

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MILWAUKEE COUNTY

and

MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION

Case 639

No. 67402

MA-13866

(DuCharme Discipline Grievance)

Appearances:

Timothy R. Schoewe, Deputy Corporation Counsel, 901 North 9th Street, Milwaukee, Wisconsin 53233, appeared on behalf of Milwaukee County.

Mathew L. Granitz, Attorney, Cermele & Associates, S.C., 6310 West Bluemound Road, Milwaukee, Wisconsin, 53213, appeared on behalf of the Milwaukee Deputy Sheriffs' Association and Grievant Scott DuCharme.

ARBITRATION AWARD

Milwaukee County, herein the County, and the Milwaukee Deputy Sheriffs' Association, herein the Association, are parties to a collective bargaining agreement which provides for the final and binding arbitration of certain disputes. The Association filed a request to initiate grievance arbitration with the Wisconsin Employment Relations Commission for arbitration of a grievance filed by the Association concerning the discipline of one of its members, Scott DuCharme, herein Ducharme or Grievant. The Commission designated Paul Gordon, Commissioner, to serve as arbitrator. Hearing was held on the matter on June 24, 2008 in Milwaukee, Wisconsin. No transcript was prepared. The parties filed written briefs and the record was closed on August 19, 2008.

ISSUES

The County states the issues as:

Did just cause exist to find that Deputy DuCharme violated the rules as alleged?

If so, did just cause exist for Sheriff Clarke to impose a one (1) day suspension?

If not, what remedy?

The Association states the issues as:

Did just cause support the rule violations as charged?

If yes, did just cause support a one day suspension?

And if not, what is the appropriate remedy?

The parties' statements of the issues are essentially the same. The County's statement is adopted.

BACKGROUND AND FACTS

The Milwaukee County Sheriff's Department has established rules and regulations which govern the conduct of its employees. Milwaukee County has civil service rules which also govern its employees. The management rights clause in the Parties' agreement reserves in the County the right to make reasonable rules and regulations relating to personnel policy, procedures and practices and matters relating to working conditions, giving due regard to the obligations imposed by the Parties' collective bargaining agreement. Among those are the following:

Milwaukee County Sheriff's Department Rules and Regulations

1.05.02 Rule 2 – CONDUCT OF MEMBERS
Members of the department shall not commit any action or conduct which impedes the department's efforts or efficiency to achieve its policies and procedures or brings discredit upon the department.

. . .

1.05.15 Rule 15 – COURTESY AND CIVILITY
Members of the department shall answer all inquiries from citizens in a courteous manner and, if requested, shall give their name and badge number. Courtesy and civility toward the public is demanded of all members of the department, and conduct to the contrary will not be tolerated. Members in their conduct shall be civil and orderly, and shall at all times exercise the utmost patience and discretion.

. . .

Milwaukee County Civil Service Rule VII, Section 4 (1)

(ff) Offensive conduct or language toward county officers or employees

These rules and regulations were in effect at all material times herein.

On June 17, 2007 at approximately 8:20 p.m. Grievant and Deputy Carl Hauski were on parks patrol patrolling the lakefront in a marked squad car when Grievant initiated a traffic stop of a BMW convertible automobile occupied by Mr. Daven Hines and Mrs. Tanya Hines. The reason for the stop was an alleged violation of the Wisconsin "move over law". Grievant's patrol car had been parked on the side of the road with its emergency lights on (at the end of a previous traffic stop), when he observed the vehicle at issue drive by, in his opinion, in violation of the "move over law". During the stop a Department Supervisor, Sergeant John Nelson, was called to the scene. Grievant had prepared a citation to issue to the driver, Mr. Hines, for violation of the move over law which was then given to Mr. Hines by the Supervisor along with other written information concerning the citation. As the citation was later being processed through the Court system it was eventually amended to a charge of improper signal for a stop or turn, and a no contest plead was entered to that charge.

Following the traffic stop, the Hines' complained of their treatment at the hands of Grievant. They did so by letter of June 17, 2007 from Tanya M. Hines to the Milwaukee County Sheriff.¹ The Sheriff's Department then did an internal investigation into the matter

¹The letter stated:

I write this letter as a "matter of principle". I have lived in the County of Milwaukee for over 38 years. I was born and raised in the City receiving my primary and High School education in the Milwaukee area. I am a graduate of Dominican High School as well as Marquette University. My husband and I were married in the city and we will soon celebrate 17 years of marriage. My son D. (minor's name redacted) recently graduated from St. Monica's School in Whitefish Bay, WI receiving the "highest honor for 8th. Grade boy"; the Monsignor Barry Award (i.e. awarded for academic excellence, leadership, self-discipline, honest and moral strength). My husband and I are faithful members of Christian Faith Fellowship Church and we willingly serve our community.

Yet, in all of my years as a god fearing & law abiding citizen of Milwaukee County I have never been faced with such "disrespect and disregard" as I experienced on the evening of Sunday, June 17, 2007. My husband and I were driving down Lake Drive on our way to dinner in the City for Father's Day. As we approached the Alterra Coffee Shop we noticed a car was pulled over on the right side with a sheriff vehicle directly behind extending into the right lane. My husband slowed down and checked to see if the left lane was clear to move out of the way of the safety vehicle. After passing Alterra Coffee, my husband and I heard sirens and saw flashing lights from a sheriff's vehicle. We pulled over to the right side just past the Marina and waited in the car for the deputy to approach. Upon approaching our vehicle, Deputy DeCharme (Badge#:643) asked if we were aware of the "move over law". My husband responded yes and then asked why we were pulled over. Deputy DeCharme responded by stating that we were in violation of that law. My husband answered that he didn't agree; in fact he slowed down and then switched lanes once the left lane was clear to uphold the law. Deputy DeCharme said that he saw space and that my husband could have switched lanes sooner. At this point, there was no sense in debating. Deputy DeCharme asked for my husband's license and I indicated in a direct manner that this seemed unfair and that I did not understand why we were singled out. Nevertheless, my husband provided his license and we waited approx. 15-20min. for Deputy DeCharme and his partner to return to our vehicle. Upon returning, Deputy DeCharme shared that we were receiving a citation for a traffic violation of the move over law and then asked for a phone number. I asked if we were receiving the citation, and why he needed our phone number. Rather than explaining or answering my question he proceeded to demand that we provide a cell, home or work phone number (contact number). I responded and provided Deputy DeCharme with my husband's work number. Thereafter, Deputy DeCharme extended his hand to return my husband's license at which time my husband took his license.

which included interviews with the Hines', Grievant, Hauski, Nelson, and the three other citizens who had been issued citations by Grievant that day. Internal Affairs prepared an Investigative Brief and an Investigative Summary which was forwarded to the Sheriff. By Order of September 17, 2007 the Sheriff issued discipline to Grievant in the form of a one (1) working day suspension from duty without pay for violation of Sheriff's Office Rules and Regulations 1.05.02 and 1.05.15, and violation of County Civil Service Rule VII, Section 4(1) (ff).

Unfortunately, the situation does not end here. Deputy Decharme accused my husband of snatching his license and then asked him to step out of the car. My husband in turn asked why he needed to step out of the car. He went on to say, if you are giving me a citation – just give it to me. At this point, we all became frustrated and the tension was uncomfortable. My husband shared with Deputy DeCharme that he did not feel comfortable getting out of the car given Deputy DeCharme's tone and behavior. He did not feel the environment was safe.

However, he did respond to Deputy DeCharme's request after Deputy DeCharme told my husband he could be arrested for disorderly conduct.

Importantly, my husband asked that Deputy DeCharme call for a supervisor. Fearing for my husband's safety, I stepped out of the car and asked why does my husband need to get out of the car? Deputy DeCharme demanded that I get back in the car and said "madam shut up and get back in the car". At which time my husband also stated, "honey get back in the car". I got back in the car and within 2min. there was a Sherriff's mobile and four officers proceeding toward my husband putting on black gloves. I prayed and asked God for safety. The Lord responded and a kind gentleman Sergeant, John R. Nelson (Badge#:29) approached my husband and walked him back to our car. He asked what happened and we explained the situation as I've outlined above. Additionally, my husband shared with the Sergeant that we are law abiding citizens, we've done nothing wrong. I've lived in the city all of my life and I come from an upstanding family. Sergeant Nelson listened to our side of the story and then asked that we wait at the car until he was able to talk with Deputy DeCharme. Sergeant Nelson returned in a matter of minutes and we saw Deputy DeCharme get into his vehicle and drive off. Sergeant Nelson explained that he was going to handle the situation from here. He informed us that he could not recant the ticket, but encouraged us to file a complaint. In fact, he gave us his card and told us to call if we needed anything. He went on to say, "he hoped we recognize that just because one individual (deputy) was disrespectful it does not represent the entire department".

The citation number#:G4921234 2. My husband's court date is scheduled for July 17th at 8:30am; Court Commissioner Rm. 221. We will appeal the citation and be responsible according to law.

This leads to my "matter of principle". I can't ignore the "prevailing thought" that the behavior exhibited by Deputy DeCharme was questionable and fell in the category of racial profiling. You see my husband is an educated black male, who has owned & operated a successful business in the City of Milwaukee for nearly 20 years. He is the father of our only child and has worked hard to provide for our family. On June 17th, He was driving the vehicle he purchased for our family; a BMW convertible.

I know there is a focus in the County to clear the Lake Front * County Parks after 7pm. I hope that as taxpayers who reside in River Hills, WI this focus will not preclude God fearing & law biding citizens from enjoying our great County because of our color.

I appeal to your sensibility as a man, husband and fair & great leader and ask that as my elected official you intervene in what I believe was a "reckless disregard & lack of character" by Deputy DeCharme. I thank you for your consideration.

The Order contained an attachment that specified the act or omission as the reason for suspension, which stated:

IA #07-196

ATTACHMENT TO COUNTY OF MILWAUKEE
NOTICE OF SUSPENSION

On Tuesday, June 19, 2007, Internal Affairs received a written complaint from citizen Tanya Hines relative to a traffic stop conducted by Deputy Scott DuCharme. It is alleged that Deputy DuCharme made a traffic stop that was racially motivated. It is further alleged that Deputy Ducharme was unprofessional in his contact with Ms. Hines and her husband during the traffic stop.

Deputies DuCharme and Hauski were assigned as partners to the Parks Patrol on Sunday, June 17, 2007. They made at least ten citizen contacts that evening and cited four persons for various violations. One person cited was Mr. Hines for violation of the “move over law.”

The interaction between the Hines’ and Deputy Ducharme did not go well. Deputy DuCharme contends that from his first request for a driver’s license he was met with negativity and uncooperativeness by both Mr. Hines and his wife, who was a passenger in the vehicle. He stated he attempted to explain the “move over law” and the reason for the stop, but they would not allow him to, constantly interrupting him. Every request that he made was met by a “no” response. At one point in the interaction he was advised by Mrs. Hines that they were close friends with Sheriff Clarke, and “he did not know who he was dealing with”, at which point he called for a supervisor to the scene. Deputy Ducharme, upon being released from the scene, immediately completed the back of the buff citation, writing 2½ pages of notes.

The Hines’ contend that Deputy Ducharme was disrespectful and abrupt with them, not explaining the reason for the stop or the citation. They did not like the tone of his voice. Mrs. Hines stated at one point Deputy Ducharme told her to “shut up and get back into the car.” Mr. Hines admits that it was wrong for his wife to exit the vehicle during the traffic stop. Mrs. Hines stated she felt they were being racially profiled and were wrongly cited. Mrs. Hines wrote the complaint although Mr. Hines was the person cited.

Sergeant Nelson was called to the scene by Deputy Ducharme. He spoke with both Deputy Ducharme and the Hines’. He had no negative interaction with the Hines, however Mrs. Hines stated to him she felt they were racially profiled.

Mr. Hines advised Sergeant Nelson that his brother was Willie Hines, Head of the Common Council and that they were close, personal friends of Sheriff Clarke. Sergeant Nelson stated he requested additional officer to provide traffic control because he had the Command Post. No other officer(s) approached the Hines, he approached them alone.

I made contact with the three other parties that were cited on this date by Deputy Ducharme and Hauski. All parties stated that the officers were friendly, professional and answered all of their questions. There is no evidence to conclude that any of the stops by these officers were racially motivated or that they approached their stops in an unprofessional manner.

Grievant's employment history with the Department since his hire in April of 1995 includes a 1997 three day unpaid suspension and several positive written comments from superiors for good work. Grievant contested the disciplinary Order which led to this grievance arbitration.

Mr. and Mrs. Hines did not attend or testify at the grievance arbitration hearing in this matter. Nelson did not testify. Captain Eileen Richards testified as to the internal investigation. Deputy Roy Felber testified generally as to commonalities in traffic stops. Grievant and Hauski did testify. Grievant testified credibly to the stop, including the following events:

He pulled the vehicle over for a violation of the move over law, and that when he approached the Hines vehicle he identified himself. The two people in the vehicle asked why they were pulled over, and he asked them if they were familiar with the move over law. He asked for the driver's license and the driver was initially uncooperative, refusing to give it to him, and the passenger told the driver not to give it, questioned him as to why they were stopped, and said other things. The driver, then identified as Mr. Hines, then did give him the license. He advised Mrs. Hines that she was borderline disorderly conduct and needed to stop. At a point during the stop Grievant asked Mr. Hines to exit the vehicle to get him away from his wife and speak with him about the stop. He did not ask Mrs. Hines to exit the vehicle. She did exit the vehicle, saying things to Grievant and her husband. Grievant repeatedly told her: "Ma'am, please be quiet. Have a seat back in the vehicle. Ma'am, have a seat back in the vehicle. Ma'am, have a seat back in the vehicle." He did not tell her to "shut up". She did not go back to the vehicle until Mr. Hines told her to step back in the vehicle. He "ran" Mr. Hines name and wrote the citation. He had originally intended to give the driver a warning. He did not feel his message about the move over law was being received. His reason for writing the citation was as a clear way to get the message across for the move over law. He was not able to diffuse the situation and he

called the supervisor to the scene. He does not believe there was anything in his approach that would lead the Hines' to feel uneasy or threatened, but he is not them.

Deputy Hauski, who was new to patrol, testified credibly to the stop, including the following events:

He was near the passenger side of the Hines vehicle, a convertible. Grievant went up to them, introduced himself in a normal tone of voice and asked Mr. Hines for his license. Right away Mrs. Hines said "don't give him your license." sounding as if she felt threatened. Mr. Hines did give his license to Grievant. Grievant asked for a phone number and they did not give him that at first. He did not hear Grievant tell Mrs. Hines at any time to "shut up." When Grievant asked Mr. Hines to get out of the car, Mr. Hines said he did not feel safe getting out of the car, that he felt threatened. He did get out of the car. Mrs. Hines then stepped out of the car. Grievant instructed her to get back in the vehicle. She refused to, but did get back in the vehicle after her husband told her to. In his opinion Mrs. Hines was the aggressor. Grievant did not show aggression towards Mrs. Hines. It was more frustration. Any oppositional behavior came from Mrs. Hines and not from Mr. Hines. He does not recall Grievant telling Mr. Hines at the beginning that he wanted to talk to him about the move over law and give him a warning. When Sergeant Nelson arrived he took over. Other police vehicles stopped there.

Further facts appear as are in the discussion.

POSITIONS OF THE PARTIES

County:

In summary, the County argues that Grievant violated Sheriff's Department Rules 1.05.02 and 1.05.15 as well as County Civil Service Rule VII, Section 4(1) (ff). The Hines' contended Grievant was both disrespectful and abrupt towards them, and he never explained the reason for the traffic stop or citation. There was no corroborating evidence by any witness as to the factual underpinnings of the traffic stop – the violation of the move over law. Hauski made no observations supportive of Grievant. No testimony sustaining Grievant's alleged reasons for making the stop were ever adduced. But, it was Grievant's conduct after the stop that is at issue.

The County argues that Grievant lost control of the stop when he engaged Mrs. Hines in a colloquy that served only to exacerbate tensions between the cops and the public. Deputy Hauski even noted that Mrs. Hines felt threatened by the way Grievant conducted himself. According to Hauski, Mr. Hines did not feel safe leaving the car or giving his phone number to someone who just demanded it with no accompanying explanation.

The County contends that Captain Richards provided the rationale for Grievant's shortcoming. The stop was "cheesy". Grievant lost control of the situation and let the wife talk him into issuing a citation to her husband. At no time did Grievant explain why he even made the stop, or why he failed to provide the available literature on the importance of the move over law. Because he failed, Grievant ended up treating both Hines differently than other drivers or members of the public.

The County argues that Grievant expressed that this case was an anomaly, and he could not explain why he lost control of the situation or why he permitted things to escalate as they did. Regarding a 1997 incident where he was culpable, Grievant was still angry and expressed the thought he was short changed, although he did at the time accept the sanction without challenge. He said that even with his experience and training he could not accept responsibility or control the conduct of others. This case presents a need to hold someone accountable who does not seem to get it. The Sheriff should be sustained, as should the minor discipline imposed.

The County further argues that there was evidence and an admission of misconduct. Grievant admits his infraction at page eight (8) of his primary brief. He merely asserts that he ought not suffer the monetary loss of a suspension. His "attaboy" letters are unrelated as regards the imposition of discipline. Grievant has been cited in Case 633 as having been treated more favorably than the employee in that case. In that case Arbitrator Jones found that Enget's two-day suspension was not excessive, disproportionate to the offense, or an abuse of management discretion, but rather was reasonably related to his proven misconduct. Milwaukee County agreed then, and now, with the Award of Arbitrator Jones. The same standard should be applied to Grievant in the instant matter.

Association:

In summary, the Association argues that Grievant's traffic stop did not bring discredit upon the department. He made the stop to educate the public on the move over law, a law that the Department has stated that it wants to enforce more thoroughly. Grievant was met with resistance and aggression. Despite repeated refusals by Hines to comply with Grievant's requests and respond to his questions, Grievant continued to try to diffuse the situation and explain to the Hines' why they were getting a citation. He even separated the Hines's in an effort to calm the parties down and give Grievant a chance to fully explain the ticket to Mr. Hines. Mrs. Hines refused to allow Grievant to do his job without constant hassle and accusations. Grievant, in another attempt to diffuse the situation, radioed for a supervisor to come to the scene. At no time did he bring discredit to the Department. He effectuated a stop to educate and enforce a law that is extremely important to the Department, especially in light of the recent tragic accident in which Deputy Tim Johnson was struck by a motorist while in the distress lane. Grievant did what he could to explain the reason for the stop and issue a citation, all while being met with hostility and aggression. He called a supervisor per Department practice. His actions were appropriate. And, neither Deputy Hauski nor Sergeant Nelson saw Grievant act inappropriately toward the Hines'. Both Captain Richards and Deputy Hauski testified that Mrs. Hines was the aggressor.

The Association argues that Grievant was never discourteous or uncivil to the Hines. He remained calm, used a normal tone of voice and addressed the Hines' respectfully throughout the stop. Deputy Hauski's unrefuted testimony supports this. The Department failed to produce any witnesses who were present during the stop to testify that Grievant's conduct was anything less than civil and courteous. Hauski testified that Grievant never showed aggression, even though Mrs. Hines was extremely verbally aggressive and continually tried to escalate the situation by badgering Grievant with accusatory questions and urging her husband not to comply with Grievant's requests for information. Everyone, even Mr. Hines, refutes the statement in Mrs. Hines' letter that Grievant told her to "shut up". There are no reports that Grievant raised his voice or swore. Neither Grievant nor Hauski felt Grievant was disrespectful at any time. The only evidence to the contrary is Mrs. Hines' letter and statement, both of which are partially refuted by her own husband.

The Association contends that Grievant did not use offensive conduct or language towards the Hines'. No one present at the scene heard Grievant tell Mrs. Hines to "shut up", including Mr. Hines. Grievant never spoke with Mrs. Hines alone. Her accusation of being told to "shut up" is baseless. Furthermore, Mrs. Hines provides no support to show that she or her husband were racially profiled by Grievant. Captain Richards testified that the integrity checks she ran on Grievant during her investigation refuted any allegation of racial profiling. Richards states that racial profiling was not at issue in her investigation. Mr. Hines never alleges he felt he had been racially profiled by Grievant. And Civil Service Rule VII, Section 4 (1) that prohibits offensive conduct or language does not apply because such actions are not allowed toward county officers or employees, neither of which pertains to the Hines. Richard's testimony confirms that the rule is not applicable. Grievant did not violate Civil Service Rule VII, Section 4 (1) and was never discourteous or uncivil towards Mr. and Mrs. Hines.

The Association also argues that just cause does not support a one (1) day suspension. The Department failed to show that Grievant related any rules. They did not put on one witness who was present at the incident, and Richard's investigation produced statements supporting Grievant's conduct. No discipline should be incurred. If the arbitrator determines there is just cause for a violation then Grievant contends just cause does not support the level of discipline imposed. Discipline should reflect Grievant's record of service. Past disciplinary history is a major factor, citing arbitral authority. Grievant's disciplinary record consists of only one suspension more than ten years ago. That was off-duty, a different rule, and is firmly disputed by Grievant. He should have appealed. It's the only suspension he received in over a decade of service. His history included numerous positive employee activity documents, many praising him for his professionalism. He does not deserve to incur the monetary loss of wages for his first infraction in ten years.

The Association further argues that just cause does not support the rule violation as charged. The allegation Grievant never explained the reason for the stop is baseless. At hearing Grievant testified he explained the reason for the stop. The citation buff corroborates this, as does his statement to Internal Affairs. The County case is weakened by Mrs. Hines

letter which indicated that Grievant inquired whether the Hines knew about the move over law, and further indicates that Mr. Hines explained why he believed he did not violate that law. The County also questions the validity of the traffic stop, but that has no bearing on the outcome of this matter. The alleged rule violations occurred after the stop was made. And it is not Grievant's burden to find a witness and prove the validity of the stop. The County advocates for an improper burden shift to which an employee must disprove the allegations.

The Association contends that the County argues Grievant's actions resulted in him losing control of the situation. That is not true. He made repeated attempts to diffuse the situation, doing nothing to provoke aggression or hostility. The County incorrectly suggests that Deputy Hauski noted that Mrs. Hines felt threatened; however, this is simply not the case. Hauski never testified to such a statement. Unfortunately, the County condones Mrs. Hines' improper behavior. The County neglects to mention she raised her voice and became combative. The County fails to explain that she exited the vehicle and failed to follow verbal commands. The County has failed to meet its burden of proof. Grievant answered all inquiries from the Hines and maintained a calm and professional demeanor throughout the incident. This episode is nothing more than a disgruntled citizen not happy about being pulled over for a violation of a law.

DISCUSSION

This case requires determining whether Grievant violated the three Rules that were cited in the September 27, 2007 disciplinary suspension Order. The factual basis alleged to support those Rule violations are in the attachment to that Order. It is the contentions in the Order and its attachments, and not the Hines complaint letter of June 17, 2007, which forms the reason for suspension and upon which the Grievant was alleged to have violated the Rules. The Hines letter was wider in scope than what the County eventually alleged after its investigation the Grievant did that was in violation of the Rules. The case does not depend on whether there was a moving violation of the "move over law". As the County's initial brief states, it was DuCharme's conduct after the stop that is at issue.

The issues in the case center around whether there was just cause to find that Grievant violated the rules as alleged, and if so, did just cause exist to impose a one (1) day suspension. The Parties did not point to a definition of just cause in the collective bargaining agreement and they did not stipulate to a definition of just cause. Generally, just cause involves proof of wrongdoing and, assuming guilt of wrongdoing is established and that the arbitrator is empowered to modify penalties, whether the punishment assessed by management should be upheld or modified. See, *Elkouri & Elkouri, How Arbitration Works*, 6th Ed., p. 948. In essence, two elements define just cause. The first is that the employer must establish conduct by the Grievant in which it had a disciplinary interest. The second is that the employer must establish that the discipline imposed reasonably reflects its disciplinary interest.

The three Rules alleged to have been violated by Grievant are:

Milwaukee County Sheriff's Department Rules and Regulations

1.05.02 Rule 2 – CONDUCT OF MEMBERS
Members of the department shall not commit any action or conduct which impedes the department's efforts or efficiency to achieve its policies and procedures or brings discredit upon the department.

1.05.15 Rule 15 – COURTESY AND CIVILITY
Members of the department shall answer all inquiries from citizens in a courteous manner and, if requested, shall give their name and badge number. Courtesy and civility toward the public is demanded of all members of the department, and conduct to the contrary will not be tolerated. Members in their conduct shall be civil and orderly, and shall at all times exercise the utmost patience and discretion.

Milwaukee County Civil Service Rule VII, Section 4 (1)

(ff) Offensive conduct or language toward county officers or employees

The third of these Rules, Rule VII, Section 4 (1) (ff) can be dealt with summarily. It prohibits employees from using offensive conduct or language towards County officers or employees. That did not happen in this case. The Hines are not County officers or employees. They are not alleged by the County to be County officers or employees. While the County certainly has an interest in the conduct of its Deputies towards other County officers and employees as shown in the Rule, it has not established any facts that implicate those interests or a violation of this Rule. Thus, there are no facts established to support a violation by Grievant of this Rule during his contact with Mr. and Mrs. Hines. There is no just cause to find a violation of the Rule or a reason to discipline Grievant for violating that Rule.

The allegation of a violation of Sheriff's Department Rule 2 reflects a County interest in how the Department is perceived by the public and individuals, and how conduct of officers might impede the efficiency of the department in carrying out its various responsibilities and policies. Bringing discredit on the Department itself is a violation and also impedes its efficiency. The interaction between a Deputy and members of the public, such as Mr. and Mrs. Hines during the traffic stop, are implicated by Rule 2. Similarly, the allegations of a violation of Sheriff's Department Rule 15 reflects a County interest in a Deputy's conduct, courtesy and civility to citizens and the general public. Mr. and Mrs. Hines are members of the general public. It must be determined if the County has established facts which support a finding of a violation of these Rules.

At the onset in this determination, the County's reply brief contends that the Grievant, at page eight of his primary brief, admits his infraction. This contention is not correct. Grievant's primary brief, as reflected in the summary of the Parties' positions, maintains that he did not violate the Rules. It further argues that if the Arbitrator finds just cause to support a violation of the Rules then the penalty of a one (1) day unpaid suspension is not supported by just cause. This is not an admission of an infraction. It is an alternative argument. It does not concede or establish any facts, or allow a conclusion to be drawn that establishes just cause for imposing discipline. Whether there is just cause to impose discipline depends on what facts and conduct have been established by the evidence in this case.

It is very significant to fact finding that neither Mr. Hines nor Mrs. Hines testified at the hearing in this grievance arbitration. Their letter of June 17, 2007 has been admitted into evidence and their statements as given to Captain Richards during her Internal Affairs investigation have been admitted into evidence as forming part of the allegations supporting the Order of suspension. These documents cannot be cross examined. The accuracy of the statements and allegations therein is therefore difficult to evaluate. In some respects they are consistent with the testimony of Grievant and Deputy Hauski, and in some respects they differ. This is in contrast to having the testimony of Grievant and Deputy Hauski at the hearing. Allegations were made by the Hines in the letter and in the interviews. Those allegations were directly refuted at the hearing by Grievant, and to a very large extent by Deputy Hauski, who were both subject to cross examination by the County. This is the nature of the evidence that has to be weighed in determining what facts and conduct the County has established.

The first allegation in the Attachment to the Order of suspension, based on the June 17th letter and statements in the investigation, is that the traffic stop was racially motivated. Mr. Hines is a black male who was driving a BMW convertible. Grievant is a white male who was driving a marked squad car. There is no evidence that this traffic stop was racially motivated. There is no evidence that race was the reason for the stop or affected Grievant's conduct during the stop. The County spends no time or effort in its briefing and arguments specifically contending that the stop was racially motivated or that Grievant's conduct during the stop was racially motivated. While conceding that it is the conduct after the stop that is at issue in this case, the County argues that there was no corroboration by any witness as to the factual underpinnings of the traffic stop. This argument is in direct conflict with the testimony of Grievant who said he observed the vehicle in violation of the move over law, and that was the reason for the stop. There is no other evidence on that point. That is not evidence of racial motivation. Nothing that happened after that implicates race playing any factor in anything Grievant did during the stop. The County argues that because Grievant failed at the stop he ended up treating both Hines differently than other drivers or members of the public. The County does not demonstrate how Grievant treated them differently, or that race had anything to do with him trying to communicate the importance of the move over law and his decision to issue the citation. Grievant had not been instructed by his supervisors not to issue citations for this type of violation. A citation was issued. During stops sometimes only warnings are given, as Grievant testified he initially intended to do. Sometimes citations are issued. What happens during a stop can be a factor in whether a warning or citation is given.

There is no evidence of anyone using any racial overtones, and in Mr. Hines' interview with Captain Richards he added that Grievant did not swear or make any type of racial overtones. This corroborates Grievant's testimony. Grievant testified, credibly, that he wanted to communicate the importance of the move over law, and the driver was not receptive to that. The evidence is that was Grievant's motivation in issuing the citation, not race. The only evidence is that the stop, and the conduct during the stop, was motivated by education and enforcement of the move over law. This is supported by the results and conclusions of the Internal Affairs investigation wherein Captain Richards contacted the other people who were issued citations by Grievant that day. The Internal Affairs conclusion on that issue, which was part of the Attachment to the Order of Suspension, bears repeating:

I made contact with the three other parties that were cited on this date by Deputy Ducharme and Hauski. All parties stated that the officers were friendly, professional and answered all of their questions. There is no evidence to conclude that any of the stops by these officers were racially motivated or that they approached their stops in an unprofessional manner.

The County has failed to establish that the traffic stop and any conduct of Grievant during the stop was racially motivated or that there was any racial profiling here. There was no racially motivated conduct that supports a finding of a violation of either Rule 2 or Rule 15, and no just cause has been established for a violation of those Rules based on racial motivation or profiling.

The Department's disciplinary Order also alleges that Grievant was unprofessional in his contact with Mr. and Mrs. Hines. It notes the Hines' contention that Grievant was disrespectful and abrupt with them, not explaining the reason for the stop or the citation. The evidence is to the contrary. Grievant testified that he did ask Mr. Hines if he was familiar with the move over law after first approaching the vehicle. Deputy Hauski, who was near the passenger side of the vehicle, testified he did not hear that. That does not mean that Grievant did not say that. Significantly, the June 17th letter itself references the Grievant, upon approaching the vehicle, asking if they were aware of the move over law, and Mr. Hines responding that he was and saying that he did not agree that he was in violation of that law. Even though the letter is hearsay, it does corroborate the testimony of the Grievant that he did explain the reason for the stop and the citation. The County has not established that Grievant did not explain the reason for the stop. That aspect of the allegations is not proven as a Rule violation or just cause to impose discipline.

The contention is made by the Hines and the County that Grievant told Mrs. Hines to "shut up and get back into the car". Grievant denies he told Mrs. Hines to "shut up." Grievant testified at the hearing that he did not say this. Deputy Hauski was standing near the passenger side of the vehicle when Mrs. Hines, the passenger, got out. He did not hear Grievant say that. In Mr. Hines' interview with Captain Richards he did not contend that Mrs. Hines was told to "shut up." Again, Mr. and Mrs. Hines did not testify at the hearing. There is insufficient evidence, even applying a mere preponderance standard, to prove that Grievant ever told Mrs. Hines to "shut up". That allegation is not proven to establish a violation of either Rule 2 or Rule 15 as just cause to impose discipline.

There is the more generalized contention that Grievant was disrespectful and abrupt with Mr. and Mrs. Hines, and they did not like the tone of his voice. In some respects it also implies a particular demeanor. This type of allegation is difficult to analyze without the Hines' testimony. The allegations in the Order's Attachment, the June 17th letter, and even the interviews conducted by Captain Richards do not present any specific explanations or examples of this rather subjective subject matter. Grievant denies he was disrespectful or abrupt. Deputy Hauski observed Grievant introduce himself and use a normal tone of voice. Hauski felt Grievant later was frustrated, but not aggressive. Grievant did testify that he cautioned Mrs. Hines that she was border line disorderly when she was asking questions and making statements while Grievant was attempting to get information from Mr. Hines and discuss the reason for the stop with him. He asked her to please be quiet. Grievant did tell Mrs. Hines, several times, to get back into the vehicle, prefacing that with "Ma'am". The County does not argue that he should not have sought the requested driver's license or phone number, or that he should not have warned Mrs. Hines about her conduct or instructed her to return to the vehicle. The County does argue that Grievant lost control of the stop when he engaged Mrs. Hines in a colloquy that served only to exacerbate tensions between the cops and the public. However, the evidence demonstrates that it was not Grievant who engaged her in the colloquy. She did interject herself into the Grievant's request for the license and phone number, as well as getting out of the car. Grievant was a police officer in a marked squad car. He was not, as the County's brief and the Hines' argue, someone who just demanded the phone number with no accompanying explanation. The County has not argued that it was inappropriate for him to try to talk to Mr. Hines away from Mrs. Hines in order to explain the reason for the stop. The evidence indicates that he had made the decision to write a citation before Mrs. Hines exited the vehicle so her conduct in that regard cannot support the County argument that Grievant let the wife talk him into giving the husband a citation. Given these circumstances, Grievant's responses and actions appear measured.

As to other matters² contended by the Hines in their letter and interviews with Captain Richards, those allegations have been considered and in the absence of testimony from Mr. or Mrs. Hines there has been no evidence produced at the hearing to substantiate them. Moreover, they had not been specifically identified in the attachment to the Order of suspension as a factual basis for the Order.

The evidence does not demonstrate that Grievant did anything during the stop to impede his or the departments efforts to achieve its' policies and procedures or to bring discredit upon the department. Even if Mr. Hines expressed sincerely that he did not feel safe leaving his car that does not demonstrate that Grievant did anything to bring discredit upon the Department. The County has not established conduct on Grievant's part at any time during the stop which violated Rule 2 as just cause to impose discipline.

² For example, the Hines' letter and interview contends that Grievant told Mr. Hines not to snatch the drivers license from him.

The evidence demonstrates that Grievant did answer the inquiries, even if those answers appeared to have been unsatisfactory to the Hines. He was courteous and civil, even if firm when the situation required it. He gave his name at the onset of the stop. He exercised patience and restraint by voicing a warning about being borderline disorderly. Similarly, he tried to speak to Mr. Hines outside of the car in a safe location so that the purpose of the stop could be explained and effectuated without interruptions. The Attachment to the Order of suspension even notes that "Mr. Hines admits that it was wrong for his wife to exit the vehicle during the traffic stop". Whether asked by Mr. Hines or on his own accord, Grievant called a supervisor when the situation might have become more excited than it was. That did have a calming effect on the situation. The County has not established conduct which violated Rule 15 as just cause to impose discipline.

The County has not established any conduct by which Grievant violated any Sheriff's Department Rules or County Civil Service Rule that he was charged with. Just cause does not exist to find that Grievant violated the Rules as alleged. Accordingly, based upon the evidence and arguments of the Parties, I issue the following

AWARD

1. The grievance is sustained.
2. As a remedy the County shall make the Grievant whole of all lost wages and benefits associated with the discipline and have his personnel records so reflect.

Dated at Madison, Wisconsin, this 12th day of November, 2008.

Paul Gordon /s/

Paul Gordon, Arbitrator