

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**LA CROSSE COUNTY (SHERIFF'S DEPARTMENT)**

and

**WISCONSIN PROFESSIONAL POLICE ASSOCIATION, LEER DIVISION**

Case 204  
No. 64903  
MA-13046

(J.P. Termination)

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**Appearances:**

**Mr. Gordon E. McQuillen, Esq.**, 822 South Gammon Road, #2, Madison, Wisconsin 53719 on behalf of the WPPA and the Grievant.

**Ms. Anna M. Pepelnjak, Esq.**, Weiss Berzowski, Brady, LLP, 700 N. Water Street, Suite 1400, Milwaukee, Wisconsin 53202, on behalf of the County.

**ARBITRATION AWARD**

Pursuant to an independent agreement to seek a sole arbitrator from a panel of five Wisconsin Employment Relations Commission Staff Arbitrators, rather than proceed using the contractual procedures stated in Article XIII, Section 12.02.4 (which included a Board of Arbitration and an expedited award date), the parties jointly requested of the WERC that Staff Arbitrator Sharon A. Gallagher act as Arbitrator of a dispute between them concerning the December 14, 2004 discharge of J.P.<sup>1</sup> Transcribed hearings were held at La Crosse, Wisconsin by agreement of the parties on April 6 and 7, August 15, October 31, and December 8, 2006. Nineteen witnesses testified; 39 County Exhibits and 10 Association Exhibits were received into the record. Five volumes of transcript containing over 1330 pages were received by December 28, 2006. The parties agreed-upon briefs (County Initial Brief, Association Reply Brief and County Rebuttal Brief), which totaled 127 pages, were received by June 15, 2007 (taking 5.5 months to prepare and submit), whereupon the record herein was closed.

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<sup>1</sup> The Grievant's initials are being used herein.

**STIPULATED ISSUES**

The parties agreed that the Arbitrator should determine the following issues herein:

- 1) Was the discharge of the Grievant for proper cause within the meaning of Article II of the Collective Bargaining Agreement?
- 2) If not, what is the appropriate remedy?

**RELEVANT CONTRACT PROVISIONS**

**ARTICLE II**

**ADMINISTRATION**

- 2.01 Except as otherwise provided in this Agreement, the County retains 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 determine the construction, maintenance, or services to be rendered; the materials and equipment to be used, the size of the workforce, and the allocation and assignment of work or workers; to schedule when work shall be performed, to contract for work, that does not result in the layoff or displacement of employees covered by this Agreement, and services, and material; to schedule overtime work; to establish or abolish job classifications; to establish qualifications for the various job classifications; and to adopt and enforce reasonable rules and regulations.

**ARTICLE XII**

**GRIEVANCE PROCEDURE AND ARBITRATION**

- 12.01 Any employee being disciplined shall be so notified in writing stating therein the reasons for such action. A copy shall be submitted to the Personnel Department and the president of the Association by the disciplining supervisor.

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12.02.4 Within 10 days of written response as provided in Section 12.02.3, the Association shall advise the County of its acceptance or rejection of the decision of the County Administrator. If the decision is rejected, the matter shall be submitted to a Board of Arbitration constituted and empowered as follows within ten (10) calendar days.

12.02.4.1 The Board of Arbitration shall consist of three (3) members: one (1) member to be chosen by the County; one (1) member to be chosen by the Union; said members shall be chosen within five (5) days after receipt of the Notice of Appeal; and a third (3<sup>rd</sup>) member who shall be Chairperson of the Board of Arbitration, shall be selected from a list of five (5) names provided by the Wisconsin Employment Relations Commission (WERC). The parties shall alternately strike names, the petitioner striking first, until one name remains who shall be the Chairperson of the Board of Arbitration. Each party shall bear their own expenses for its witnesses and representatives and both parties shall equally bear the expense of the third party.

12.02.4.2 Grievances subject to this arbitration clause shall consist only of disputes about the interpretation or application of particular clauses of this Agreement and about alleged violations of the Agreement. The Board of Arbitration shall have no power to add to, or subtract from, or modify any of the terms of this Agreement, nor shall substitute its discretion for that of the County or the Association where such discretion has been retained by the County or the Association nor shall it exercise any responsibility or function of the County or the Association. No questions affecting the wage structure of the County shall be considered arbitrable.

12.02.4.3 It is further agreed that the findings of the Arbitration Board shall be final and binding upon both parties and that such findings shall be made in writing within twenty (20) workdays after the dispute has been submitted to arbitration, unless an extension is approved jointly by the County and the Association.

## RELEVANT WORK RULES AND POLICIES

### Conduct of Jail Personnel

#### 100.01 Policy

It is the policy of the La Crosse County Sheriff's Department to maintain the highest degree of professionalism and effective security, beginning with established jail rules and personnel policies. Failure to follow any of the listed procedures may lead to disciplinary action, including termination.

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#### 3. Jailer Conduct

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- i. Jail staff and employees shall conduct themselves at all times, both on and off duty, in such a manner so as to reflect most favorably upon the department. Conduct unbecoming is any conduct that adversely affects the morale, operations, or efficiency of the department or any conduct that has a tendency to adversely affect, lower, or destroy public respect and confidence in the department or any officer or employee. Conduct unbecoming also includes any conduct that brings discredit upon the department or any officer or employee.

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#### 4. Staff Rules and Regulations

- a. All jail staff is expected to comply with all rules, regulations, orders, policies, procedures, and written or verbal orders from a superior officer or supervisor.
- b. Each employee is responsible for being familiar with the rules, regulations, special orders, memos, policies, procedures, and equipment needed to perform his duty assignment, and for checking their e-mails as soon as practicable after reporting to their daily assigned duty stations.

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## **LA CROSSE COUNTY SEXUAL HARASSMENT POLICY**

### **PURPOSE**

- To establish the La Crosse County policy against sexual harassment
- To encourage employees who are victims of sexual harassment to report instances of sexual harassment
- To establish a grievance procedure for the reporting of instances of sexual harassment.

### **POLICY**

It is the policy of La Crosse County to provide a businesslike work environment free from all forms of employment discrimination including incidents of sexual harassment. No employee shall be subjected to unsolicited and unwelcome sexual overtures or conduct, either verbal or physical. The employer will not tolerate any form of sexual harassment in the workplace. Sexual harassment will be treated as misconduct with appropriate disciplinary sanctions, up to and including discharge.

### **PROHIBITED CONDUCT**

Unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature constitute prohibited sexual harassment when:

- Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment,
- Submission to or rejection of such conduct by an individual is used as the basis for an employment decision, or
- Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Examples of prohibited conduct include, but are not limited to, loud or sexually suggestive comments; sexual flirtations, touching, advances, or propositions; off-color language or jokes of a sexual nature; slurs and other verbal, graphic, or physical conduct relating to an individual's gender; or any display of sexually explicit pictures, greeting cards, articles, books, magazines, photos or cartoons

### **REPORTING PROCEDURES**

1. The following persons are designated to handle employee complaints:
  - a. Each department head
  - b. The Personnel Director
  - c. The Administrative Coordinator
2. Any employee, who believes that he or she has been subject to sexual harassment by anyone, including supervisors, co-workers, or visitors shall report the sexual harassment to any person designated to handle employee complaints.

3. Allegations of sexual harassment shall be reported to a designated person by the employee immediately. Until the complaint is found to be valid, the identities of the parties involved shall be kept confidential to the extent possible.
4. If the complaint involves someone in the employee's direct line of command, or if the employee is uncomfortable discussing the matter with their Department Head, the employee is urged to go to another Department Head with the complaint, or any other County manager or supervisor.
5. Any offended employee who is covered by a collective bargaining agreement may use the grievance procedure to initiate an action.

#### INVESTIGATION OF COMPLAINT

1. The Personnel Department shall investigate the facts surrounding the complaint and reach a conclusion concerning its validity within 30 days of the receipt of the employee's complaint. The Personnel Department shall protect the privacy of the complaining party to the extent possible.
2. Should the complaint be found valid, the harasser shall be subject to such disciplinary action up to and including discharge, as shall be deemed appropriate.

### **LA CROSSE COUNTY UNPROFESSIONAL OR OFFENSIVE LANGUAGE IN THE WORKPLACE POLICY**

Every person deserves the respect and dignity of being treated as a human being. This policy is specifically designed to prevent and discourage words or actions that are harmful, derogatory, or otherwise demeaning to any human being. Violations of this policy may subject an employee to discipline up to and including discharge.

Phrases and expressions that were considered acceptable or normal in years past may be quite offensive in today's working environment. What is offensive or unprofessional? That determination may vary with each person; however, there are some phrases and expressions that should be considered very likely to be offensive in today's working environment. Some examples are:

**REGARDING AGE:** The following are offensive: "old girl", "old boy", "old timer", "old man", etc.

**REGARDING SEX:** The following are offensive: “doll”, “honey”, “babe”, “sugar”, “sweetheart”, “dearie”, the terms “girls” or “boys” when referring to women or men in the workplace. For example “the girls in the office” may be demeaning. A more appropriate phrase would be “the women in the office”, however, when referring to employees who may be either male or female, “the staff in the office” or “the employees in the office” is probably the most appropriate.

**REGARDING RACE:** The term “colored” or “Negro” may be considered offensive and the term “Black” or “African American” may be more appropriate. Ethnically derogatory terms must not be used in the workplace.

**REGARDING CREED:** Derogatory terms for any faith, religion or beliefs must not be used in the workplace.

**REGARDING NATIONAL ORIGIN:** Statements regarding any nationality or ethnic group are offensive if they give the impression that the group is ignorant, stupid, lazy or has other derogatory characteristics.

**REGARING SEXUAL PREFERENCE:** Wisconsin law allows no discrimination with regards to sexual preference. Therefore, derogatory remarks about gays, lesbians, etc., are offensive; and since sexual preference is not obvious, jokes or derogatory remarks about sexual preference are not appropriate at any time in the workplace.

**REGARDING DISABILITY:** Any derogatory reference to weight, body build, physical attribute or to a physical or mental disability must not be used in the workplace.

**OTHER OFFENSIVE PHRASES OR COMMENTS** include “dumb blond jokes”, comments or phrases using foul or off-color words of any kind, jokes regarding the sexual attributes of either sex or any race, bathroom humor of any kind or other non-professional remarks. La Crosse County expects all employees to refrain from obscenities, swearing or using obscene words or gestures in the workplace.

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Question: Can’t I tell jokes or talk to anybody any more? Yes. These rules are not as restrictive as they sound. A couple of good tests for a joke, phrase or other comments are:

- Would I be comfortable making these statements or telling these jokes to my parents, my spouse or my religious leader?
- Would I be concerned if the La Crosse Tribune printed my comments on

## **CRISIS PLAN MASTER**

### **VIOLENCE PREVENTION**

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### **REPORTING THREATS**

- Zero tolerance policy
  - No threats of any kind will be tolerated at La Crosse County
  - A threat is a verbal intimidation that suggests physical harm to yourself or your family, or damage to career or reputation of yourself or your family.
- Workplace threats
  - A threat from the public is not acceptable and should be reported.
  - A threat from another County employee is not acceptable and should be reported.
- Of-the-job threats
  - A threat from a family member or acquaintance that affects your job is not acceptable and should be reported.
- Reporting procedure
  - Report threats immediately to your supervisor, or if supervisor is unavailable, another person in charge. In emergency situations, notify 911.

### **RESPONDING TO THREATS AND VIOLENCE**

- Personal response
  - Escape danger if possible.
  - Stay put and lock yourself in – if not possible to escape.
  - De-escalate hostility – if not possible to escape or lock self in  
Deflect-Refocus-Redirect.
  - Don't endanger yourself to save property.
- Co-worker response
  - Look out for each other.
  - Be prepared to offer help.
  - The best way to save someone's life is to leave the area, find help, and call 911.

### **EMERGENCY COMMUNICATION**

- Phone 911 in the event of physical danger or imminent danger.
- Use an emergency alarm button, if available, only if you are unable to call 911 or it would be unwise to call 911.
- Use a non-verbal signal to get the attention of a co-worker or other person



nearby.

#### FOLLOWING A VIOLENT INCIDENT

- Should there be a violent incident, the County will provide counseling on site through the Employee Assistance Program as needed. Counseling may also be available to employee's family members.

#### BACKGROUND<sup>2</sup>

J. P. was hired into a Jailer position by the County and he worked on third shift in that position from August 25, 1999 until his termination on December 14, 2004. At hire, the County gave J.P. orientation on County policies and training as a Jailer and it gave him a copy of the County's policies, although shortly after he began his employment, J.P. was called up and deployed to Germany for nine months with the U.S. Military. After completing his tour of duty, J.P. returned to County employment as a Jailer, again on third shift. At some point, J.P. admitted he read the County Policy manual (U. Exh. 10, p. 26) and he saw County Exhibit 7. In 2002, J.P. signed that he had received training on County policies (Cty. Exhs. 4 and 18).<sup>3</sup>

It is undisputed that Thomas Mackey was employed as a County Jailer on third shift for twenty years before he was promoted to Sergeant in 2001, a non-unit position, and was thereafter employed as the Sergeant on the third shift.<sup>4</sup> J.P., Murphy, Miller and Figueroa along with Pierstorff, Weinberger, Cocoran, Mallette, Harris and Hall were all employed as third shift jailers at all times relevant to this case.

On November 27, 2002, Sergeant Mackey evaluated J.P.; this evaluation covered the period from December 17, 2001 to November 27, 2002 (Cty. Exh. 26). In this evaluation, Mackey rated J.P. in all fifteen categories as "meeting standards," where the three possible ratings were "meets standards," "exceeds standards," and "needs improvement." Mackey also wrote the following positive comments (in the categories listed to the left) on this evaluation:

- 2) Adherence to Work Rules & Supervisor's Directions: Given written reprimand 5-17-02. No problems since then.

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<sup>2</sup> The background facts contained in this Section reflect credibility resolutions made by the Arbitrator, putting to rest any arguments to the contrary.

<sup>3</sup> Anderson and Taunt testified to the County's normal orientation, training and in-service processes which have been in place for some time. As J.P. had not been employed as a Jailer before being hired by the County, this Arbitrator believes the County must have given J.P. training and orientation.

<sup>4</sup> Mackey stated he was Union President for twelve to fifteen years prior to becoming a Sergeant. The County attempted to use this fact, without more, to argue that unit employees held Mackey's promotion against him or resented his elevation to management. The record evidence does not support such a conclusion.

- 3) Acceptance of Diversity: Deals with inmates and coworkers with respect.
- 4) Safety on the Job: Understands the importance of safety and security in the Jail.
- 6) Knowledge: Good understanding of the job.
- 8) Quality of Work: Takes pride in his work.
- 9) Initiative, Dependability & Accountability: Helps out at any location in the Jail.
- 10) Cooperation & Teamwork: Signs up for overtime to help the Dept. out.

On December 16, 2003, J.P. was again evaluated by Sergeant Mackey covering the period January 1, 2003 to December 16, 2003 (Cty. Exh. 27). On this evaluation four ratings were possible on each of sixteen categories, from “exceptional performance” to “exceeds expectations,” “meets expectations,” and “needs improvement”; on four categories only “needs improvement” and “meets expectations” ratings were available. Mackey rated J.P. as meeting expectations in all 20 categories. Mackey wrote comments on six categories, as follows:

- 3) Judgment, Critical Thinking, and Problem Solving: At times lets others think for him.
- 5) Knowledge of Job: He understands the job.
- 12) Support of Work Groups, Teamwork: Will do another evaluation with him in 3 mos. to see if any change in attitude [sic] has changed [sic].<sup>5</sup>
- 14) Attitude: Dwells on what he perceives to be negative.
- 16) Acceptance of Change: Got upset when work situation was changed.
- 17) Attendance & Punctuality: 9 sick days used. 4 of which for January. No pattern.
- 19) Adherence to Work Rules/Supervisory Directions: Under the impression that management is out to get him—timesheet. “Let’s get J \_\_\_\_\_” attitude.

Mackey made no suggestions for improvement, and set no goals for J.P. on this evaluation and failed to elaborate further on any of these comments. On July 3, 2004, Sergeant Mackey again evaluated J.P. stating “knows and understands the job,” setting no goals, making no suggestions, and stating no problems with J.P.’s work (U. Exh. 1).

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<sup>5</sup> There is no record evidence to show that Mackey ever did a three-month evaluation of J.P.

J.P.'s record of discipline at the County includes a written reprimand dated May 17, 2002 concerning J.P.'s playing card games on the County computers in violation of a November 13, 2001 computer use policy (Cty. Exh. 28B).<sup>6</sup> There is no question that J.P. never repeated the computer use misconduct. On January 14, 2003, J.P. received a letter of reprimand from Sergeant Hoesley concerning a January 8, 2003 incident where J.P. allowed an inmate to retain his street shoes in his cell, in violation of Policy 103.03 which Hoesley wrote "jeopardized the safety and security of the jail" (Cty. Exh. 39). The letter also mentioned the May 17, 2002 written reprimand J.P. received for improper computer use which the January 14, 2003 letter stated also "jeopardized" safety and security. The January 14, 2003 reprimand stated that a copy thereof would be placed in J.P.'s personnel file and:

Any further violation of this nature will result in disciplinary action as serious as job termination.

Again, there was no evidence submitted herein that showed that J.P. repeated the misconduct described in the January 14, 2003 reprimand.

### FACTS<sup>7</sup>

On November 12, 2004,<sup>8</sup> J.P. was sent the following letter placing him on "administrative leave with pay effective immediately pending an investigation." In addition, the letter stated, "The investigation is in regard to your actions and includes the allegation of harassment in the workplace" (U. Exh. 6). From November 16<sup>th</sup>, through December 5<sup>th</sup>, the County conducted an investigation, using Vernon County Deputy James Hanson. Hanson issued his Summary Report regarding the allegations made against J.P. on December 6<sup>th</sup> (Cty. Exh. 1). The Sheriff then considered Hanson's report and spoke to Personnel Director Taunt and the County Corporation Counsel and on December 14<sup>th</sup>, the Sheriff issued the following termination letter to J.P.:

. . .

This letter is in regard to employment related allegations that have been made against you. These allegations include creating a hostile work environment and sexual harassment of co-workers. Chief Deputy James Hanson of the Vernon County Sheriff's Department investigated these allegations. He was assisted by

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<sup>6</sup> County Exhibit 28A is Mackey's version of the meeting he held with J.P. on April 10, 2002 to counsel/warn him about his computer use. At this meeting, it is undisputed that Mackey also counseled J.P. about being more respectful during radio checks. The radio checks conduct, however, was not made a part of the written reprimand Mackey issued over one month later, making the former irrelevant.

<sup>7</sup> The Facts section reflects credibility resolutions made by the Arbitrator.

<sup>8</sup> All dates hereafter are in 2004 unless stated otherwise.

The allegations investigated include: On Sept. 23, 2004, you harassed Jailer Figueroa in the Booking Area of the La Crosse County Jail regarding the issue she would not assist Jailer Murphy with roving duties on a previous shift. You told Jailer Figueroa that she "needed to strap on a pair, that fucker needs to be put in his place", referring to Sgt. Mackey. The context of the harassment caused Jailer Figueroa to believe that she was working in a hostile work environment.

On an ongoing basis since Sept. 19, 2004, you have referred to Sgt. Mackey using vulgar and profane language including "fucker, prick, Hitler, and asshole." These statements you have made to Jailer Figueroa have resulted in significant emotional stress and have caused her to believe she was working in a hostile work environment.

Since the beginning of October, 2004, you persistently asked Jailer Figueroa if she had said anything to Sgt. Mackey. You subsequently contacted Jailer Figueroa at home on more than one occasion asking the same questions. On Oct. 16th you worked in the female jail with Heather Figueroa. You constantly questioned her about her conversations with Sgt. Mackey. Jailer Figueroa told you to leave her alone. On Nov. 3rd you called Jailer Figueroa at home and continually questioned her about what she said to Sgt. Mackey to the point that she began crying. This caused Jailer Figueroa to believe that she was working in a hostile work environment.

During March 2004, you obtained the personal calendar book of Jailer Heather Figueroa and subsequently wrote harassing and sexual comments on twenty nine dates. You admitted you wrote these comments and that your nickname is Dude. The comments included "sex with Dude, date with Dude, molest Dude, make porno with Dude." You have also made sexually explicit gestures to Jailer Figueroa. These actions caused physical damage to the personal property of another and also caused Figueroa to believe she was being sexually harassed and working in a hostile work environment.

On August 27, 2004, you made sexual harassing comments to Jailer Serres in regards to the fact that she reached for her pen in her shirt pocket and it was not there. Since that date, you made sexual comments to Jailer Serres approximately 15 times in regards to her "pen".

On September 18, 2004, you confronted Jailer Terri Serres and asked her if she is, "one of Mackey's little rats"? This would be in violation of Jail Policy 100.01 regarding Conduct of Jail Personnel.

On various dates you have made comments to Jailer Serres about her boyfriend, who is also a Sheriff's Department employee. You stated she should get rid of him, and you have also made physical contact with her to the point that she needs to always be conscious of your movements. This would be in violation of Jail Policy 100.01 regarding Conduct of Jail Personnel and the La Crosse County Sexual Harassment Policy.

La Crosse County has a zero tolerance policy for harassment in the workplace. Based on your admissions, reports, interviews, and the independent investigation, I am satisfied the allegations are sustained. You have both verbally and sexually harassed co-workers and created a hostile work environment. Given the seriousness of these infractions, I have made the decision to terminate your employment with La Cross County.

. . .

#### Allegations Involving Figueroa

The relevant credible facts of record against which the above termination letter must be tested are as follows. On third shift on September 19 – 20<sup>th</sup>, Heather Figueroa was assigned to perform Housing duties on third shift;<sup>9</sup> Pat Murphy remained assigned that night to work as Rover after (third shift) Sergeant Mackey denied her request to be re-assigned to the Huber Center, an easier position;<sup>10</sup> J.P. and Tim Mallette were working that night in booking.

On this shift, Figueroa completed the canteen slips and brought them down (from Housing) to the 1<sup>st</sup> floor to deliver them to Mackey. At this time, Mackey asked Figueroa what she was going to do next. Figueroa told Mackey that she was going downstairs to take a (smoke) break and take out the garbage and bring the uniform cart back upstairs.<sup>11</sup> Mackey asked why Figueroa was doing (Murphy's) Roving duties. Figueroa responded that because she was going downstairs for a break she thought she would take care of the other duties. Mackey told Figueroa he did not want her to do any Roving duties that night and that there was no reason for Figueroa to do both Housing and Roving duties. Figueroa replied "OK."

Figueroa took her break and then returned to the jail and told Murphy she had to do all the Roving duties that evening. Murphy responded in anger, that if Mackey was going "to keep fucking with" her, she would have to write everything down, keep track of it and get an

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<sup>9</sup> As a general rule, on third shift one jailer works in Huber Center, one in Housing, one in Master Control and one works as a Rover; two jailers work in Booking, two in Female Jail and two others work on this shift. Booking and Roving duties are more difficult and time-consuming.

<sup>10</sup> Mackey denied Murphy's request for a duty assignment change on September 19-20<sup>th</sup> because Murphy refused to give Mackey a reason why she wanted the change.

<sup>11</sup> Taking out garbage and performing uniform cart duties are Rover, not Housing, duties.

attorney as soon as she had enough on Mackey.

Later, Figueroa learned that other jailers knew about Mackey's ordering her not to assist Murphy on September 19-20<sup>th</sup>. On September 23<sup>rd</sup>, J.P. and Mallette asked Figueroa why she had refused to do any Roving duties for Murphy. Figueroa responded, "I just do what I am told". J.P. replied, "Heather, you need to strap on a pair,<sup>12</sup> that fucker (Mackey) needs to be put in his place." This exchange upset Figueroa greatly and she cried in the presence of J.P., and Mallette that evening.<sup>13</sup>

On September 24<sup>th</sup> Figueroa was assigned to Housing and J.P. was Rover. Murphy called Figueroa at the beginning of that shift and asked her to check the log to see how many rounds the Housing person completed for the Rover in the last few days. Figueroa told Murphy she "felt bad" about not helping Murphy out on September 20<sup>th</sup> but she (Figueroa) had just been doing what she was told by Mackey. Murphy said that was fine, but she still wanted Figueroa to check the log to see if the Housing jailers had done rounds for the Rover jailers on the previous few nights. Figueroa found this was true and told Murphy. Murphy said, "Interesting, just when I am working. Tom's (Mackey) fucking with me."

Figueroa then talked to Mackey about "the teasing" by J.P. and Mallette and "Mackey asked the Sheriff to meet with Figueroa on September 24<sup>th</sup>". At her meeting with the Sheriff, Figueroa told the Sheriff about her experiences with J.P., Murphy and Mallette and the Sheriff told Figueroa that if they continued to tease her over the phone she could just hang up on them, that Figueroa did not have to check the log for Murphy and if Figueroa had any other problems she should tell a Sergeant about it and it would be taken care of. During this conversation, Figueroa cried and appeared very upset and she told the Sheriff:

. . . that I was so tired of people bad mouthing Sgt. Mackey every night I came to work. I told him that's all J. P., Pat Murphy and Tim Mallette do, and that since I got along with Sgt. Mackey and do what he tells me to I have to listen to them say things like "Your on the Dark Side", "you're the Golden Child", "You have nothing to worry about, your (sic) one of Mackey's little pets". I told him statements like these and the names they were calling Sgt. Mackey in front of me like "Fuck", "Prick", "Hitler". "Asshole", etc., were really starting to take a toll on me emotionally and I could not take it anymore because this has been going on for so long and I could not understand why they would continue doing this to me after I had told them that I did not want to be in the middle of it. (Cty. Exh. 10)

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<sup>12</sup> J.P. was referring to a pair of testicles by this comment.

<sup>13</sup> County Exhibit 24, p. 6, shows J.P. "could tell she (Figueroa) was upset" (see also County Exh. 10 and Tr. 781-82).

On that same shift (September 24-25<sup>th</sup>), Mackey called J.P. into his office and gave J.P. a copy of Policy 100.01(3)(i), Jailer Conduct and accused J.P. of harassing a co-worker. J.P. stated he did not know what Mackey was talking about. Mackey told J.P. there was going to be major trouble if one more jailer came to Mackey and complained that J.P. had harassed them. J.P. stated he did not know what incident/or who was involved. Mackey told J.P. that he (J.P.) had been accused of harassing a coworker about not helping out another coworker with Roving duties. J.P. reiterated he did not know what Mackey was referring to. Mackey then said that all of this was going to be a verbal warning about harassing coworkers but if he had to ask Heather Figueroa to write a statement about what J.P. had said to Figueroa on a recent night in Booking, Mackey would then give J.P. a written warning. J.P. then stated that if he had said something to Heather he was only joking and Mackey replied that Heather did not think it was so funny.<sup>14</sup> Mackey then asked J.P. if he had referred to Mackey as a “fucking asshole” for changing J.P.’s assignment from Female Jail to Huber that night. J.P. said he was angry with Mackey but that he did not swear. Thereafter, Mackey told J.P. to return to work and that he had been verbally warned about getting along with coworkers. J.P. said he respected Heather and he did not mean anything by what he said to her. J.P. then returned to work with Figueroa as his partner. J.P. was furious with Figueroa and did not speak to her for the rest of the night. (Tr. 129; Cty. Exh. 10.) There is no question that on September 24<sup>th</sup> J.P. knew Figueroa had filed a harassment claim against him.

Thereafter, J.P. referred to Sergeant Mackey as “fucker, prick, Hitler and asshole” in conversations with Figueroa which upset her. During the first few weeks of October, J.P. relentlessly and extensively questioned Figueroa on several occasions about what she had said to Mackey and what he had said to her. These conversations made Figueroa feel uncomfortable intimidated and bullied, so much so, that Figueroa lied to J.P. stating that she had not talked to Mackey about him (J.P.). One of these conversations, on October 16<sup>th</sup>, lasted for 2 to 3 hours. J.P. then told Figueroa he planned to ask Sergeant Anderson about what was going on. At this point, Figueroa felt bullied and uncomfortable and she told J.P. that she did not want to be in the middle of the situation between him and Mackey. J.P. said that he understood but that Mackey was “fucking with him again” and he (J.P.) was going to find out why.<sup>15</sup> Figueroa did not telephone J.P. at any relevant time to talk about J.P.’s

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<sup>14</sup> County Exh. 24, pp 9-10; County Exh. 11; County Exh. 12.

<sup>15</sup> J.P. asserted that on October 19<sup>th</sup>, he called the first shift Sergeant, Anderson, to ask what was going on and that someone had filed a harassment complaint against him. J.P. claimed Anderson told him during a (later) call that Figueroa had filed the complaint and that it would be all right if J.P. spoke to Figueroa about the complaint.

Although Anderson recalled a conversation with J.P. on the subject of the harassment allegations, Anderson stated he knew nothing about what J.P. was talking about and he referred J.P. to Mackey. Anderson agreed to talk to Mackey but when he did so, Mackey said the situation was between him and Daggett and J.P. (Tr. 1227-28). Anderson also stated that he did not recall and he would never have told J.P. to confront the victim of his alleged harassment (Tr. 1229-1230) and as he had no conversation with Captain Daggett and he made no notes on the conversation (in accord with his practices regarding important conversations) he believed

J.P. then called Figueroa at home on at least two occasions, once on October 25<sup>th</sup> and again on November 3<sup>rd</sup> (U. Exh. 8; Tr. 1076-79). During both of these conversations, Figueroa told J.P. she did not want to be “in the middle of things anymore” (Tr. 1079), but J.P. did not stop asking Figueroa what she had said to Mackey and what he had said to her. The telephone conversation on October 25<sup>th</sup> lasted 15 minutes and the one on November 3<sup>rd</sup> lasted 69 minutes. Figueroa felt uncomfortable, bullied and she cried during both of these conversations. J.P. admitted he was aware that Figueroa was “upset” during both of these conversations (Tr. 1079).

During the November 3<sup>rd</sup> telephone conversation, J.P. stated he planned on asking Captain Daggett for a meeting to ask Daggett to check his (J.P.’s) personnel file and whether the “fucker” (Mackey) could write J.P. up for harassment on his evaluation. J.P. also told Figueroa this after Mackey gave him the verbal warning (on September 23-24th). At this point in the November 3<sup>rd</sup> call, Figueroa told J.P.:

I told J. that I did talk to Sgt. Mackey but I was not going to tell him what was said. I also told him again that I wanted to stay out of the situation between him and Sgt. Mackey and that I would unless I got called in to answer any questions.

This really made him (J.P.) upset and he continually questioned me” what did you say to Mackey?” “Do you feel I’m harassing you?” “What did Mackey say?” You need to tell me Heather because unfortunately you are involved.” I told him I’m staying out of it. At this point my fiancé came into the room before he left for work and saw that I was on the phone crying. He asked me who I was talking to and I told him J. from work and that I would tell him later. He (J.P.) continually badgered me about the situation and informed me that he would let me know what happened at the meeting with Capt. Daggett. (County Exh. 10, p. 9).

On November 10<sup>th</sup> (17 days after J.P. received the verbal warning) Figueroa was assigned to work a 12 hour shift and to relieve Mike Durand; her partner that night was Brett Miller. On this day, Durand spoke to Figueroa about the harassment allegations made against J.P. at J.P.’s request, as follows:

Shortly after I arrived Mike Durand walked over and shut the top part of the door which connects the office to the dayroom. He then pointed his finger at my face and said “You,” “you” “You know what you did”, I said “I didn’t do anything.” And he said “Yes, you did, you know what you did Heather.” I repeated to him that I didn’t do anything. The whole time he said this to me he was pointing his finger in my face. He then said “come in here” as he motioned to Bill Olson’s office. “I need to ask you a few questions.”

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no such conversation with J.P. ever occurred (Tr. 1231). In all of the circumstances here, I credit Anderson on this point and I find that J.P. knew on September 23 – 24<sup>th</sup>, when Mackey warned him that Figueroa was the complainant.



We both entered Bill Olson's office and I asked him what was going on. He said "I need to know what you said to Sgt. Mackey because I am representing J.P. as his union rep and I need to go into this meeting prepared." I told him to, that "I did not say anything," because I felt he was acting threatening to me by his actions in the office. But, I did inform him that I felt I was working in a hostile work environment. He again pointed his finger in my face and said "Let me tell you something, management is the one causing the hostile work environment." At this point I was crying and told him "This has been going on for along time and it has to stop."

Mike Durand went on to say that Sgt. Mackey was the cause of all this and that he tormented Bob Bavix, J. P., Tim Mallette, Pat Murphy and Tasha Spears. He also said "I could see if it were one or more people but he could name several people that Mackey had it out for (sic). I told him that I try to get along with everyone and just do my job and that it was awful coming to work in a hostile work environment. He also told me that the reason he had his finger in my face and was talking to me that way was because "that's what Sgt. Mackey did to J.P. when he talked to him." (County Exh. 10, pp. 10-11).

Figueroa emerged from this interrogation upset and crying (U. Exh. 4; Tr. 932).

After this exchange between Figueroa and Durand on November 10<sup>th</sup> at 9:30 a.m., Figueroa asked Sergeant Thompson to come to the Huber Center to talk to her. At this time, Figueroa told Thompson about her encounter with Durand, and Thompson memorialized in a memo as follows:

. . .

She stated that when she relieved Mike Durand tonight at 7pm he came up to her and pointed his index finger about 2 inches in front of her face and kept repeating the words "You, You, You" and told her "you know what you did so why don't you just admit it." Heather asked him what he was doing and he told her that he was "acting like Mackey would when he talks to people to show her how it felt. Heather stated this was in the Huber Center office in plain view of the inmates and of Jailer Miller. Heather then said Durand had her step into Bill Olson's office and he proceeded to grill her for the next ½ an hour about what she said to management about J.P. Durand said he wanted to know everything so he was prepared for the meeting with Doris. Heather said she did not say anything and told Durand that she was tired of all of this and wanted to be left out of it because people are mad at her. Durand told Heather that management, not other jail staff, is creating the hostile work environment by letting Mackey

go after people.

During my talk with Heather she was very upset and cried off and on and stated that that (sic) she “can’t take it anymore” and that the whole situation is causing her a great deal of stress. She stated that people are mad at her and talk behind her back because Tom likes her. I told her that she has done nothing wrong and that any future problems like this she should immediately come to Sgt. Mackey or me. I told Heather to write out everything Durand said to her and to make sure she communicated in detail how it made her feel. I told her to put it in an envelope, seal it and put it in my mailbox.

. . .

As a result of what had occurred on November 10<sup>th</sup> and Thompson’s memo, a meeting was held at 7:00 a.m. on November 11<sup>th</sup> between Figueroa, Mackey and Captain Daggett at which, for the first, time the decision was made to change Figueroa’s schedule to “limit contact” with J.P.<sup>16</sup>

On November 12<sup>th</sup>, the County suspended J.P. pending an investigation of his conduct and the County hired Vernon County Deputy James Hanson to investigate J.P.’s conduct, among other things, which Hanson launched on November 16<sup>th</sup>.

During Deputy Hanson’s investigation of allegations against J.P., Figueroa told Hanson about writings J.P. and Murphy made in her pocket calendar in 2004 which she used to keep her personal and family appointments/events. It is undisputed that J.P. made 30 entries in red (indelible) pencil which included the following: “Lunch with Dude; Dude is lunch; Date with Dude; Meet Dude in mop closet; Sex with Dude; Molest Dude; Orgy with Dude; Kick Dude in stones for writing all over calendar, Make porno with Dude; and Spank Dude.”<sup>17</sup> This was the first time Figueroa had mentioned these writings to anyone in management. Figueroa never brought this up previously because she was afraid J.P. would be fired for having written them. Also during her November 16<sup>th</sup> interview with Hanson, Figueroa reported a conversation she had had on October 30<sup>th</sup> with Terri Serres in which Serres reported various comments J.P. made to her.

#### Allegations Involving Serres:

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<sup>16</sup> It is surprising that the County would not have taken steps to protect/screen Figueroa from further workplace contact with J.P. sooner when Mackey had first-hand knowledge (as early as September 25<sup>th</sup>) of Figueroa’s harassment complaint against J.P. County Exhibit 15, p. 2.

<sup>17</sup> References in the calendar to “Dude” refer to J.P. whose nickname is Dude. Also, of the 30 entries, there were 18 “Dates with Dude,” all Saturdays, and these writings specifically referred to J.P.’s “joke” about Figueroa’s practice of performing oral sex on Saturday nights (Cty. Exhs. 13 and 31).

At her November 16<sup>th</sup> interview with Hanson, Terri Serres stated that J.P. asked her if she, was “one of Mackey’s little rats” (Cty. Exh. 31). During this interview, Serres

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confirmed that J.P. made sexual comments and innuendo to her “all the time,” but she never reported this to a supervisor/manager because she was a newly hired employee. Serres stated that she chose not to work third shift because of J.P.’s repeated comments to her. She recounted, in detail, her interactions with J.P. in a statement she wrote out after her interview with Hanson. Serres’ credible description of her encounters with J.P. in 2004 (made three days after Hanson interviewed her), read as follows:

August 27, 2004 – Huber Center – Third Shift – Partner: Jailer J.P.

On August 27, 2004, I worked Third Shift in the Huber Center with Jailer J.P. This date marked the first of four shifts working with Jailer P. as my partner.

Before starting the shift, I already knew that I needed to prepare myself for working with this individual. From my recent Training experiences on third shift, I knew the reputation that Officer P. had while working with female officers. Up to this point, I had never experienced any problems with Jailer P., as he had never been my duty partner during my Training phase.

My first night working with Officer P. was spent trying to figure out where I exactly stood in the scheme of the Third Shift crew. While working on third shift, I have always had the feeling of walking on egg shells around my partners, as I was labeled a “Second Shifter.” However, while working with Jailer P., that first night, I did not feel uncomfortable. Throughout the night, we talked and joked together about activities we enjoyed outside of work – small talk trying to get to know each other a little. At one point in the night, Jailer P., did joke about an incident where I reached for my pen that was in my left breast pocket of my jailer uniform. However, when reaching for it, the pen was not there and I ended up with my hand on left breast pocket. Jailer P., did see this and joked and said something like “what were you grabbing for?” At his comment, I just ignored it, as I did not know it was going to get out of hand later.

August 31, 2004 – Huber Center – Third Shift – Partner: Jailer J.P.

On August 31, 2004 I worked Third Shift in the Huber Center with Jailer J.P. This date marked the second of four shifts working with Jailer P., as my partner.

On this particular shift, I had read an e-mail sent out to all Jailers by another Jailer asking if anyone would be interested in purchased (sic) a pair of extra long pants. I remember that Jailer P., and I laughed at the size of pants indicated in the e-mail because they were quite small. I had mentioned something like “who could ever fit in a pair of pants like that?” Jailer P., replied, saying something

like “*I bet you would look good in them.*” I again ignored this comment, hoping the conversation would go away.

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September 18, 2004 – Female Jail – Third Shift – Partner: Jailer J.P.

September 18, 2004, I worked third shift in the Female Jail with Jailer J.P. This date marked the third of four shifts working with Jailer P. as my partner.

Just as our shift began together, Jailer P. confronted me about my relationship with the first floor of the Sheriff’s Department, meaning the Administration Bureau. Jailer P. asked if I too was “*one of Mackey’s little rats.*” I responded by telling Jailer P., that I wasn’t. After that comment, I felt uncomfortable and threatened to work with Jailer P., as I knew that every move that I made would be scrutinized by him and reported to his fellow Third Shift “friends.” This conversation would be the turning point of my working relationship with Jailer P. After being confronted like this, I no longer felt that his silly games and comments were appropriate for me to continue ignoring. So, my ultimate solution was to try and avoid any contact with Jailer P., after this point.

Third Shift Run-ins With Jailer P.

After the initial pen comment made to me by Jailer P. on August 31, 2004 in the Huber Center, I would often see Jailer P. working Third Shift when he was not my partner. During these times, more often than not, if Jailer P. could catch my attention, he would say something like “*how is your pen doing?*” Or “*can I use your pen?*”. These comments were directly referencing my left breast and this notion began to frustrate me. These comments also made me feel very much uncomfortable when seeing Jailer P. around the Jail. The comments, when said in front of other jailers, began to embarrass me even though the other jailers did not know the meaning – or at least I have no prior knowledge of them knowing the meaning.

6-Month Review With Sgt. Mackey

On October 12, 2004, I had my 6-month review with Sgt. Mackey. One of the first questions that Sgt. Mackey asked me was why I had signed up to work a Second Shift rotation for the 2005 work year. I had indicated to him that I felt comfortable working on Second Shift and was not sure that I could handle any more time on Third Shift. Sgt. Mackey then asked me to elaborate on my Third Shift comment. This is when I told him about the Female Jail incident on September 18, 2004 with Jailer P. I had explained to Sgt. Mackey that I felt most of the Third Shift jailers had also felt the way that Jailer P. did, so I no longer felt comfortable working on Third Shift.

My mistake during the 6-month review was not telling Sgt. Mackey about the other incidents involving Jailer P. However, my reasoning for not doing so is because at that time, I had only worked for the jail for 6 months and did not feel that I should be “rocking the boat” this early in my career. And at the time, I felt that I was strong enough to handle the comments until the end of the year –

because I knew that starting January 1<sup>st</sup>, I could totally avoid ever working with Jailer P. again. (County Exh. 13)

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During Hanson's investigation, he interviewed all other third shift jailers to determine, in part, their perceptions of Sergeant Mackey. In this context, Hanson used the following introduction and questions:

Chief Deputy Jim Hanson has been requested to conduct an independent investigation regarding personnel matters within the jail staff. At this time you are not a subject of the investigation however, you may be a witness as part of this inquiry. Information from you will not result in disciplinary action against you.

You may or may not know about the issues which have surfaced regarding employees of the Sheriff's Dept. Jail staff. The issues may be causing tension and inefficiencies within the jail division, particularly on third shift. We would like to ask you questions regarding, supervisors, co-workers, and administration regarding these issues.

We will ask you some broad questions, feel free to answer as you wish. Once again, anything you tell us will not be used as discipline towards you.

1. How do you like your job as a jailer?
2. Do you have any particular problems with co-workers?
3. Do you feel that some of your co-workers, particularly on 3<sup>rd</sup> shift, short cut their duties or do not carry their share of the load compared to others?
4. Do you feel that supervision is fair with jail staff on 3<sup>rd</sup> shift in regards to discipline?
5. Is there anything else that you feel is important that the independent investigator should know about any situations occurring in the jail?

Hanson's investigation revealed that almost one-half (6) of all third shift jailers (13 total) had personal issues of fairness under Mackey's supervision, which Hanson summarized as follows in his December 5<sup>th</sup> Report to the Sheriff:

I write in follow-up to the investigation that you asked me to conduct into the allegations against Jailers Murphy, J.P., and Durand. In the course of this investigation, I think it's fair to say that I ran into issues other than (sic) the allegations. In fairness to you and your department, I feel compelled to at least relate some of these issues and/or criticisms of supervisory staff, in the hopes that you can constructively use this in administrating your department into the future.

...

The following comments and/or information was (sic) collected at interviews from co-workers on the third shift:

...

3. Interview of Jailer Steve J. Severson: He indicates that supervision on third shift is not fair at all. He advises that if Mackey has it out for you he will get you. Again, the biggest issue with Severson was when he brought food into Jennifer Pierstorff while he was off duty. Mackey attempted to get a PBT (Breath Test) of him in the parking lot and so forth and it was unpleasant for Severson. Further, he states that Mackey has people on edge so much. There was this probationary employee, Kim Murphy, who he went after but she would have been quite capable in the long hall (sic). Mackey is into intimidation and if he gets away with (sic) he will do it to you.

...

8. Interview with Jailer Jennifer L. Pierstorff: As stated in her interview summary, it appears to me the Jailer Pierstorff attempted to offer a laundry list of issues to the third shift operations. Further, to this investigator her attitude appeared to be quite resentful of any supervision. Further, she offers, because of Sergeant Mackey she was disciplined in a matter of Jailer Severson bringing her food while he was off duty at one time. She related to the fact that Sergeant Mackey wanted to PBT test on Jailer Severson as a result of him being off duty (interesting to me was the jail policy on off duty jailers being in the building). Pierstorff further relates that Mackey has written her up for things she can't control and that she is certain that cameras are being watched by him and other management and she obviously resents that. She relates that administration always believes Mackey. She advises that she feels "put down all the time". There is in her opinion, a constant "walking on eggshells or needles" all the time during her working hours. She further advises that all jail shifts are not held to the same standard and accuses Sergeant Mackey of "pimping inmates" in difficult booking situations. She further relates that Mackey has accused her of making personal phone calls while on duty and phone calls between work stations, including the accusation of her trying to carry on a conversation with Jailer Severson.

9. Interview of Jailer Debra K. Harris: In response to questions about third shift supervision, she advises that Sergeant Mackey has put so much pressure on the situation. He is constantly looking over peoples (sic) shoulders. I have known Mackey for many years, but I have distanced myself from currently. This jailer advises that she feels sorry for J.P., because he is a very nervous wreck due to Sergeant Mackey. Further, she offers that it "seems impossible to redeem yourself with Sergeant Mackey and I have known him for

many years”. “I am not sure what caused him to change”.

. . .

11. Interview of Jailer Jennifer M. Koby: Jailer Koby expression (sic) some genuine concerns for the training program in the jail. She has resigned her post as a training officer and primarily faults Sergeant Mackey for the deterioration in the Jail training (sic) Program. She does not feel that supervision on third shift is fair and relates that “under the spotlight” is dangerous with Sergeant Tom Mackey. There are different rules on different shifts, according to this employee. She relates that she does not dislike Sergeant Mackey, but in her opinion he is not a leader. She believes that he rules with fear and intimidation. Clearly, this employee hopes for the days to return where by (sic) staff members will respect Sergeant Mackey instead of living in fear of him. (This employee provided a copy of her jail training program resignation).

12. Interview of Jailer Timothy M. Mallette: This employee also feels that supervision on third shift is not fair. He relates that Sergeant Mackey targets people he doesn't like. Further, he states that Mackey got him suspended for four days without pay and two letters of reprimand in his file. According to the employee, a grievance hearing exonerated him from any wrong doing and all papers and reprimands were thrown out of his file. According to this employee, accordingly, people have been on edge for three years. This employee states that Mackey has targeted him (sic) Jailer Murphy, restricting duty stations for 5 ½ months without movement. This employee pimps difficult booking situations and inmates, causing them to be combative, but only in situations with a raised voice and a (sic) obvious emotional overtone, striking me as somewhat obsessive). Further, this employee accuses management and administration as doing nothing when it comes to Mackey. According to this employee no one has any courage to purse (sic) matters against Mackey. “This stuff happens all the time and he is going to get someone hurt”. Mallette related a couple of instances where Mackey pushed his foot into an inmates (sic) back. Further, in one instance, he states Mackey pushed his foot onto a female inmates (sic) neck in a skirmish in the booking room. I inquired as to why jail staff or himself would not have reported this conduct, and Mallette said “what's the use? Administration won't do anything about it anyway”. I inquired as to why he wouldn't do an anonymous letter to the Sheriff or somebody and he responded “I don't know”. Mallette further stated the (sic) Mackey had given him horrible reviews and evaluations after this past year and he had previously had very good reviews and evaluations for seven years prior. Mallette relates that the only problem on third shift is Sergeant Mackey. Further, Mallette cites inconsistencies in write up for errors and omissions or mistakes in booking. Indicating that he had a report written on him for missing some marijuana in a female inmates purse, versus someone else who missed a knife in inmates property. The incident of the knife involved no write up of the employee what so ever, (sic) according Mallette. When asked about other Sergeants in previous supervision, Mallette said “Sergeant Holesly is weak and follows Mackey's

lead". Mallette finished his issues with Sergeant Mackey by stating that different people are treated differently.

13. Interview of Jailer Brett D. Miller: This employee advises (sic) has we spoke about the fairness of supervision on third shift that "Mackey occasionally makes things difficult in his estimation". He cited a situation from January 4, 2004 in that Jailer Cocoran needed some time off for a Packer game. Word was that Cocoran was going with Murphy and J.P. to the Packer game. Cocoran approached Miller (this interviewee) for an exchange, which is allowable under policy. According to Miller, Sergeant Mackey called other employees in an attempt to block the switch, so as to prevent Corcoran from attending the Packer game with Murphy and J.P. According, (sic) no one cooperated, and the switch was allowed to occur as requested. This employee noted that this situation was beyond what he normal (sic) saw in Sergeant Mackey.

. . .

### POSITIONS OF THE PARTIES

#### County Initial Brief:

The County asserted that J.P.'s discharge was appropriate under Article II of the labor agreement because the record evidence clearly showed that the County had credible evidence to show that J.P. created a hostile work environment by verbally and sexually harassing Heather Figueroa and Terri Serres and by showing disrespect for Sergeant Mackey. In this regard, the County noted that 1) J.P. and Mallette confronted Heather on September 23, 2004 about not helping Murphy with Roving duties during which J.P. used profanity to belittle and taunt Heather about "strapping on a pair" and putting "that fucker (Mackey) in his place"; 2) On September 25, 2004 J.P., when confronted by Mackey about getting along with coworkers, admitted harassing Figueroa when he said he had been joking with her.

Regarding the evidence of disrespect of Mackey, the County noted the jailers that testified for J.P. considered that Mackey's insistence that Murphy do her job constituted harassment. The County urged that J.P. was one of many jailers who disrespected County authority but that he took it farther, urging Figueroa to confront and defy Mackey.

In the County's view, rather than taking Mackey's verbal warning to heart, J.P. "engaged in a course of conduct that lead to his termination." (ER. Br., p. 21): J.P. called Figueroa at home, he hounded and badgered her at work all in violation of County policy against "unprofessional or offensive language in the workplace" (Cty. Exh. 7).

Regarding the evidence of sexual harassment, the County observed that there is no doubt that J.P. wrote many suggestive and demeaning comments on Figueroa's personal calendar not once but twice in virtually indelible red pencil; that J.P. started a "running joke" about Figueroa's Saturday night sexual activities with her fiancé (now her husband); and that



J.P. engaged in a similar course of sexual harassment of Terri Serres by turning her innocent gesture of reaching for a pen in her breast pocket – into comments about Serres’ breast.

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In his defense, J.P. and other Union witnesses stated that sexual banter permeated the jail prior to J.P.’s discharge; that Figueroa laughed at J.P.’s sexual jokes/comments/actions. But allowing J.P.’s claim that he was just joking with Figueroa and Serres to stand would require rejection of Figueroa and Serres’ statements to the contrary and require rejection of the strong possibility that when these women were sexually harassed they may have decided not to outwardly show their true reaction to the harassment out of embarrassment, intimidation, or the wish not to call attention to themselves, ELEVA-STRUM S.D., MA-9898 (GALLAGHER, 1998). In addition, the County urged that J.P.’s perception of his own actions is irrelevant, as sexual harassment can only be fairly judged by the victims thereof. Also, the County noted that both Figueroa and Serres suffered physically and emotionally due to J.P.’s sexual harassment, and his actions if they had gone unabated, could have subjected the County to liability under State and Federal laws which prohibited sexual and other workplace harassment. Therefore, the County properly put a stop to J.P.’s intentional activities by terminating him.

Regarding the evidence of J.P. disrespecting Mackey, the County observed that J.P. admitted referring to Mackey as a “fucker, prick, Hitler, asshole”; and that his disrespect of Mackey and refusal to follow Mackey’s orders violated County Policy 101.01(5)(a) which requires jailers to comply with County rules, regulations, orders, policies, procedures and written and oral orders of a superior officer/supervisor. The County then asserted that due to several inmate suicides in 2004, greater adherence to County policies such 101.01(5)(a) was necessary. The County then offered several (unsupported) reasons why third shift jailers appeared to disrespect Mackey (ER. Br., p 27) but it urged that no matter what the reason(s), the County was not required to countenance same from J.P.

The County contended that the termination of J.P. reasonably reflects the County’s disciplinary interest in preventing inappropriate workplace conduct – in other words, the County’s punishment fit J.P.’s crimes. Here, the Sheriff properly considered J.P.’s prior disciplinary record and performance evaluations, his violation of County policies, and the potential legal liability of the County for J.P.’s actions, all of which supported the Sheriff’s decision to terminate J.P.

The County anticipated that the Union would argue that J.P. was disparately treated visa vis other jailers and Mackey. However, the County urged that how Mackey has been treated is irrelevant in this case as he is a management employee who was merely performing his duties and whose actions show that he and J.P. were not similarly situated; and the Union has failed to otherwise meet its burden of proof regarding its assertion that J.P. was disparately treated by the County. Notably, no documentary evidence was submitted to support the Union’s claim that Mackey treated J.P. more harshly than other jailers. Indeed, the County noted that Mackey had nothing to do with J.P.’s personal choice to harass Serres and his choice to disregard Mackey’s verbal warning and conduct a campaign of harassment of Figueroa. The Union’s assertion that Mackey strictly enforced rules against third shift jailers

was not supported by the evidence and the evidence also showed that when the County received jailer complaints, they were heard and addressed.

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Union Reply Brief:

The Union argued that the standard for review in this case must be that of “just cause” as enunciated by Arbitrator Carroll Daugherty in ENTERPRISE WIRE 46 LA 359 (1966). The Union conceded that J.P. engaged in some of the conduct described in the Sheriff’s termination letter as the basis for his discharge but it disputed the “degree that (J.P.) engaged” in it, whether the County’s policies “are relevant to this case” and whether the County applied its policies “equitably” (U. Br., p 10). The Union urged that J.P. could not reasonably have known the probable consequences of his actions would be termination, and therefore J.P. lacked the proper forewarning/notice necessary to hold him responsible for misconduct. Here, although the Sheriff stated that the County has a “zero tolerance” for sexual harassment, there is no County policy cited in J.P.’s termination letter which actually states that engaging in any sexual harassment will automatically result in termination (although it did so regarding violence/threats in the workplace (Cty. Exh. 5)). Second, the County failed to prove it had a history or practice of terminating employees for engaging in sexual harassment. It also failed to show that J.P. had ever engaged in such conduct prior to September 23, 2004. Indeed, J.P.’s prior disciplinary history showed that in 2002, he was disciplined twice (joking on radio check and playing games on the County computer), which misconduct he never repeated thereafter.

Regarding the verbal warning Mackey gave J.P. in September, 2004, the Union argued that Mackey’s writing a memo thereon and placing along with a memo from Captain Zimmerman “in his private files” showed that Mackey had a hidden agenda concerning J.P. because these documents were never shared with J.P. or the Union until the instant hearings. This requires a conclusion that J.P. was never put on notice that he would be fired if he engaged in harassment. Because “P\_\_ did not engage in the conduct as alleged in the letter of termination, the warnings that the County may have given or felt that it was giving are essentially meaningless” (U. Br., p 15).

The Union argued that the rules or orders J.P. allegedly violated “are reasonable but were applied unreasonably in (J.P.’s) case” (U. Br., p 15). The Union noted that in the letter of termination the Sheriff cited only Policy 100.01, Conduct of Jail Personnel and the County’s Sexual Harassment Policy, so that the Arbitrator cannot find that J.P. violated the County’s Crisis Master Plan or its Unprofessional or Offensive Language in the Workplace Policy which were not listed in J.P.’s termination letter but were raised by the County at the instant hearing and in the County’s Brief herein.

The Union then conceded that the County’s Sexual Harassment Policy and Jail Personnel Policy “are reasonable” (U. Br., p 16). The Union then reiterated its arguments that the policies the Sheriff cited in J.P.’s termination letter do not contain a reference to “zero tolerance.” In addition, the Union noted that the Sheriff admitted herein that he did not know, before J.P.’s discharge, the County’s sexual harassment policy was a “zero tolerance” policy (Tr. 565, 585, 590). In fact, the Union urged that the language of the County’s Sexual

Harassment Policy is written broadly, in terms which could lead employees to believe it is “not as restrictive” as it sounds (U. Br., p 18).

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The Union observed that when J.P. applied the County’s tests for offensiveness found in the County’s Sexual Harassment Policy, J.P. stated that he had no religious leader and he would not be uncomfortable if the writing he placed in Figueroa’s calendar and the statements he made to Figueroa and Serres if they were shared with his parents, his spouse or if they were published in the newspaper. Given this testimony, the Union urged that the interpretation and application of the County’s policies to J.P. showed that “those policies are not reasonable” (U. Br., p 19).

Next, the Union contended that the Sheriff failed to make a reasonable effort to discover whether J.P. violated the rules/orders described in the termination letter and that the investigation conducted was neither fair nor objective. In this regard, the Union urged that by interviewing Mackey first, this set the tone for and tainted Hanson’s investigation against J.P. and that the use of Captain Wolf as a Departmental liaison and assistant in the investigation (who developed the list of questions to be asked) requires a conclusion that Hanson’s investigation was not truly independent. In addition, the questions asked of J.P., Murphy and Durand were different from those asked of the remaining (third shift) jailers; that no follow-up investigation was done regarding allegations made by those interviewed that Mackey treated some jailers more harshly than others but follow-up investigation was done with Figueroa when the writing in Figueroa’s calendar came to light; that only third shift jailers were interviewed when all jailers should have been questioned about jokes, innuendos and sexual comments at work and about working on third shift or with Mackey.

The Union also argued that all Hanson did was investigate allegations that had been brought forward previously; and Hanson demonstrated that he was predisposed to believe County supervisors over the jailers because he did not apply GARRITY with Mackey, just with J.P., Murphy and Durand. The Union also asserted that Hanson failed to fully investigate the allegations made – he never viewed jail video tapes which might have showed some of the interactions between Figueroa, J.P. and others; and Hanson never asked jailers about their practice of assisting each other, he never asked other jailers about whether they made sexual comments to Figueroa or Serres or whether they made comments about Figueroa’s calendar and references to “Mackey’s rats,” and he never checked to see how long the telephone conversations lasted between J.P. and Figueroa. For these reasons and because J.P., Murphy and Durand were forced to try to disprove statements by Mackey and Figueroa, the Arbitrator must find that the investigation was biased against them and therefore find the County lacked just cause to discharge J.P.

The Union then contended that the Sheriff did not have substantial evidence that J.P. violated County rules/orders as alleged in the termination letter, as follows. J.P.’s alleged harassment of Figueroa on September 23, 2004 about her refusal to assist Murphy and his comment about “strapping on a pair” and putting Mackey “in his place” was insufficient to cause Figueroa to believe she was working in a hostile work environment. J.P. had a right to reject Mackey’s verbal warning and investigate what had gone on “in an effort to contest the

discipline” (U. Br., p 27) and J.P.’s conversations with Figueroa in October were simply part of his investigation. Figueroa never stated she was being harassed or sexually harassed.

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Rather, she lied to her co-workers, and to the Union’s attorney and then reported all events to Mackey showing that she was truly one of Mackey’s “pets.” The Union implied it might have been different had Figueroa “told (her co-workers) that she did not want to hear anything more about their feelings about Mackey or that she was feeling harassed...”(U. Br., p. 28). Once the County understood Figueroa was complaining about being sexually harassed then it should have followed County policy and turned the matter over to the Personnel Department. Figueroa’s state of mind at the hearing had nothing to do with J.P.’s conduct toward her in 2004.

Regarding the vulgar and profane language J.P. used to refer to Mackey, the Union argued that such could not have caused Figueroa stress or to conclude that she was working in a hostile environment. The record evidence failed to show J.P. engaged in this conduct – it was all attributed to other jailers. J.P. also had nothing to do with the salacious yearbook created by Murphy and no part in the jail suicides at the County. The County’s speculations that Mackey’s prior involvement with the Union, that third shift employees lacked supervision for some time, or that there was a culture of indifference to management on third shift are irrelevant to this case as is the County’s belated charge that J.P. disregarded the chain of command.

J.P.’s persistent questioning of Figueroa about her conversations with Mackey, including calling her at home, could not have caused Figueroa to believe she was working in a hostile environment. The County allegations/arguments on this point are misleading, they do not support J.P.’s termination and they do not refer to conduct which amounted to sexual harassment. No evidence was proffered to show that J.P. had disrespect for authority and chain of command or that J.P. ever instructed anyone to defy Mackey or any other manager so that these items (not mentioned in the termination letter) should be disregarded by the Arbitrator. J.P.’s going above Mackey to Captain Daggett and speaking to Sergeant Anderson about his situation showed that J.P. did as Mackey did when he disregarded chain of command by taking Figueroa’s complaint directly to the Sheriff.

Also, Mackey ambushed J.P. on September 23, 2004 by failing to inform him what the meeting was about and failing to offer J.P. a Union representative at this meeting. Although the Union conceded that Mackey identified Figueroa as the victim of J.P.’s harassment on September 19, 2004, the Union argued that this was insufficient to identify her as the complainant given Figueroa’s lies thereon, justifying J.P. and Durand’s inquiries. Mackey failed to discipline J.P. for using vulgar and profane language in referring to Mackey on September 23, 2004. Figueroa never accused J.P. of sexually harassing her and she did not tell him not to call her at home nor did she cut off telephone conversations at her home which J.P. initiated with her.

The Sheriff’s allegation in the termination letter that J.P. wrote harassing and sexual comments in Figueroa’s calendar is untrue because Figueroa stated she did not feel the comments J.P. admittedly wrote in her pocket calendar were harassing and she never

complained of being sexually harassed by anyone. No evidence was proffered to prove that J.P. ever made sexually explicit gestures to Figueroa. Figueroa initiated and laughed at J.P.'s

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jokes about her activities on Saturday night (having oral sex with her fiancé). Figueroa engaged in and at times initiated dirty jokes and comments about her 10 year old son dating a jailer. Figueroa voluntarily brought her pocket calendar to an interview with County investigators who then "discovered" J.P.'s written comments thereon. Figueroa testimony about the calendar was internally contradictory and contradicted by Figueroa's husband and other witnesses who stated she freely talked and laughed about the entries. Figueroa never stated that she told J.P. and Murphy not to write in her calendar or that she thought their writings were offensive or that they constituted harassment. So J.P. never knew his conduct would be construed as such. Figueroa also asked J.P. to download a salacious song for her young son and she participated in creating a sexually explicit yearbook for another jailer with Pat Murphy.

Serres initiated comments (not protracted but limited) about her pen and she admitted that she then participated in the "joking" thereon. (U. Exh. 3; Cty. Exh. 13). Serres also stated she never felt sexually harassed by J.P.'s comments about her pen. Therefore, J.P. was never put on notice that Serres believed she was being sexually harassed by him. Therefore, this evidence must be disregarded. J.P.'s alleged questions of Serres whether she was "one of Mackey's little rates" did not violate County Policy and did not constitute harassment because Serres was concerned about this issue before she met J.P. This allegation was unsupported by the record and should be disregarded. Serres did not interpret J.P.'s comments about her boyfriend as harassing and Serres also denied that J.P. ever deliberately and inappropriately touched her, making these allegations unsupported by the record. The Union also speculated that Serres' claim that J.P. had touched her improperly was due to Serres' being an inexperienced jailer.

Finally, the Union argued that the County discriminated against J.P. In this regard, the Union noted that Malette and another jailer (not J.P.) had filed complaints against Mackey but nothing came of them while the County vigorously pursued Figueroa's complaints. Also, other employees who had been accused of harassing their co-workers were given warnings/discipline prior to discharge. Furthermore, the third shift jailers' assertions that Mackey singled out J.P. and others for harsh treatment was never investigated by the Sheriff. As J.P. had only minor non-related prior discipline, he was treated differently from others similarly situated. In sum, the Union urged the Arbitrator to sustain the grievance and reinstate J.P. with backpay.

#### County Rebuttal Brief:

Initially, the County took issue with the following "facts" stated in the Union's brief:  
1) That J.P. did not receive the same level of training at his orientation that other jailers received; 2) That J.P. had worked on third shift without a Sergeant before Mackey was promoted to that slot. The County urged the opposite facts are fully supported by this record.

Concerning the proper standard of review, the County argued that Arbitrator Daugherty's seven tests of just cause should not be used in this case as the parties did not stipulate to their use, making the County's two-part test, whether the County has a disciplinary interest in J.P.'s conduct and whether J.P.'s punishment was reasonably related thereto, more appropriate.

The County urged that although J.P. has blamed virtually everyone except himself for what he did, the record evidence failed to support the Union's claims. In this regard, the County noted that the Union did everything it could to assassinate Figueroa's character in this case - - it accused her of being a bad mother, and of engaging in and condoning sexual banter and "jokes" about herself, her husband and her son. In addition, the record clearly showed that J.P. hounded Figueroa far beyond (more than 30 days) the point he could have reasonably argued he was "investigating" whether to file a grievance over Mackey's oral warning issued on September 23, 2004. Thus, the Association's arguments -- that Figueroa provoked Mackey to order her not to assist Murphy with roving duties and that because of her own poor character, Figueroa simply could not have been felt offended, intimidated or harassed by J.P.'s comments and conduct -- were unfair and unsupported by this record.

Notably, Figueroa did nothing to provoke J.P. The fact that she denied that she had complained about J.P. and that she pleaded with J.P., sometimes tearfully, to keep her out of it, this she did in order to extricate herself from the situation. But Figueroa's pleas fell on deaf ears. The fact that Figueroa did not formally complain that she had been sexually harassed does not require a conclusion that she welcomed the constant questions, the name-calling, the intimidation and bullying both at home and at work, and the disgusting comments J.P. made to Figueroa and that he wrote in Figueroa's calendar. The record showed that when Figueroa could no longer stand J.P.'s treatment, she complained and she should not be required to use any magic words to do so.

In addition, the County urged the Arbitrator to discredit J.P. regarding his claim that he did not know who had complained about his conduct until some time in October, (after the September 23<sup>rd</sup> verbal warning), when Sergeant Anderson identified Figueroa as the complainant and Anderson allegedly told J.P. he could talk to Figueroa about her complaint with impunity. In the County's view, J.P.'s claims simply did not ring true. In any event, the County urged that J.P. should have known that he should stop hounding and interrogating Figueroa after Mackey's warning and certainly after his alleged October conversation with Anderson, yet J.P. subsisted.

Regarding J.P.'s harassment of Serres, revealed during the County's investigation into Figueroa's complaint, the County argued that this evidence provided further support for its decision to discharge J.P. Significantly, Serres gave a statement detailing J.P.'s treatment of her, his repeated comments about her pen, which were intended to refer to her breast, which caused Serres to change shifts and to vigilantly avoid contact with J.P. Serres' recanting that

comments and that she failed to lodge a formal complaint against J.P. do not require a conclusion that she welcomed J.P.'s treatment of her. J.P. admitted asking if Serres was one of Mackey's rats and his alleged comments urging her to leave her boyfriend to hook up with him and his comments about her breast/pen all demonstrated that J.P. intended to threaten, intimidate, embarrass Serres, all of which made her so uncomfortable that she felt she had to change shifts to get away from J.P.

J.P.'s attempts to blame his supervisor, Sergeant Mackey, are similarly unsupported by the record evidence. In this regard, the County noted that J.P. knew on September 23<sup>rd</sup> that a coworker had complained of his harassment even if Mackey used "ambush" tactics to question J.P. J.P. thereafter relentlessly pursued Figueroa showing he knew she must have been the complainant. In addition, contrary to the Union's assertion, the evidence did not support a conclusion that Mackey influenced Hanson's investigation to hide Mackey's alleged practice of singling out certain jailers for harsh treatment. In this regard, the County noted that Hanson conducted an independent investigation with an open-ended question format which was called by Sheriff Weissenberger after he spoke to Figueroa and in which Mackey was just one witness. Also, the County noted, Hanson interviewed jailers about their relationship with Mackey to determine how Mackey interacted with jailers, finding more than half of them had no problem with Mackey while the others complained about Mackey in some way, and Hanson reported this to the Sheriff.

Concerning J.P.'s name-calling and disrespect toward Mackey, the County asserted that the Union has argued out of both sides of its mouth on this point, asserting J.P. was not properly disciplined which allowed him to conclude that his name-calling and disrespect for Mackey was not objectionable at the County while also arguing that Mackey failed to follow chain of command and that he derided J.P. and treated third shift jailers in a tyrannical manner. The County urged that the Union's arguments on this point were inconsistent with the Union's contention that Mackey singled out certain jailers for harsh treatment.

Regarding the Union's claims that 1) all jailers interviewed should have received GARRITY warnings; 2) that only Figueroa was asked to write a statement which Hanson reviewed early in his investigation (implying that this colored his investigation); 3) that Captain Wolf's involvement in the investigation compromised J.P.'s GARRITY interview; 4) that Hanson failed to independently verify certain facts, such as by checking all jail video tapes and doing follow-up interviews. On these points, the County argued that it was unnecessary to give GARRITY warnings to all jailers interviewed; that Figueroa and Serres wrote statements which caused Hanson to broaden his investigation to determine whether Figueroa and Serres had been victims of harassment; that Wolf's involvement in the investigation was necessary to facilitate a full investigation as Hanson was from outside the department; that Hanson made a full investigation, including requesting to look at some jail video tapes and doing appropriate follow-up interviews before closing the investigation in accord with his authority so that the Sheriff could decide what if any discipline was necessary.

The Union's arguments concerning the discharge letter are baseless. In this regard, the County noted that J.P.'s discharge letter mirrors the language of the County's Sexual Harassment Policy, that the letter makes clear that J.P.'s vulgar and disrespectful references to Mackey and his urging Figueroa to defy Mackey were grounds for his discharge. The Union's arguments that the Sheriff did a poor job of analyzing the evidence and unfairly applied County policy in deciding to discharge J.P. were unfounded. On this point, the County noted that the Sheriff conferred with County managers and went over Hanson's report with them; that the evidence herein showed that the Sheriff weighed and evaluated the information gathered by Hanson so there was no need for the Sheriff to re-investigate the allegations made. Also, the Union's contention that the County should have afforded J.P. a LOUDERMILL – type hearing misconstrues that decision, CLEVELAND BD. OF ED. V. LOUDERMILL, 470 U.S. 532 (1985), as LOUDERMILL only requires that the employee be advised of the charges against him/her and be given an opportunity to respond, which points was satisfied here, GILBERT V. HOMAR, 520 U.S. 924 (1997). J.P. had the opportunity to submit evidence during the investigation and he failed to produce Serres' e-mail (U. Exh. 3) when he was asked about allegations made by her.

Concerning the Union's argument that Figueroa was treated more favorably by the Sheriff than Mallette, the County observed that the Union failed to prove herein the allegations Mallette made against Mackey (also revealed during Hanson's investigation). Also, the Union's assertions that the County has been inconsistent with its prior disciplinary actions and it has established poorly worded policies were also baseless. Here, J.P. received and chose to disregard the verbal warning he received from Mackey prior to his discharge, making his case different from the other two employees discharged for harassment. Also, the Sheriff saw no reason to give J.P. a second chance in the circumstances, given that his having given other employees a second chance in the past did not work.

The Union's argument that the County's Sexual Harassment Policy fails to define such harassment is incorrect because, the County urged, its policy defines sexual harassment as it is defined in the Code of Federal Regulations. The County found "remarkable" the Union's assertion that the County's Offensive Language Policy would not have prevented J.P. from using profane language, as he admittedly did, because such language was common in J.P.'s world. Finally, in response to the Union's argument that the evidence does not support the termination penalty, the County urged that its policy allows it to skip progressive disciplinary steps if the situation warrants. Here, the allegations of verbal and sexual harassment, the use of foul language toward management and coworkers, in the County's view fully supported the Sheriff's decision to discharge J.P.



## DISCUSSION

Although some of the facts stated in the letter of termination are not disputed by J.P. for example, J.P. admits having written in Figueroa's calendar as described above<sup>18</sup> - - the rest of the allegations made in the December 14<sup>th</sup> discharge letter are in dispute. Based upon all of the record evidence as well as my assessment of the demeanor of the witnesses, I find the testimony of Heather Figueroa and the written report of Terri Serres, (Cty. Exh. 13) constitutes the true and accurate accounts of their encounters with J.P.

In regard to Figueroa, I found her to be entirely believable. In this regard, I note that Union Exhibit 2 showed that Figueroa's testimony in the Pat Murphy case was essentially the same as her testimony herein. In this case, although Figueroa showed herself to be an emotional woman<sup>19</sup> and she appeared to be under stress while being questioned by counsel, she answered the questions put to her and she never lost her temper or attempted to evade questions.<sup>20</sup>

In contrast, I found much of J.P.'s testimony to be incredible. His answers on direct examination by Union Counsel, that he would use the same language and tell the same or similar "jokes" to his wife and his mother that he used/told at the jail, and that he would not mind if the comments he wrote in Figueroa's calendar were printed in the newspaper are simply unbelievable, even in the vulgar modern world we live in. Also, a close analysis of County Exhibit 24 (and Union Exhibit 10) shows how evasive J.P. was in answering Hanson's questions and how often he contradicted or hedged his statements (See Cty. Exh. 24, pp. 13, 18, 26, 32). In this Arbitrator's opinion, J.P. clearly admitted that he had read and understood County's policies (County Exh. 24, p. 26); and that he knew when he was verbally warned by Mackey on September 25<sup>th</sup> that Figueroa had complained to management that he (J.P.) was harassing her (Cty. Exh. 24 pp. 6 through 21). And yet, after September 25<sup>th</sup>, J.P. relentlessly questioned Figueroa sometimes for hours at a time, in person and on the phone about what she had said to Mackey and he to her, all in a supposed effort to "investigate" whether he should file a grievance on the September 25<sup>th</sup> verbal warning.<sup>21</sup> Even when Figueroa begged J.P. not

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<sup>18</sup> J.P. defends regarding writing in Figueroa's calendar by asserting Figueroa lacked the moral and ethical character to be offended/harassed by such crude personal references or that she participated in similar activities at the jail.

<sup>19</sup> Figueroa wept at times under questioning.

<sup>20</sup> Union Counsel's questions designed to attack Figueroa's character did not rattle her. Figueroa answered those questions honestly and in a straight forward manner even when the answers were unflattering.

<sup>21</sup> J.P.'s assertions that he was "investigating" a potential grievance are disingenuous. Section 12.02.1 of the effective labor agreement requires that grievances must be filed "within six (6) workdays of the alleged violation" Notably J.P. questioned Figueroa for weeks after a grievance on the September 25<sup>th</sup> verbal warning would have been untimely filed and after Union President Devine told J.P. that the Union would not likely

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proceed on a verbal warning.

to be put in the middle of his problems with Mackey, J.P. did not relent nor did he cease questioning Figueroa after she appeared upset in his presence and on the phone. J.P.'s treatment of Figueroa, in my opinion, constituted intentional harassment/and demonstrated his disregard for Mackey's September 25<sup>th</sup> warning to get along with coworkers.

Furthermore, I note that some of the details of J.P.'s story changed from his interview with Hanson in his testimony herein. For example, J.P. did not claim herein that Figueroa called him and initiated talk about the harassment complaint and J.P. did not state herein that he asked Figueroa if it would be all right if he called her to talk about the harassment complaint against him, as he did in Union Exhibit 10, at page 11 (Compare Cty. Exh. 24, pp. 18-19).

In crediting Figueroa, I am mindful of her admissions in record documents and in her testimony herein that she lied to J.P. repeatedly, saying she had not complained to management about J.P.'s treatment of her. In this Arbitrator's experience, it is not uncommon for victims of harassment to deny, to themselves and to others, that they are being harassed; and it is similarly common that when victims are confronted by their harassers they try to avoid further harassment by denying their complaints. This is simply part of our human nature – that the weaker, less powerful individual will try to avoid conflict with a stronger more powerful individual.<sup>22</sup> Figueroa freely admitted herein lying on this point and in all of the circumstances her reaction, although wrong, was understandable, given J.P.'s relentless pursuit of answers to his questions. Based on the above analysis, I have credited Figueroa over J.P.

Regarding Terri Serres' credibility, as shown above, I have quoted Serres' report (Cty. Exh. 13) in the Facts Section of this Award and I find that it constitutes the true and correct account of Serres' encounters with J.P. for the following reasons. On direct examination herein, Serres repeatedly affirmed that the specific statements she made in her written report were true (See, Tr. 315, 317, 334, 336, 343). Serres also confirmed herein that J.P. made repeated, unwanted statements to her about her pen/left breast as alleged in her report, that these statements were sexual in nature (Tr. 380), that they made her feel uncomfortable and embarrassed (Tr. 330, 332, 333) and that J.P.'s comments caused Serres to request to work a different shift at her end-of-probation review (Tr. 334).

Serres' demeanor on the witness stand, showed how nervous and uncomfortable she was about having to testify against a coworker and yet she confirmed the truth of all facts stated in her written report. It was only after Union Counsel showed Serres' J.P.'s termination letter and questioned her thereon, that Serres denied feeling harassed and offended, she professed to have no recollection of some facts she had previously confirmed and she also stated she was convinced by the County that she had been harassed. And on cross, Serres basically stated that she "asked for" this treatment from J.P. because she participated in the

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<sup>22</sup> I note that from my estimate, J.P. was a muscular man over 6 feet tall, while Figueroa was a woman less than 5 feet 8 inches tall and Serres was a petite woman, only 5 feet 4 inches tall by her own admission.

banter and joking about her pen, she laughed about it, she never filed a complaint against J.P. and she never asked J.P. to stop making the comments. She therefore believed she could not feel offended or harassed by J.P.'s comments to her.

Serres, reactions on cross were normal and predictable. In my view, she felt harassed and offended at the time J.P. made the comments, but she later doubted herself and believed she may have over-reacted. Also, Serres' need to try to ignore or to join in and make light of the harassment was her rejection of the role of victim and/or her attempt to reassert her power over the situation.<sup>23</sup> In these circumstances Serres' written report is a more reliable account of Serres' reactions to what happened to her, than her testimony herein.

Furthermore, J.P. essentially admitted making the pen comments to Serres (Cty. Exh. 24 pp 30-31) and he admitted he could have used the word "rat" in talking to Serres about whether the rumor was true that she met Mackey outside the jail (Cty. Exh. 24, p. 32) and J.P. also admitted he could have commented to Serres that she should get rid of her boyfriend (Cty. Exh. 24, p. 33). In these circumstances, I believe Serres' report is the true and accurate account of her encounters with J.P.

The Union has urged that the Arbitrator Daugherty's seven tests of just cause should be applied in this case and the County objected thereto. Absent a joint agreement to apply Daugherty's standard, I find it would be inappropriate to apply same. However, this is a discharge case, and as such the County bears the burden of proof to show it had just cause to discharge J.P. which requires this Arbitrator to look at every relevant aspect of J.P.'s County employment, the County's investigation of the allegations against J.P. and the Sheriff's decision – making process to assure that the County met its burden of proof herein.

At various points in its Brief, the Association admitted the County's rules are reasonable and at other times it argued the rules applied in this case are unreasonable. I find the rules cited in the Sheriff's discharge letter are fair and reasonable. The County has a vital interest in assuring that the comportment of its officers is becoming, that it reflects favorably on the department and that departmental morale, operations and efficiency are maintained (Policy 100.01 (3)(i)). Also, I note that Policy 100.01 is broad enough to prohibit verbal harassment between jailers.

It is clear that the County has a serious responsibility to assure its employees that they will not be subjected to unsolicited and unwelcome sexual overtures or conduct, either verbal or physical, at work. And the County's Sexual Harassment Policy goes on to state, the County "will not tolerate any form of sexual harassment in the workplace" (emphasis supplied). In this Arbitrator's view, this language clearly states the equivalent of a zero tolerance standard for sexual harassment, although it does not technically use the term "zero tolerance." The

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<sup>23</sup> Serres having sent Union Exhibit 3 to "Dude" on September 1<sup>st</sup> does not, in my view, diminish Serres initial feelings of discomfort, offense and embarrassment from J.P.'s comments to her.

County has a clear and unquestionable interest in assuring that its employees have as safe and stress free a workplace as possible and that it offers a “businesslike work environment free from all forms of employment discrimination including incidents of sexual harassment.” The Policy also clearly states that the penalty for a violation of its Sexual Harassment Policy is “disciplinary actions up to and including discharge” (Cty. Exh. 6).

As is clear from the Facts Section of this Award, this Arbitrator believes that J.P. was fully aware of the rules and policies of the County before he began harassing Figueroa. On this point, I note that J.P. stated he did not remember receiving orientation from County Personnel at the time of his hire or after he returned from military duty, but J.P. did not state that no such orientation could have occurred (Tr. 722). Also, J.P. admitted that he received a copy of the County’s Personnel Policies from the Sheriff’s Department which included County Exhibits 3, 5, and 6 (Tr. 723). J.P. also specifically recalled seeing County Exhibit 7 (the Unprofessional and Offensive Language Policy) and he admitted he could have attended in-services on sexual harassment (Tr. 722-3) although he specifically denied viewing the County’s sexual harassment video (Tr. 722). In all of the circumstances here, I believe J.P.’s recollection was faulty on some points and that he actually received orientation and in-service in all County policies including Policy 100.01 and the Sexual Harassment Policy.

In addition, although not cited in the December 14<sup>th</sup> termination letter, the County’s Unprofessional and Offensive Language Policy (which I have found J.P. received orientation on and a copy of), is aligned with and supports the County’s Sexual Harassment Policy as containing a zero tolerance standard.<sup>24</sup> Particularly, this Unprofessional and Offensive Language Policy is designed to assure that “harmful, derogatory or otherwise demeaning” words or actions are not used by employees to employees and that employees treat each other with “respect and dignity.” Violations of this Policy “may subject an employee to discipline up to and including discharge.” The Policy then goes on to give some clear examples of offensive and/or unprofessional phrases and expressions.<sup>25</sup> In this Arbitrator’s view, this Policy put County employees on notice that when in doubt whether a fellow worker might be offended, they should refrain from “obscenities, swearing or using obscene words or gestures in the workplace.”

The record evidence clearly showed that on September 25<sup>th</sup> at his meeting with Mackey and Zimmerman, J.P. became aware that it was Figueroa who had complained that J.P. had harassed her. Mackey expressly warned J.P. that he should get along with coworkers in the

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<sup>24</sup> I do not find the County’s Crisis Plan relevant here. First, it was not cited in the termination letter. Second, I do not believe J.P.’s conduct can be interpreted as containing threats or violence toward Figueroa and Serres. I have therefore not considered this piece of evidence in arriving at this Award.

<sup>25</sup> The Policy clearly was not intended to contain an exhaustive list of prohibited phrases and expressions. No policy could do so. Thus, the Association’s argument that J.P. was not put on notice exactly what language was prohibited simply gives him no credit for the intelligence he clearly showed on the witness stand herein and would make it virtually impossible for the County to prohibit such conduct.

future or there would be “big trouble” and Mackey stated that J.P. had harassed Figueroa (who would write out a statement thereon at Mackey’s request). J.P. also knew that the situation was serious because Mackey threatened J.P. with a written warning. In my view, although Policy 100.01 (3)(i) which Mackey gave to J.P. at this meeting, does not directly describe the type of misconduct J.P. had engaged in as of September 25<sup>th</sup>, Mackey’s (oral) statements to J.P. clearly demonstrated the kind of misconduct prohibited.<sup>26</sup> Also, J.P. clearly showed at this meeting that he knew that he was being warned to cease harassing Figueroa and that he must get along with his coworkers in the future and if J.P. did this, no further discipline would be issued.<sup>27</sup>

Also, J.P.’s claim that he did not know Figueroa was the complainant until after he spoke to Sergeant Anderson does not ring true. First, as stated above, J.P. knew from Mackey on September 25<sup>th</sup> that Figueroa was the complainant because Mackey threatened J.P. with a written warning if Mackey had to ask Figueroa to write an account of the harassment.<sup>28</sup> Indeed, J.P. demonstrated his full understanding of Mackey’s threat and Figueroa’s complaint by apologizing for having said things to Figueroa (in jest, he claimed) that she found offensive. Second, according to this record, the only jailer J.P. questioned repeatedly about the harassment claim lodged against him was Figueroa – and no one else. If J.P. had truly been unaware or in doubt who had made the complaint, it strikes me that he would have questioned other Jailers and that evidence thereof would have been placed in this record. No such evidence was proffered herein. Third, my careful review of Sergeant Anderson’s testimony herein showed him to be a capable manager, and the Sergeant in charge of training on departmental policies. In my view, Anderson would never have authorized or permitted J.P. to question the victim, Figueroa, about her harassment complaint. And given the fact that Anderson was first shift Sergeant and that he had no notes of such a conversation with J.P. (as was his practice), I believe that Anderson did not give J.P. permission to confront Figueroa about her complaint (Tr. 1228 – 31).

Regarding the allegations that J.P. spoke disrespectfully of Mackey at work and that

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<sup>26</sup> The Association argued that because Mackey put his hand-written memo (Zimmerman’s memo) regarding the September 25<sup>th</sup> meeting with J.P. in his own files this showed that Mackey had a “hidden agenda.” I disagree. The overall record evidence including Zimmerman’s testimony and his memo, failed to prove such a “hidden agenda” existed.

<sup>27</sup> Understandably, Mackey did not give J.P. copies of the Sexual Harassment Policy at this September 25<sup>th</sup> meeting because J.P.’s actions regarding Figueroa’s calendar and his conduct with Serres only came to light after J.P. was placed on administrative suspension on November 12<sup>th</sup> (U. Exh. 6).

<sup>28</sup> Sergeant Zimmerman’s memo (Cty. Exh. 12; Tr. 30-39) confirms Mackey’s statement which identified Figueroa as the complainant. Better practice in labor relations would have been to decide in advance whether J.P.’s actions, if proven, warranted a verbal or written warning and to issue same to J.P. without the use of any threats. It also would have been appropriate for Mackey to give J.P. a copy of the County’s Unprofessional or Offensive Language Policy (Cty. Exh. 7) on September 25<sup>th</sup> .

topic was broached by Mackey, he failed to properly warn J.P. not to disrespect him in the future. Rather, according to Mackey's memo (Cnty. Exh. 11), Mackey simply accepted J.P.'s denial of using the term "fucking asshole" to describe Mackey to fellow employees and the verbal warning Mackey issued was to get along with coworkers<sup>29</sup> and did not include a warning to refrain from speaking disrespectfully of supervisors behind their backs.

The County argued that as Policy 100.01 (5)(a) requires employees to comply with County rules, orders, policies and procedures, J.P.'s having been trained on this Policy requires a conclusion that he was bound to comply with all County rules. This argument is insufficient to "boot strap" Mackey's question to J.P. on September 25<sup>th</sup> concerning J.P.'s calling Mackey "fucking asshole" behind his back into a proper valid verbal warning thereon.

The Association has argued that because both Figueroa and Serres laughed at and participated in J.P.'s repeated oral and written harassment of them and because it was common for Jailers to bring in and share pornographic magazines and for Jailers to use profane language and tell dirty jokes at work, neither Figueroa nor Serres could fairly claim that J.P.'s conduct amounted to sexual harassment. I disagree. First, the testimony regarding Figueroa's laughing about the calendar entries made by J.P. from female Jailers Cocoran and Harris (Tr. 840 and 828-9 respectively) was insufficient to demonstrate Figueroa did not, in fact, feel harassed by J.P.'s conduct. In this regard I note that this evidence can just as easily be interpreted as Figueroa trying to make light of or minimize the impact of J.P.'s written notes on her calendar to try to fit in with her coworkers<sup>30</sup> and to reject the victim role. Also, the fact that some third shift Jailers used profane language and told dirty jokes does not mean that they also engaged in sexually harassing each other as J.P. did by writing in Figueroa's calendar and by his treatment of Serres. It is significant that none of the witnesses herein reported any other harassing or sexually harassing conduct similar to J.P.'s (except the writings that discharged Jailer Pat Murphy also wrote in Figueroa's calendar).<sup>31</sup> In addition, I note that when the Sheriff became aware of a salacious yearbook put together by former Jailer Pat Murphy and Figueroa, among others, and the Sheriff issued a memo putting a stop to such activities

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<sup>29</sup> In my view, speaking badly of a coworker behind his back does not fit into the definition of "getting along with coworkers."

<sup>30</sup> Jailer Cassidy did not engage in the profane language and dirty jokes and the other Jailers respected her requests, but as Jailer Corcoran confirmed – County Jailers joke around with the people they like at work (Tr. 855).

<sup>31</sup> The Association has also argued that Figueroa's joking about her son and Jailer Cocoran, the fact that she took her son to Hooter's for his birthday, that Figueroa's asked J.P. to download a rap song containing sexual language (U. Exh. 9, printed lyrics) for her son, showed that Figueroa could not have felt harassed by J.P.'s conduct toward her at work. I note that even J.P. admitted he did not understand all of the lyrics of this song when he listened to it at the time he downloaded the song for Figueroa (Tr. 1326). Based upon my finding that Figueroa was more credible than J.P. and the facts of this case, I do not believe this evidence concerning Figueroa's character was sufficient to overcome the fact that J.P.'s outrageous harassing oral and written comments to Figueroa were, on their face, completely inappropriate.

The Association has argued that Vernon County Undersheriff James Hanson's investigation was tainted, slipshod and unfair. The record evidence in this case shows quite the opposite. Here, the Sheriff employed an experienced, intelligent police officer from outside his Department to investigate the situations that arose in 2004 including the allegations made by Figueroa against J.P. At the beginning of his investigation, Hanson wrote as follows about his authority, among other things:

On November 15<sup>th</sup>, 2004 at 1:15 p.m., I met with the LaCrosse County officials in the conference room of the LaCrosse County Sheriff's office in the law enforcement center. In addition to myself, present are Sheriff Michael Weissenberger, Chief Deputy Steven Helgeson, Captain Jeff Wolf and Captain Doris Daggett. From past experience all four of these individuals I have known.

Further introduction was made to Sgt. Tom Mackey and Mary Marco, Deputy Personnel Director for LaCrosse County.

I am informed of the following pertinent to this investigation:

Sgt. Tom Mackey is the third shift supervisor in the LaCrosse County jail. I'm further informed that one of his jail officers is Heather Figueroa. There is apparently employment conflict of some nature between Heather Figueroa and three other individuals that work the same shift in the jail. I'm advised that they are Patricia Murphy, Michael Durand and J.P. There is apparently further conflict between Murphy, Durand and P. with their supervisor, Sgt. Tom Mackey. This appears to be ongoing conflict.

Although this Undersheriff Hanson will remain vigilant as to any criminal activity, the original intent of this investigation is to examine these conflicts and three policies involved with LaCrosse County government. LaCrosse County offers three policy documents relative to employment conduct, anti-harassment and relationships. The first policy is that provided by the Sheriff's Department. There is a second anti-discrimination, anti-harassment policy from the LaCrosse County personnel department. There is a third policy relative to the same sort of issues under the LaCrosse County Crisis Plan. I'm advised that all three of these employees participated in LaCrosse County orientation and have signed off on associated policies.

I am further requested to look into an incident involving jailer Patricia Murphy specifically, wherein a suicide note was left for jail staff underneath the door of a cell and most likely not handled properly in the best interests of the inmate.

I am further informed and provided written documents that have been



provided to Murphy, Durand and P. wherein the Sheriff has suspended them with pay pending the outcome of this investigation.

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All this being considered, Sheriff Weissenberger assigned Captain Jeff Wolf of the Investigation Division to assist and otherwise host me as a lead investigator from an outside agency to look into and review these matters.

When Hanson issued his "Summary Report," Hanson described his "Approach" to the investigation as follows:

. . .

The allegations against all three employees were examined for criminal intent. Upon review of the Wisconsin Statutes, it was determined by me that the specific allegations did not reach to the point of violating Wisconsin Statutes. A number of statutory excerpts and jury instructions were reviewed by me, specifically as to harassment, hate crimes, crimes against certain persons, unlawful use of telephones, unlawful use of computerized communication systems, use of honesty testing devices in employment situations, and misconduct, as it may relate to public employees.

Through the La Crosse County Personnel Office I was able to examine and obtain a copy of the many documents used in orientation for La Crosse County employees. This hiring packet is made part of this record.

I also examined policies relative to employment in the La Crosse County Sheriff's Department. Pertaining (sic) to the Sheriff's regulations are the Jailer Job Description, Policy 100.01 (Conduct of Jail Personnel), Policy 108.01 (Inmate Mail), and Sheriff's Directive (Dated July 1, 2003 at 8:34 AM).

Pertaining (sic) to La Crosse County Policies is the La Crosse County Sexual Harassment Plan and the La Crosse County Crisis Plan (Zero Tolerance Policy on Threats). In summary, all these documents were examined by me as they may or may not relate to this investigation.

As a matter of record, all other third shift jail staff was interviewed by me in the presence of Captain Jeff Wolf. These interviews consisted of structured questions. Any information not relative to the allegations in this inquiry and regarding other staff of the department, whether positive or negative will be relayed by separate memorandum to Sheriff Weissenberger.

. . .

The Association has argued that Hanson's investigation was not truly independent, but it was flawed and unfair. In this regard, the Association argued as follows:

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- 1) Captain Zimmerman assisted Hanson and drafted interview questions for Hanson;
- 2) Mackey and Figueroa were interviewed early in the investigation;
- 3) Hanson did not investigate allegations brought against Mackey previously;
- 4) Hanson failed to fully investigate all aspects of J.P.'s case; and
- 5) Hanson did not use Garrity with Mackey.

In regard to the above, I believe this record showed that Zimmerman's assistance was necessary as Hanson was from outside the Department; that the questions Hanson asked were relevant and probative; that Mackey and Figueroa were interviewed early on because they first reported J.P.'s conduct to management; Hanson was never asked to investigate prior complaints made against Mackey which, from this record were dealt with by the Sheriff/County although not to the satisfaction of the complaining employees; and Hanson interviewed all third shift jailers about their perceptions of management and reported his findings to the Sheriff; Hanson did not give Mackey Garrity warnings because Mackey was not alleged to have engaged in harassment or sexual harassment of anyone. In my view, although there may have been other avenues Hanson could have checked (such as, jail video tapes).<sup>32</sup> Hanson found substantial evidence that J.P. had engaged in the misconduct as alleged.

The Association has contended that the Sheriff should have further investigated the situation after receiving Hanson's many reports. This assertion is unsupported by the record. This Arbitrator believes that Figueroa and Serres felt harassed and offended by J.P.'s conduct. And Figueroa told J.P. at least twice that she did not want to be put in the middle of the situation, she appeared upset and cried in J.P.'s presence and later told County managers she was stressed out and could not stand being in the middle of the situation anymore. To require Figueroa to use the magic word "harassed" or "sexually harassed" in speaking to J.P. or in reporting J.P.'s objectionable conduct toward her before the County could investigate and hold J.P. responsible therefore would have given J.P. an easy out.<sup>33</sup> In addition, before making his decision, the Sheriff studied Hanson's reports and findings, he spoke to County Personnel representatives and he reviewed County policies and he looked at J.P.'s prior

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<sup>32</sup> It is clear on this record that jailers generally help each other out by covering when one of them needs a break. This fact must have been known to Mackey who had been a County Jailer for more than 20 years before he was promoted to Sergeant of third shift. Thus, Mackey's decision to send Figueroa to essentially verbally warn Murphy by telling Murphy that Mackey had ordered Figueroa not to help Murphy on September 19-20<sup>th</sup>, in this Arbitrator's opinion, constituted questionable supervision.

<sup>33</sup> As argued by the County, to require the victims of harassment to confront their harassers and accuse them to their faces of such conduct would make it too easy for harassers to engage in this conduct with impunity.

disciplinary record. I do not believe the Sheriff was required to go farther before concluding J.P. should be discharged.

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Regarding Serres, I am convinced that Serres did not originally initiate J.P.'s comments about her left breast/pen. As discussed above, I believe that Serres was sexually harassed by J.P.'s repeated comments about her pen/breast and that J.P.'s comments to Serres about whether she was one of "Mackey's rats" and that she should dump her boyfriend and "hook up" with J.P.<sup>34</sup> made Serres feel intimidated, uncomfortable and embarrassed, so much so, that Serres became fearful of J.P. and felt she had to watch J.P.'s movements when he was at work with her. All of this caused Serres to choose a second shift position in order to get away from J.P. Again, whether Serres chose to later re-label J.P.'s comments to her as not constituting harassment is not determinative of the issue. For the reasons stated above, I believe that Serres' written statement (County Exh. 13) revealed her true, gut reaction and that her partial recantation herein constituted Serres' well-intentioned, honest act of second-guessing herself so as not to be a partial cause of J.P.'s discharge.

In all of the circumstances of this case,<sup>35</sup> I believe the County proved it had just and proper cause to terminate J.P. and I therefore issue the following

### AWARD

The discharge of J.P. was for proper cause within the meaning of Article II of the labor agreement. The grievance is therefore denied and dismissed in its entirety.

Dated in Oshkosh, Wisconsin, this 25<sup>th</sup> day of March, 2008.

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<sup>34</sup> The Arbitrator understands that young people use the term "hook up" to describe the act of having sex with the person hooked up with.

<sup>35</sup> The evidence in this case failed to show that J.P. was disparately treated by the County. In regard to the Association's assertion that the termination was inappropriate here – that J.P.'s conduct was not serious enough to warrant same - - is also rejected. J.P.'s prior disciplinary record showed minor discipline in my view and those prior warnings (in 2002 and 2003) were not relevant to J.P.'s misconduct on September 25<sup>th</sup> (and thereafter). Following the September 25<sup>th</sup> verbal warning, however, I do not believe that the County's policies and practices required it to give J.P. "a second chance." Given the seriousness of J.P.'s misconduct, it would be inappropriate for me to substitute my judgment for that of the County regarding the proper penalty in this case. Regarding the Association's Loudermill assertion, I note that J.P. was advised of and he responded to the allegations made against him at his interview which was recorded and transcribed, and at which he had Association representation, and that during the investigation the Association failed to produce Serres' e-mail.

Sharon A. Gallagher /s/

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Sharon A. Gallagher