

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**WAUPACA COUNTY**

and

**WISCONSIN COUNCIL 40, AFSCME, AFL-CIO, LOCAL 2771**

Case 159

No. 67009

MA-13707

(Klettke Discipline and Termination Grievances)

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**Appearances:**

**Mark F. Yokom, Esq.**, Davis & Kuelthau, S.C., 219 Washington Avenue, P.O. Box 1278, Oshkosh, Wisconsin 54903-1278, on behalf of the County.

**Mr. Michael J. Wilson**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite B, Madison, Wisconsin 53717-1903, on behalf of the Grievant and Local 2771.

**ARBITRATION AWARD**

According to the terms of the 2005-2007 collective bargaining agreement between the captioned parties, the parties requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and resolve a grievance filed on October 26, 2006 concerning the October 16, 2006 termination of Kathy Klettke.<sup>1</sup> The Commission appointed Sharon A. Gallagher as Arbitrator in these cases. Hearing in the matter was held on August 24, 2007 and was completed on December 3 and 4, 2007. A stenographic transcript of the proceedings (covering 18 witnesses' testimony and 683 pages of transcript) was made and received by January 9, 2008. Responsive briefs in the matter were agreed upon, with the County submitting the first brief, the Union the responsive second brief and the County replying thereto. The last brief herein was received on May 29, 2008, whereupon the record was closed.

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<sup>1</sup> Although there was only one file opened in this case by WERC, both the County and the Union have fully argued the merits of Klettke's grievance over the County's written warning issued on June 12, 2006 to Klettke as well as the grievance over Klettke's discharge. Both grievances will be decided in this Award.

### ISSUES

The parties were unable to stipulate to the issues to be decided in this case. However, they agreed that the Arbitrator could frame the issues based upon the relevant evidence and argument as well as the parties' suggested issues. The County suggested the following issues for determination:

- 1) Did the County violate Article 8 of the labor agreement when it discharged the Grievant on October 16, 2006?
- 2) If so, what is the appropriate remedy?

The Union suggested the following issues:

- 3) Did the County have just cause to discipline and/or discharge the Grievant?
- 4) If not, what is the appropriate remedy?

Given the fact that there are actually two grievances before me, which the parties argued at length, and that Articles 2 and 8 state that a just cause standard shall be applied to discipline and discharge cases, I believe the Union's issues more accurately state the controversies herein and they shall be decided in this case.

### RELEVANT CONTRACT PROVISIONS

#### **ARTICLE 2 – MANAGEMENT RIGHTS**

2.01 The Employer possesses all management rights except as otherwise specifically provided in this agreement and applicable law. These rights include, but are not limited to the following:

- A) To direct all operations;
- B) To establish reasonable work rules and schedules of work;
- C) To hire, promote, transfer, schedule and assign employees;
- D) To suspend, demote, transfer, discharge, and take other disciplinary action against employees for just cause;
- E) To layoff employees because of lack of work or other legitimate reasons;
- F) To maintain the efficiency of operations;

- G) To take reasonable action, if necessary, to comply with state and federal law;
  - H) To introduce new or improved methods or facilities or to change existing methods or facilities;
  - I) To determine the kinds and amounts of services to be performed as pertains to the operations and the number and kinds of classifications to perform such services;
  - J) To contract out for goods and services, provided, however, that no employee shall be on layoff or laid off or suffer a reduction of hours as a result of such subcontracting;
  - K) To take whatever action is necessary to carry out the functions of the County in situations of emergency;
  - L) To designate a person in charge to manage that department in the absence of the department head.
- 2.02 It is further agreed by the Employer that the management rights shall be exercised reasonably.
- 2.03 Nothing in this Agreement shall preclude the Employer from enacting its responsibilities under the Americans with Disabilities Act.

#### **ARTICLE 8 – DISCIPLINARY PROCEDURE**

- 8.01 The following disciplinary procedure is intended as a legitimate management device to inform the employee of work habits, etc., which are not consistent with the aims of the Employer's public function, and thereby to correct those deficiencies.
- 8.02 Any employee may be demoted, suspended or discharged or otherwise disciplined for just cause.
- 8.03 Suspensions shall not be for less than two (2) days, but for serious offense or repeated violations, suspension may be more severe. No suspension shall exceed thirty (30) calendar days.
- 8.04 Notice of discharge or suspension shall be given to the employee personally and written memorandum stating the cause thereof filed in the personnel office and a copy sent to the Union.

## ARTICLE 23 – BREAKS

23.01 Break times not to exceed fifteen (15) minutes shall be designated by department heads for times for individuals as close to mid-morning and mid-afternoon as possible so that maximum efficiency shall be maintained. Break time not taken is lost and may not be used to shorten the work day, or any other application thereof. It is understood that non-professional employees may not leave county property.

## RELEVANT COUNTY POLICIES

Individual situations and the seriousness of the incident must be considered when determining the appropriate level of discipline. In general, discipline is given in the following sequence:

**1st offense** – The employee will be given a verbal reprimand. The supervisor and/or Department Head shall give the employee the reasons for being disciplined and also the manner in which the employee shall correct his/her problem in the future. This verbal reprimand will be documented in writing by the supervisor and Department Head and shall be forwarded to the Personnel Department for placement in the employee's personnel file permanently. . . .

**2nd offense** – The employee shall be given a written reprimand. This letter, like the verbal warning will give the rule or policy broken or cite the area of poor performance and manner to improve performance. Written warnings will be placed in the employees official personnel file permanently. . . .

**3rd offense** – The employee shall be suspended for no fewer than two work days without pay. Employees who are considered exempt according to the Fair Labor Standards Act will be suspended in accordance with the requirements of the Fair Labor Standards Act. . . .

**4th offense** – The employee will be discharged by letter. Before any person is discharged, the matter shall be reviewed with the Personnel Director. In the event that immediate dismissal is required and the Personnel Director or Corporation Counsel is unavailable, the employee shall be suspended with pay by the person in charge of the department at that time pending investigation.

The disciplinary process may be initiated at any level consistent with the seriousness of the infraction. Copies of written reprimands, suspensions, or terminations shall be provided to the employee, the employee's supervisor, and the Personnel Director for placement in the employee's official personnel file permanently.

## **SECTION 15 – WORK RULES AND DISCIPLINE**

- A. **POLICY.** The purpose of discipline is to correct the job behavior and performance of employees. It is the sincere desire of all Department Heads and supervisors to help employees in every way possible in the event an employee has problems in his/her employment with the County. However, whenever the behavior or job performance of an employee is such that it interferes with or adversely affects the efficient or effective fulfillment of the mission of the department or that of the county organization, such actions shall be dealt with firmly. The discipline policy is uniform, applying equally to all departments and individuals. The Waupaca County Board has adopted an Employee Assistance Program for county employees. The employee, who is involved in a disciplinary action, will be referred to, and may if appropriate, at his/her discretion become involved in the program.

As a representative of Waupaca County to the public or as a provider of a service internal to the organization, each employee, as a condition of employment, accepts a fundamental obligation to promote and protect the interest of his/her employer. Performance of the job duties to an acceptable standard, dedication to duty, service to others, and the promotion of harmony and productivity in the workplace are the cornerstones upon which the entire employment relationship is based.

It is the obligation of each supervisory employee to foster such efforts and attitudes among their subordinates and to take disciplinary measures when work instruction, positive reinforcement and personal example alone are inappropriate or insufficient in producing the desired results. Any disciplinary action taken is to be applied fairly and to be commensurate with the behavior or job performance giving rise to such action.

- B. **EMPLOYEE RIGHTS.** Employees have the right to expect fair and impartial treatment in the administration of discipline. For that reason, each employee shall be entitled to recourse under the County's Employee Complaint procedures, in the event that he/she feels such disciplinary action to be unfair, unwarranted, or unduly harsh in terms of the infraction or performance cited. In addition, an employee who feels any such disciplinary action taken has been based upon illegal considerations prohibited by the Waupaca County Equal Employment Opportunity Policy shall be entitled to pursue redress without intimidation under the County's Equal Employment Opportunity Complaint Procedure which is outlined under the County's Affirmative Action Plan. No such right of

complaint shall reduce any employee's obligation to continue performing his/her work in accordance with departmental standards, to contribute to maintaining internal harmony within the workplace, and to promote and protect the interests of the County.

- C. **PROCEDURES.** In taking disciplinary action, the employee's supervisor shall identify the unacceptable behavior or job performance, shall verify the incident or conduct, and shall document the unacceptable incident or conduct. It is important to issue discipline as soon as possible after the incident which gives rise to the disciplinary action. However, it is recognized that delays in issuance may be warranted in situations requiring investigation and consultation.
- D. **GROUNDS FOR DISCIPLINARY ACTION.** The following non-exclusive examples shall be grounds for disciplinary action ranging from a warning to immediate discharge depending upon the seriousness of the offense in the judgment of management:
1. Incompetence or substandard performance of assigned job duties.
  2. Dishonesty or falsification of records including time cards.
  3. Insubordination (refusal to carry out a reasonable order, insolence, talking back, arguing, verbal abuse or assault of a supervisor, co-worker, or member of the general public).
  4. Theft.
  5. Destruction, negligent or unauthorized use or other misappropriation of county equipment or property.
  6. Possession, sale, exchange and/or use of intoxicants, illegal drugs or controlled substances while on duty or closely preceding duty. Abuse of prescription or other medications. (This rule may be suspended at the discretion of the Department Head to facilitate undercover investigations.)
  7. Fighting or creating a disturbance among co-workers resulting in an adverse affect upon morale, production, or maintenance of proper order.
  8. Disorderly or immoral conduct including off-duty conduct which brings disrepute upon the individual or which reflects adversely upon the County as an employer.

9. Absence without authorized leave, or misrepresenting the purpose of an authorized leave.
10. Abuse of sick leave.
11. Habitual tardiness.
12. Use of official position or authority for personal profit, sexual purposes, or political advantage.
13. Harassment or sexual harassment.
14. Engaging in discriminatory or abusive conduct with respect to employees protected by equal employment opportunity laws.
15. Gambling on County property.
16. Disregard or repeated violation of safety rules and regulations.
17. Knowingly making false or malicious statements with the intent to harm or destroy the reputation, authority or official standing of individuals or organization.
18. Acceptance of any gift, favor or service that might reasonably be viewed as tending to improperly influence an employee in the discharge of his official duties.
19. Violation of established department work rules.
20. Negligent work performance or failure to perform duties in accordance with department standards.
21. Work stoppages such as strikes or slowdowns.
22. Failure to wear a seatbelt and otherwise comply with the law while driving an automobile in the course of employment. Failure to ensure that passengers comply with seatbelt laws.
23. Workplace violence.
24. Violation of policies regarding confidential information.
25. Other circumstances may warrant disciplinary action and will be treated on a case-by-case basis.

### STIPULATION OF FACTS

- 1) Video surveillance of Kathy Klettke was done on June 16, 2006 by Investigator Dave Maas. The video shows Klettke entering a Family Dollar Store in Clintonville, WI on June 16, 2006 at approximately 3:55 p.m. and leaving one hour later. The Union will stipulate that the video is of Klettke and that she was at the Dollar Store on that date, but it disputes the video times stated.
- 2) If Investigator Maas were to testify, he would say that the video equipment was operating accurately and correctly on June 16, 2006 and that the date and time stamps on the video tape and the visual depictions are an accurate pictorial of what Maas observed on June 16, 2006 as reflected in County Exhibit 2.
- 3) Sarah Binder would have testified that she had the ability to observe and did observe Klettke leave the County building on May 24, 2006, at approximately 11:30 in the morning, saw her leave the building on May 31, 2006, at approximately 12:15 p.m., and then finally saw Klettke leave the building on June 1, 2006 at approximately 10:50 a.m.; and that this information was communicated to Ms. Dorst either the day it occurred or the next day.
- 4) Dawn Jensen, a Social Worker with the County, was on-call on September 2, 2006. If called to testify Jensen would say that she was called to the Basina residence for a crisis situation. She arrived on premises at approximately 1:15 p.m. and left at approximately 1:45 p.m., and would further testify during that the time she was there, she did not see Ms. Klettke at the residence or on the premises.

### BACKGROUND

The Grievant, Kathy Klettke (Klettke) was employed by the County as a full-time Social Worker in the Department of Health and Human Services (H & HS) from 1994 until her discharge on October 16, 2006. At the time of her discharge, Klettke was a Social Worker II assigned as the County's Juvenile Crisis Worker/Outreach Prevention Specialist.<sup>2</sup> Klettke's position involved working with juveniles who had entered the County Court and/or mental health systems and who, along with their families, were receiving County services. Klettke's regular work hours were 7.25 per day, from 8 a.m. to 4 p.m. including an unpaid 45 minute lunch. H & HS does not have any rules/policies regarding what time to count toward the 7.25 hours per day (Tr. 443).

Klettke stated herein, without contradiction, that prior to June 12, 2006, her work schedule was very flexible; that she was expected to schedule her own cases and she often set "team meetings" with the mothers of children involved in her cases for the lunch hour; that she

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<sup>2</sup> No position description for Klettke's position was placed in this record.

regularly left from home (without first going into the office) for her first appointments of the day with clients; that she would often “flex” her work day starting an hour later or ending her work day one hour earlier when she worked to 5 p.m. the day before (Tr. 586; 622-3). No evidence was proffered to show that Klettke’s approach to her schedule was prohibited by any County rule or policy.

Klettke’s position included entering case notes and assessments on a State of Wisconsin internet program known as “eWISACWIS” which is designed to track and document contacts that H & HS professionals (including Social Workers) have with children who have entered the County Court/mental health systems. There is no County policy indicating when and how often Social Workers must complete and transmit these case notes and assessments in their juvenile cases to the WISACWIS site, and the County does not provide in-service training in this area (Tr. 215; 233) and the County has not educated employees regarding how to complete this work “within a timely manner” (Tr. 232).<sup>3</sup> No H & HS employees other than Klettke, had been disciplined for failing to timely or properly enter case notes and assessments into WISACWIS.

The County also has an internal calendaring system known as “DRI.” H & HS employees, like Klettke, have flexible schedules (Tr. 586 and 622). They use the “DRI” system to list their out-of-office appointments so that Department support staff and supervisors know where H & HS Social Workers are and when they will return to the office in case County managers or clients need them. H & HS professionals can fill out their “DRI” entries either minutes in advance or weeks in advance and these entries can be changed after the fact when out-of-office appointments or planned work is cancelled or changed (Phelan, Tr. 448-50; Dorst, Tr. 144 and 215). No Social Workers (except Klettke) have been disciplined for failing to change their DRI entries (later) to show that they did not do what they originally entered on the DRI. And it is undisputed that Social Workers have never been expected to correct their DRI entries after the fact (Tr. 450, 452, 453). No training or in-service is offered on DRI. The DRI has not been used as a time accounting report (Tr. 454), and no County policy addresses it.

H & HS employees are expected to complete and submit bi-weekly timecards and compensatory time reports which are then approved by their supervisors before being submitted for payment. H & HS also has a voluntary, rotating on-call system for response to crisis situations after hours which Social Workers can agree to participate in. Volunteers are issued a beeper and a cell phone and they are then on-call up to one week at a time, from Thursday at 4 p.m. to the following Thursday at 8 a.m. Volunteers can switch weeks with each other or assist each other to cover their on-call time. There is no County policy which requires H & HS supervision be informed of volunteers switching weeks or covering for each other or that they are traveling out of state while on-call (Tr. 656). Rather, on-call volunteers

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<sup>3</sup> Although Dorst stated Klettke’s case notes and assessments were “in general” late being entered into the system, Dorst later admitted none of Klettke’s reports were missing or late (Tr. 232).

must inform the Sheriff's Department of these arrangements (Tr. 573-4) just so that the Sheriff's Department dispatcher can reach them (or their back-up) by paging them at any time outside regular H & HS office hours. The on-call Social Worker must then use the H & HS cell phone to call the Sheriff's Department upon being beeped and to call clients who need assistance (Cty. Exh. 26).<sup>4</sup> If there is a problem with a pager (malfunction or if the on-call worker is out of range), the on-call Social Worker is expected to contact the Sheriff's Department dispatcher to give alternate numbers where he/she can be reached. While on-call, Social Workers claim comp time for their time spent responding to after hours contacts. Dorst offered no evidence to dispute that Kevin Will acted as Klettke's back-up on September 28 and 29, 2006 (Tr. 654) or that Klettke failed to deal with any on-call contacts that weekend.

Four weeks out of the year the County requires H & HS employees to complete time study sheets. No evidence was provided herein to show H & HS employees (including Klettke) were told to fill out these sheets accurately or face discipline (Tr. 100). H & HS employees have PC's in their offices which they use to e-mail County staff and supervisors. The County generates computer logs which, at 15 minute intervals, show when H & HS employees log onto and off of their computers and when they access the internet. No rules/policies were placed in this record that require H & HS employees to log onto or off of their computers at any certain times (Tr. 231).

Because H & HS employees have access to confidential information about clients which must be protected, the H & HS offices are locked after regular business hours and Social Workers have been issued key cards which they use, after business hours, to enter the building, and to enter the H & HS office suite on the second floor of the County Courthouse building by swiping their key cards (Tr. 460-1). This system does not require employees to swipe out in order to exit the H & HS offices or the building. Each H & HS employee has their own key card which identifies them as they enter the building by generating an electronic report which shows the employee's key card number and their time of ingress (Tr. 140). No evidence was submitted to show that when two employees swipe in, one after the other and the door opens, whether both swipes are recorded (Tr. 463-4)<sup>5</sup> and no evidence was submitted to show key card door maintenance and repairs.

There are audio tapes of all Sheriff's Department dispatch calls. No one in management checked/listened to these tapes regarding contacts with Klettke prior to deciding to terminate Klettke (Tr. 650-52). Video tapes are made of activities around the Jail entrance to the Courthouse from the public parking lot. No one in management checked/looked at these video tapes regarding Klettke's comings and goings (Tr. 339). County H.R. Director Welch confirmed that there have only been two prior cases of record falsification by County employees and that in both cases the County issued the employees written warnings (Tr. 302); and neither of these cases occurred in the H & HS Department (Dornfeld, Tr. 273-4; Welch, Tr. 301).

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<sup>4</sup> Dorst stated that on-call workers are not expected to keep the County cell phone turned on because the cell phone's battery can run down.

<sup>5</sup> Klettke was the only H & HS employee who was required to swipe in and out each day (Tr. 460-1).

When an H & HS employee is disciplined, the supervisor is expected to have a meeting with the employee to discuss the matter. Even if the discipline is a verbal warning, it is memorialized in a document which, according to County policy, should be dated and signed by the supervisor and the employee, acknowledging receipt of a copy (Tr. 82-83). Copies of signed discipline are normally retained by the Department and County Human Resources (Tr. 227; 256; 293).

Klettke had the following record of discipline prior to her discharge.<sup>6</sup> On June 28, 2005, Klettke was issued a verbal warning “citing a June 16, 2005” incident (without comment). Klettke and Dorst signed and dated this verbal warning on June 28, 2005.<sup>7</sup> Klettke acknowledged by signing that she had received a copy of the verbal warning.

**Explanation of incident(s) and Disciplinary Action # from Waupaca County Policies and Procedures/Bargaining Unit Contract/Department Policies**

Section 15, Part D, #1, Substandard Performance of Assigned Job Duties and 20. Failure to perform duties in accordance with department standards. Kathy had been instructed to provide a report outlining how she would implement the written instructions given her about her job. She did not do so. In addition, she sought to close cases prior to those cases having the necessary documentation, against specific instructions to complete necessary documentation prior to closing. A specific plan for how Kathy will change her current work habits in order that her job be completed is needed immediately, given that we began discussing the necessity of that plan in October, 2004.

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Note: To the employee you are hereby given this notice in order that you may have an opportunity to correct the incident noted. If you fail to correct your actions as above listed or engage in any other violations of policies/procedures, you may be subject to further disciplinary action up to and including discharge.

The Employee Assistance Program (EAP) is available to employees who may have problems which may interfere with work performance.

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The “specific plan” referred to above, for how Klettke would change her work habits to accomplish her job duties was not placed in this record.

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<sup>6</sup> No County system of written evaluations appears to exist and no evaluations of Klettke were offered herein.

<sup>7</sup> On the form there is an area which refers to “Previous Disciplinary Action” and states the type of discipline (Verbal or Written Warning or Suspension) as well as the date(s) thereof. No “Previous Discipline” was listed on this June 28, 2005 warning. The details of the incident on June 16, 2005 which triggered the June 28, 2005 verbal warning were never described herein by Dorst, Klettke or any other witness. This verbal warning was never brought to arbitration.

FACTS

**A. Events leading to the June 12, 2006 written warning:**

On June 5 or 6, 2006, Dr. James Fico<sup>8</sup> issued the following memo to Klettke, which he discussed with Klettke that day. This memo was prompted by Dorst bringing information to Fico about Klettke's work time issues:

Kathy,

As I mentioned last time I reviewed your time card, it needs to be precise your times of being on the job were actually as follows:

5-22 5.5 hrs  
5-23 6.5 hrs  
5-24 6.0 hrs  
5-25 6.0 hrs  
5-26 Unknown, but a maximum of 6.5 hrs  
  
5-30 6.25 hrs  
5-31 5.0 hrs  
6-1 6.5 hrs  
6-2 7.25 hrs vacation

I prefer that you turn in a time card that reflects these actual hours.

. . .

Dorst further explained that after Fico issued this memo, she (Dorst) met with Klettke. When Klettke refused to voluntarily change her own time cards, Dorst then changed Klettke's time-cards for May 22 through June 10, 2006 and docked Klettke's pay thereon.<sup>9</sup> Klettke refused to change her own time cards because she believed she had recorded her time accurately (Tr. 125). Dorst described the sequence of events on this point as follows:

BY MR. YOKOM:

Okay. Did you discuss the changes that you made to this time card with Ms. Klettke?

A Yes, I did.

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<sup>8</sup> Dr. Fico was not called as a witness herein.

<sup>9</sup> County Exhibit 8, pages 2A and 1B show that instead of being paid for 72.50 hours' straight pay each two weeks (full-time hours), Klettke received 48.25 hours (May 21-June 3) and 64.25 hours (June 4-10) at straight time. Dorst also changed Klettke's comp time report for June 10 through 16, 2006 so that Klettke received only 9 hours of comp time for her week of on-call work (County Exh. 9).

- Q When?
- A I personally had a discussion with her about the changes that were made to the time card when I made the changes to the time card and handed her a copy of the time card that was being turned in with the changes I had made. Prior to that, I had had a discussion with her along with Dr. Fico about accurately recording her time on that time card. Prior to that conversation, Dr. Fico had presented her with page 1A of this exhibit that reflected the times that I changed the times to on the time card.
- Q All right. Let me see if I can break that down so it chronologically makes sense. You received this time card, which is page 2A of County Exhibit 8, right?
- A Correct.
- Q You investigated the matter using these records that we have gone through, correct?
- A Correct.
- Q And you made the changes to the time card that are handwritten on there?
- A Correct.
- Q You then presumably discussed that with Dr. Fico?
- A Yes.
- Q Dr. Fico then –well, how soon after you received this time card from Ms. Klettke did you make those changes? How long did it take for you to investigate this?
- A I reviewed all – I received the time card on Friday afternoon, I reviewed all of the records that I had supporting the time over that weekend and notified Dr. Fico of my findings on Monday morning.
- Q Do you know the date of June, that Monday morning would have been?
- A It would have been June 5th.
- Q All right. And then Dr. Fico writes this note which is page 1A, correct?
- A Correct.
- Q And would that be the 6-5 in the left-hand corner, is that June 5?
- A That is my assumption.
- Q All right. And then Dr. Fico has a discussion with Ms. Klettke regarding this note that he writes with her, correct?
- A That's my understanding. (Tr. 116-118).

After her discussion with Klettke, Dorst issued Klettke the following “Directive” dated June 12, 2006:

During the past two weeks your comings and goings have been monitored due to the belief that you were inaccurately reporting your time at work. As a result, I am directing you to enter and exit the building and hallways by using your identification badge and the card reader system. This will require that you swipe your card for every entry and every exit rather than following someone through the door or having someone let you in a door. If circumstances arise that you need to be let through a door without utilizing your identification badge you will need to report your entry or exit immediately to Dr. Fico, Alan, Renee, or myself. If we are not available you will need to report to Carol, Lana, or Dennis.

In addition, I am requesting that you accurately record your time through 100% time accounting and provide the completed forms to me prior to leaving for the day. This will allow me the opportunity to evaluate how your time is spent and to better assess the accuracy of your time accounting methods. I appreciate the work you do and hope this process will assist in making your job more productive and efficient. If you have additional questions please ask.

Klettke next received a written warning, signed and dated by Dorst and Klettke on June 12, 2006.<sup>10</sup> That warning listed incidents which occurred on June 5, 6 and 7, 2006, only, and read as follows:

**Personnel Policies and Procedures, Section 15, D. Grounds for Disciplinary Action, #2) Dishonesty or falsification of records including time cards:** Documentation and observation of Kathy's attendance at work indicated she worked less hours than she reported on her time card for the pay period of May 21 through June 3, 2006. She was given the opportunity to amend her time card on June 5 and June 6 and chose not to do so. In addition, she has falsified her time study documents for the dates of June 5 and June 7 indicating she was in her office when observation and documentation indicate otherwise. **#9) Absence without authorized leave, or misrepresenting the purpose of an authorized leave:** Kathy has been observed not being in her office for periods of time longer than a break and/or lunch time on May 23, 24, 26, 30, 31, and June 1, 5, and 7. She has not asked for leave at these times and DRI does not reflect an appointment. **#11) Habitual tardiness:** Documentation and observation indicate that Kathy is routinely late for work without prior notice or notice the morning of the late arrival. Dates of these occurrences are May 22, 24, 25, 26, 30, 31, and June 1, 5, and 6.

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<sup>10</sup> The County submitted another Written Warning (County Exh. 6, page 2) which was neither signed nor dated by Dorst or Klettke regarding an incident of January 12, 2006 and it was not retained by the Department and H.R. (Tr. 86). As discussed infra in the Discussion Section of this Award, because the County failed to prove Klettke ever received this warning and because County policy requires all discipline to be signed and dated by the supervisor and the employee and that the Department and Human Resources retain copies of all signed and dated discipline, I have not considered this January 12, 2006 written warning.

**Union Contract, Article 27 – Lateness:** Documentation and observation indicate that Kathy is routinely late for work without prior notice or notice the morning of the late arrival. For dates see above.

This warning contained the same legend as the June 28, 2005 verbal warning about subsequent misconduct triggering further discipline up to discharge.

The above-quoted written warning was the result of Klettke's supervisor, Dr. Dorst's (Dorst) investigation of Klettke's use of her work time which Dorst claimed was motivated by Klettke's co-workers' (Sarah Binder and Lynn Curda) complaints/observations (in January, February, May and June, 2006 and later in August and September, 2006) that Klettke was not in her office at the beginning, during and/or at the end of her regular work days when her Departmental calendar (DRI) said she should have been (Tr. 92-94).<sup>11</sup>

It is significant to this Arbitrator that Dorst kept no notes of her conversations with Klettke (except for the October 16, 2006 meeting) which conversations began apparently just prior to June 5, 2006, and that Dorst had no independent recollection of the dates of her conversations with Klettke. Dorst described her various conversations with Klettke, herein regarding Klettke's use of work time/time keeping as follows:

1) Use of employee key card:

BY MR. YOKOM:

Q And what specifically did you tell her about the use of the card key?

A I had requested that she (Klettke) use the card key when she entered and when she exited so that I could better monitor when she was coming and going from the floor for varying appointments and such.

Q Do you require that of all employees working under you?

A No. (Tr. 90)

2) Taking a 45 minute unpaid lunch:

BY MR. YOKOM:

Q What did you specifically tell her (Klettke) about taking a lunch?

A That the County contract specifies that she's required to take a lunch, that she needed to take at least a half an hour lunch daily. Though the allotment for the time within the contract is a 45-minute lunch, and that that time was not to be used on the beginning or the end of the day as per the wording of the contract. (Tr. 98)

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<sup>11</sup> The Union objected to Dorst's testimony on this point as hearsay because Binder and Curda did not testify herein. I agree with the Union regarding Curda, however, this evidence, in fairness, can only be used to show Dorst's motive and cannot be used for the truth of the matter allegedly asserted by Curda. As the Union entered into a Fact Stipulation regarding Binder (Tr. 69-70) the Union's objection to Binder is overruled. Dorst has been discredited herein. Therefore, the only evidence regarding this point is the Binder Stipulation concerning when Binder saw Klettke leaving the Courthouse building on May 24, 31 and June 1, 2006. This evidence is insufficient to prove that Klettke failed to work 7.25 hours on those days. Mande corroborated Klettke's work on her son J's case on May 26, 2006 and that Klettke was at the Courthouse with Mande when her son's case was processed that day (Tr. 384).

3) Completing time studies:

BY MR. YOKOM:

Q Did you also have conversations with Ms. Klettke about the requirements and the necessity to accurately record her time?

A Yes.

Q Both on – on compensatory time sheets – on comp time sheets and then time sheets she turned in for her pay checks?

A Yes.

Q And did you have – how many conversations did you have with her about those issues?

A One that I specifically recall.

Q Would that have been before or after the June 2006 discipline?

A It was just prior.

Q And give us the substance of that conversation.

. . .

A Myself and Dr. Fico had a conversation with her regarding the necessity for accurately recording time, with relation to the time that she had actually worked.

Q And that – you already indicated that was for regular time cards as well as compensatory time cards, what about the time study sheets that you described earlier?

A (No response) (Tr. 99-100)

BY MR. YOKOM:

Q Was that part of that same conversation to accurately record on those time study sheets?

A I don't recall having a specific conversation with her regarding accurately recording on the time study; though it is the understanding that you accurately record on the time study, to fulfill the obligation of the time study requirements. (Tr 100)

. . .

THE ARBITRATOR: Was that ever explained to her, that she is not to do that?

THE WITNESS: I did not have that conversation with her but it is my understanding that the county has been using these time study forms for a very long time and when I started in my position and was first given my first time study that was explained to me.

THE ARBITRATOR: But you don't know if she ever received that information?

THE WITNESS: She did not receive it from me.

THE ARBITRATOR: Okay. (Tr. 122)

It is undisputed that Dorst never told Klettke how she was being “monitored.” No evidence was submitted to show that Klettke failed to submit completed time forms to Dorst each day after June 12, 2006. It is also undisputed that no one in management told Klettke that if she failed to work her regular hours or if she flexed her time or if she failed to card in and out or did not properly complete her time studies, she would be fired (Tr. 90; 98; 100; 125; County Exh. 8, p. 1A and County Exh. 25).

**B. Events Leading to the October 16, 2006 Termination:**

The County issued no discipline to Klettke after it issued the above-quoted June 12, 2006 written warning (and docked her pay on June 16<sup>th</sup>) and no one in management spoke to Klettke about her conduct on or after June 12, 2006 until October 16, 2006 when the County terminated Klettke.<sup>12</sup> However, in early June, 2006, Dorst, H & HS Department Head Dennis Dornfeld and Department Supervisor Dr. James Fico decided to hire a private investigation firm to monitor Klettke’s activities during her regular and on-call work hours (Tr. 123). On June 9, 2006, County H.R. Director Amanda Welch (Welch) e-mailed her informal commitment on behalf of the County, to enter into a contract for private investigation/security services with “Diversified Investigations llc” (Diversified), owned by Julie Russell, to monitor Klettke’s activities (U. Exh. 1, page 5). Welch then signed a contract with Diversified, dated June 8, 2006 (U. Exh. 1, page 6-8).

When she entered into the contract with the County, Russell stated that she relied on the County’s information, without checking it further, that Klettke had been improperly reporting her work time to the County (Tr. 56). Diversified had never had dealings with Waupaca County prior to June 8, 2006. Thereafter, Julie Russell personally placed a magnetic, 6 by 4 inch Global Positioning System (GPS) device on Klettke’s personal car, under the bumper and out of sight, without Klettke’s permission or knowledge while the car (a gold Ford Taurus) was parked in the County public parking lot (Tr. 39; 53). Neither Russell nor the County attempted to get a warrant to place the GPS device or to receive information therefrom regarding Klettke’s whereabouts (Tr. 53; 63). When Russell placed a GPS device on Klettke’s Ford, this process took about two minutes. Thereafter, Russell monitored the device and replaced the device on the car once (again, surreptitiously),<sup>13</sup> periodically checking its battery (Tr. 60).

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<sup>12</sup> Dorst’s testimony on page 349 of the transcript was that she (Dorst) did not talk to Klettke about going to the Family Dollar Store after she issued the June 12<sup>th</sup> warning because she hoped it was an isolated incident that would not be repeated. I find this testimony unbelievable in light of the fact that on June 9, 2006, the County had already decided to hire Diversified Investigations, Llc., to monitor Klettke’s comings and goings because the County suspected Klettke of theft of time, among other things.

<sup>13</sup> The GPS device was not hard-wired into Klettke’s vehicle so there was no “entry” into Klettke’s vehicle (Tr. 42-44). The device used was battery operated and was attached to the outside of Klettke’s car using a magnetic case (Tr. 42). As a general rule and with Klettke’s case, such devices utilize satellites and radio wave codes (in real time) which are transmitted between available satellites and the GPS device. The GPS device emits a “ping” and coordinates of the ping and satellite codes are sent to a website which shows on a map-quest type of program where the GPS device is located, giving an approximate address or location within 100 feet (Tr. 41 and County Exh. 3).

Diversified also assigned two other agents, Investigator Rogers and Maas, to follow Klettke and to video tape her.<sup>14</sup> On June 16, 2006 Maas video taped Klettke shopping at the Family Dollar Store from 3:45 to 4:45 p.m. (Fact Stip. 2; Cty. Exh. 2). Klettke, on her work time documents for June 16<sup>th</sup>, reported that she took a “break/lunch” from 4:00 to 4:45 p.m. and then she returned to the office (Cty. Exh. 9, page 2). Notably, on June 16<sup>th</sup>, Klettke went to the appointments she had listed on her calendar (although at different times and for different durations) which Investigator Maas reported she had done to the County (Cty. Exh. 2).

It is significant that prior to October 16, 2006, Diversified did not give the County its GPS evidence (County Exh.’s 3, 4 and 5)<sup>15</sup> but its agents did speak regularly to Dorst and Welch as demonstrated by Diversified’s reports, e-mails and bills regarding Klettke (U. Exh. 1). However, the County neither counseled nor warned nor disciplined Klettke regarding any of the information garnered by Diversified on or after June 9, 2006.

### **The Basina Incident:**

On Saturday, September 2, 2006, Klettke was on-call but she was not the designated Departmental on-call Social Worker for crisis intervention. That person was Dawn Jensen. Klettke resides about one mile from Diane Basina’s home. On September 2<sup>nd</sup>, at 11:29 a.m. (Artz, Tr. 416; County Exh. 24), Diane Basina called the Sheriff’s Department dispatcher and requested a Social Worker come to her home immediately to assist with her daughter who was then out of control, threatening to kill her mother and burn the house down (Tr. 407). The Sheriff’s Department told Basina she would have to jump through some other “loops” – that a County Social Worker could not come immediately. Basina requested a Sheriff’s deputy come to her house as soon as possible. Basina then called Klettke at home and frantically asked Klettke to come to her home immediately to help with her out-of-control daughter.<sup>16</sup> Klettke agreed to come and she arrived at the Basina’s home about 5 minutes later.

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<sup>14</sup> Close analysis of the documents contained in Union Exhibit 1 (memos, bills, e-mails and the contract between Diversified and the County) showed that three Investigators were assigned to the case: Maas, Russell and Rogers; that all three performed visual surveillance of Klettke and changed the GPS device on Klettke’s car; the GPS device on Klettke’s car had to be changed out on at least six occasions: September 13, 14, 21, 26, October 2 and 4 because the battery died or no data was being provided; on October 10<sup>th</sup> Diversified could not find Klettke’s vehicle between 2:20 and 4:45 p.m. Diversified created 50 pages of memos on its surveillance of Klettke between June 8 and October 11, 2006.

<sup>15</sup> Therefore, County Exhibits 3 through 5 were not considered by the County in deciding to terminate Klettke and they have only been considered herein as background information.

<sup>16</sup> Basina stated herein that Social Worker Lynn Curda told her on Friday, September 18<sup>th</sup>, that Klettke would be on-call that weekend (Tr. 405-6). Basina knew Klettke lived close by and she knew that Klettke had not been assigned to her family as its Social Worker because Klettke and the Basinas were neighbors, but Basina needed help with her daughter immediately, so she called Klettke (Tr. 407).

When Klettke arrived, (around 11:40 a.m.) Basina's daughter was yelling, swearing, aggressive verbally, and abusive and being restrained on the ground in the yard by her father (Tr. 554-6). Klettke intervened and began speaking to the daughter while the parents withdrew out of earshot. Diane Basina stated herein that Klettke was able to calm her daughter down, that Klettke stayed "a good extended time" (Tr. 408), she thought, up to 2 or 3 hours (Tr. 409), and that her daughter stopped yelling after Klettke arrived. Basina also stated that on September 2<sup>nd</sup>, Klettke "was there for me and helped me out a lot" (Tr. 413).

Deputy Sheriff/Detective Carl Artz was dispatched to the Basina home at 11:29 a.m. and he arrived at the Basina residence at about 11:45 a.m. (after Klettke). Artz saw Klettke and spoke to Klettke about the family situation (Tr. 416). Artz spoke to those present and he then called on-call Social Worker, Dawn Jensen, who arrived around 1:15 p.m. and took over the crisis and processing Basina's daughter<sup>17</sup> (Tr. 422-23). Artz left at 1:47 p.m. Artz filed the following police report describing his call at the Basina home on September 2, 2006:

On the above date and time, the Waupaca County Sheriff's Department Communications Center received a call from Diane Basina of ... Waupaca, Wisconsin, 54981. Diane indicated that she requested an Officer as she wants to speak with this Officer in regards to her juvenile daughter, ... Diane indicated that her daughter was listed as a missing person and/or runaway, returned home and is causing a disturbance at the residence. Diane Basina had requested Officers respond to the residence of ... Waupaca, Wisconsin, Town of Farmington, Waupaca County. Deputy Julie Thobaben was advised of this complaint and this Officer was familiar with a complaint listed as W06-09158 of a Sex Offense that possibly occurred with the juvenile, ... and responded to the residence on Otter Drive.

Upon arrival, I met with the juvenile's parents Richard Basina and Diane Basina and asked them what had occurred at the residence. They indicated that their daughter came home at approximately 11:15 and in questioning her as to her whereabouts, she became quite upset. When she viewed her room, she became more upset and a verbal argument ensued and property was damaged. Upon that, she exited the house and was restrained and brought back in the house until this Officer's arrival.

I asked Diana and Richard the whereabouts of their daughter. They indicated that she was in the living room and or dining room of the area of the residence and I proceeded to that location to speak with her as to the events of the day. (The daughter) was near the kitchen area and had a blanket in front of her face and did speak in regards to the events of the day. She indicated that she had

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<sup>17</sup> Fact Stip. 4) states Jensen arrived at the Basina home at 1:15 p.m. and did not see Klettke which is entirely possible as Klettke left the Basina's around that time.

returned home and later it was found out that she was returned home by Cheryl A. Winters of N2543 Hodget Court, Waupaca, Wisconsin, 54981. When she arrived home, (in her words) her parents were giving her some shit and then when she wanted to go to her room, she viewed her room and everything was taken from her. That is when she became quite verbally combative with her parents, then exited the residence, said she was leaving and was restrained. (The daughter) said, was injured while she was restrained. The areas where she indicated she was injured were in the head area, knees and arms. No visible injuries were viewed that were indicated to this Officer.

Deputy Julie Thobaben also entered the residence and heard most of the comments made by (the daughter). She indicated she did not want to live there anymore, would not follow the rules of the house and wanted to go to either Ashley Nolan's in Weyauwega, or she wanted to see and make contact with her ex-boyfriend whose name is unknown to this Officer. This Officer indicated that those options would not be met from our standpoint and not speaking for the Department of Human Services Juvenile Intake, that probably would not be a possibility also. (The daughter) would not agree to stay at the residence. She did not care where she went, but did want to leave the residence for the weekend.

In observing (the daughter's) behavior, the damage to the phone and her being uncontrollable as far as staying at the residence and managed by the parents for the weekend, the recommendation was made to call the Waupaca County Department of Human Services, Child Intake Division to approach a remedy in regards to the behavior and placement of (the daughter). A call was made by the Waupaca County Sheriff's Department to the Waupaca County Department of Human Services Juvenile Intake Worker Dawn Jensen. She indicated she was proceeding to the scene of our complaint located on . . . Drive and would make contact with this Officer in regards to this complaint.

Upon meeting Social Worker Dawn Jensen, she was apprised of the situation in regards to (the daughter's) returning home from a missing person complaint and/or runaway situation. Also regarding the incident that occurred shortly after 11:15 this morning where she became disorderly in the home and also damaged property being a phone in that residence and her statement in regards to not remaining at the house the remainder of the weekend. Dawn Jensen filled out a Temporary Custody Order for Non-Secure Supervision and (the daughter) was transported to a location in the City of Waupaca..

The Reporting Officer believes that with the situation of her running away from home on Friday, the 1st of September, the disorderly conduct in the home being uncontrollable, using profanity and causing a disturbance at the residence and also damaging property, a crime had been committed in regards to her behavior.

Statements were filled out in regards to this behavior by Diane Basina and Richard Basina and are attached to this complaint in regards to her actions. This complaint can be referred to the Waupaca County Department of Human Services Juvenile Intake Division for review and also this can be attached to an ongoing complaint where contact will have to be made with (the daughter) in regards to complaint W06-09158 in regards to the sex offense that was reported to this Officer on 8/31/06.

...

Artz stated that he did not mention Klettke's involvement on September 2<sup>nd</sup> in his report<sup>18</sup> because she was not the designated on-call H & HS Social Worker that weekend. Artz and Basina stated herein that no one at the County contacted them prior to October 16, 2006 regarding the events of September 2, 2006 and Klettke's involvement therein (Tr. 418; 411).

After September 2<sup>nd</sup>, no one at the County spoke to Klettke to say that Klettke should not have gone to the Basina residence on September 2<sup>nd</sup> because she was not the designated on-call Social Worker that weekend (Tr. 134-5). No County policy was submitted to show that Klettke should have refused Diane Basina's plea for her assistance on September 2<sup>nd</sup> and Klettke was not disciplined regarding this incident prior to her October 16<sup>th</sup> termination (Tr. 134-5 and Tr. 205).

#### **Other September and October incidents:**

Nothing relevant occurred until September 25, 2006. On that day, Dorst stated, Klettke arrived tardy for work and keyed into/out of the building only once. On September 26<sup>th</sup>, Klettke failed to use her key card to access/exit the building.<sup>19</sup> On September 27, 2006, although Klettke had indicated to Dorst that she intended to catch up on making her "WISACWIS" entries, Klettke failed to do so.

On September 28, 2006, Klettke was scheduled to attend a 1.5 day Crisis Intervention Conference in Baraboo, Wisconsin. Klettke left her home on September 28<sup>th</sup> between 8:15 a.m. and 8:30 a.m. in her car; and Klettke arrived at the conference hotel just after 10:00 a.m. (Tr. 577). The Conference began at 9 a.m.

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<sup>18</sup> Artz corroborated both Klettke and Basina's testimony herein regarding Klettke's involvement at the Basina home on September 2<sup>nd</sup> and he admitted that his written report was inaccurate regarding his contact with Klettke that day. Klettke stated that she originally reported the time of her involvement at the Basina home incorrectly but she never had a chance to change the times because she was (by then) discharged. Klettke admitted herein that she wrote down the time of her participation at the Basina home on September 2 incorrectly. However, I find that the record facts support the substance and the general duration of time frame she reported.

<sup>19</sup> This assertion is untrue (County. Exh. 13, page 2).

Social Worker Kevin Will (who also attended this Baraboo conference) stated that the first hour or hour and one-half (9 a.m. to 10:30 a.m.) were dedicated to a welcome, a summary of what the conference would involve and a motivational speaker (Tr. 428-9). Will also stated that when attending a conference on County time, H & HS employees simply claim their normal 7.25 regular daily hours on each day of the conference which could include travel time (Tr. 427) even if the conference lasts longer than 7.25 hours, but that there is no County rule or policy on this point (Tr. 443-444). Will also stated that it is normal for H & HS employees to claim travel time to and from conferences (Tr. 428) and that he would not expect to be disciplined by the County if he chose not to attend a conference buffet dinner after his regular work hours (Tr. 430) and he would not expect to be disciplined if he had arrived at the Baraboo conference at 10:15 a.m. (Tr. 434).

On September 28<sup>th</sup>, Klettke checked into the hotel and attended the conference beginning after 10:15 a.m.; she did not miss any substantive sessions that day or the next. Sometime on September 28<sup>th</sup>, Klettke asked Will to cover for her on Friday and the rest of that weekend while she was on-call because she was planning to see her daughter in Waukesha and after the conference, to travel to Indiana and she felt there could be issues with the beeper and/or County cell phone operation coverage<sup>20</sup> (Tr. 432; 438). Will agreed to take on-call calls for Klettke if needed (Tr. 428-9).

Early Friday morning (3 a.m.) the Sheriff's Department paged Klettke and could not reach her. The Sheriff's department then called Kevin Will's home number and his wife gave the caller her husband's hotel telephone number in Baraboo. The Sheriff's Department then reached Will who gave them Klettke's room number at the hotel and the Sheriff's Department then called and talked to Klettke. Klettke took calls and handled on-call matters over that weekend while she traveled to Indiana, with Will as her back-up. There was no evidence to show that calls went unanswered while Klettke was on-call. The County has no rule/policy prohibiting on-call Social Workers from traveling out of state while they are on-call. Klettke was not counseled or disciplined for traveling to Waukesha, Wisconsin and Indiana after attending the Baraboo conference.

On October 2, 3, 4, 10 and 11, 2006<sup>21</sup> the County submitted key card documents, computer log-on/off documents, DRI and time study and GPS documents, allegedly showing that Klettke claimed more hours (4.75 hours) than her actually worked. Klettke consistently denied inaccurately reporting her time. Witness Suzanne Mande confirmed Klettke's testimony

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<sup>20</sup> Will stated herein that in the past, he had personally had trouble with the operation of the County cell phone while in Baraboo, Wisconsin (Tr. 433). After September 29<sup>th</sup>, the County never tested Klettke's pager to determine whether it was defective, as Klettke claimed. Dorst essentially corroborated Klettke in this area (Tr. 148-52).

<sup>21</sup> October 2, 4 and 10 are not referred to in Fico's Summary, infra. Dorst asserted herein that Klettke had listed a meeting with the County Corporation Counsel from 1:45 to 2:30 p.m. on October 10, 2006 which she failed to attend. The record evidence (including Dorst's own testimony (Tr. 164)) failed to support this assertion and it has been disregarded.

herein that Mande cancelled the October 11, 2006 team meeting at the Wheelhouse Restaurant because of Mande's schedule (Tr. 389-390) and that she (Mande) had had a regular weekly lunch meeting with Klettke regarding her son's case on September 25, 2006 (Tr. 387). Mande stated no one from the County talked to her about her contacts with Klettke prior to October 16, 2006 (Tr. 395).

Regarding the October 3 reference in Fico's summary, that Klettke was at home for 90 minutes when she was expected to be at work, I note that County Exhibit 15 refers to that date at pages 3, 4 and 5. Pages 3 and 4 show nine times that Klettke either entered or exited the Courthouse building using her key card. Significantly, the key card evidence does not indicate whether Klettke was entering or exiting the building. Page 5 shows that Klettke reported that she worked 7 hours on October 3 and she was paid by the County therefor (County Exh. 16, pages 4 and 5 are the same pages 3 and 4 of County Exh. 15). Witness Julie Haehnlein also corroborated Klettke regarding Klettke's having stopped at Haehnlein's home on the morning of October 3, 2006 and that Klettke came to Haehnlein's home again that afternoon, driving a black Chevy pick-up truck (Tr. 397-398).

Sometime in early October, 2006, Dorst gave a summary of the evidence of Klettke's "misconduct" she had gathered to Dr. Fico and Dornfeld.<sup>22</sup> A meeting was held by Dr. Fico, Dornfeld and Dorst on or about October 12, 2006 at which time the memo quoted below (County Exh. 21) was discussed:

**DISCIPLINE OF KATHY KLETTKE  
OCTOBER 12, 2006**

Compiled by James M. Fico, PhD  
from the  
summary developed by Tiffany Dorst, PsyD

**FALSIFICATION OF TIME AT WORK**

September 2, Kathy Klettke responded to a neighbor's call to assistance, and claimed it as work time. She also claimed as work time an hour with the neighbor that is known by law enforcement witnesses to be untrue.

Stated in writing that she arrived at training conference in Baraboo at 8:30. She left her home to attend the conference (web map says the trip takes one hour 46 minutes) at 9:05 on September 28. Stated that two hours were required for her to return home from Baraboo, and instead of driving home, she went to Indiana.

On October 3, was at home during a 90 minute period when she claimed to be at work.

Was filmed at the Family Dollar shopping when claimed work time.

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<sup>22</sup> Dorst's summary was never produced or submitted in this case.

### **FAILURE TO RESPOND TO DIRECT INSTRUCTIONS**

Kathy Klettke is to call in when she will be late for work. On September 25 she arrived after 9:30, and mentioned that she was late because she was brushing her granddaughter's hair.

Has been instructed to use the card reader upon entry and exit to the unit. Repeatedly avoids doing so, including on September 25.

Counts lunch time as work time, despite having been specifically told that she must take time for lunch. Claims 45 minutes on most days during lunch period as paid time.

Was instructed by Dr. Dorst that Kathy Klettke should not attend specific team meetings. Kathy Klettke attended the team meeting today, according to her schedule, against instructions. We learned from another staff member that the team meeting probably did not happen. We will confirm that with the GPS tool. Spent the rest of the day at home rather than attend a medical appointment as scheduled.

### **INADEQUATE WORK PRODUCT**

Repeatedly and consistently does not do WiSACWIS assignments. On September 27 she was at work for five and one half hours to do WiSACWIS work, and did none.

Has been disciplined twice regarding inadequate work product.

### **POOR PROFESSIONAL JUDGMENT**

Kathy Klettke advised one of our staff **not** to report important information to the court.<sup>23</sup>

### **SUMMARY**

All the incidents point to an uninterrupted course of theft of time from the employer, false statements on her time card, refusal to complete work despite having been disciplined for lack of work completion, and a general pattern of deception by Kathy Klettke regarding her work product and work time.

It was on the basis of the above-quoted memo and the discussion thereon that Dornfeld decided to terminate Klettke. Dornfeld made his decision to terminate Klettke prior to October 16, 2006 (Tr. 268).

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<sup>23</sup> No evidence was submitted to support this assertion. It has been disregarded.

On October 16, 2006, Klettke was called to a meeting by Dorst in the morning. She was offered Union representation, Union Steward Janece Swenson. During the October 16<sup>th</sup> meeting Klettke and the Union were never given copies of County Exhibit 21. Even though Klettke asked for specifics, no specific charges against her with dates and names were given to Klettke.<sup>24</sup> Klettke and the Union were rushed through this October 16<sup>th</sup> meeting which took less than 1 hour. Klettke was then given the option to resign or be terminated. Klettke denied any and all wrong doing and she chose termination. Klettke was then given the following letter dated October 16, 2006:

. . .

This letter is to inform you that effective today October 16, 2006 you have been terminated from your position as Social Worker II with the Waupaca County Department of Health and Human Services. This decision was based on a number of reasons, including falsification of time worked, failure to respond to direct instructions, inadequate work product, and poor professional judgment.

. . .

Klettke's written warning case and termination case were then brought forward for arbitration. Documentary evidence the County possessed in support of Klettke's written warning and termination was not given to her until December 6, 2006 at Klettke's U.C. hearing.

### **POSITIONS OF THE PARTIES**

#### **County Initial Brief:**

The County noted that Klettke had received one verbal warning and two written warnings prior to the events which lead up to her discharge and that the misconduct described in those prior warnings (which were not grieved) involved violations of the same or similar policies as are involved in the June 16, 2006 written warning and the October 16, 2006 discharge of Klettke. Given Klettke's past work record and her most recent misconduct which included claiming 17.0 more hours worked than she actually worked in 2006, the County urged it had just cause to discharge Klettke.

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<sup>24</sup> Dorst confirmed that the Family Dollar Store incident (Tr. 174; 208), Klettke's failure to use her key card (Tr. 176) and the June 2005 verbal warning (Tr. 172) were not mentioned on October 16, 2006. Dorst stated that management did not discuss specific reasons for Klettke's termination nor did they discuss in detail the management outline with (County Exh. 21) Klettke on October 16<sup>th</sup> because in past meetings Klettke had given management irrelevant information, she had not given straight answers and she had failed to stay on track (Tr. 356-7). The evidence was insufficient to show Klettke was given a copy of County Exhibit 21 on October, 16, 2006.

The County then cited portions of the transcript herein where, it urged, Klettke admitted she had received County policies and was aware that she could be disciplined for violating County policies such as dishonesty/falsifying time records, theft, tardiness, substandard or negligent work performance and absence without authorized leave or misrepresenting the purpose of her leave (Tr. 609-10 and 624 - 26; County Exh. 22). In addition, the County contended, the facts clearly show that Klettke also violated other County policies and procedures: 1) On September 2, 2006 Klettke responded to an on-call matter when not the official on-call worker and then she charged comp time therefor; 2) On September 25, 2006, Klettke arrived late at a County meeting and failed to use a County key card for ingress and egress that day; 3) On September 26, 2006, Klettke failed to use her key card to enter and exit the Courthouse; 4) On September 27, 2006 Klettke failed to use her key card and she failed to properly record her work time; 5) On September 28, 2006 Klettke arrived 1 hour and 25 minutes late for conference in Baraboo, WI and on September 28 and 29, 2006, Klettke was unreachable by the County Sheriff's department while on-call; 6) On October 10, 2006 Klettke was not at a meeting with the Corporation Counsel when her schedule indicated she was to be there at the time stated. The County asserted that the prior discipline Klettke received showed that the County applied progressive discipline, and that she was specifically notified that continued failure to follow County policies and procedures would result in further discipline up to and including discharge.

The County asserted that Klettke denied all wrong-doing at her October 16, 2006 termination meeting and chose termination over resignation and because neither she nor the Union asked for further information or for time to investigate the situation, the facts showed that the County gave Klettke and her representatives a full opportunity to present information and argument on October 16<sup>th</sup>. Therefore, no claim could successfully be made by the Union that the County failed to provide Klettke with due process as the Union asserted, citing *STOCKHAM PIPE FITTINGS CO.*, 1 LA 160 (MCCOY, 1945); *MEREDITY CORP.* 78 LA 859 (TALENT, 1982). The County then analyzed the documentary evidence it had submitted regarding Klettke's actual hours of work (for May 23, May 30, May 31 and June 1 and 5) which it argued clearly showed that Klettke claimed 12.5 hours more than she actually worked and that for October 2, 3 and 4, 2006, Klettke also claimed 4.5 hours more than she actually worked. These actions warranted the written warning of June 12, 2006. Klettke's continued misconduct after June 12, 2006 violated County policy and were sufficiently serious to warrant her discharge. The County then cited several arbitration cases concerning falsification of records (Cty. Br. p. 33-35), which it urged are on point for this case. In all the circumstances, the County asserted that the Arbitrator should not substitute her judgment for that of the County by setting aside Klettke's discharge because the County "acted in good faith, after a proper and fair investigation and the County did not act arbitrarily or capriciously..." or with any hostile discrimination toward Klettke.

**Union Reply Brief:**

The Union urged that the County's issue statement, which specifically cited only Section 8.01 and 8.02 of the labor agreement, states the issues herein in such a way as to foreclose the Arbitrator's review of the due process issues herein and the reasonableness of the County's actions toward Klettke under Sections 2.02 and 8.04 of the labor agreement. In this regard, the Union urged that Section 8.04 requires reinstatement with back-pay of Klettke's regardless of whether there was "just cause for her discipline" (U Reply, p. 1).

The Union argued that the vagueness of Personnel Director Welch's October 16, 2006 termination letter as well as Welch's method of delivery – sent by regular mail to Klettke – violated not only due process tenets but also the express terms of Section 8.04. The Union asserted that Section 8.04 requires personal service to Klettke of a notice of discharge which is to include "a written memorandum stating the case thereof... and a copy (must be) sent to the Union." Thus, the Union asserted that the County's failure to follow Section 8.04 constituted a persuasive reason to overturn Klettke's discharge.

The Union then analyzed the reasons for Klettke's termination stated by Welch;

1. Falsification of time worked;
2. Failure to respond to direct supervision;
3. Inadequate work product; and
4. Poor professional judgment.

At the instant hearing, the Union noted that although the County submitted a copy of the County's "Personnel Policies and Procedures," there was no mention of these policies and procedures as grounds for Klettke's discharge in Walsh's October 16<sup>th</sup> letter. The Union urged that an employer's reasons for discharge should be stated in "plain English," to give the employee and the labor organization an opportunity to understand and assess the employer's position for purposes of settlement or litigation. The Union noted that Welch is an experienced Human Resources professional who should have been able to issue a letter containing clear reasons for Klettke's discharge and how Klettke's conduct had run afoul of the County's rules/policies.

The Union then cited ADRIAN COLLEGE, 89 LA 861 (ELLMAN, 1987) for the proposition that hoarding charges of misconduct against an employee, which are only revealed when the discharge is challenged, constitutes a serious violation of due process protections which require the employer to fairly and objectively investigate the situation, to show the employer gave the employee written notice of the reason for discipline and that it gave the employee an opportunity to rebut the charges against him/her. Where as here, the employer is deceptive, unfair, withholding of charges against the employee, unwilling to set its own ethical and legal standards for employees yet willing to stalk its employees by use of an unauthorized GPS system to track the employee's movements, the discharge should be set aside, the Union urged.

The Union asserted that the County's standard – whether Klettke committed the misconduct and if so, whether the discharge was discriminatory, unfair or arbitrary and capricious is inappropriate here. Here, the Union noted, the County failed to explicate the specific misconduct Klettke engaged in so it is impossible to really apply that test urged by the County.

The Union asserted that the County failed to support, in any way, its assertion herein that “there is no substantive difference between tracking an individual by GPS data and by visual videotape.” Rather, the Union urged that the County's action in putting a GPS monitor on Klettke's car was an invasion of her privacy, a violation of the labor agreement and a refusal to bargain in good faith in violation of Wis. Stats. 111.70(3)(a)4 and 1. On the invasion of privacy issue, the Union observed that the 4<sup>th</sup> Amendment to the U.S. Constitution guarantees that people have a right “to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures;” that in *KATZ V. U.S.*, 389 U.S. 347 (1976), the Supreme Court enunciated its privacy test as, a) whether the individual possesses a subjective expectation of privacy in the place of the “search” and b) whether the individual's subjective expectations of privacy is one that society should recognize as reasonable.

The Union contended that the use of GPS tracking “has faced increased scrutiny” *DOW CHEMICAL VS. U.S.*, 476 U.S. 227 (1986) (aerial photography of an industrial plant on private property, constituted an unreasonable search without a warrant). The Union next cited *STATE V. JACKSON*, 76 P. 3D 217 (WASH., 2003) for the proposition that one cannot fairly equate GPS tracking of an individual on public roads to personally (visually) monitoring the individual on public roadways. Also, the Union urged that some judges have found that GPS tracking should constitute a seizure in violation of the 4<sup>th</sup> Amendment. This is so because the application of a GPS tracking device to a vehicle is a “meaningful interference with an individual's possessory interest,” if the owner is unaware and has not consented to the tracking and if it is accomplished by the performance of mechanical work on or alteration of the owner's car. *U.S. V. MCIVER*, 186 F. 3D 1119, *KLEINFELD CONCURRANCE*, (9<sup>TH</sup> CIR., 1999). In *PEOPLE V. LACEY*, (NO. 2463, NY COUNTY CT., MAY 6, 2004), the Court stated that attaching a GPS device to a vehicle is an intrusion into the individual's “personal effects” and that the simple act of parking a car in a public place does not mean the owner has thereby consented to allow law enforcement or private individuals to tamper with the vehicle by attaching a tracking device to it.

The Union noted that although the Wisconsin Supreme Court has yet to weigh in on the subject, Wis. Stats. Section 895.50(2)(a) defines “invasion of privacy” and “trespass.” In the Union's view, attaching a GPS monitoring system to a car in Wisconsin will be found a trespass, (invasion of privacy) and violative of Wisconsin law in the future.

Furthermore, the Union cited cases in *ELKOURI AND ELKOURI, HOW ARBITRATION WORKS* (SIXTH ED, P. 1155) to show that it could be argued that when considering monitoring employees even in the workplace or in company cars, arbitrators weigh the business needs of the employer against the employees' rights to privacy and analyze whether the employer has a legitimate business need for the information, whether the employer has assurance of reasonable safeguards of employee rights and whether the employer's actions in gathering the information constituted a substantial change in working conditions.

Here, the Union asserted, the County chose to use GPS (a radically invasive technology) on Klettke's personal vehicle without considering her privacy rights; and the County failed to prove it had a legitimate business need to do so. Indeed, the Union urged that placing a GPS tracking device on Klettke's personal vehicle was overly intrusive and also constituted a substantial change in working conditions, the impact of which (at the least) the County was obliged to bargain with the Union, citing RACINE UNIFIED S.D., DEC NO. 29846-A (JONES 9/1/00); BEVERAGE MARKETING, INC., 120 LA 1388 (FAGAN, 1/14/05) (employee's discharge set aside and a 60 day suspension imposed for failing to work during work hours as disclosed by the GPS on his company car). The Union contended that the County's conduct toward Klettke was so unreasonable and outrageous that it violated even the arbitrary and capricious discharge standard, preferred by the County. In addition, the Union noted that the County failed and refused to reveal the GPS and videotape evidence it had relied upon to discharge Klettke until December 6, 2006, the day of Klettke's Unemployment Compensation hearing, claiming that the evidence was protected information maintained by the County's attorney/private investigator. In all of these circumstances, the Union urged the Arbitrator to reject the County's GPS evidence, as "offensive," "outrageous" and "badly tainted," and to order Klettke reinstated with full backpay.

The Union argued that the County's witnesses (Dorst, Welch and Dornfeld) lied when they stated that Klettke was given a copy of County Exhibit 21 at the October 16, 2006 meeting. Notably, Union witnesses Phelan and Swenson stated no such document was presented to Klettke or to the Union containing the term "GPS," on October 16<sup>th</sup> and the County failed to mention "GPS" to Klettke and the Union on October 16<sup>th</sup>. Furthermore, the Union contended that Dorst's testimony either failed to support the County's claims (Tr. 175-176) or it showed that she was either lying or confused. The County's treatment of Klettke on October 16<sup>th</sup> also demonstrated that the County failed to meet in good faith on October 16<sup>th</sup> with Klettke and the Union because the County's conduct showed that it had previously decided to discharge Klettke.

The Union argued that the County unreasonably delayed disciplining Klettke, essentially stock-piling offenses and then, in violation of due process tenets, discharging her. In this regard, the Union noted that within 2 days of June 16<sup>th</sup>, the County knew that the County's private investigator had allegedly caught Klettke shopping at the Dollar Store for one hour when Klettke should have been working. And yet the County failed to timely discipline Klettke for this misconduct until it discharged her on October 16<sup>th</sup>, four months later. Also, the Union asserted that the County either disciplined Klettke twice for the same offense or let incidents pass which the County later used against her as justification for Klettke's discharge, violation of double jeopardy principles. The Union then observed, concerning the alleged incident of September 2<sup>nd</sup>, that Dorst spoke to Klettke within one week of September 2<sup>nd</sup> and Dorst did not issue any discipline. Nonetheless, this September 2<sup>nd</sup> incident was used as a factor in Klettke's discharge although it was not discussed at the October 16<sup>th</sup> termination meeting. The Union cited (and quoted at length from) several cases on the timeliness of discipline and double jeopardy (U. Br. pp 18-23).

The Union further argued that because Klettke was never notified or given a copy of the January 12, 2006 written warning, it should not be considered herein. The Union noted that neither Klettke nor Dorst signed the discipline, in line with County policy/procedure, and the County failed to provide the Union with any January 12, 2006 discipline document – signed or unsigned – in response to the Union’s repeated requests for Klettke’s records prior to early December, 2006 (Cty. Exh. 27). Thus, the Union urged, Dorst and Welch must have lied herein regarding the issuance of the January 12, 2006 discipline. As Klettke never received County Exhibit 21 or County Exhibit 6, page 2, on or before October 16, 2006, the Union also asserted Klettke’s documented disciplinary record was simply not as bad as the County has claimed herein.

The Union therefore urged that Klettke’s work record, containing one stale written warning (given 28 months before her discharge), followed by a verbal warning on June 12, 2006 was insufficient to support her immediate discharge. Finally, the Union argued that “management targeted the grievant for discharge in June of 2008,” as follows:

The grievant had the audacity to file a grievance against the Waupaca County management and her work life became a living hell thereafter. After fourteen accomplished years of service the grievant overnight became a poor performer unable to benefit from just progressive discipline, beyond redemption, beyond hope.

The County has taken it for granted that the grievant could be singled out for card swipes, DIR (sic) up-dates, convention restrictions, GPS monitoring, lunch break rules, compensatory time rules, pressured on Wis . . reports, and the list goes go (sic) on and on. The grievant was set-up to fail.

If the grievant did not automatically boot-up the computer, it meant she was not at work, she was not working. She was not required to boot-up at any particular time.

The County did not want corrective behavior, if it had, it would have acted promptly on each and every potential problem. What the County really wanted was to overwhelm the grievant. The County certainly was not prepared to listen to any explanation the grievant might of (sic) made. Turns out the County discovered after the fact that the grievant was at the Winnebago Mental Health Center, did go to the Corporation Counsel’s office, was at her appointments, was at authorized locations, acted prudently in assisting a neighbor in crisis, produced credible witnesses to collaborate her version of events, had more than one vehicle available for business travel, conformed to otherwise accepted practice at out of town training sessions, maintained on-call status, smoked outside, was on crutches after long recovery period, at times had to adjust her schedule because clients did not show for appointments and so forth and so on. None of this matters to the County, the County is hell bent on discharge and never conform (sic) its position to the facts unless the Arbitrator intervenes.

County computations even skew the time reports by double deduction for lunch periods.

Door swipes, started in June of 2006, when did the Employer either bother to check door swipe records or make an issue of same, October of 2006. If there was a problem with door swipes the Employer had an obligation to supervise from the get-go. No one bothered to explain how exactly the grievant was supposed to time the swipe, just swipe, so if the door was open and the grievant swiped was her card recorded?

All of the records that were eventually produced, subsequent to discharge, included only a report of the grievant's activity, who else may have been though (sic) the doors and how accurate was the mechanism at reporting passage. Were the reports edited? The record reveals that the best evidence, videos from the cameras located at the entrances were never investigated to verify the electronic report.

. . .

#### **County Reply Brief:**

The County noted that this case essentially concerns the appropriateness of the June 12, 2006 written warning and the October 16, 2006 discharge of Klettke. The County urged, herein, that the Union has attempted to shift the focus away from Klettke's clear misconduct. Indeed, the County asserted that the Union failed to challenge the County's charges against Klettke. Specifically, the County asserted

. . .that the Union does not argue that (1) the policies and work rules/directives the grievant violated were unreasonable, arbitrary or capricious; (2) the grievant was unaware that her misconduct was a violation of policy, work directives and work rules or that she was unaware that the misconduct could result in discharge; (3) the punishment for the grievant's misconduct was too severe; (4) the grievant was treated any differently by the County than other similarly situated employees, or (5) the grievant's misconduct was not a violation of County policy and work rules/directives. (Cty. Reply, pp 1-2).

The County argued that both the June 12, 2006 written warning and the October 16, 2006 termination of Klettke were based on just cause. In regard to the written warning, the County asserted that it must stand as a basis for Klettke's discharge because the "the Union does not argue against the discipline at all." In this regard, the County noted that the June 12, 2006 written warning was for misconduct similar to that for which she was discharged – "incompetence or substandard work performance" and "negligent work performance or failure to perform duties in accordance with department standards." Furthermore, the County noted, the June, 2006 warning contained verbiage that repeated misconduct of any kind could result in "further disciplinary action up to and including discharge" and the January 12, 2006 written

warning contained the same verbiage. In addition, the June 12, 2006 warning was for “dishonesty or falsification of records including time cards,” “absence without authorized leave or misrepresenting the purpose of an authorized leave” and “habitual tardiness” and it contained the same legend regarding further discipline and discharge for additional misconduct. Thus, Klettke was clearly and repeatedly warned that similar misconduct could result in her discharge.

The County noted that four days after the issuance of the June 12, 2006 warning, Dr. Dorst changed Klettke’s entries and returned Klettke’s time card to Klettke “and discussed the situation with her;” that Klettke offered no reasonable explanation, according to the County, why “she requested 1.50 hours of compensatory time...while taking a lunch, shopping and not attending an after hours appointment.” The County then listed the misconduct Klettke allegedly engaged in on September 2, 25, 27, 28, October 2, 3, 4, 10 and 11, 2006: Performing on-call work and requesting comp time therefor when not on call, arriving late at a County meeting and at an out-of-town conference, failing to use her key card, failing to work on WISACWIS, misrepresenting her work time, failing to communicate properly while on call, misstating the time of a meeting at the Corporation Counsel’s Office on her DRI calendar.

The County contended, contrary to the Union’s assertions, that its use of GPS technology was reasonable and proper. In this regard, the County observed that although the Union argued in its brief that the County had committed a prohibited practice in violation of Sec. 111.70(3)(a)4 and 1, Stats, by its use of GPS technology here, the Union never filed a WERC complaint, nor did it request to bargain with the County thereon. In addition, Union official Phelan recognized in his testimony herein that the County has a right to monitor employee activity and to discipline employees for falsifying their time records.

Also, the County urged that the Union’s legal arguments and citations concerning the County’s use of GPS technology to track Klettke’s movements were not based on the current state of the law in Wisconsin, but on “what it (the Union) wished the law was or what it might be in other jurisdictions or given different facts.” The County then cited, discussed and distinguished the following cases cited and argued by the Union in its initial brief:

DOW CHEMICAL V. U.S. 476 U.S. 227 (1986);  
STATE V. JACKSON, 150 WASH. 2D 251, 76 P. 3D 217 (WASH. 2003);  
STATE V. KOCH, 175 WIS. 2D 684, 499 N.W. 2D 152 (1993) CERT. DEN. 510 U.S. 880 (1995);  
PEOPLE V. LACEY, 3 MISC. 3D 1103 (A), 787 N.Y.S. 2D 680 (2004);  
U.S. V. MCIVER, 186 F. 3D 1119 (9<sup>TH</sup> CIR., 1999) (KLEINFELD CONCURRENCE);  
RACINE U.S.D., DEC. NO. 29846-A (JONES, 9/00).

The County then argued that even if the Arbitrator finds its use of GPS technology was improper, she can properly consider the GPS evidence herein as supporting just cause for Klettke’s termination, citing ANHEUSER – BUSCH, INC., 351 NLRB NO. 040 (9/07) where the NLRB held “that an employer may discipline employees for misconduct even if the misconduct is detected through unilateral and unlawfully implemented means.” The County also asserted

that the Union misrepresented the discipline in BEVERAGE MARKETING, INC., 120 LA 1388 (2005) because the arbitrator there found the penalty too harsh, in light of the employee's unblemished work record and 22 years of service, not because GPS was used by the company.

The County then cited and discussed the following cases which it urged support a conclusion that the County properly used GPS technology to track Klettke in this case:

KATZ V. U.S., 389 U.S. 347 (1967);  
U.S. V. KNOTTS, 460 U.S.276 (1983);  
U.S. V. MORAN, 349 F. SUPP. 2D 425 (N.D.N.Y. 2005);  
PEOPLE V. ZICHWIC, 94 CAL, APP. 4<sup>TH</sup> 944 (6<sup>TH</sup> DIST. 2001);  
STATE V. MERIDITH, 337 OR. 229, 96 . P. 3D 342 (2004).

In the County's view, these cases stand for the following propositions -- that the police do not need a warrant to use electronic technology and the use of GPS is not an unlawful search under the 4<sup>th</sup> Amendment because there is no expectation of privacy when a person is traveling in an automobile on public roadways. Here, the County asserted, Klettke had no expectation of privacy when she traveled in her car during working hours.

In addition, the County cited and discussed several Wisconsin cases to show that "the use of a GPS tracking unit is not unlawful or unreasonable if a search or seizure does not occur." STATE V. CABAN, 210 WIS. 2D 597, 606, 563 N.W. 2D 501 (1997); U.S. V. KARO, 468 U.S. 705 (1984). In an unpublished opinion, the Wisconsin Court of Appeals held that the use of a GPS device did not violate Wisconsin Constitutional search and seizure provisions, STATE V. HAAS, 244 WIS. 2D 289, 628 N.W. 2D 438 (WIS. APP. 2001). Also, the County noted that in Wisconsin, there is no constitutional or statutory prohibition of the use of GPS tracking and although Congress, in 1993 and 2000, had proposed statutes that would have limited the use of GPS on a federal level, these proposed statutes were never enacted. Indeed, the County observed that in 2004, employers spent \$9 Billion on technological monitoring devices for the workplace. The County then cited several recent cases, from Connecticut, Ohio and Oregon state courts to support its assertions that there is no expectation of privacy while driving and that the work-related activities and location of an employee's public activities are not subject to a privacy interest. Regarding Wisconsin statutory provisions on the subject, the County contended that neither Chapters 942, 968, nor Chapter 995, limit, control or prohibit the use of GPS technology. MUNSON V. MBSD 969 F. 2D 266 (7<sup>TH</sup> CIR., 1992); HILLMAN V. COLUMBIA CTY., 164 WIS. 2D 376, 392, 474 N.W. 2D 913 (CT. APP. 1991).

The County asserted, contrary to the Union, that Klettke had notice of the misconduct she was accused of by delivery to her of County Exhibit 21 on October 16, 2006 and she had a full opportunity on October 16<sup>th</sup> to respond to those charges but she failed to effectively do so, to seek a recess or to request further information. The County also argued that nothing in the labor agreement requires the County to cite "chapter and verse" concerning each incident of misconduct it relied on in deciding to terminate Klettke, citing PORTAGE COUNTY, MA-13545 (GORDON, 12/07, P. 33). And contrary to the Union's claims, Section 8.04 shows that the County, in fact, followed the agreement on October 16, 2006 and thereafter.

The County additionally, resisted the Union's claim that there was an unreasonable delay between Klettke's misconduct and her discipline. Rather, the County noted, management met with Klettke 11 times between June 12 and October 16, 2006 "for various reasons related to her work performance" so that no stock-piling of charges occurred, again citing PORTAGE COUNTY, SUPRA AT P. 31.

For all of these reasons, the County urged the Arbitrator to deny and dismiss the grievance in its entirety.

### DISCUSSION

A couple of preliminary questions must be addressed before the merits of these two cases can be analyzed. First, the question whether the January 12, 2006 written warning may be considered as part of progressive discipline of Klettke which lead to her discharge. As I stated above in footnote 8, I find it significant that neither Dorst nor Klettke signed this written warning, although County policy and practice undisputedly would require same. Indeed, the County was unable to produce any signed document, and none was retained in the Department or in H.R., again, contrary to the County's normal policy and practice. In addition, I note that Klettke flatly denied ever having seen this written warning prior to her Unemployment Compensation hearing in early December, 2006, and Klettke specifically denied ever having met with management regarding this warning (Tr. 595-6). Finally, only Dorst "recalled" meeting with Klettke regarding this warning and asserted that both she and Klettke signed the warning (Tr. 82-3, 86). Notably, Dornfeld appears to have had no involvement in issuing this written warning (Tr. 293-4).

So, this issue comes down to a credibility resolution between Dorst and Klettke. In this kind of case, some arbitrators might acknowledge that discharged employees have "an axe to grind" that other employee witnesses do not have when testifying regarding the important under-pinnings of a discharge. This is so because the discharged employee stands to gain reinstatement and backpay if the grievance is sustained. However, this Arbitrator believes that the application of such generalizations can be unfair and that the better approach is to meticulously study and analyze the record as a whole to assure that fair decisions on the issue of just cause for the discipline and the discharge of a grievant can be reached.

An in-depth review of Dr. Dorst's testimony in this case shows that Dorst was not a credible witness for the following reasons. Dorst repeatedly failed/refused to answer questions put to her by the County's attorney (Tr. 98; 100; 111; 133; 148; 164; 175; 344); she also repeatedly failed to directly answer questions, using phrases like "that I recall" (Tr. 86; 99; 185) or "not that I recall"/"not that I specifically recall" (Tr. 77; 85; 90; 93; 97; 125; 129; 135; 137; 139; 158; 176; 211; 212). In addition, other County managers who were present at pivotal meetings involving Klettke and who could have corroborated Dorst either did not testify herein (Dr. Fico and Alan Stauffer; Tr. 233-4) or did not recall relevant facts or showed confusion regarding when discussions occurred and the content thereof (Dornfeld, Tr. 255; 262; 266-68; 275-7; 290-2). Furthermore, Dorst also appeared to have a better recollection

when recalled to testify telephonically and after she admittedly read the printed transcript of the first day of hearing (Tr. 356-358); she gave more in-depth explanations of County actions concerning Klettke on being recalled (Tr. 343; 347-8); and Dorst produced notes she purportedly took during the October 16, 2006 meeting with Klettke (Cty. Exh. 23; Tr. 350) which were not offered previously.

In all of these circumstances and in light of the fact that Klettke appeared to be a straight-forward and truthful witness (even when her testimony was, at the least, less than flattering) and given that Klettke's testimony was corroborated by both County and Union witnesses on major points, I find that where it differs from Dorst's, Klettke's testimony should be credited herein.

**The merits of the June 12, 2006 written warning:**

Klettke received a verbal warning on June 28, 2005 for "Substandard Performance of Assigned Job Duties" which essentially concerned closing case files precipitously, before completing necessary documentation (in violation of County Policy 15, D1). In this verbal warning, Klettke was also directed to draft a report regarding how she intended to implement written job instructions. In my view, this verbal warning was not of the same type, seriousness or tenor as the June 12, 2006 written warning. As no evidence was submitted to show that Klettke engaged in any similar misconduct after mid-June, 2005, in my view, this 2005 verbal warning is stale and cannot, in fairness, form the basis of progressive discipline to support the June 12, 2006 written warning, which cited very different violations of County policy.

This Arbitrator also finds it very significant that Klettke credibly testified that her hours were very flexible and that she set her own schedule without seeking supervisory approval or permission prior to June 12, 2006. In addition, witness Kevin Will confirmed that there were no County policies telling Social Workers what to include in their 7.25 regular work hours (Tr. 427; 443-4). Witness Phelan also stated that the DRI systems and the key card system were not intended to be used as time accounting/tracking systems (Tr. 449-52; 461-2).

I have found above that the January 12, 2006 written warning cannot be used as part of progressive discipline in these cases because it is unsigned, undated and was not given to Klettke at the time, nor was it not properly stored as a County record. I have also found that the June 28, 2005 verbal warning was for such different misconduct that it cannot form the basis of subsequent discipline of Klettke for very different conduct. So what is involved here is the simple question whether the June 12, 2006 written warning is supported by just cause standing alone.

Given the circumstances surrounding the June 12, 2006 written warning, it is clear that the answer to this question must be no. The record facts show that Klettke was disciplined several times for the same alleged offenses which occurred between May 21 and June 7, 2006:

Dr. Fico issued Klettke a memo on or about June 5 or 6, 2006 (Cty. Exh. 8) and Dorst issued Klettke another memo (Cty. Exh. 25) dated June 12, 2006, both different from the formal June 12, 2006 written warning. Notably, these Fico and Dorst memos detailed the same alleged misconduct covered by the June 12, 2006 written warning, but neither the Fico nor Dorst memos stated that Klettke's enumerated conduct was unacceptable or that future similar conduct would result in disciplinary action against Klettke. In my view, Klettke had a right to be, at least, confused by Fico and Dorst's mixed messages which came just prior to the issuance of the formal June 12, 2006 written warning; and that Klettke could have reasonably concluded that the Fico and/or Dorst memos constituted all the discipline she would receive for her conduct in May and June, 2006, so that the formal June 12<sup>th</sup> written warning constituted double jeopardy.

It is apparent that the record facts of this case support a conclusion that the County failed to be clear and concise when disciplining Klettke, by issuing three separate internally inconsistent documents regarding Klettke's conduct from May 21 through June 7<sup>th</sup>, and then docking her pay in June 16, 2006. In addition, the record facts herein showed that the County made no effort to forewarn Klettke prior to June 12, 2006 regarding what conduct she could be disciplined for in the future.

In regard to the latter point, I note that prior to June 12, 2006, there were no County rules/policies/in-services/memos which clearly directed all Social Workers 1) to log on their computers first thing in the morning and log off at the end of their work days; 2) to use DRI and key cards to prove when they are in the office and when they are at appointments; 3) that Social Workers must take a 45 minute unpaid lunch each day (less a 15 minute paid contractual break); and 4) that Social Workers can not flex their work time if they work outside regular work hours (if they work early, late or through lunch).

Here, Klettke stated (without contradiction)<sup>25</sup> that before June 12, 2006 her work schedule was very flexible and she set it herself without getting prior approval (Tr. 586; 622-3). It is also undisputed on this record that Klettke was the first Social Worker to be disciplined for flexing her hours, for failing to log on/off her computer, for failing to record her appointments accurately on DRI and failing to change her DRI entries when her appointments changed; and that Klettke was the only Social Worker who was ordered to use her key card every time she entered and exited the Courthouse building (Phelan, Tr. 449-52; 461-2).

Regarding the specific allegations contained in the June 12, 2006, written warning, I note that the charges made, require the County to prove that Klettke specifically intended to defraud the County by her conduct. In my view, the record does not support a conclusion that Klettke intended to seek pay for time she had not worked, to seek leave which she was not entitled to or regarding which she had misrepresented the reason therefore. Klettke was simply following her understanding of County policy in reporting her work time as she did.

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<sup>25</sup> Witness Kevin Will confirmed the fact that no County rules or policies existed prior to Klettke's discharge regarding what to include in Social Workers' the 7.25 hours of work (Tr. 427; 442-3).

The County has offered computer log on/off information, DRI calendars, key card usage information, time study and time card information, a stipulation regarding what Sarah Binder would have said had she been called to testify. In my view, this information is insufficient to prove that Klettke was not working when she was supposed to be, that she sought to be paid for non-work time, that she was “habitually” tardy or in that she abused her leave. This is so because Klettke credibly testified that prior to June 12, 2006 she had had a very flexible schedule which she set herself and the County failed to prove it had any contrary rules, policies or in-service/trainings. Furthermore, the record evidence clearly demonstrated that the County treated Klettke differently than it had treated its other employees. This is shown by the testimony of Michael Phelan and Kevin Will, described above.

Finally, this Arbitrator finds it very significant that on June 9, 2006, four days after Fico issued his memo and three days before Dorst issued her memo and the County issued the June 12, 2006 written warning (with Dornfeld’s prior approval), the County contracted with Diversified to monitor Klettke’s movements because, the County told Russell, the County believed Klettke was not honestly reporting her work activities/time/hours. Thus, given the fact that the County began surreptitiously monitoring Klettke before it issued the June 12, 2006 formal written warning, it cannot be said that the County gave Klettke any time to correct her alleged prior misconduct. Indeed, these facts also support a conclusion that Klettke’s discharge was a foregone conclusion in the minds of County managers, all in violation of the tenets of due process.

In all of the circumstances here, the June 12, 2006 written warning must be set aside, there being no just cause to support it, and the grievance thereon is sustained in its entirety. The June 12, 2006 written warning will also be ordered expunged from Klettke’s record and the County will be ordered to reimburse Klettke for any pay she was docked concerning the June 12, 2006 written warning.

**B. The October 16, 2006 termination:**

There are a number of items which must be addressed before the merits of Klettke’s termination can be reached. First, I note that the County’s policy (and Article 8.03 of the contract) indicated that a third offense should bring a 2 day suspension. The County chose not to follow its own policy and the contract on this point. In addition, Section 15A states that the County “sincerely” desires “to help employees in every way possible” if the employee has a “problem” in their County employment. Section B also states that employees have “the right to expect fair and impartial treatment in the administration of discipline.” Finally, Section C requires the employee’s supervisor to “identify the unacceptable behavior or job performance” and that the supervisor, “shall verify the incident or conduct and shall document the unacceptable incident or conduct.” Section C also states that discipline should “issue as soon as possible after the incident.” Finally, County policy provides for progressive discipline: a verbal warning, a written warning, a suspension and then a discharge. None of the policies described above was applied in Klettke’s cases, based upon the record evidence herein.

Second, Dr. Fico's Summary (dated October 12, 2006) constitutes, in my view, the best evidence of the actual alleged instances of misconduct which formed the basis of the County's decision to discharge Klettke. Significantly, Fico's summary does not list any conduct prior to September 2 (except the June 16<sup>th</sup> Family Dollar Store incident); it failed to specifically list lunch time violations; and no evidence herein was submitted to support the "poor professional judgment" allegation.

The County has couched its charges against Klettke as amounting to "stealing time." However, cases of "theft of time" normally arise when one worker punches the timecard of another worker who is not at work, so that the latter will receive pay for time not worked. In this case, the County's allegations, even assuming they could prove all of them, do not amount to theft of time. Rather, the County's case is really one of alleged malingering – such as where an employee flexes their time or runs errands on work time or takes extended breaks. In cases of malingering, the employer has a heavy burden – to prove that the employer has a clear and consistent rule prohibiting any such malingering. Beyond proving that a clear rule existed prior to the discipline of the grievant, to meet its burden, the employer in a malingering case must essentially prove that its employees knew they were expected to work every minute of every day or be subject to discipline.

Here, the County failed to prove it had a clear rule against malingering before May, 2006 and it failed to prove that its employees did, in fact, work every minute of every day. Rather, the evidence in this case showed that Social Worker hours were flexible and that there were no rules telling them what to include in their regular 7.25 hours per day.

The next issue that must be dealt with in this case is whether the evidence gathered by Diversified by attaching and re-attaching GPS devices on one of Klettke's personal vehicles without first obtaining her permission or a warrant, can fairly be used to support Klettke's termination. The parties have cited many court cases herein all of which concern actions by law enforcement officers (not private individuals) where the officers placed "bird dog" tracking devices, used thermal imaging devices or placed GPS devices to monitor criminal suspects without having attempted to get warrants. Thus, the questions before the courts involved in these cases were whether the electronic monitoring done violated the suspects' 4<sup>th</sup> Amendment rights to be free of illegal searches and seizures by government agents under the Federal Constitution or its State constitutional counterparts. In the vast majority of the cited cases, the Courts found no illegal 4<sup>th</sup> Amendment searches or seizures (or similar State constitutional violations) had occurred.

The instant case is not a criminal case. No law enforcement agencies were involved. No warrant was sought by the County or Diversified and none would have been granted by a court based on the record facts here. Although I agree that Klettke had a diminished expectation of privacy in her private car when it was parked in the County's public parking lot, this does not mean that the County and its agent, Diversified, were then free to tamper with Klettke's private vehicle, by surreptitiously attaching a tracking device without Klettke's permission or a warrant, which device altered the vehicle and essentially interfered with Klettke's possession and use of the vehicle.

Nor has it escaped this Arbitrator's attention that Klettke was represented by a Union which had no idea what the County was up to until long after Klettke was fired. Thus, the Union had no ability to weigh and assess the evidence against Klettke. This is very far from good, effective labor relations. In all of these circumstances, I find that the GPS evidence gathered by Diversified against Klettke must, in fairness, be excluded from the record in these grievance arbitration cases and this Arbitrator has not considered the County's GPS evidence in reaching her Awards in these cases.<sup>26</sup>

Also, it is significant to this Arbitrator that Klettke stated herein and Dorst admitted that the County failed to counsel Klettke as problems arose with her work. For example, during the two months before her discharge, Klettke stated that no one in management told her she was not reporting her non-paid lunch time properly (Tr. 509). During this period, Dorst never warned Klettke about being late for work and that she should have been using her card to enter and exit (Tr. 588); and management never told Klettke her work (and time claimed therefore) on the Basina incident was improper, or that her stopping at the Family Dollar Store, her late arrival at the Baraboo Conference and her actions on October 3<sup>rd</sup> were improper and could subject her to discipline or discharge (Tr. 583-5).

In addition, I find it significant that Dorst admitted that she and Fico decided not to counsel Klettke about her alleged misconduct that occurred in September and October, 2006, at the time they occurred, because they had decided Klettke's problems "had clearly not improved" and "that those discussions (with Klettke about the conduct) had been had and that we were not going to have them any further" (Tr. 343-44). Furthermore, Dorst admitted that she and Fico did not counsel Klettke prior to October 16, 2006 about her time-keeping problems on October 2, 3, 4, 10 and 13, 2006 for the same reason – it would not have done any good (Tr. 347-8).<sup>27</sup>

And yet, during the last six months of Klettke's employment, Dorst approved all of Klettke's time cards and comp time requests and did not dock Klettke's pay after June 16, 2006 (Tr. 205). In my view, Dorst and Fico could have and should have at least counseled Klettke as events they took exception to took place in September and October, 2006 and their failure to do so amounted to stockpiling of alleged misconduct which denied Klettke the opportunity to understand that management considered her conduct improper and subject to discharge, which then denied Klettke the opportunity to choose to mend her ways. By conducting themselves as they did, Dorst and Fico denied Klettke due process and these instances of September and

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<sup>26</sup> The County cited an NLRB case, Anheuser-Busch, Inc., 351 NLRB No. 40 (9/07) for the proposition that an employee, under the N.L.R.A., can be disciplined for misconduct even if the misconduct was detected through "unilateral and unlawful means." In Wisconsin, it is the W.E.R.C. that administers public sector labor law and the Commission applies state law and exercises its discretion to cite and/or follow the external cases it chooses. In addition, these cases are grievance arbitration cases not controlled by Board law.

<sup>27</sup> On pages 163-5 of the transcript Dorst failed to state believable and supported reasons why Klettke's conduct of October 10 – supposedly missing a meeting at the Corporation Counsel's office – was used as a basis for her discharge. This allegation was unproved on this record.

October, 2006, cannot stand to support Klettke's discharge.

The County has contended that because Klettke was not the official on-call Social Worker on September 2<sup>nd</sup>, she should not have responded to D.B.'s call to Klettke at her home for immediate assistance with the Basina daughter. Based on her conversation with Diane Basina, Klettke made a judgment call, in any unusual situation not expressly covered by County policy, and she went to the Basina's immediately to help. According to everyone present that day who testified herein, Klettke contributed significantly to defusing what Diane Basina stated could have been a very dangerous and potentially tragic situation. In these circumstances, Klettke's conduct on September 2, 2006 did not amount to misconduct under County policies/rules and she should not have been disciplined therefor.

Regarding the Baraboo Conference, there simply was no evidence proffered herein to show that Klettke was "unreachable" while on-call on September 28 and 29, 2006. Rather, the record facts showed that Kevin Will acted as Klettke's back-up that weekend (Tr. 428-9; 432; 438). In this regard, I note that the Sheriff's Department reached Klettke at 3 a.m. on Friday night by first calling Will's wife and then Will, presumably because Will was Klettke's back-up of record. Indeed, County Exhibit 26 failed to prove that Klettke had engaged in any misconduct regarding her on-call duties that weekend and Dorst could offer no evidence to show Will was not Klettke's back up that weekend or that any calls went unanswered by Klettke.

Regarding her (admitted) late arrival at the Baraboo Conference on September 28<sup>th</sup>, I note that Klettke stated that she did not miss any substantive session at her conference. Also, Kevin Will confirmed there are no County rules/policies which Social Workers could follow to know what to include in the 7.25 work hours employees could claim when attending out-of-town conferences for the County. Rather, Will stated, it was up to the employee's supervisor but he believed that Social Workers were allowed to count their travel time to and from the conferences so long as they charged the County only 7.25 hours per day (Will confirmed that Dorst had allowed him to do this, Tr. 443-4). Will further stated that sometimes the conference and networking go on past 7.25 hours, but employees only claim 7.25 hours. Finally, Will stated he would not expect the County to discipline an employee for arriving at the Baraboo Conference at 10:15 a.m. or for failing to attend the Baraboo networking buffet after 5 p.m.

Here, Klettke did not claim more than 7.25 hours per day and she attended the Baraboo Conference as expected. Clearly, Klettke followed the rules she and Will were aware of in attending the September 28 and 29, 2006 Baraboo Conference. And yet, the County treated Klettke differently and it used Klettke's late arrival at the Conference as a reason for her discharge (without ever notifying her that conference attendance rules had been changed).

The remaining allegations in Fico's summary regarding September 25 and October 3, 10, 11,<sup>28</sup> were not supported by the evidence herein. County Exh. 13 showed that Klettke used her key card on September 25<sup>th</sup>. Also, Haehnlein, Mande and Dorst's testimony actually

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<sup>28</sup> Regarding October 2, 2006, this date was not mentioned in Fico's summary.

showed that Klettke did not commit the misconduct alleged. And no evidence was proffered herein to support Fico's allegation of "poor professional judgment."

Finally, regarding the June 16<sup>th</sup> Family Dollar Store incident, I note that Klettke stated on her timesheet that she took a break/lunch from 4 p.m. to 4:45 p.m. and that she admitted herein going to the Family Dollar that day. County Exhibit 9, page 2, shows that Klettke was in the store for about the same amount of time Investigator Maas video taped Klettke at that store. However, I note that County Exhibit 2 shows that from 1:03 to 2:03 p.m. Maas lost track of Klettke completely. Maas' report also showed that Klettke attended to her expected appointments on June 16<sup>th</sup> (although the times changed) (Cty. Exh 2).

In all of the circumstances of this case, there was no just cause for Klettke's discharge and I issue the following

**AWARD**<sup>29</sup>

The County did not have just cause to issue Klettke a written warning on June 12, 2006 and all reference to it as well as the Fico and Dorst memos regarding it are ordered to be expunged from Klettke's personnel file. The County also did not have just cause to discharge Klettke on October 16, 2006. Therefore, all documents referring to Klettke's discharge are hereby ordered to be expunged from her personnel file and the County is ordered to reinstate Klettke with full backpay and benefits from October 16, 2006 forward, and to reimburse Klettke for the time docked from her pay on June 16, 2006.

Dated in Oshkosh, this 31st day of October, 2008.

Sharon A. Gallagher /s/

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Sharon A. Gallagher, Arbitrator

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<sup>29</sup> The Union made arguments herein regarding alleged violations of Sec. 111.70, Stats. This Arbitrator has no jurisdiction of these allegations and she has not considered them in reaching these Awards.