

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**SHEBOYGAN COUNTY SUPPORTIVE SERVICES
EMPLOYEES UNION LOCAL 110, AFSCME, AFL-CIO**

and

SHEBOYGAN COUNTY

Case 392
No. 67766
MA-14011

Appearances:

Mr. Samuel Gieryn, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 187 Maple Drive, Plymouth, Wisconsin 53073, for the labor organization.

Mr. Michael Collard, Personnel Director, Sheboygan County, 508 New York Avenue, Sheboygan, Wisconsin 53081-4692, for the municipal employer.

ARBITRATION AWARD

The Sheboygan County Supportive Services Employees Union, Local 110, AFSCME, AFL-CIO and Sheboygan County are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising there under. The union made a request, in which the county concurred, for the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide a grievance over the interpretation and application of the terms of the agreement relating to discipline, namely the termination of Correctional Officer Larry Krueger. The Commission designated Stuart D. Levitan as the impartial arbitrator. Hearing in the matter was held in Sheboygan, Wisconsin, on February 2, 2008. The parties submitted written arguments and replies, the last of which was received on May 13, 2008.

ISSUE

The parties stipulated to the following issue:

“Did the employer have proper cause to impose the discipline reflected in the Employee Report dated November 13, 2007? If not, what is the appropriate remedy?”

RELEVANT CONTRACTUAL LANGUAGE

ARTICLE 3 – MANAGEMENT RIGHTS RESERVED

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

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Sheboygan County may adopt reasonable rules and amend the same from time to time and the Union agrees to cooperate in the enforcement thereof.

OTHER RELEVANT PROVISIONS

The Sheboygan County Sheriff's Department Policies and Procedures Handbook contains the following:

SEC. 1-9-9 EMPLOYEE CALL-IN AND OVERTIME REQUIREMENTS

POLICY – All Department employees who are requested to work overtime by their supervisor/s are required to comply with the request. Employees who are called in or otherwise requested to work during normally scheduled off-duty time must comply with the call-in or request.

PROCEDURES –

1. Supervisors requiring overtime, or calling in employees to work on their normally scheduled off-duty hours are encouraged to use discretion.
2. Reasonable delays to arrange for child care will be granted by the supervisor when necessary.
3. Excuses for non-compliance will be evaluated by the supervisor and a division commander on a case by case basis. When an excuse is deemed invalid, the employee will be subject to disciplinary action including discharge as the circumstances may warrant.
4. Employees who refuse to comply with call-in or overtime requests will be subject to disciplinary action including discharge as the circumstances may warrant.

5. Supervisors will **not** require employees to work overtime or call in employees to work on their off-duty time as a means of punishing an employee. Requirements for extra work shall be for the sole purpose of fulfilling the mission of the Sheriff's Department.
6. Employees will normally be subject to call-in on a priority basis when circumstances allow. The order of priority from first to last will be: employees off duty, employees on regular days off, employees off on single holidays, vacation or x-time days, and finally those employees off on a full week or more of vacation.
7. Employees who are ill or otherwise not physically fit for duty at the time of their call-in will be excused, but may be required to validate their condition at a later date.

SEC. 1-12-4 RULES OF CONDUCT FOR ALL EMPLOYEES WHILE ON DUTY

- (4) Employees shall perform all required duties and shall not avoid or shirk responsibility, danger or disagreeable duties.
- (15) Untruthfulness by an employee regarding official Department business with a superior or a prosecutor will not be allowed.
- (26) Insubordination, including refusal to perform a work assignment, is prohibited.

SEC. 1-12-5 RULES OF CONDUCT FOR ALL EMPLOYEES WHILE OFF DUTY

- (3) All employees of the Department shall be subject to call at all times while off-duty.

BACKGROUND

The grievant, Larry Krueger, began work as a correctional officer with the Sheboygan County Sheriff's Department on April 28, 1998. He was terminated on November 13, 2007, for allegedly being evasive and untruthful during an investigative interview concerning the reasons why he did not respond to a call-in request to work an overtime shift.

The events which culminated in Krueger's termination began on October 20, 2007, when a third shift correctional officer called in sick and second shift commander Lt. Cindy Detienne began the process of trying to fill the overtime. After a second shift officer was held over to work the first half of the third shift (2300 to 0300 hours), Detienne sought to fill the remaining four hours by calling a first shift officer in four hours early. She consulted the list

showing how often and how recently the officers had been called in (the so-called Force List), and called each officer in order, starting with Krueger at 2052 hours. None answered. Detienne then asked patrol Lt. John Detienne to send an officer to Krueger's house and inform him he was to report to duty at the Detention Center.¹

Krueger had been on vacation from October 4 to October 19, with October 20 his first day back at work. After work, he and his wife went to Wal-Mart from about 1200 to 1930 hours, then had dinner at a fast-food restaurant. His parents visited for about 40 minutes, bringing over some items which had belonged to Krueger's recently deceased grandmother. Krueger states that about 2020 he turned on his computer and opened a Miller Genuine Draft Light beer.² Krueger states he drank that beer and was about half-way or so into his second when Detienne called. Krueger states he was in the bathroom at the time, but shortly thereafter reviewed the message and knew that she wanted him to report at 0300. Krueger states he finished the second beer and had a third, finishing about 2130. He states he then brushed his teeth and went to bed, without returning Detienne's call.

Sgt. Bradley Jorsch, who had spent 12 years as a patrol officer and made hundreds of arrests for various offenses relating to alcohol, was assigned to go to Krueger's house and tell him about the overtime call-in. At 2238 hours on Saturday, October 20, 2007, he sent Detienne the following e-mail, recounting what transpired:

On Saturday, October 20, 2007 I was advised by Lieutenant Detienne (Patrol) to make contact at Larry Krueger's residence to inform him needed to begin his work day at 0300 hours on the 21st of October.

I had contacted Larry in person at his residence at 2145 hours to inform him of his start time. He told me he could not come into work, because he had been drinking. I did not smell the odor of an intoxicant on his breath. I asked him if he would be willing to submit to a PBT to see how good or bad he was. He agreed. A PBT was administered by use of squad 49's PBT. Two PBT's were given, and an end BRAC was .000 both times.

I had shown Larry his PBT result and said he should be fine. He told me he was not fine and would not be able to come into work because he had been drinking. I told him if this was the case and he had been drinking he was fine now. He insisted he was not fine and would not be able to start at 0300 but would be in at 0700. I informed him I would tell the powers that be the he would not be starting at 0300.

At 2200 hours, Lieutenant Detienne (Corrections) requested that I test squad 49's PBT. Squad 49's PBT was tested for detection of alcohol and

¹ All subsequent references to "Detienne" are to Cindy Detienne.

² According to information provided by the Miller Brewing Company, this brand is 4.2% alcohol.

accuracy of BRAC by me at 2230 hours. Squad 49's PBT was functioning properly.

Jorsch elaborated on this e-mail in a subsequent written report, as follows:

On Saturday, October 20, 2007, I, Sgt. Jorsch, was advised by Lt. John Detienne to make contact at Correctional Officer Larry Krueger's residence to inform Correctional Officer Krueger he needed to begin his workday at 0300 hours on 10/21/07.

I had contacted Larry in person at his residence at 2145 hours to inform him of his start time. He told me he could not come into work, because he had been drinking. I did not smell the odor of an intoxicant on his breath. To me, it did not appear that he was impaired or had been consuming intoxicants. I asked him if he would be willing to submit to a PBT to see how good or bad he was. He did agree to do so. A PBT was administered by use of squad 49's PBT. Two PBT's were given, and an end BRAC was .000 both times.

In administering the Preliminary Breath Test, I had given Larry two. During the first PBT sample, I had asked Larry to blow into the straw. Larry did comply, and while he was blowing, I had waited to get some deep lung air.

Just as Larry had stopped blowing into the PBT, I had pressed the button in order to obtain a sample of Larry's breath. The PBT had given me an end BRAC of .000. Because I had pushed the button as Larry had finished blowing into the straw, I believed there was the possibility that I may not have obtained a successful breath sample from him, so I administered a second PBT to confirm the .000 result. After a second Preliminary Breath Test was given to Larry, I did obtain a successful test, and the end result was again .000.

I had shown Larry his second PBT result and said he should be fine to work. He sincerely told me he was not fine and would not be able to come into work, because he had been drinking. I had advised him if this was the case and he had been drinking, he was fine now. He again insisted he was not fine and would not be able to start at 0300 but would be in at 0700 hours. I informed him I would tell the powers that be the he would not be starting at 0300 hours.

During my conversation with Larry, he was not rude, disrespectful, nor did he display a poor attitude. He was cooperative throughout my contact with him. Even though I could not detect any type of clues, which would lead me to believe he had been consuming intoxicants, Larry insisted that he had been.

At 2200 hours, Lt. Cindy Detienne requested that I test squad 49's PBT to make sure it was functioning correctly. Squad 49's PBT was tested for detection

of alcohol and accuracy of BRAC by me at 2230 hours. After testing squad 49's PBT, I determined the PBT was functioning properly. It did give me a reading of .09 by use of the alcohol solution in the PBT testing device. The solution is rated at .10. However, in calibrating the PBTs, a -.01 is used to give persons the benefit of the doubt when using the PBT in the field.

The State of Wisconsin Department of Transportation has approved the Alco-Sensor III, made by Intoximeters Inc., for use as a Preliminary Breath Test Instrument. On July 30, 2007, SCSO Lieutenant Rupnik calibrated all Department PBTs with a control solution provided by the State of Wisconsin. All squad PBTs were calibrated to .01%, including the PBT which Sgt. Jorsch used on Correctional Officer Krueger on October 20, 2007. The SCSO had not calibrated the PBT which Jorsch used between July and October, 2007.

Detienne filed the following Employee Incident Report:

On October 20, 2007 at 2045 hours, I, Lt. Detienne received a phone call from Sgt. Johnson, advising there was an officer who had called in sick on third shift. Sgt. Johnson asked if I could fill the overtime. After referencing the Force List, I called all officers available to report for duty at 0300 hrs on October 21, 2007. I called CO Krueger first and left a message as there was no answer. I went on to call CO Fisher, CO Seider, CO Giese, CO Plouff and CO Ploetz with out response.

At 2120 hrs. I contacted Lt. John Detienne in patrol and asked him to send a deputy to CO Krueger's residence [redacted] as he was first on the force list, and inform CO Krueger, he was to report for duty at the Detention Center at 0300 hrs. Lt. John Detienne advised the (sic) he would send a squad when one became available.

At approximately 2200 hrs I contacted Lt. John Detienne to find out if someone was able to make contact with CO Krueger. He advised me, Sgt. Jorsch had made contact and CO Krueger had refused to come in, because he said he was drinking. I asked if he was drinking and Lt. John Detienne said that Sgt. Jorsch had administered a PBT with a reading of .000. (see attached report from Sgt. Jorsch).

I made phone contact with Capt. Salata, to advise him of the situation. The decision was made to place CO Krueger on administrative leave for failure to follow a lawful order. Capt. Salata instructed me to call CO Krueger at home and advise him not to report for duty until contacted by Sheriff Helmke.

At 2208 hrs I contacted CO Krueger, I informed him that he had been placed on Administrative Leave and was not to report for duty until contacted by Sheriff Helmke. CO Krueger was very upset and said "I was drinking, I can't come in

at three.” I explained that he was administered a PBT with a reading of .000. CO Krueger said, “you don’t understand I had 3 beers, my wife saw me drink them, the PBT must be wrong.” I told him that I would contact patrol and have them check the PBT, but that did not negate the fact that he was ordered in, given a PBT and still refused to come in. He responded by saying, “fine, you want me into work with beer on my breath, I will be in at three.” I said (“) I said (“) Larry, you know I don’t want you here with beer on your breath, (“) and again reminded him of the PBT reading. He again said, “Cindy, you don’t understand, I don’t know what to do. I’ve been drinking.” I then asked him, “Are you drinking now?” He said “yes, I opened another one, because of my nerves, but I’ve only had half of it.” He went on to say (“) I just don’t know what to do.(“) I said that the decision had already been made and you have been placed on Administrative Leave. He then said, “I will do anything to avoid being put on leave, I will come in at three, you don’t understand I am between a rock and a hard spot.” I again told him that the decision has been made and that he was not to report to work. I informed him I would be filing this report and it would be the decision of the administration regarding potential discipline.

On October 30, 2007, Detienne conducted a formal investigative interview with Krueger, who was accompanied by two union representatives. Prior to the interview, Krueger was given the following notice:

**SHEBOYGAN COUNTY SHERIFF’S DEPARTMENT
INTERNAL INVESTIGATION
INFORMING THE MEMBER**

- 1.) The Sheboygan County Sheriff’s Department is presently investigating you concerning; **Your refusal to report for duty on October 21, 2007 at 0300 hrs. after being ordered to.**
- 2.) Disciplinary action may result.
- 3.) This is an internal investigation, and the answers you give, or the fruits thereof, cannot be used against you in a criminal proceeding.
- 4.) Pursuant to Wis. Statute 164.02 and/or 111.70(2), you are entitled to representation by a representative of your choice who, at your discretion, may be present for consultation at all times during the investigation.
- 5.) **Refusal to respond during the investigation, or any response, which is untruthful, could result in your suspension or termination from the Sheboygan County Sheriff’s Department.**
- 6.) You will have to submit to a videotaped interview. You may consult with your representative while being interviewed. Your presence at the interview is required.

At the start of the investigative interview, Lt. Detienne read the following

DEPARTMENT INVESTIGATION
NOTICE OF INVESTIGATION:

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

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

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

Although there is no indication Krueger was facing any criminal charges arising out of the events of October 20-21, the employer has referred throughout this proceeding to the investigative interview as a "Garrity" hearing.

At the investigative/"Garrity" interview, Krueger acknowledged he heard the phone ringing but said that, "I just didn't answer. I was doing something ... actually, I think I was going to the bathroom." Krueger said he hadn't known who was on the line when the phone was ringing, but once he looked at the Caller ID he knew it was Detienne. He also stated he listened to the message and knew it was about an overtime call-in.

Q: How come you didn't call me back?

A: I didn't think it was my responsibility to call you and tell you I had been drinking.

Q: It's your responsibility to return my calls is it not? When you've been called in?

A: Yes and no.

Q: Can you explain that?

A: I didn't think that because I had been drinking at the time I should call back barring the fact that something like this would happen between you and I.

Detienne's question as to whether Krueger heard Jorsch tell him that he was fit for duty elicited the following exchange:

Q: Did he tell you you were OK to go report to work?

A: He did not say anything in that I remember.

Q: You don't recall if he said that?

A: I don't recall

Q: So ... Based on what I have in Sgt. Jorsch's report he's saying that he told you you were OK to report

A: At that particular point. And I reiterated I felt the effects of alcohol and would not be reporting

Q: OK, so you do remember him telling you you were OK to report at zeroes.

A: Actually, I don't remember him saying that

Q: OK. Well now wait a minute first you told me you didn't remember. Then you said you do remember ... I'm confused ... do you recall him telling you that?

A: I gotta think here.

Q: Take your time....

A: To be honest with you, I don't remember pacifically (sic) what he said. I remember him saying something to that effect. And I answered him that I still feel under influence of alcohol and I'm not coming in. and that was my answer back to him.

Detienne and Krueger than engaged in a five-minute colloquy on whether Krueger felt the PBT was a good indicator of the presence of alcohol on a person's breath, and the amount. After several lengthy pauses, Krueger said the PBT -- which he, like all correctional officers, had used on persons being processed into the jail or returning from Huber release -- was "an indicator, but not a good indicator."

Detienne asked if Krueger recalled an incident from several years prior in which he had sought to call in sick from a bar, and reported for work after being subjected to a PBT which resulted in a reading of .000, Krueger asked to be excused to consult with his two union

representatives. After a five-minute break, Krueger returned, and addressed Detienne's question of how the two instances – which both involved a reading of zero on the PBT – were different, and why Krueger reported for work in the earlier incident, but not on October 20-21: "I can't answer that particular question because I don't know ... I don't know, I honestly don't know ... I look at it as two different incidents."

Nor could Krueger explain why Jorsch did not smell any alcohol on his person or breath. Krueger maintained, in response to Detienne's direct question, that he had three beers between 8:30 and 9:30.

On November 1, 2007, Lt. Detienne, accompanied by Capt. Adams interviewed CO Krueger's wife, Donna, who was accompanied by Officer Damian Ballantine, and filed the following summary:

Donna Krueger was informed that Correctional Officer Krueger requested that we interview her as a part of Correctional Officer Krueger's investigation. Donna explained that she and Larry had gone to Wal-Mart on October 20, 2007. She said they had gotten a call from Larry's parents, and they had stopped over at their house to drop off some things from Larry's grandmother. She said that Larry's parents left around 2015 hours and that is when Larry had his first beer. Donna went on to say that she saw him drink it when she was in the living room. She said at 2045 hours, she saw him open his second beer while he was working on his computer. She said she could not confirm if he had a third beer or not, because she went to bed at 2050 hours. Larry stayed up and was working on his computer. She said the cans were on the counter when she got up in the morning.

Donna did admit to hearing the phone ring and that she did have caller ID on her phone. She said she did not pay attention to the phone or the message, as she was putting her daughter to sleep. She said that when she is putting her daughter to sleep, she doesn't answer the phone for anyone. She said she was not aware of what Larry was doing then I initially called at 2050 hours, because she was putting her daughter to sleep. She said she was not aware of the time I left a message until after Sgt. Jorsch left their residence. She told Larry to look at the machine to see what time I had called. She did not know if Larry had looked at the machine prior to this or not.

Donna reiterated that Larry started drinking sometime after 2015 hours, and she went to bed at 2050 hours. Larry did not go to sleep at that time but was in bed when Sgt. Jorsch arrived at their residence at 2150 hours. She did not know how long Larry was in bed or if he was asleep when Sgt. Jorsch arrived. She said she did not get up with Larry, she stayed in bed.

Captain Adams told Donna that Larry wanted us to talk to her and asked what she could tell us about this incident in an effort to be fair about this. She said that she had asked Larry about this, and he told her that he did not tell us to talk to her but that she could corroborate his story. She said that he absolutely was drinking that night, and that she could verify that. When he came back into the bedroom, she asked Larry if he had his store bought breathalyzer, just in case ours was not working properly. Larry told her it was broken. She said if she would have known what was going to transpire, she would have taken Larry to the hospital for a blood test, because he was drinking that night. She said that Larry was drinking Miller Beer, it was not NA Beer. The beer was left over from her daughter's birthday party last June. Captain Adams explained that Sgt. Jorsch did not detect an odor of alcohol and that the PBT was calibrated and read zeros, and the only explanation we would have is that Larry was not drinking. She said that she (had) nothing to hide and that she is a very honest person and would not lie for Larry, and that Larry was absolutely drinking that night. She said she had nothing to hide, and she would not lie for him.

After Sgt. Jorsch left, Larry came back to the bedroom and was very upset. He said he blew zeros, and that he did not know how he did that. When asked if he drank any more that night, she said that he opened his fourth beer in the bedroom when he was on the phone with me and took a drink to calm his nerves.

Donna wanted us to know that Larry was not lying. She said she was very concerned about safety, and when Larry said he could not go into work, she believed him.

Detienne summarized her investigation and the "Garrity" interview, and conveyed her conclusions, in the following memorandum:

On Tuesday, October 30, 2007 at 1400 hrs., I, Lieutenant Cindy Detienne conducted a Garrity Interview with Correctional Officer Larry Krueger. During the interview, Correctional Officers Brian Verhelst and Damian Ballantine were present as union representation. This is a summary of my interview with Larry Krueger, for a complete account, please refer to the digital recording.

CO Krueger did admit to being at his resident when I initially called to inform him of the overtime at 2050 hrs. He admitted to answering the phone ring (sic) and to having caller ID, he listened to the message left for him. Knowing that he was needed to report to work, he opted not to return the phone call. He said that he did not know the call back policy at that time, however later in the interview he admitted to being called in 17 times so far this year.

Sgt. Jorsch arrived at his residence at 2150 hrs. He said Sgt. Jorsch informed him that Lt. Detienne needed him to come in to work. He said that he told Sgt. Jorsch that he had been drinking, that he had a couple of beers. He did agree to submit to a PBT administered by Sgt. Jorsch and was shown the results of the PBT being .000. Correctional Officer Krueger said that he did not understand how it could register because he had had 3 beers in the past hour. CO Krueger did admit to being told he was OK to go into work by Sgt. Jorsch, CO Krueger said that he was not coming into work because he still felt the effects of the alcohol, but he would answer the phone if I were to call.

CO Krueger admitted to consuming 3, 12oz cans of beer between the hours of 2030 and 2130 hrs. 20 minutes prior to Sgt. Jorsch's arrival. He again admitted to observing the PBT results of .000. CO Krueger said it would have been 5 hours between the time that Sgt. Jorsch said he was needed to report to work. CO Krueger then admitted to consuming ¼ of a can of beer between the time Sgt. Jorsch left his residence and my phone call at 2208 hrs.

CO Krueger was administered a PBT on one other occasion with the results of .000. He went on to work his assigned shift. When asked why he could work his shift on that date and not on October 20th with the same PBT results he was unable to give a definitive answer to my question. He had no explanation why Sgt. Jorsch did not detect an odor of alcohol on his person or on his breath, 20 minutes after consuming alcohol. When asked if he really was drinking on the night of October 20 or if he just did not want to come into work. He said no that he was drinking that night.

Because of my interview, violations of the following policies were founded (sic).

SEC. 1-12-4 RULES OF CONDUCT FOR ALL EMPLOYEES WHILE ON DUTY

- (5) Employees shall perform all required duties and shall not avoid or shirk responsibility, danger or disagreeable duties.
- (16) Untruthfulness by an employee regarding official Department business with a superior or a prosecutor will not be allowed.
- (27) Insubordination, including refusal to perform a work assignment, is prohibited.

SEC. 1-12-5 RULES OF CONDUCT FOR ALL EMPLOYEES WHILE OFF DUTY

- (4) All employees of the Department shall be subject to call at all times while off-duty.

SEC. 1-9-9 EMPLOYEE CALL-IN AND OVERTIME REQUIREMENTS

- (4) Employees who refuse to comply with call-in or overtime requests will be subject to disciplinary action including discharge as the circumstances may warrant.

Also on November 1, Sheriff's Department Director of Operations Bruckbauer conducted an investigation in which he attempted to replicate the events as recounted by Krueger. He filed the following report:

On November 1, 2007, I, Director Bruckbauer, had a discussion with Sheriff Helmke and Inspector Berg in reference to the internal investigation Correctional Officer Larry Krueger. The discussion centered on Correctional Officer Krueger's assertion that he had consumed three (3) twelve (12) ounce beers in a one (1) hour period. After consuming these beers Correctional Officer Krueger voluntarily submitted to two (2) PBT tests, twenty (20) minutes after finishing the third beer, both PBT tests resulted in readings of .000.

It was decided that I would consume three (3) twelve (12) ounce beers at my residence, in the same time span as Correctional Officer Krueger and administer myself a PBT test to determine if a test result of .000 was possible.

Sergeant Jorsch had used the PBT from squad 49 to administer the PBT tests to Correctional Officer Krueger. I therefore took that PBT home with me to administer to myself.

I consumed three (3) twelve (12) ounce bottles of Miller Lite from 1900 to 2000 hours, after I had consumed my evening meal. I consumed the first bottle of Miller Lite from 1900 to 1915. At 1935 hours I administered myself a PBT, which resulted in a reading of .008. I then consumed the remaining two bottles of Miller Lite by 1955 hours. I consumed no additional Miller Lite or any other alcoholic beverages after this point.

At 2005 hours I administered myself a PBT, which resulted in a BAC reading of .018. I administered another PBT at 2020 hours, twenty (20) minutes after finishing the last of the three (3) Miller Lite beers. This PBT test resulted in a BAC reading of .022.

I then administered myself a PBT test every twenty (20) minutes until I received a BAC reading of .000. The results are as follows:

2040 – BAC .017
2100 – BAC .010
2120 – BAC .001
2140 – BAC .000

On November 13, 2007, the employer issued the following:

**SHEBOYGAN COUNTY
EMPLOYEE REPORT**

X VERBAL
X WRITTEN
8 SUSPENSION # OF DAYS
X TERMINATION

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COMPLAINT

Michael J. Helmke, Sheriff of Sheboygan County, believes and has determined that CO Larry P. Krueger has engaged in actions meriting dismissal from the Sheriff's Department.

STATEMENT OF INCIDENT

On October 22, 2007, Lieutenant Cindy Detienne was assigned to conduct an investigation into the possibility Correctional Officer Larry Krueger had refused to report for duty on October 20, 2007, to cover an overtime shift of 0300-0700. The following are the results of that investigation.

On October 20, 2007, Lieutenant Cindy Detienne received a phone call from Sergeant Johnson advising a third-shift officer had called in sick. In order to maintain shift minimums, a second shift officer was being held over until 0300. A day shift officer would need to be called in early, and start their shift on 0300 on October 21, 2007.

Lieutenant Cindy Detienne consulted the "Force List" and attempted phone contact with Correctional Officer Larry Krueger, who was first on the Force List, Lieutenant Cindy Detienne's phone call to Correctional Officer Krueger went unanswered. Lieutenant Cindy Detienne left Correctional Officer Krueger a message advising him of the situation and asking Correctional Officer Krueger to call back.

Lieutenant Cindy Detienne attempted five additional phone calls to different correctional officers in an attempt to order someone in to cover the open time slot of 0300-0700, to no avail. Lieutenant Cindy Detienne then contacted the on-duty patrol supervisor and requested personal contact at Correctional Officer Krueger's home, as he was first on the Force List, to order him in to fill the open hours of 0300-0700.

On October 20, 2007 at 2145, Sergeant Jorsch was able to make personal contact with Correctional Officer Krueger at his resident. Upon making contact with Correctional Officer Krueger, Sergeant Jorsch advised him he had to report for duty at 0300 on October 21, 2007. Correctional Officer Krueger stated he could not report for duty at 0300, as he had been drinking. According to Correctional Officer Krueger, he had consumed 3 beers between 2030 and 2130. Sergeant Jorsch could not observe any odor of an alcoholic beverage emitting from the breath or person of Correctional Officer Krueger and requested him to take a PBT (preliminary breath test). At approximately 2150, Correctional Officer Krueger consented to two PBT tests. Both PBT tests resulted in BAC readings of .000.

Sergeant Jorsch showed the BAC reading of .000 to Correctional Officer Krueger and advised him he would be fine to report for duty at 0300. Correctional Officer Krueger stated he was not fine and would not be able to report for duty at 0300, but would be in at 0700. Sergeant Jorsch advised Correctional Officer Krueger that he would advise his superiors that he would not be reporting for duty at 030.

Upon being advised by Sergeant Jorsch of Correctional Officer Krueger's refusal to report for duty, Lieutenant Cindy Detienne contacted Captain Karol Salata. After discussing the issue with Captain Salata, Lieutenant Cindy Detienne contacted Correctional Officer Krueger and advised him he was on paid Administrative Leave and not to report for duty until he was contacted by a representative of the Department. Correctional Officer Krueger was allowed to return to work on October 25, 2007, after being on Administrative Leave for one (1) day.

On October 26, 2007, Correctional Officer Krueger was served the Informing the Member information in written form. Item five (5) on the Informing the Member form states, "Refusal to respond during the investigation, or any response, which is untruthful, could result in your suspension or termination from the Sheboygan County Sheriff's Department."

On October 30, 2007, Lieutenant Cindy Detienne conducted a Garrity interview with Correctional Officer Krueger. At the start of the Garrity interview, Correctional Officer Krueger was served the Notice of Investigation. Paragraph

two (2) of this document states, “A member of the Sheriff’s Department is expected to respond truthfully to all such questions in an open manner. Failure to cooperate, whether by evasion, untruthfulness or choosing not to answer, may result in disciplinary action up to an including dismissal.”

During the course of the Garrity interview, Correctional Officer Krueger was evasive and untruthful in reference to his consumption of alcoholic beverages. Specifically, Correctional Officer Krueger’s responses as to the amount of time in which the alcoholic beverages were consumed were evasive or untruthful. Furthermore, during the interview, Correctional Officer Krueger stated he did not know the Department’s policy on Employee Call-in and Overtime Requirements.

After the Garrity interview, Correctional Officer Krueger was again placed on Administrative Leave.

Based on Lieutenant Cindy Detienne’s investigation Correctional Officer Krueger was found to have violated the following Department policies:

1-12-4 (21) “It shall be the responsibility of the employee to know the Department policies, rules, orders, directives and bulleting board information relative to employment.” Action taken – Verbal-written reprimand

1-12-4 (26) “Insubordination, including refusal to perform a work assignment, is prohibited.” Action taken – Written reprimand

1-9-9 (3) “Excuses for noncompliance will be evaluated by the supervisor and division commander on a case-by-case basis. When an excuse is deemed invalid, the employee will be subject to disciplinary action including discharge as the circumstances may warrant.” Action taken – one (1) day unpaid suspension

1-9-9 (4) “Employees who refuse to comply with call-in or overtime requestys will be subject to disciplinary action including discharge as the circumstances may warrant.”

1-12-4 (15) (Jorsch) “Untruthfulness by an employee regarding official Department business with a superior or a prosecutor will not be allowed.” Action taken – six (6) days unpaid suspension.

Violation of Notice of Investigation (Detienne Garrity interview evasiveness) “A member of the Sheriff’s Department is expected to respond truthfully to all such questions in an open manner. Failure to cooperate, whether by evasion,

untruthfulness or choosing not to answer, may result in disciplinary action up to and including dismissal.” Action taken – termination.

1-12-4 (15) & Violation of Informing the Member (Detienne Garrity interview untruthfulness) “Untruthfulness by an employee regarding official Department business with a superior or a prosecutor will not be allowed,” and “Refusal to respond during the interrogation, or any response, which is untruthful, could result in your suspension or termination from the Sheboygan County Sheriff’s Department.” Action taken – termination.

ACTION TAKEN: Correctional Officer Krueger shall receive the following discipline. A verbal-written reprimand for violation of Department policy 1-12-4(21), a written reprimand for violation of 1-12-4(26), a one (1) day unpaid suspension for violation of Department policy 1-9-9 (3), a one (1) day unpaid suspension for violation of Department policy 1-9-9 (4), a six (6) day unpaid suspension for violation of Department policy 1-12-4 (5) (Jorsch), and termination for violation of Department policy 1-12-4 (5) (Detienne Garrity). Any future misconduct will result in progressive discipline appropriate with the severity and/or frequency of your misconduct.

On a five-point Employee Performance and Development Review for 2004, 2005 and 2006, Krueger received cumulative scores of 3.23, 3.3 and 3.42 respectively, indicating he had slightly exceeded expectations each year.

According to the evaluation issued in the spring of 2005, Krueger met expectations in 19 categories and exceeded expectations in 13. Among the areas in which he exceeded expectations were Knowledge of Job, Quantity of Work, Dependability, Attendance, and Cooperation. Among the comments:

QUANTITY OF WORK (3.50): Officer Krueger is reliable in his completion of technical and conceptual tasks. He strives to excel in his duties, and when his daily duties are completed, he participates in extra duties as well. Larry generally attempts to complete auxiliary tasks on top of his expected duties, and strives to maintain the balance between his work and his co-workers, trying to facilitate them when and where he can.

DEPENDABILITY (3.08): As previously stated, Officer Krueger is reliable and competent in his duties. Larry is a self-started, and rarely if ever needs to be told to complete a task. On the contrary, Larry typically strives to complete his tasks in a timely manner, moving on afterwards to help others in their duties or complete other necessary tasks about the facility. Larry’s work is timely, showing his knowledge of timetables and his ability to prioritize tasks responsibly.

ATTENDANCE (4.33): Larry had only one sick day last year, which was more than acceptable, and had no recorded instances of being tardy. Larry rarely, if ever, leaves his work area without justification, taking only scheduled breaks and moving to other areas when and where his duties require him to.

ADDITIONAL COMMENTS: Officer Krueger is a solid officer with the knowledge of his professional experience behind him. He provides laudable service to his department through his performance of extra duties and his dedication to useful knowledge outside the scope of his duties, such as maintaining First Responder Certification. He is to be commended for his hard work and continuous effort for making this facility an effective, efficient correctional facility.

In 2005, Krueger met expectations in all areas except Initiative and Attendance, in which he was rated as “highly satisfactory.” According to the review:

INITIATIVE: Larry is a self-motivator and self-starter. He is an Officer who does not need prodding or reminding as to when to start a task. When work needs completing, Officer Krueger is there to start. I also enjoy Larry’s willingness to take on extra duties without complaining. He is valuable in his ability to assess medical concerns such as High Blood Pressure problems or other medical issues. He also, on his own, makes sure the Air Packs are full and the units in good condition.

ATTENDANCE: Officer Krueger has a very good record of attendance. He rarely uses sick leave. In the past calendar year, Larry only used 2 days of sick leave. He is a prudent Officer who reports for his Job duty on time.

In 2006, Krueger was given a score of 3 four categories (Job Knowledge, Efficiency, Initiative and Getting Along with Others) and a score of 4 in three, as follows:

ATTITUDE: Larry has a good attitude in this category. Larry’s personality enables him to express his views and feelings in a calming, direct way which is non-abusing and non-threatening to his peers. This ability of calmness also is an asset when he needs to deal with disruptive inmates. He can converse with Inmates in a constructive, common sense approach which they understand and appreciate. Larry is also quick to point out informative ways to improve our operations. When he detects a problem, he will notify supervision.

ATTENDANCE: The record indicates Larry used ... sick day in 2006. This is a highly commendable accomplishment. Larry is always one to report in plenty of time to start his shift.

DEPENDABILITY: I find Office Krueger to be very dependable as an Officer. He works on completing duties ahead of schedule, especially when informed of upcoming problems or a rash of bookings. Officer Krueger uses his time wisely and can always complete work on his own with little or no supervision. Larry also brings in added responsibility by being able to aide (sic) our Nursing Staff with his experience in medical care. He is able to assess when medical care is needed, especially in emergency situations.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the union asserts and avers as follows:

Because of the devastating effect a determination that the grievant had lied would have on his future employment in law enforcement, the employer's standard of proof should be "beyond a reasonable doubt."

The employer was wrong to credit the observations of Jorsch and the PBT reading rather than the testimony of the grievant and his spouse, who consistently described his drinking that night. Despite admitting that grievant could have indeed drunk as he said he did, the employer improperly terminated grievant solely on the word of Jorsch and the PBT test.

Even though the Alocensor PBT is based on scientific principles, it is still just a machine, with very little evidence in the record of its accuracy, either of the model or this unit. Indeed, this particular unit tested ten percent below less than an hour later. Calibration tests were inconsistent and untimely. False negatives do occur. That the PBT is inadmissible to prove criminal alcohol offenses evidences their unreliability. Further, the tool of the PBT was misused when Jorsch administered both tests improperly.

A trusted, hard-working veteran officer should not be terminated solely on the basis of a suspect PBT test and Jorsch's limited observations.

As to the verbal reprimand, the employer did not prove the grievant did not know the call-in procedure. That written policy is unclear regarding an employee's obligation to return a call-in message when the employee had a valid excuse. There is no clear directive to return a call when the employee believes he is excused.

Even though it may appear the grievant admitted he didn't know the call-in policy, he was really only admitting he didn't understand his obligation. Since he wasn't physically fit for duty, he understood he was excused. The grievant's confusion is understandable, and he certainly didn't break any clear written rule.

The written reprimand for insubordination for refusing the order to report at 3:00 a.m. is invalid because the grievant did not actually refuse to comply – he believed he was unfit and therefore excused. Having a valid excuse for not coming to work – as the grievant did – is not insubordination.

Testing positive for alcohol after reporting to work would have subjected the grievant to discipline, so his right to avoid discipline allowed him to assert the valid excuse for not reporting.

Jorsch didn't order the grievant to work, but merely told him he was fine now and would be fit to report at 3:00 a.m.

Then, without discussing the matter with the grievant or allowing him to comply, the employer put the grievant on administrative leave. The grievant's statement to Detienne that he would do anything to avoid being placed on leave does not sound like insubordination, which requires the employer to establish it had given a clear and direct order, and that it had informed the employee of the consequences for failure to comply.

But here, the supervisor never spoke to the employee until after the decision had been made to place him on leave. There's a good chance a discussion would have led to grievant's compliance; indeed, once he learned (too late) of the consequences, he almost begged to be let come in. The grievant should have been given a warning and an opportunity for compliance.

The one-day suspension because the employer considered the excuse grievant gave for non-compliance is the same conduct involved in the insubordination charge.

The grievant's excuse was both true and valid. He had been drinking, and was unfit for duty at the time of the call-in, as specified in the policy.

The additional one-day suspension for refusing to comply with the call-in request under sec. 1-9-9, procedure 4., is invalid because it punishes the same conduct for which grievant received the written reprimand and one-day suspension. That is improper triple jeopardy.

The six-day suspension for giving an invalid and allegedly untrue excuse to Jorsch is again punishment for the same conduct, which the employer cannot punish *ad nauseum*.

The grievant should not have been terminated for being evasive or untruthful during the Garrity interview because he answered the questions carefully and deliberately. The grievant was not intentionally ambiguous or vague when

answering questions about whether a PBT is a good indicator of alcohol use; he legitimately didn't know. Being uncertain or careful is not the same as being evasive, especially on a question, such as this, that is a trap.

The grievant was also not being evasive when answering "yes and no" to the question of whether he had a responsibility to call Detienne back, because he legitimately believed his valid excuse meant he didn't have to call. He may have been wrong, but there is a difference between being wrong and being evasive. Greivant's acknowledgement that he learned later that he did have to call back did not indicate he knew that all along.

The grievant was obviously confused by employer's question of why he was fit to report on a prior occasion when his PBT showed zeroes, but not this time. Although his answer may have been somewhat awkward, he was not withholding any information

Because the grievant's statements to Jorsch and Detienne about his drinking were truthful, his termination for untruthfulness in the Garrity interview was invalid. The employer's evidence that grievant was not drinking is both circumstantial and unreliable, in that neither Jorsch's testimony nor the PBT breath sample provide sufficient evidence to override the consistent testimony of grievant and his spouse. The lack of observable signs of intoxication provides no assurance grievant did not have any alcohol in his system. The encounter between Jorsch and the grievant was brief, took place with little illumination, outside, after the grievant had brushed his teeth, and did not involve any field sobriety tests. Jorsch's observations do not provide the clear and convincing evidence that the grievant did not drink as he said he did, especially since Jorsch did not determine that the grievant had not had anything to drink at all – only that he was at that time fit to report.

There is no evidence that the PBT is completely reliable, either in general or as regards this particular unit, especially since the unit had not been calibrated in over two months and Jorsch administered both tests improperly. The employer has not established that the grievant was untruthful about drinking that night.

Nor has the employer established that the grievant was untruthful about whether he drank beer while on the phone with Detienne that night.

The accusations against the grievant are odd considering his reputation for trustworthiness and straightforwardness over 9.5 years, and completely out of character. Substantial character evidence raises doubts as to whether grievant committed the acts for which he has been disciplined.

Further, the employer's conduct in sending a uniformed deputy to the grievant's home – and only the grievant's home -- waking him, and requesting a breath sample, solely to enforce the call-in policy, was such an unreasonable invasion of the employee's privacy that all evidence which the employer obtained should be excluded, as it would be in a criminal case. The employer's practice of harassing employees in this manner should be stopped.

Even if the grievant were guilty of all the misconduct alleged, discharge would still be too harsh a penalty, given the employee's excellent record and all the circumstances. The seriousness of the alleged misconduct is mitigated by the fact that it appears to have been a highly isolated, spontaneous mistakes, and it was the employer that put the employee in the uncomfortable and confusing position.

Because the employer violated the greivant's rights to privacy and against unreasonable searches, the evidence from the PBT should be disregarded. But even if it is not, the employer has not proven that the grievant committed the conduct alleged. The discharge should be overturned and the grievant made whole. But even if the grievant had committed all the acts alleged, the penalty of discharge would still be too harsh, and should be reduced to a ten-day suspension.

In support of its position that the grievance should be denied, the employer asserts and avers as follows:

The Sheriff had proper cause to terminate the grievant due to his untruthfulness and evasiveness during an official investigation.

As to the appropriate standard for the burden of proof, it is generally accepted that the employer must demonstrate that the conduct occurred by a preponderance of the evidence. The grievance should be denied if the County has shown that it is more likely than not that the grievant engaged in the conduct that justifies his discharge.

The grievant was discharged for his conduct during the investigatory interview. As the grievant essentially admitted at the arbitration hearing, it is well known with the department that employees who are untruthful or evasive during Garrity interviews are discharged. The grievant received notice of the probable consequences of his actions.

The rules that grievant violated – the need for truthfulness and accuracy -- were reasonably related to a proper objective of the department. Inasmuch as the department undertook every reasonable effort to determine whether the grievant had, in fact, been untruthful during his interview, a complete investigation was

conducted. The department even attempted to replicate the situation the grievant described. And the investigation was conducted fairly and objectively.

The employer obtained sufficient proof that the violation took place. Despite striving mightily to argue that it is possible for the grievant to have been telling the truth, it has come away empty handed. The testimony of Lt. Riddiough does not support the union's argument.

An experienced sergeant concluded from his own personal observation that the grievant had not been drinking. Several knowledgeable officers, who know from their own experience someone who has been drinking does not show a .000 on a PBT, concluded there is no realistic probability that the grievant was telling the truth. Disagreeing with their conclusion requires pure speculation.

Beyond the question of untruthfulness, the grievant's evasiveness is an independent and sufficient alternative ground for his termination. He was evasive during the interview concerning the time period in which the beers had been consumed, concerning his knowledge of the policies regarding call-ins and overtime, and concerning his knowledge of the accuracy and reliability of a PBT test. His lack of forthrightness during the interview failed to meet the minimum standards the Sheriff's Department can reasonably expect of its officers.

The employer has applied its policies evenhandedly and without discrimination. The uncontroverted testimony was that the Department has consistently applied the same penalty when an officer has been found to have been untruthful or evasive during a Garrity interview.

The degree of discipline was reasonable. The daily freedom or confinement of many people depend on the truthfulness and reliability of correctional officers. If the Department cannot trust an officer to be truthful concerning his own conduct, it cannot trust that officer with the necessary degree of control over inmates' lives. To ensure that the Department was properly exercising its responsibilities to the public, termination of the grievant was the only option.

In reply, the union posits further as follows:

The employer errs in claiming that Lt. Detienne called each of the officers on the Force List who were available to work. She did not do so, but only called those she felt deserved a "force" due to the amount of times they had previously been forced. Her targeting of just a few employees, particularly the grievant, adds to the egregiousness of the employer's conduct. Further, the employer's claims of the need to enforce the call-in policy are seriously weakened by the obvious fact that there were several substantial alternatives the employer did not

utilize. The employer's actions were not justified by any legitimate business need.

The employer further errs in claiming that the PBT used on the grievant was found to be working properly after the incident. It was not, but was reading .01 low. The confusion and uncertainty caused by the employer's erroneous and incomplete calibration, plus the procedural errors Jorsch made, raise doubts about what the PBT evidence means.

The employer is wrong to cite as evidence of the grievant's evasiveness the fact that he did not have an explanation of how his statements about his drinking could be true given the results of the PBT. The fact that the grievant did not have an explanation does not mean he was being evasive; he just didn't know.

The employer errs further in stating the grievant was evasive during the Garrity interview concerning the time period during which the beers were consumed, concerning his knowledge of the policies regarding call-in and overtime, and concerning his knowledge of the accuracy and reliability of a PBT. That the grievant struggled to answer questions about the PBT is not evasiveness, but only due to his lack of knowledge.

Despite claiming that the department has a strong history of terminating employees who are found to have been untruthful or evasive during an official investigation, the employer failed to provide any examples of that.

Given the impact an adverse ruling would have on the grievant, the employer errs in maintaining it only needs to demonstrate that the conduct occurred by a preponderance of the evidence. A higher standard of evidence should be required.

Despite the employer's legitimate interest in having its officers be truthful, even if the allegations herein are true, this was a first offense and an isolated incident regarding minor administrative matters. The alleged untruthfulness did not involve grievant's duties as a correctional officer, but only concerned his relationship with the department as an employee. The allegations do not involved matters of high importance or sensitivity, or any moral turpitude.

Despite its claims of making every reasonable effort to investigate the accuracy of a PBT, the employer produced precious little evidence that the device used was accurate. Given variables of size and conditions, Bruckbauer's experiment was inconclusive.

Despite claiming that its investigation was fair, its results were not fair. The employer unfairly discriminated against the grievant and violated his privacy, so that all evidence thereby obtained should be disregarded.

The employer errs in claiming that it obtained sufficient proof that the violation took place. It did not. And the employer did not consider carefully enough the inherent unreliability of its evidence and the procedural defects in its methods.

The arbitrator should not sanction the employer's needless violation of the grievant's privacy rights and its unreasonable search of his person, and should exclude any evidence obtained. Even if the employer's allegations were true, to the extent that the employer's egregious behavior directly provoked the grievant's reaction, such reactions should be disregarded, or at least some mitigation attributed.

The employer failed to prove by clear and convincing evidence that the grievant committed any conduct worthy of discipline, neither the observational or the breath test evidence were reliable enough to establish with any level of certainty that the grievant was untruthful, and the grievant was not insubordinate. Accordingly, all discipline in this matter should be removed and the grievant made whole.

In reply, the employer posits further as follows:

The union errs in maintaining that the employer should be required to show the grievant's guilt beyond a reasonable doubt. Further, the only authority the union cites utterly fails to support that proposition. It is not a crime to be sober, and, except for certain fraternities, being completely sober is not even generally considered as stigmatizing behavior. There is no justification for considering the key factual dispute – whether the grievant had in fact been drinking – under any standard other than “preponderance of the evidence.”

Since the union virtually concedes the PBT establishes that it is likely the grievant was not telling the truth when he claimed to have had three beers that night, the county introduced sufficient evidence of the grievant's untruthfulness. The fact that PBT's are used by the State of Wisconsin to establish probable cause means that the officer must have a preponderance of the evidence. Despite the union attempts to confuse matters, the issue is not whether the grievant was impaired, or had anything at all to drink – the issue is whether the grievant was telling the truth when he said he had three beers over the course of an hour, ending twenty to thirty minutes before the PBT was administered. Had the grievant been telling the truth, his PBT would probably have been between .02 and .03. Absolutely no evidence was submitted of even

one instance of a functioning PBT reading .000 when given to a subject who had been drinking.

The union further errs in not accurately describing Jorsch's evidence. He did not concede he did not get a valid reading on the first test. And he did obtain a successful test on the second test, and thereafter tested the PBT to verify it was functioning properly. The fact that the test result was .09 instead of .10 was due to the solution probably degrading over time, and does not matter.

The grievant's only evidence he was telling the truth was the uncorroborated testimony he and his spouse gave. The grievant was committed to his initial falsehood and had to maintain his story.

The employer also introduced sufficient evidence of evasiveness. His conduct throughout was a clear exemplification of not responding in a direct and straight-forward manner. The grievant obviously felt trapped by the conflict between his own knowledge of the reliability of the PBT and the fact that such an admission would be tantamount to admitting he had lied.

Given these violations, the arbitrator should not substitute his judgment for that of the employer. Termination was the proper penalty.

Finally, the union's claim that the department made an unreasonable intrusion into the grievant's privacy and conducted an illegal search is preposterous. The visit to the grievant's home would not have been necessary if the grievant had returned the call from Lt. Detienne. And the PBT -- which the grievant voluntarily agreed to take -- was offered because he was openly expressing a fear he was too intoxicated for duty and would be subject to discipline if he reported. The PBT was a way to demonstrate that he was fit for duty, and provided the grievant with protection from possible discipline if he did report. Nothing about this situation affects the existence of proper cause for the discipline.

DISCUSSION

As reflected in the Employee Report of November 13, 2007, the employer imposed several disciplinary sanctions on Krueger, ranging from a verbal-written reprimand to termination. The union seeks to have all disciplinary actions nullified and all references thereto removed from the grievant's personnel records, and the grievant made whole.

In order to sustain discipline, an employer generally must prove by a preponderance of the evidence the several elements of its case. However, in acknowledgment that certain allegations are so serious -- especially concerning immorality and illegality -- some arbitrators apply a higher standard of proof on the employer in cases where denial of the grievance would

impose an exceptional and lasting reputational or professional penalty. As it has been said, when a discharge “could destroy an employee’s reputation in the community” and significantly if not permanently damage “his or her future employment prospects ... many arbitrators insist on a higher standard of proof, requiring ‘clear and convincing evidence’ of the employee’s guilt.”³

Given the profound reputational and professional implications of a determination that a correctional officer has been evasive or untruthful, I believe the employer needs more than a simple preponderance of the evidence. But I do not agree with the union that this case calls for the criminal standard of “beyond a reasonable doubt.” In this instance, I adopt the standard of “clear and convincing evidence” regarding the charges of evasion and untruthfulness.

But having claimed that the stigmatizing effect of a determination that a correctional officer has been evasive or untruthful is so profound that I should use a higher standard of proof, the union cannot claim that the allegation relates only to “an isolated incident regarding minor administrative matters.” Being evasive or untruthful during an official investigation certainly subjects a correctional officer to discharge, even for a first offense.

The employer imposed a verbal-written reprimand for Krueger’s alleged violation of section 1-12-4 (21) of the Policies and Procedures Handbook, which makes it “the responsibility of the employee to know the Department policies, rules, orders, directives and bulletin board information relative to employment.” Inasmuch as Krueger himself stated at his “Garrity” interview, “I’m not familiar with the call-back procedure ...I was not really familiar with the procedure and since this time I have gone into the policy manual and looked at it,” it is readily evident the record evidence supports the employer’s determination that a violation occurred. A verbal-written reprimand for such a violation is certainly within the appropriate range of discipline for such an offense. The grievance is therefore denied as to this element of the Employee Report.

The employer next imposed a written reprimand for Krueger’s alleged violation of section 1-12-4 (26) of the Handbook, which prohibits “Insubordination, including refusal to perform a work assignment ...” But as the union correctly notes, “insubordination” is a precise term in labor relations, and requires the employer to establish two distinct elements – that “the employee was given a clear and direct order and the employee was informed of the consequences for failure to comply with such an order.” LINCOLN WOODS PRODUCTS, A-5578 (Crowley, 8/97). As the arbitrator elaborated:

It is generally recognized that in order to conclude that just cause exists for the imposition of disciplinary action for Insubordinate conduct, the following events must occur:

³ *The Common Law of the Workplace*, St. Antoine, ed., BNA Books, Washington D.C., 2005, sec. 6.10

1. An authorized Managerial Employee, understood as such by the Employees under whom they work, issues a clear and explicit order or directive that a reasonable Employee would understand both its meaning and that it was indeed such a directive;
2. Followed by a clear and explicit pronouncement of the penalty that may be imposed for the Employee's failure to comply therewith; and
3. The Employee's clear and explicit refusal to follow the order or directive. SYNTEC INDUSTRIES, 99 LA 105 (Stanton, 1992).

In explaining why “(t)here is a difference between being asked to do something and being directed to do something,” Arbitrator Crowley gave an example very relevant for this instant controversy: “Employees may be asked to work overtime and a refusal would not be insubordination, but if directed or ordered to work overtime followed by a refusal may very well be insubordination.” Although Jorsch certainly made it clear that Detienne needed and expected Krueger to report, Jorsch neither issued a direct order that Krueger do so, nor stated the penalty for his failure to comply. The statement in the Informing the Member notice that Krueger refused to report “after being ordered to” is not correct. While Krueger’s conduct was clearly unprofessional and constituted a patent shirking of his responsibility, it was not insubordination. As this charge is not proved by a preponderance of the evidence, the written reprimand for insubordination is found to be without just cause, and this element of the grievance is therefore sustained.

The employer next imposed a one-day unpaid suspension for Krueger’s alleged violation of Handbook section 1-9-9 (3), which provides that, “Excuses for noncompliance will be evaluated by the supervisor and division commander on a case-by-case basis. When an excuse is deemed invalid, the employee will be subject to disciplinary action including discharge as the circumstances may warrant.” Krueger’s excuse for not complying with the request that he report for overtime was that he was unfit for duty due to his having been drinking. But Krueger, a large man, said he drank three light beers between 2030 and 2130 on October 20; he was not needed at the Detention Center until five hours later, at 0300 on October 21. Even if Krueger was truthful about his alcohol consumption on October 20, he would no longer be under the influence of alcohol at 0300 the next morning. Indeed, Jorsch had already told him that (along with his observation that Krueger seemed all right even then). The employer had just cause to find this excuse invalid and to impose a one-day disciplinary suspension. The grievance is therefore denied as to this element of the Employee Report.

The employer next imposed another one-day unpaid suspension of Krueger’s alleged violation of Handbook section 1-9-9 (4), which provides that, “Employees who refuse to comply with call-in or overtime requests will be subject to disciplinary action including discharge as the circumstances may warrant.” Section 1-9-9, Policy, provides that all employees who are requested to work overtime “are required to comply with the request,”

including employees “who are called in or otherwise requested to work during normally schedule off-duty time....” Krueger knew that his supervisor was requesting him to work overtime, and he chose to ignore her phone call, ultimately going to bed without even bothering to return her call. Given the exigent circumstances inherent in any overtime situation in a correctional facility – especially one for a 0300 shift – employees have the affirmative responsibility to respond promptly to a supervisors request to work overtime. A Sheboygan County correctional officer who knowingly ignores a supervisor’s phone call regarding an overtime call-in commits a violation of section 1-9-9- (4). By Krueger’s own admissions, the employer had just cause to find that he violated this provision. Again, a one-day unpaid suspension for such misconduct is entirely within the appropriate range of discipline. The grievance is therefore denied as to this element of the Employee Report.⁴

The remaining three disciplines – the six-day suspension, and the two terminations – allege that Krueger was untruthful and evasive in his encounter with Jorsch and in the “Garrity” interview.

The union complains that since this suspension and the terminations all involve the same underlying issue – whether or not Krueger had consumed three beers between 2030 and 2130 on October 20, 2007 – the multiple disciplines constitute multiple jeopardy. I disagree. I believe that while the statements which Krueger made were essentially identical – i.e., “I had three beers between 2030 and 2130 hours” – the circumstances in which he made the statement were sufficiently distinct to constitute separate events. That is, telling Jorsch on the night of October 20 that he had been drinking and telling Detienne during the “Garrity” interview on November 1 that he had been drinking are distinct and separate events and, if untrue, would constitute distinct and separate violations.

There is certainly a preponderance of the evidence that Krueger’ statement was untrue. Jorsch, a veteran road officer with extensive experience with people who had been drinking, and confident in his ability to spot alcohol use, testified he was within six inches of Krueger and didn’t smell any alcohol, and didn’t think he’d been drinking. Jorsch testified credibly that Krueger was not impaired at the time, and certainly would not be so at 0300 on October 21. He also testified he had never known a PBT to produce a false negative.

⁴ The union contends there is “no clear directive” for an employee to return a call-in call when the employee believes that s/he is excused. But there is a clear directive (1-12-4(4) that an employee must not “shirk responsibility, danger or disagreeable duties.” As Detienne correctly found, Krueger did indeed violate sec 1-12-4 (4). Even if Krueger was, as he said, in the bathroom at the moment Detienne called, he knew within moments that it had been she and what she wanted. Krueger knew his supervisor was trying to call him in for overtime, and he went to bed without returning the call. He says it figured since he wasn’t fit for duty, he didn’t have to. I disagree. A corrections officer who so knowingly ignores a call-in request is clearly shirking responsibility. The *determination* of whether the excuse was valid may be made subsequently, but its *announcement* – as with the absence from a regular shift on sick leave – must be made proactively. Interestingly, although I think this is one of the easiest violations to prove, and was recommended by Detienne, the Employee Report which terminated Krueger did not cite a violation of 1-12-4 (4).

And there was apparently at least one good PBT reading of .000. Although a PBT is a less precise mechanism than a breathalyzer, and may not be used as evidence in a criminal proceeding, it is a standard law enforcement tool used to establish probable cause that a person had been drinking, and about how much. Krueger himself has used a PBT to monitor persons reporting or returning to the detention center. The particular model involved herein – the Alcosensor III – has been certified by the Wisconsin DOT. Despite the union's attempt to minimize its significance, this is good testimonial and scientific evidence that Krueger had not done the drinking he said he had.

The union's affirmative evidence consists primarily of the testimony of the grievant and his spouse. Such testimony is usually considered so self-serving that its accuracy is also suspect. However, the grievant's spouse did testify credibly that the grievant had been drinking, as he said. Further, the employer holds a somewhat illogical position in *citing* Mrs. Krueger's statement about Krueger drinking while on the phone with Detienne as proof of Krueger's mischaracterization of that element to the evening, but *rejecting* her other testimony that he had also been drinking earlier.

Despite Jorsch's experience, the union challenges his observations, noting that he did not perform a field sobriety test, and that Krueger had already brushed his teeth and gone to bed, and was standing outside in uneven illumination. Moreover, given that a man of Krueger's size would not be impaired at 2150 after drinking three light beers from 2030 to 2130, Jorsch's clear and convincing testimony that Krueger was not impaired does not necessarily establish that Krueger did not drink the beers as he said he did.

The union also seeks to undercut the validity of a PBT in general, the accuracy of the unit Jorsch used that night, and the manner in which Jorsch administered the test. By Jorsch's own statement, at least one of the tests was likely invalid, and this unit itself read ten per-cent low just a few hours later. And the union offered testimony from Sheboygan Police Department Lt. Brad Riddiough, who claimed that he was aware of instances where people who admitted to drinking alcohol, took PBTs which produced results of .000.

However, Riddiough could not recall any specifics or particulars. And Jorsch's subsequent test of the unit established that the battery was not dead, and the .09 reading of the .10 test solution could be explained by expected degradation of the sample over time.

The union also cites the grievant's positive work record. The grievant does indeed have a positive work record, meeting or exceeding all expectations over his last three performance reviews. Of particular note for this matter is that Krueger thrice exceeded expectations in attendance, and did so twice regarding dependability, along with high marks for initiative, attitude, and quantity of work. As Detienne testified at hearing, Krueger has generally been a good employee, and prior to October 20 she felt she could trust him (but not afterwards).

There is a preponderance of evidence that Krueger did not drink three beers between 2030 and 2130 on October 20, 2007, meaning there is a preponderance of evidence that he was

untruthful when he so stated to Jorsch and to Detienne. However, due to questions about the execution of the PBT tests and Jorsch's observations I find that the employer has fallen just short of establishing the necessary elements by the clear and convincing evidence. I am also very troubled at the length of time between the event (on October 20) and the investigative interview (on October 30).⁵ I have therefore sustained the grievance and nullified the six-day suspension and the termination for untruthfulness.

The employer also maintains that Krueger's evasive answers during the "Garrity" interview provide independent and sufficient alternate grounds for its decision to terminate him. Specifically, the employer maintains Krueger was evasive "concerning the time period during which the beers had been consumed, concerning his knowledge of the department's policies regarding call-in and overtime requirements, and concerning his knowledge of the accuracy and reliability of a PBT test."

As I review the taped interview, I do not find Krueger to be at all evasive concerning the time period during which he drank the three beers; he maintained throughout that he got home about 2015, opened his first beer about 2030, and had finished drinking three beers by 2130. Krueger was extremely evasive, however, on the two other points the employer has cited (and several others as well). To say, as the union does, that Krueger answered the questions during the "Garrity" interview "carefully and deliberately" is an understatement. At times during the interview, Krueger took pauses before answering as long as 27 seconds. A brief review of the unofficial transcript of that interview, excerpted above, shows an employee abjectly failing to meet the standard for direct and complete answers that Sheboygan County Sheriff's Department legitimately expects of its correctional officers. The video of the "Garrity" interview establishes by clear and convincing evidence that the grievant was evasive concerning his knowledge of the department's policies regarding call-in and overtime requirements, and concerning his knowledge of the accuracy and reliability of a PBT test.

Had the employer established by clear and convincing evidence that the grievant was untruthful, I would have denied the grievance outright and affirmed his termination. However, while evasiveness is a very serious charge, in light of the grievant's commendable work record over a period of almost ten years, I believe that the employer did not have proper cause to terminate him solely on that basis, but did have proper cause to impose a very lengthy unpaid suspension.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

⁵ In CITY OF BERKELEY, 106 LA 364 (POOL, 1996) the arbitrator overturned a discharge because the employer's delay of two to three days in asking the employee about the allegations denied the grievant his rights to due process.

AWARD

1. That the employer had proper cause to impose the verbal-written reprimand and the two one-day suspensions, so the grievance as to those elements is therefore denied;

2. That the employer did not have proper cause to impose the written reprimand, the six-day suspension and the termination(s) for untruthfulness, so the grievance as to those elements is therefore sustained;

3. That the employer had proper cause to discipline but not terminate the grievant for evasiveness, so the grievance as to that element is therefore sustained in part and denied in part.

As remedy, the discipline shall be modified to consist of two one-day suspensions, to be served on the first two days the grievant would have worked following issuance of the Employee Report, and a one-year unpaid suspension, commencing on the date the grievant would have next worked following the two one-day suspensions.

Dated at Madison, Wisconsin, this 22nd day of August, 2008.

Stuart D. Levitan /s/

Stuart D. Levitan, Arbitrator

