to demonstrate that Sgt. Mugnani reasonably could have been expected to have a working knowledge of the history of these specific custody exchanges, there is substantial evidence that Sgt. Mugnani could reasonably have been expected to have obtained more information about the background of the events of that evening.

There is substantial evidence in the record that Sgt. Mugnani went to the exchange with the incorrect assumption that M was unreasonably late. His statement to her at the scene indicated that he faulted her for having wasted valuable time.

As noted above, Deputy Natter did not tell Sgt. Mugnani about the events of that evening before Sgt. Mugnani left for the exchange. The record of the radio discussion after Sgt. Mugnani was at the scene demonstrates that Deputy Natter was willing to truthfully and fully respond to questions at that time. I am satisfied that it was reasonable for the investigating supervisors to conclude that Deputy Natter would have answered questions honestly at the earlier time had Sgt. Mugnani made an inquiry.

The record of that later radio conversation indicates that Sgt. Mugnani could reasonably have obtained sufficient background to have handled the situation differently. Specifically, Deputy Natter was very forthcoming in the later radio traffic that M had received a call from K stating the children would be brought to M's house. This certainly would have put M's tardiness and behavior in a different light. It would have also raise concerns about the credibility of Q and K. Accordingly, the finding by the investigating supervisors that Sgt. Mugnani failed to get adequate background information before going to the custody exchange is supported by substantial evidence.

c. Violation of General Order 4.060(20) Failure to Investigate When Acting in Patrol Deputy in Custody Exchange (Unsatisfactory Performance)

The next allegation is that Sgt. Mugnani engaged in unsatisfactory performance by not obtaining M's side of the story when he re-interviewed her a number of days after the exchange. The core issue with respect to this charge is whether Sgt. Mugnani should have requested that M give him her side of the story when he met with her after the incident. Sgt. Mugnani relied upon the fact that she did not volunteer her story. There are no disputed facts. Sgt. Mugnani announced that he was going to issue M a second citation, this one for trespassing, shortly after his arrival.¹² It is clear that he did not have her side of the story before issuing the citation. The investigating officers concluded that it would not have been proper to issue the trespassing citation had Sgt. Mugnani known her side of the story. This is a domestic conflict situation. Supervisors could reasonably conclude that the failure to fully learn the facts could lead to undermining the quality of the policing mission to maintain the peace under those circumstances. The aspect of the charges is sustained.

Sgt. Mugnani could reasonably have been expected to have knowledge that his failure to investigate risked the issuance of an unwarranted citation, increased the risk of conflict and increased efforts by both former spouses to manipulate deputies in the future.

The rule is reasonable under the circumstances and Sgt. Mugnani should have foreseen the consequences of his action. The Department met the procedural standards enunciated above. This charge is sustained.

The penalty imposed by the Department, written confirmation of an oral warning reasonably relates the violations found. There is no basis shown in the record for an change in the level of discipline. Accordingly, the charges are sustained in part and denied in part.

AWARD

That since the Department did not have just cause to discipline Sgt. Mugnani for not having background knowledge of the custody exchange prior to September 18, the charges are not sustained in that part. The Department has shown cause for the imposition of a written confirmation of an oral warning on the grounds noted in the body of the discussion above. The charges are sustained in that regard.

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

Stanley H. Michelstetter II /s/

Stanley H. Michelstetter II, Arbitrator

¹² Sgt. Mugnani had a radio discussion with Deputy Natter shortly after Sgt. Mugnani left the custody transfer scene on September 18. It is at that time he first learned that there had been a "mixup" as to where the custody exchange was to take place. This information made Q's (the complaining witness's) credibility questionable.

