

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**WAUPACA COUNTY**

and

**WAUPACA COUNTY LAW ENFORCEMENT OFFICERS  
ASSOCIATION, LOCAL 2771, AFFILIATED WITH WISCONSIN  
COUNCIL 40, AFSCME, AFL-CIO**

Case 164  
No. 68321  
MA-14194

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**Appearances:**

Davis & Kuelthau, S.C., by **James R. Macy**, 219 Washington Avenue, Oshkosh, Wisconsin, appeared on behalf of the Employer.

**Houston Parrish**, Staff Representative, 1547 Somerset Drive, Stevens Point, Wisconsin, appeared on behalf of the Union.

**ARBITRATION AWARD**

Waupaca County Law Enforcement Officers Association, Local 2771, Affiliated with the Wisconsin Council 40, AFSCME, AFL-CIO, herein collectively referred to as the "Union," and Waupaca County, herein referred to as the "Employer," jointly selected the undersigned from a panel of arbitrators from the staff of the Wisconsin Employment Relations Commission to serve as the impartial arbitrator to hear and decide the dispute specified below. The arbitrator held a hearing in Waupaca, Wisconsin, on November 19, 2008, and continued by telephone November 26, 2008. Each party filed a post-hearing brief, the last of which was received February 5, 2009. After the close of briefing, the Union requested the opportunity for further argumentation which request was granted. Supplemental argumentation closed on February 19, 2009.

**ISSUES**

The parties were unable to agree on a statement of the issues. They stipulated that I state them. I state them as follows:

1. Did the Employer have proper cause to discharge Officer Furman under the terms of a last chance agreement?
2. If not, Did the Employer otherwise have proper cause to discharge Officer Furman?
3. If the answer to questions 1 and 2 are “no,” what is the appropriate remedy?

### FACTS

The Employer is a Wisconsin county. It performs various functions. It performs a law enforcement function through its Sheriff’s Department, herein “Department.” The Union represents the full-time sworn law enforcement employees of the Department, including patrol officers, the Transport Officer and Patrol Sergeants. Officer Jennifer Furman was a Patrol Officer at the time of her termination in the bargaining unit represented by the Union. She was a non-unit reserve officer for the Sheriff’s Department from 1996. She was then employed as a full-time telecommunications operator from 1998. She then served as a Corrections officer in the County Jail from July, 1999, to August, 2000. She was then promoted to Transport/Warrants Officer which is a sworn position in the bargaining unit. The Transport Officer was responsible for transporting people in custody to court, other jails or facilities, and to serve civil process. The Transport Officer also assists other Deputies as back-up at accident scenes and crowd control. On March 20, 2008, the Department promoted her to Patrol Officer. Although she had training in her former sworn position, the Department also instituted a supervised on-the-job training program for her. The training program was completed August 21, 2008, two days before the incident leading to her discharge. Her duties included, but were not limited to traffic stops for driving a motor vehicle while under the influence of intoxicants (herein “DUI”) and other offenses. She also performed back-up for other law enforcement officers of other jurisdictions in the county and fellow deputies.

In, general, Officer Furman has no relevant disciplinary history with the County other than that specified herein. In April, 2006, Officer Furman was suspended for having used the Internet to write disparaging remarks about a Circuit Judge and an Assistant District Attorney. At the time, she was the Animal Control Officer and she was removed from that position. She ultimately returned to that position. On October 16, 2007, while she was in the role of Transport Officer/Civil Process, she had an incident in which she received a temporary restraining order to be served upon a former fellow employee. She thought those who were in the fellow employee’s support system ought to be forewarned in order to provide emotional support as may be needed for the former fellow employee. She was told by her supervisor to not tell anyone about the restraining order. Although civil process is public record, Deputies are required to keep process-serving matters confidential except as required in the performance of their duties or otherwise required by law. Officer Furman, knowing it was a violation of her professional responsibility and that she expressly had been told not to tell anyone else, notified another employee of the fact that the restraining order was about to be served. Her

stated motivation for doing so was to assure emotional support for the recipient of the order. On October 17, 2007, the Employer called her into a meeting with Union representation. She was essentially told that they had not decided what discipline to impose but might discharge her. She was afforded an opportunity to sign a "last chance agreement." She and her Union Steward unsuccessfully attempted to contact the Union Business Representative, but he was not available. Neither asked the Employer for more time to decide. Officer Furman and her Union steward signed the last chance agreement and Officer Furman endorsed it "under duress." The Union never filed a grievance or took any other action protesting the negotiations leading to the last chance agreement. The Employer never took any step to investigate the "under duress" endorsement.

The incident which is the subject of this dispute occurred in the early morning hours of August 23, 2008. Officer Furman was off duty. She had been at the county fair on the evening of October 22 and then went to Club 54, a local bar. She had done some drinking at each place and had seen Jared Fleece at Club 54 in the company of two females. She was at the Bear Lake Campground when she received two calls from Mr. Fleece by his cell phone to her cell phone. In the first, he stated that he was being followed by police and asked her what he should do. In the second he stated that he was about to be pulled over. She then drove to the scene of the arrest.

Jeremiah Johnson testified to the events which occurred next as follows. He is a Patrol Officer for the Manawa City Police Department. He has about two years experience. He works the 11:00 p.m. to 7:00 a.m. shift. The Manawa City Police Department is a small department. There are, at most, two police officers on duty between 11:00 p.m. to 7:00 a.m. He was on duty alone on this evening. The situation in dispute involves a DUI traffic stop of a car with multiple occupants. This type of traffic stop involves significant risk to the safety of the arresting officer, particularly when there are multiple occupants in the car. The procedure for performing a traffic stop of this nature is for the arresting officer to stop the vehicle, position the officer for his own safety, secure the occupants of the car, do a visual inspection to determine if there are open containers of alcohol or other contraband, do a field sobriety examination of the driver, determine if there will be an arrest, and insure that the driver and occupants are transported to a safe destination in a way which is safe. This procedure was well known to Officer Furman.

Officer Johnson testified that shortly before 2:30 a.m. he spotted a suspect vehicle in the City of Manawa driving in what appeared to be an erratic manner. He decided to follow the vehicle. The vehicle attempted to evade him by entering a local self-service car wash. However, the vehicle entered the exit portion of the car wash rather than the entrance. Officer Johnson parked his squad and watched the vehicle. The vehicle then exited the car wash and drove around to the entrance and stayed in the car wash; however, the car wash was never activated.<sup>1</sup> The vehicle exited the car wash and drove to a parking area belonging to a local

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<sup>1</sup> Other evidence indicates that Mr. Fleece made the first phone call at the time he exited the car wash from his cell phone to her cell phone. He told her that he was being followed by a squad car and expected that he would

landscape contractor. Officer Johnson, being familiar with the owner and employees and recognizing the unusual hour, knew that the vehicle had no business being at that location. The location was not an actual or de facto public thoroughfare. Officer Johnson received assistance from a Waupaca County Patrol Officer who drove to the landscape lot. Officer Johnson entered the landscape business property, activated his emergency lights and pulled in behind the subject vehicle. The Waupaca County Patrol Officer arrived and blocked the exit of the subject vehicle. The two squads thus prevented the vehicle's escape. He positioned his vehicle behind and slightly adjacent to the stopped vehicle in accordance with appropriate police procedures designed for officer safety and to prevent the vehicle from backing up. At the same time, the Waupaca County Officer left his vehicle and stood in a position to perform a physical back-up function. Officer Johnson exited his vehicle and approached the vehicle. He did a physical scan of the interior and obtained identification of all of the occupants. He then returned to his vehicle to run the license plate and identification of the occupants for outstanding warrants. There was a warrant for one of the passengers but it was not of the type which would have required Officer Johnson to take the person into custody.

The driver again called Officer Furman and at that time, she did learn where the stop was located. Officer Furman drove to the scene. She was driving her husband's truck at the time. She was enroute for five minutes and made no effort to notify her own dispatch by cell phone that she was enroute to this scene or to contact her shift supervisor to inform him of her intentions. Officer Johnson did not know she was enroute to the scene.

The Officer who had acted as back up left for another call. His shift Supervisor, Sgt. Wilz, had radioed that he would come to the scene and act as back up while the Officer responded to another call. Sergeant Wilz had not arrived when Officer Furman arrived. She drove past the scene turned around and returned. She pulled her vehicle into the parking area behind and to the driver's side of the subject vehicle. She left her lights on facing in the direction of Officer Johnson and, thus, illuminated Office Johnson and the scene. This was against normal police procedure in that it decreased the safety of Officer Johnson and could have impaired the results of the field sobriety check. Officer Furman had given a male patron who was inebriated a ride home. At the time of this incident he was asleep in the back of her truck.<sup>2</sup> Officer Furman got out of the truck and stood by the door until Office Johnson recognized her. The two had worked together. Officer Furman did not say anything to Officer Johnson, but went to the passenger side of the subject vehicle and talked to the two passengers. Officer Johnson questioned to himself why she was there, but concluded that she was a sworn officer and would not do any harm.

Sergeant Wilz arrived and placed his vehicle behind that of Office Johnson. Officer Furman left the passenger side of the subject's vehicle and went to talk to Sgt. Wilz behind

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be pulled over. He asked her what he should do. The Department suggested in its examination that Officer Furman had the opportunity to tell the driver how to minimize the impact of the impending DUI stop. Officer Furman admitted that she was at the Bear Lake Resort, some five to ten minutes away.

<sup>2</sup> This was not known to Officer Johnson until after the incident.

Officer Furman's squad car. She volunteered to drive the driver and passengers to a safe place. Sergeant Wilz smelled alcohol on her breath and asked if she had been drinking. She admitted that she had. He asked how much and she said she had two beers. Sergeant Wilz elected to believe her but did not believe that she should be entrusted with driving the driver and passengers to a safe place. That was done by Officer Johnson.

After the stop was completed, Sgt Wilz told Officer Furman that the matter was completed. The two disputed at hearing what that meant. Officer Furman stated that he told her that he would report the matter further and if Officer Johnson did not it would end there. Sergeant Wilz testified that he meant that the matter was concluded for the night.

### RELEVANT AGREEMENT PROVISIONS

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#### ARTICLE III - MANAGEMENT RIGHTS

The County possesses the right to operate County government and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this contract. These rights, which are normally exercised by the County or the Sheriff include, but are not limited to the following:

- A. To direct all operations of the Sheriff's Department.
- B. To hire, promote, transfer, assign, lay off or retain Employees in position with the County and to suspend, demote, discharge, or take other disciplinary action against Employees for proper cause.

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#### ARTICLE VII - TRAINING

The County agrees that it will assume prime responsibility for training Employees in the bargaining unit under the guidelines of qualified personnel in the work in which they are assigned. Each Employee assumes full responsibility for reasonably learning and knowing the material presented in the training sessions and further agrees to maintain a level of professional competence and physical and mental fitness necessary to perform the work assigned.

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ARTICLE IX - DISCIPLINE

Section 1: Employees who have completed their initial probationary period may be suspended, demoted, dismissed, or otherwise disciplined for proper cause as follows:

- A. Whenever the Sheriff or Chief Deputy or his designee believes that an Employee under his command has acted so as to show him or her to be incompetent to perform his or her duties or to have merited suspension, demotion, dismissal, or other discipline, he may discipline - including suspend, demote or dismiss the Employee by written order to the employee, with a copy filed with the Personnel Committee.
- B. The Employee may appeal this action to the Personnel Committee.
- C. The Personnel Committee shall forthwith notify the Sheriff, Chief Deputy, or his designee of the filing of the appeal and furnish him/her with a copy of the same.
- D. Within ten (10) days after mailing or serving notice of the appeal, the accused Employee shall either file:
  1. A written request with the Personnel Committee for a hearing and the matter shall proceed according to Section 3, or
  2. A written statement with the Personnel Committee stating that the accused Employee waives any and all statutory rights that he or she may have to proceedings before the Personnel Committee and court appeal there from, as specified in Section 3, and also stating that the Employee elects to process the matter exclusively under the grievance procedure provided for in the Association Agreement with the County. In the event the Employee does not make either of the above filings, the Employee shall be deemed to be proceeding under Section 3 and the Personnel Committee may take whatever action they deem justifiable on the basis of the charges filed and shall issue an order in writing.

Section 2: In the event the above waiver of proceedings before the Personnel Committee and court appeal therefrom is held to be invalid by a Court of competent jurisdiction upon an action commenced by the Union or Employee, then the matter shall be heard as provided in Section 3, but there shall be no award of back pay for the period from the date of the filing of the waiver until the date the court award is received by the Employer.

Section 3:

- A. Within three (3) weeks after filing of the request for a hearing provided for in Section 1(B), 1, above, the Personnel Committee shall appoint a time and place for the hearing of the charges and the Committee shall notify the Sheriff or Chief Deputy or his designee who filed the complaint with the Committee, and the accused Employee of the time and place of such hearing, and any testimony taken shall be transcribed. The Chairman of the Committee shall issue subpoenas for the attendance of such witnesses as may be requested.
- B. At such hearing the Chairman of the Committee shall possess authority to maintain order and enforce obedience to his lawful requirements and if any person at the hearing shall conduct himself in a disorderly manner, and after notice from Chairman shall persist therein, the Chairman may order him or her to withdraw from the hearing, and on his refusal may direct the person to be removed from the hearing and charged with Disorderly Conduct and such other remedies the law provides.
- C. At the termination of the hearing the Personnel Committee shall determine in writing or not the charge is well founded and shall take such action by way of suspension, demotion, dismissal, other disciplinary action or reinstatement, as it may deem requisite and proper under the circumstances, and file the same with the Secretary or the Committee and the Sheriff or Chief Deputy or his designee, the Association, and the Employee.

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### **RELEVANT RULE PROVISIONS**

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#### **Rules of Responsibility**

- R-1 Purpose and General Policy

A law enforcement officer in Wisconsin has equivalent authority and responsibility when he or she is off-duty as when he or she is on-duty. Wisconsin Statutes, Section 59.23 and 59.24, which provide county law enforcement deputies with their authority, do not make any distinctions between the authority of the county deputy when he or she is on-duty and when he or she is off-duty. Although the deputy is not expected to respond in his or her law enforcement capacity on a continual, 24 hour basis, the deputy is equipped to respond to his or her law enforcement capacity under certain circumstances even when he or she is off-duty.

#### Definitions

- A. On-Duty  
Whenever a deputy is exercising his or her law enforcement authority while on a shift or a specific tour of duty.
- B. Off-Duty  
A deputy who is not exercising any law enforcement authority and/or is not regularly scheduled to report to work with the department for a specific tour of duty.

- R-2            When a deputy takes any law enforcement action or exercises his or her law enforcement authority when he or she is off-duty, that deputy shall follow all policies, regulations, and procedures of the Waupaca County Sheriffs Office.
- RR-3           Although the off-duty deputy is expected to assert his or her law enforcement authority under the appropriate circumstances, that deputy shall not:
- A.    Use his or her law enforcement authority in any circumstances where there is a problem, quarrel, or other conflict which involves that deputy or that deputy's family, friends, or neighbors, unless contravening factors are present, such as the use or threatened use of a deadly force, is present; or
  - B.    Arrest a person for a traffic violation which occurs in the presence of the deputy, unless that traffic violation and the violator can be stopped or apprehended by the off-duty deputy without the violation of any statutes or of any departmental policies.

**WAUPACA COUNTY SHERIFF'S OFFICE  
RULES OF CONDUCT**

These rules of conduct shall be applied to all members of the Waupaca County Sheriff's Office.

- RC-1           A deputy shall maintain a level of conduct in his/her personal and business affairs such that there is no impairment of his/her ability to perform as a law enforcement deputy. Deputies shall be truthful and honest and shall immediately report to their superior any infraction of Wisconsin Statutes, or Departmental Rules and Regulations. No deputy shall accept a reward fee, gift, or other gratuity for the performance or nonperformance of law enforcement duties.

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- RC-20          Abuse of the deputy position
- A.    Deputies shall not use his or her position or official departmental identification card or badge:

1. For personal or financial gain
2. For obtaining privileges which are not otherwise available
3. For avoiding the consequences of an unlawful act.
4. Sheriff's Office unless authorized to do so by a supervisory deputy or Sgt. This shall not apply to material contained in press releases or information which should be disseminated immediately in the interest of public safety.

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RC-28           Deputies shall not intentionally interfere with an investigation which is being handled by another deputy of the Office of another law enforcement agency.

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### **POSITIONS OF THE PARTIES**

#### **Employer**

Officer Furman's actions violate the last chance agreement. Under the terms of the last chance agreement, Officer Furman is subject to discharge. Even if that agreement were not applied, her conduct constitutes just cause for discipline and discharge is the only appropriate remedy. Her last discipline was a three week suspension and progressive discipline would result in discharge. Officer Furman agrees she should not have appeared on the scene. Officer Furman voluntarily accepted the last chance agreement. The Union explained the terms to her at the time she signed it. Although Officer Furman signed the agreement "under duress," neither she nor the Union filed a grievance concerning the agreement. The position of Transport/Civil Process Officer and Patrol Officer are both sworn positions and discipline in the former position properly continues into the latter. Officer Furman testified that she knew the last chance agreement would apply to her when she changed positions. In the past, discipline has carried over between the two positions.

The same policies applied to Officer Furman in both positions. She unequivocally violated numerous policies in this incident. Officers are trained in officer safety and they are trained to work as a team and not put each other at risk. Both are trained not to show up off duty or on duty smelling of alcohol. Officer Furman knew from a prior incident with a State Patrol Officer that she should not show up at another officer's traffic stops. She violated Section D 1 substandard performance. She also violated Section D 1 by engaging in off duty conduct which brings disrepute upon the individual or the Employer. Specifically, she reported to a traffic stop to assist a friend she knew to be so under the influence that his passengers would need a ride home. Basic common sense would suggest that she not do so to avoid even the appearance of impropriety. She did everything to assist her friend and nothing to assist the officer in charge of the scene. She put the officer in a position in which he would

have had to interrupt a field sobriety test to talk to her and find out what she was doing there. She violated Section D 12, using her position or authority for personal profit or political advantage. State Patrol Officer Linjer testified that when she was about to perform a field sobriety test Officer Furman, then a civilian at the scene, asked her if she recognized her as a Waupaca County Officer and to reconsider arresting the individual in custody. Although the situation was not known to the Employer, it does demonstrate a past propensity to engage in the same inappropriate behavior. The facts and circumstances demonstrate that Officer Furman used her authority to gain access to the scene in question. She interrupted the scene by making sure that Officer Johnson recognized her. At a minimum she put herself in a position of creating an appearance of impropriety. She made sure that Officer Johnson recognized her as a law enforcement officer and sent a subtle message to him in the process.

Officer Furman violated Sheriff's rules RC 1 by allowing an "impairment" of her duties in that it impaired her ability to work with Manawa police officers. She also withheld information that the person stopped had admitted to her that he was so intoxicated that he would require a ride home. She also violated RC-20 by abusing her position of Officer. She also violated RC-28 which prohibits a Officer from interfering with an investigation by another police agency. She intentionally left the roadway and entered private property where she knew a stop was taking place. She parked shining her lights directly into the police officer's eyes. This is a breach of procedures which put the Police Officer in jeopardy and put his investigation into jeopardy. She continued to sit in her vehicle surveying the situation. She waited in her car until he started a field sobriety test. She then left her vehicle and went to the unlighted side of the stopped car without any communication with the Police Officer. He was clearly diverted. Officer Furman's position that she was there merely to offer the suspect and/or his passengers a ride home is inadequate to explain all of her actions. Officer Furman could not have known who was in the car facing him with the lights on or what the occupant's intentions. Officer Furman's actions violate rule RR-3 governing the assertion of authority by an off duty Officer.

The Employer had proper cause to discharge Officer Furman even in the absence of a last chance agreement. There were grounds for discipline as previously noted. Discharge is the only appropriate remedy because progressive discipline has been applied and the previous suspension has not sufficed to discourage this conduct. Even applying the "Seven Tests" the Employer's decision must be sustained. The arbitrator should sustain the discharge.

### Union

The Employer has failed to show just cause for this discharge. The just cause standard is even higher for off-duty misconduct. The Employer must show a nexus to employment. It has failed to show she violated any rule relating to this type of situation. The Employer has failed to show a nexus between Officer Furman's off duty arrival at a traffic stop and her position as a Patrol Officer. There is no demonstrated harm to the Employer's reputation. Her conduct does not render her unable to do her duties. There is no evidence that her co-workers shun her.

Officer Furman did not violate the last chance agreement. She signed the agreement under duress without the Union's representative present. It provides that she can be fired for future "policy violations." The last chance agreement makes no mention of being summarily terminated for off-duty conduct that was not the subject of a specific rule. If there is any ambiguity in the document it must be construed against the Employer which drafted it.

The Employer did not put Officer Furman on notice that her conduct was prohibited. The Employer violated Article VII-Training by not adequately training her in this circumstance. The Employer has failed to recognize that she was designated a "trainee" at this time. She has demonstrated a good record through training.

Officer Furman honestly believed that she was not violating any work rule when she offered the nominal service of giving the subject and his passengers a ride home. She had no ulterior motives and nothing to gain. As the Employer pointed out, she was aware she was on a last chance agreement. It is not uncommon for an officer to seek to find ride home for people stopped for DUI and passengers.

The Employer's reasons for termination do not justify terminating Officer Furman. The Employer has failed to show that Officer Furman's conduct merited discipline at all. The grievance should be sustained and Officer Furman ordered reinstated and made whole for all lost wages and benefits.

### **Employer Reply**

The Union's statement of the facts ignores Officer Furman's prior discipline and last chance agreement. Sergeant Wilz's statement that the matter was done was not intended to mean that discipline would not be considered or imposed. It merely meant that the incident which is the subject of this dispute was over with. His conduct in calling his superior to report the matter before Officer Johnson filed his complaint shows that he did not view the matter as closed for disciplinary purposes. Expert testimony about police procedures and Officer Johnson's statements demonstrate that Officer Furman put Officer Johnson in a situation in which he was unsafe. The Union offered no testimony to rebut this expert testimony. Officer Furman was present at the stop not only as a civilian but as an Officer. Her presence was an indirect effort to influence Officer Johnson. If Officer Johnson makes an arrest, he is arresting someone known to Officer Furman and possibly creating tension between the two in the future. If he does not, it appears that he is doing her a favor. Even in the absence of a last chance agreement, the Employer has demonstrated proper cause for the discharge. The Employer has explained how her conduct violates various rules in its brief. This is not a case where the off-duty conduct occurred away from the Employer's business: she injected herself into a police matter.

The Union's claims that she was not trained to avoid interfering in another officer's investigation are without merit. Officer Furman was trained to behave in a manner which

does not bring discredit to the department and officers are trained that on or off duty they will obey the rules of the department. The Employer has proved a direct and demonstrable nexus between Officer Furman's conduct and its interests. The subject's statement in an interview by the Department goes to the heart of the matter. He stated that he believed that by Officer Furman appearing on the scene that the police officer in charge would go easier on him. The Union's brief is devoid of any reference to the impact of the last chance agreement on this case. A continuing theme of Officer Furman's prior discipline stems from her inability to delineate between her position as a patrol officer from her personal relationships. The discipline should be sustained.

### **Union Reply**

The Employer's brief misstates the facts. There is no evidence that Officer Furman disrupted Officer Johnson's traffic stop. In fact, Officer Johnson testified that he was fully able to complete his investigation. If he had been disrupted, he could have conducted the field sobriety test again. Similarly, there is no proof that she intended to interfere with the traffic stop. The fact that she drove by does not establish that she intended to interfere or was doing anything nefarious. Contrary to the position of the Employer, Officer Furman never admitted that she had intended to do anything wrong. As to the last chance agreement, the Employer incorrectly asserts that it did not tell her she had to sign it just then. In fact, they made it perfectly clear that she had to sign it or be fired right then. Although Officer Furman signed the agreement "under duress" the Employer did not seek to clarify that matter. The Union also notes that Officer Furman was promoted to Patrol Officer from her former position with a pay increase. Contrary to the position of the Employer, Mr. Fleece never asked Officer Furman to get him out of a ticket. He testified she never offered to do so. Officer Furman had only had two drinks over a six hour period prior to this incident. There is no rule against an off-duty officer drinking. Further Officer Furman only briefly stuck her head into the vehicle which was the subject of the traffic stop. The Employer alleges in its brief that Officer Furman was dishonest however the investigation report does not cite her for dishonesty at all. The Employer also overstates the significance of Officer Furman's headlights. The video shows that they were not angled toward Officer Johnson. Officer Johnson's spotlights were much stronger and cancelled out the effect of Officer Furman's lights. Officer Johnson never sought to have Officer Furman turn off her lights. The Employer has no proof that Officer Furman had any intention to influence the traffic stop. Their entire case relies upon speculation. The evidence of her motivation is demonstrated by the fact that she was giving the person already asleep in her vehicle a ride home. Officer Furman's innocence is also shown by the fact that she knew it was likely that backup from the Department was likely to arrive at the scene while she was there. The last chance agreement was not negotiated with full Union representation. Additionally, it is over-broad and does not contain a clear and concise statement of the actions which will constitute a violation. Its application in this instance is unfair. Officer Furman's work history does not justify her discharge. She had eight years without discipline. Her two prior incidents do not merit discharge. The first discipline involved intemperate statements because she was too intense about her position as Animal Control Officer. The second incident involved a single incident of insubordination.

She told another officer about a TRO after being told not to do so. Nonetheless, the TRO was public information and the Employer felt confident enough in her to promote her to Patrol Officer afterwards.

## DISCUSSION

### *1. Statement of the Issues*

The parties disagreed as to the statement of the issues. The main difference deals with the effect of the last chance agreement. I have phrased the issues to properly account for the dispute regarding the last chance agreement.

### *2. Effect of the Last Chance Agreement*

The Union has challenged the last chance agreement on three bases:

1. Officer Furman and her Union Steward were not given an adequate opportunity to determine whether or not to accept the agreement.
2. The agreement was not negotiated with the Union's Staff Representative rather than a Steward.
3. The agreement is ambiguous and over-broad as to the circumstances which will constitute a violation.

The Union relies heavily upon Hearing Examiner Emery's decision in WINNEBAGO COUNTY, WERC DEC. NO. 32468-B (2/09) for the proposition that an employee's waiver of contract rights is ineffective if the union is not a party to the agreement.

Arbitrators are bound by agreements of the parties. They will honor last chance agreements "fairly" negotiated by a union and employer.<sup>3</sup> In the foregoing Examiner decision, the Employer negotiated a last chance agreement waiving the employee's right to grieve future discipline with an employee, but without the participation of his union representative. The Examiner concluded that the waiver was ineffective because the union therein was not a party to the agreement. In this case, the employee was represented by a Union Steward. Article VIII, provides that the Union representative in the grievance procedure is defined as follows:

"The term "Representative", (sic) shall mean the member of the Association appointed by it to fulfill the functions enumerated in this article."

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<sup>3</sup> National Academy of Arbitrators, *The Common Law of the Workplace*, Sec. 6.5, (BNA, 2d. Ed.), Sections 6.3.



Article IV – Association activity, Section C, provides that the Union will notify the Employer of the “. . . election or selection of officials assigned to handle various aspects of the grievance procedure.” Under these provisions, it is the Union and not the Employer who selects the representative in the grievance procedure and to negotiate with respect to grievance matters. Accordingly, it is only the designated representative who can enter into a settlement waiving provisions of the Agreement. Officer Furman was represented by Kraig Probst, a fellow employee and recognized Union Steward, at an investigative meeting. The evidence is insufficient to conclude that the only person allowed to deal with grievances is the Union’s Staff Representative.<sup>4</sup> The above-quoted provisions contemplate that Stewards have the authority to negotiate with respect to grievances. At the very least the Steward had the apparent authority on behalf of the Union. At the conclusion of the meeting, the Employer presented the last chance agreement as an alternative to immediate termination. The record is unclear whether the two were told that they had to sign the agreement that day, but they were not told that they did not have to sign it that day. The Employer did allow them time to try to telephone the Union’s Staff Representative, but they were unsuccessful.<sup>5</sup> No one requested more time to consider the proposal. Mr. Probst signed the last chance for the Union and Officer Furman signed “under duress.” Because Mr. Probst had the apparent authority to sign the agreement and did so, I conclude that the agreement is executed by the Union.

Officer Furman implied she was “forced” to sign the agreement because of the threat of termination. This threat is commonly involved in the negotiation of last chance agreements. It is not equivalent of a failure of an opportunity to fully consider her choices and to have the full advice of the Union. Officer Furman accepted the benefit of the agreement. The Union’s Steward was fully aware of the existence of the agreement. No one took any action, informal, grievance, or complaint of prohibited practice with the WERC. Any grievance on the subject would be untimely as of the time this dispute arose. The time for filing a complaint under Sec. 111.07(14), Stats, has expired by the time this dispute arose. The evidence is insufficient that the Employer took any action which interfered with the Union or individual employee’s right to raise these issues earlier. I conclude that issues concerning the negotiation procedure are time barred at this time.

The Union has challenged the fairness of the last chance agreement. The disciplinary situation underlying the last chance is one over which it was reasonable for the Employer to seek a last chance agreement. The disciplinary situation underlying the last chance, disregard of an order to not disclose police matters, is not disputed. The dispute at the time was solely the level of appropriate discipline. It would not have been unreasonable for the Employer to consider discharge as appropriate for an instance of insubordination of the type which occurred. As discussed below, the circumstances underlying the discharge and those

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<sup>4</sup> It may be that the Union has placed restrictions on the level of authority which its Stewards have, but there is no evidence in the record that the Employer was notified of those limits or otherwise had a practice of dealing only with the Staff Representative on certain issues.

<sup>5</sup> All references to the transcript herein are noted as “tr.” See, tr. 177.

underlying the last chance agreement are sufficiently similar that the last chance agreement applies irrespective of its breadth.

### 3. *Merits*

The main issue in this matter involves the credibility of Officer Furman. The Employer has made three main factual arguments. 1. It argues that she intentionally interfered with the Officer Johnson's investigation of the DUI stop, 2. She placed Officer Furman and others at risk, and 3. She intended to abuse her authority as a sworn law enforcement officer, including, but not limited to, influencing Officer Johnson in his decision as to issuing a citation for DUI. I conclude that she

1. Willfully disregarded the efficacy of Officer Johnson's investigation;
2. Intentionally abused her authority as a sworn officer in multiple ways solely to advance her social relationship with the suspect.
3. Intended to influence Officer Johnson to not issue a DUI citation to the suspect.
4. She disregarded her training to put Officer Johnson and others at the scene at risk

The Employer's case relies mainly upon inferences from Officer Furman's conduct on videotape at the scene and negative inferences of motivation and otherwise from her testimony and conduct. With that, the review of the evidence begins with the video and Officer Furman's explanation of the events. I recognize that all of the participants other than on-duty law enforcement were using alcohol that evening. The alcohol use is likely to affect the quality of both the recollection and the judgments of the participants. I also recognize that the testimony of Officer Furman is defensive and self-serving. The fact that testimony is defensive and self-serving does not necessarily support a conclusion that the witness is concealing improper motives.

I turn now to the testimony of Officer Furman is as follows. She acknowledges that she understood at the time of this incident that it would have been unethical for her to attempt to influence another law enforcement officer in his or her decision to charge a suspect stopped by that officer. She had been at the County Fair and had consumed approximately four beers between 9:00 p.m. and 11:45 p.m. She then left and went to the Route 54 tavern to see a band. She stayed there from Midnight until 2:30 a.m. She consumed two beers while there. She saw Mr. Fleece at the Route 54 Tavern in passing. She knew that he had a couple of girls with him. She knew that he had been drinking. She denied that she was intoxicated or impaired from driving.<sup>6</sup> She received two calls from Mr. Fleece as he drove through

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<sup>6</sup> She denied being impaired as a driver at any time she drove a vehicle, tr. 168, et seq.

Manawa. He called her by cell phone to her cell phone. At the time of the first call, she was at the Bear Lake Camp Ground about five to ten minutes away from the site of the traffic stop. She had a male passenger who was passed out from consuming alcohol in her back seat. She was in the process of giving that male passenger a ride home. When she talked to Mr. Fleece, she concluded he was in a somewhat panicked state. He said that he was being followed by police in Manawa. He was cut off before he could say more. He called back about five minutes later and stated he was going to be pulled over and asked her what he should do. Officer Furman responded by asking where he was. She stated that by the way he was describing what he was driving she knew he was not driving his own car. She told him that she could come and give him a ride.

She then drove to the site of the stop. She intended to help the officer-in-charge of the scene by giving Mr. Fleece and/or his female friends a ride home. She drove by the scene and determined that the officer-in-charge of the scene was Officer Johnson whom she knew. She knew that he would not know the vehicle she was driving. She did not want to position her vehicle behind that of the suspect or behind that of Officer Johnson because either position would interfere with the stop. She then positioned her vehicle and got out of the truck and stood by it until Officer Johnson recognized her. She then went over to the subject vehicle and talked to the passengers until Sgt. Wilz arrived. She asked them where they lived and if they could call someone to give them a ride home or not. The passengers were quite intoxicated. Sergeant Wilz arrived then. She went over to him and talked with him. She said that she was there to offer rides to the suspect and/or passengers. He said he smelled alcohol on her breath and asked her if she had been drinking. She said "yes." He asked her how much and she said "two beers." By this she was referring only to that which she consumed at her last stop because the beer would have been out of her system. Sergeant Wilz told her that she should not be there and told her that this was the end of it as far as he was concerned. He could not prevent Officer Johnson from complaining more.

I find Officer Furman's explanations of the reasons for her conduct essentially incredible. There is no legitimate reason why she needed to go to this scene. The evidence indicates that police in the area routinely find safe rides home for suspects and passengers they confront in traffic stops. Mr. Fleece had his cell phone and Officer Furman's private cell phone number. There is no reason why she could not have told him to call her after the stop was over if anyone needed a ride home.<sup>7</sup> Similarly, she had the ability to use her cell phone to call her own dispatcher or supervisor-on-duty and have the dispatcher notify whoever was at the scene that there was someone willing to provide a ride home to the suspect and/or his passengers. She did not need to have the fact that she was a law enforcement officer transmitted to Officer Johnson.

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<sup>7</sup> The available evidence does indicate that Officer Furman commendably makes herself available to give safe rides home to others. She had another intoxicated person asleep in her vehicle at the time of this incident. The finding here is that there is no reason why she had to go to the scene to do so.

Officer Furman essentially testified that she intended to be a help to whoever the officer was in charge of the scene. I find that she did not act in the interest of Officer Johnson or her employer in any way. As noted, even before she went to the scene, she had the opportunity to have her own dispatcher announce to the officer-in-charge that she would arrive in a civilian vehicle. That would have been the closer-to-normal procedure. Her own testimony indicates that she recognized when she arrived that there would be some difficulty for the officer in charge of the scene until he or she recognized her. She easily could have continued to drive past the scene and have her dispatcher radio her arrival. She consciously drove past the scene and chose to approach it while deliberately ignoring that difficulty. In any event, it is clear that she parked her vehicle with her lights facing Officer Johnson, something she knew to be improper. She also never offered to assist Officer Johnson in any way and she disregarded his interests by going to the subject vehicle with the passengers still inside. Officer Furman's reason for going to the scene, to offer a ride, also indicates that she disregarded the interests of her Employer and colleagues. It would have violated policy for another police officer to allow the suspect or his passengers to ride with someone who had obviously been drinking. I conclude that she acted solely in the interest of her social relationship with Mr. Fleece.

The Employer alleges that she intentionally interfered with Officer Johnson's investigation and placed him in danger at least momentarily. She at least willfully disregarded her training to interfere with that investigation. A review of the video demonstrates that when she arrived she pointed her vehicle with her lights pointing essentially toward the officer. She was trained not to do so. It would put the officer at risk should the suspect become unruly, one of the passengers of her vehicle or the suspect vehicle become unruly or, another person came to the scene.<sup>8</sup> She assumed from her personal knowledge of Mr. Fleece that he would not become a risk. However, testimony indicates that Officer Johnson is relatively new. There is no way to guarantee that he could not have made a mistake and lost control of the situation. A close analysis of the video indicates that she did not point her lights directly at Officer Johnson, an act which would have signified conscious intent to interfere. She only directed them in his general direction. I conclude that she willfully disregarded her training in a way that put Officer Johnson at risk.

While it is certainly questionable whether Officer Furman intended to interfere with Officer Johnson's investigation, the evidence is clear that she willfully disregarded the efficacy of his investigation both by pointing her lights at Officer Johnson and requiring him to pay attention to her long enough to identify her. She acknowledged that she was trained to not do so. Further, Officer Furman's explanation as to why she went over to the suspect vehicle is not credible. There is no reason why she could not have waited at her vehicle after being identified by Officer Johnson. Be that as it may, there is no explanation as to why she stuck her torso deeply in the suspect vehicle. At the very least, she made any chain-of-custody argument more difficult. I conclude that she willfully disregarded the efficacy of Officer Johnson's investigation.

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<sup>8</sup> I note, for example, that Officer Furman had a passenger who was asleep in the back seat of her vehicle. She took the risk that the person would stumble out of her vehicle into this situation.

The prime issue in this matter is Officer Furman's alleged abuse of her authority. Officer Furman testified that she came to the scene without knowledge of whether the officer-in-charge would know her. She drove past the scene to check it out before returning to the scene. One questions whether she would have stopped had she seen a supervisor from her own department backing up Officer Johnson. She acknowledged that she made a decision to gain admittance to the scene by standing next to her vehicle until Officer Johnson recognized her as a police officer. This was a use of her authority to gain access to the site to act solely in her own personal interest. Similarly, she used her authority as a police officer to go to the suspect vehicle. Officer Johnson testified that he allowed her to do so because he assumed that because she was a police officer she would not do any harm. Finally, she arrived in her personal vehicle after having been drinking. She knowingly used her authority to not be questioned about her sobriety while driving and intended to do the same to drive the suspect and/or his passengers home. I am satisfied that she used her authority as a police officer in these regards to act in her own personal interest.

The most important inference from the record is the inference that she intended to influence Officer Johnson to not charge the suspect with DUI. I am satisfied from the expert testimony of her supervisors and the testimony of Officer Johnson and the nature of the testimony by State Patrol Officer Linjer that Officer Furman's appearance on the scene would be understood by Officer Johnson as an attempt to influence the charging decision. The most serious question in this matter is Officer Furman's intention. Did she intend to interfere? I conclude from the facts and circumstances and Officer Furman's past behavior that she did. First, I find that there is no convincing evidence as to why she went to this scene. Second, she clearly intended to have Officer Johnson identify her as a police officer. She acted in a manner which would visibly demonstrate that to Officer Johnson that she was acting solely in the interests of the accused. Third, she drove past the scene and made a decision to go to the scene only after she saw that Officer Johnson was there and no Sheriff's Department personnel were there. Fourth, the Employer offered the testimony of State Patrol Officer Linjer to show a propensity by Officer Furman to engage in similar conduct.<sup>9</sup> The incident Officer Linjer recounted was acknowledged by Officer Furman and Bartender Bonikowske to have occurred. They merely disputed the details in significant respects. The factual difference cannot be explained by possible hostility between State Patrol Officer Linjer and Officer Furman. There is no evidence that the two have other than a passing recognition of each other. State Patrol Officer Linjer is a trained law enforcement officer. It is her responsibility and experience to remember in detail the incidents which occur during an arrest. Accordingly, I conclude her testimony is credible. I don't believe Bartender Bonikowske has as reliable a memory. It is not likely that she would remember details such as Officer Furman having identified herself as a law enforcement officer to Officer Linjer. Further, Bartender Bonikowske merely denied that Officer Furman asked for "special favors." The situation was more subtle than an outright request for "special favors." The credited testimony is evidence of a propensity to

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<sup>9</sup> This incident was not known to the Employer at the time of discharge. Officer Fuman was never told about the incident. I have admitted this evidence only for the limited purpose of showing a tendency or propensity to use offering a ride home as an excuse for intentionally attempting to influence an investigation.

engage in intentional efforts to influence another's investigation. Officer Furman's conduct was more overt in the former incident. It could only have been an intentional effort to influence Officer Linjer. Based upon the evidence as a whole, I conclude that Officer Furman intended to influence Officer Johnson to not charge the suspect with DUI in the incident which is the subject of this discharge.

I conclude that the Officer Furman's conduct violated RC-28 by "intentionally" interfering with another law enforcement agency's investigation. Officer Furman's conduct with respect to Officer Johnson's investigation violates this rule because the level of willful disregard of Officer Johnson's investigation under circumstances where she should have so clearly known that she risked interference is sufficient to meet the definition of "intention" in this rule. Officer Furman violated RC-20 by abusing her position to attempt to obtain leniency for the suspect not available to ordinary citizens. Officer Furman violated rules of responsibility RR-2 and RR-3. RR-3 provides in relevant part: "[The] deputy shall not . . . use his or her law enforcement authority in any circumstance where there is a problem . . . which involves . . . that deputy's friends . . . unless contravening factors are present, such as the use or threatened use of a deadly force." There is ambiguity in this rule as to when an officer is using his or her authority. Even from Officer Furman's own admissions, she knew it inappropriate to interfere in another law enforcement officer's investigation and attempted to skirt the rules by "merely offering a ride." Nonetheless, the facts are that she knowingly used her authority to gain access to the scene, to be trusted to go the subject vehicle, to attempt to give a ride home to a suspect even though she consumed alcohol. Finally, the very purpose of this rule is to strongly discourage a police officer from confusing his or her police function with his or her personal relationships. In this case, Officer Furman violated one of the purposes of this rule by attempting to use her position and authority to discourage Officer Johnson from changing Mr. Fleece with DUI.<sup>10</sup>

#### ***4. Appropriate Penalty***

The next question is whether discharge is the appropriate penalty. In this regard, I first address the Union's argument that Officer Furman had a right as a citizen to go to the scene in question. Sworn Officers generally have the same rights as citizens except as their official duties may require otherwise. Without making a finding on the subject, it is conceivable that those rights might mitigate discipline where there is a compelling personal interest. This is hardly that kind of circumstance. I find that there are no personal reasons which mitigate the imposition of discipline in this case.

The next question is whether discharge is appropriate. I conclude that it is. The most important violation is Officer Furman's attempt to influence Officer Johnson's DUI

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<sup>10</sup> It is apparent that Mr. Fleece is a personal friend of Officer Furman. He had her personal cell phone telephone number and she knew him well enough to be able to recognize from his discussion on the phone that he was not driving his own vehicle. His statement indicated that Officer Furman frequently text messaged jokes to him.

determination. Officer Furman's testimony denying that she was trying to influence the stop is either the result of her deluding herself about what she was doing or an outright lie.

The last chance agreement involves an analogous but not identical situation. In that case Officer Furman violated a direct order, not for personal gain, but out of concern for a fellow worker. The situation involved a conflict between her official duties and her personal friendships and relationships. I am satisfied, irrespective of the last chance agreement, that the underlying discipline constituted a very clear warning by management to not mix her official responsibilities with her personal relationships. I also conclude that her conduct is well within the type of behavior the last chance agreement was intended to proscribe.

Officer Furman's past off duty conduct of making disparaging statements undermining the relationship of the Department with prosecutors again shows a history of not respecting the level of responsibility attendant on being in law enforcement. Progressive discipline has not been effective.

The Sheriff's department has a vital interest in its integrity both for the public and working with other law enforcement officers. It has an obligation to take disciplinary action to prevent influence peddling in any form. I conclude that there is no other level of discipline other than discharge which would protect its interests. Accordingly, the Employer had proper cause to discharge Officer Furman. Therefore, the grievance is denied.

### AWARD

The Employer had proper cause to discharge Officer Furman for violating the last chance agreement and, in any event had proper cause to discharge her. It, therefore, did not violate the agreement when it discharged Officer Furman.

Dated at Madison, Wisconsin, this 3rd day of April, 2009.

Stanley H. Michelstetter II /s/

Stanley H. Michelstetter II, Arbitrator

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