

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**LOCAL 1323-B, AFSCME, AFL-CIO, on behalf of the
DODGE COUNTY SHERIFF'S DEPARTMENT SWORN EMPLOYEES**

and

COUNTY OF DODGE, WISCONSIN

Case 227
No. 68504
MA-14255

Appearances:

Lee Gierke, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, P.O. Box 727, Thiensville, Wisconsin 53092-0727, appearing on behalf of the Local 1323-B, AFSCME, AFL-CIO, on behalf of Dodge County Sheriff's Department Sworn Employees, which is referred to below as the Union.

James R. Korom, von Briesen & Roper, S.C., Attorneys at Law, 411 East Wisconsin Avenue, Suite 700, Milwaukee, Wisconsin 53202, appearing on behalf of the County of Dodge, Wisconsin, which is referred to below as the County, or as the Employer.

ARBITRATION AWARD

The County and the Union are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for final and binding arbitration. The parties jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin, a member of its staff, to serve as Arbitrator to resolve a grievance filed on behalf of Gregory Weihert, who is referred to below as the Grievant. Hearing on the matter was conducted on March 31, 2009, in Juneau, Wisconsin. The hearing was not transcribed, and the parties filed briefs by April 29, 2009.

ISSUES

The parties stipulated the following issues for decision:

Did the County have just cause to impose a twenty day suspension without pay for Deputy Gregory Weihert for off-duty misconduct that occurred on August 31, 2008?

If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

**ARTICLE III
MANAGEMENT RIGHTS**

- 3.1 Except as hereinafter provided, the Employer shall have the sole and exclusive right to determine the . . . suspending or discharging for cause of any Employee. . . .

BACKGROUND

The grievance form alleges a violation of Section 3.1, and specifically questions whether the Grievant's twenty day suspension constitutes "excessive discipline." The form notes that the discipline is traceable to the action of the Sheriff's Grievance Committee (the Committee) which issued a "Determination" (the Determination) dated October 31, 2008 (references to dates are to 2008 unless otherwise noted). The Determination is traceable to a "Statement of Charges" (the Charges) filed by Sheriff Todd Nehls on October 6.

The Committee's Determination includes the following "factual findings":

13. In the course of his employment as a law enforcement officer of the Dodge County Sheriffs Department, Gregory B. Weihert has not received any prior discipline.
14. On August 31, 2008, in Richland County, Wisconsin, Gregory B. Weihert operated a motor vehicle while he was under the influence of an intoxicant, in violation of Section 346.63(1)(a), of the Wisconsin Statutes, and in violation of Richland County, Wisconsin, Ordinance No. 107, which adopted Section 346.63(1)(a), as a Richland County, Wisconsin, ordinance.
15. On August 31, 2008, in Richland County, Wisconsin, Gregory B. Weihert operated a motor vehicle with a prohibited alcohol concentration, in violation of Section 346.63(1)(b), of the Wisconsin Statutes, and in violation of Richland County, Wisconsin, Ordinance No. 107, which adopted Section 346.63(1)(b), as a Richland County, Wisconsin, ordinance.
16. On August 31, 2008, in Richland County, Wisconsin, Gregory B. Weihert was stopped by Paul Higgins, a deputy sheriff of the Richland County, Wisconsin, Sheriff's Department. During the traffic stop, Gregory B. Weihert asked Deputy Sheriff Paul Higgins several times, if there would

be a professional courtesy and Gregory B. Weihert told Deputy Sheriff Paul Higgins several times that Gregory B. Weihert was a deputy sheriff for Dodge County.

17. The Dodge County Sheriff's Department, before filing the charges against Gregory B. Weihert, made an investigation to discover whether Deputy Gregory B. Weihert did, in fact, violate a rule or order.
18. That on August 31, 2008, Deputy Gregory B. Weihert violated the following Dodge County Sheriff's Department rules:
 - A. Mission Statement, which states, in part, "We will nurture public trust by holding ourselves to the highest standards of professionalism, performance and ethics;" and,
 - B. Policy 101.20 Rules Of Conduct/Conflict of Interest, which states, in part, "Employees shall obey all public laws and shall not use their official position for avoiding consequences of illegal acts."

The Determination notes that, "based upon the above-stated factual findings" it "finds that all of the charges are well-founded; that "there is just cause for an unpaid suspension of employment for Deputy Gregory B. Weihert for 20 scheduled working days"; and that it "makes its findings based upon the following standards:"

1. Deputy Gregory B. Weihert knew, or should have known, of the probable consequences of his conduct, specifically, that his actions could be considered a violation of the Dodge County Sheriff's Department Mission Statement and the Dodge County Sheriff's Department Policy 101.20 Rules of Conduct/Conflict of Interest. Deputy Gregory B. Weihert knew, or should have known, for these reasons, that his actions could subject him to disciplinary action.
2. The Dodge County Sheriffs Department Mission Statement and the Dodge County Sheriffs Department Policy 101.20 Rules of Conduct/Conflict of Interest are reasonable and emphasize the importance for law enforcement officers to avoid conduct which brings disrepute or reflects adversely upon the Department and for law enforcement officers to be impartial and responsible to the persons they service so as not to create a conflict of interest. These values are especially important when fostering the confidence and support of the community to assure that services it requires will be delivered in a fair and just manner.
3. The Dodge County Sheriff's Department, before filing the charges against Deputy Gregory B. Weihert, made a reasonable effort to discover whether Deputy Gregory B. Weihert did in fact violate a rule or order.

4. The reasonable effort made by the Dodge County Sheriff's Department to discover whether Gregory B. Weihert did, in fact, violate a rule or order was fair and objective.
5. The Dodge County Sheriff's Department discovered substantial evidence that Deputy Gregory B. Weihert violated the rules described in the charges filed against Deputy Gregory B. Weihert.
6. The Dodge County Sheriff's Department is applying the rules described in the charges filed against Deputy Gregory B. Weihert fairly and without discrimination to Deputy Gregory B. Weihert.
7. The proposed discipline is reasonably related to the seriousness of the charges and to Deputy Gregory B. Weihert's record of service with the Dodge County Sheriff's Department. It is the opinion of the Committee that the actions of Deputy Gregory B. Weihert in violation of the Dodge County Sheriff's Department Mission Statement and the Dodge County Sheriff's Department Policy 101.20 Rules Of Conduct/Conflict of Interest are serious and have brought disrepute to the Dodge County Sheriff's Department and have reflected adversely upon the Department. The disrepute which Deputy Gregory B. Weihert's actions have brought to the Department and the adverse reflections which have been cast upon the Department by Deputy Gregory B. Weihert's conduct, justify the unpaid suspension of employment for Deputy Gregory B. Weihert for 20 scheduled working days.

The Union filed the grievance in response to the Committee's approval of the twenty day suspension recommended by Nehls.

The Charges read thus:

8. On or about August 31, 2008, Deputy Weihert engaged in the following: While traveling in Richland County Deputy Weihert was stopped by a Richland County deputy. During the traffic stop it was determined that Deputy Weihert was operating a motor vehicle while intoxicated. Deputy Weihert requested professional courtesy, implying that he should not be arrested because he was a law enforcement officer. His blood alcohol concentration was shown to be .10 on a preliminary breath test. Additionally, Deputy Weihert had an open can of beer in his vehicle.
9. In response to an internal investigation involving Richland County Sheriff Darrell Berglin, Richland County Chief Deputy Tom Hougan, Richland County District Attorney Andrew Sharp, Deputy Paul Higgins, Dodge County Sheriff Todd Nehls, and Deputy Greg Weihert, the following facts were ascertained:

- a. Gregory B. Weihert . . . was operating his personal vehicle on Hy 80 in the county of Richland on August 31, 2008 at approximately 10:49pm.
- b. After being stopped by Deputy Paul Higgins of the Richland County Sheriff's Department, it was determined that Deputy Weihert's blood alcohol level was .10, in violation of State Statutes 346.63(1)(a) and 346.63(1)(b).
- c. That an open intoxicant was found in the driver area of the vehicle in violation of State Statute 346.935(3).
- d. That Deputy Weihert did request of Deputy Higgins "professional courtesy", as if to imply that he should not be arrested because he is a law enforcement officer.
- e. Deputy Weihert's actions are in direct violation of State Law.
- f. Deputy Weihert's actions directly undermine the foundation of the Department Mission Statement, which states, in part, "We will nurture public trust by holding ourselves to the highest standards of professionalism, performance, and ethics."
- g. Deputy Weihert's actions directly violate the provisions of Policy 101.20 Rules Of Conduct, which clearly states, in part, "Employees shall obey all public laws and shall not use their official position for avoiding consequences of illegal acts."
- h. Deputy Weihert, if convicted of the State Statutes listed above, would have become ineligible to operate a county owned vehicle for a period of up to three (3) years.

The Charges conclude by requesting a hearing and by requesting that the Grievant be suspended without pay for twenty days. The Committee conducted the hearing on October 31.

Higgins testified at the hearing. He noted that he filed a formal report detailing the events of August 31. His report reads thus:

First Contact with OWI Suspect's Vehicle

I was in patrol . . . on State Highway 80 South just north of State Highway 60 when I saw a northbound vehicle pull off to the side of the road. It has been my practice when I have a vehicle that pulls off to the side of the road, I will get behind them and activate my emergency lights and see if there is some sort of

problems. Sometimes it somebody using their cell phone where I will ask them if they are going to park there to use their emergency flashers and so on, it is just my practice to check to see what is the matter or if there is a problem.

I had stopped and made sure it was clear to make the U-turn and at that point the vehicle did make a U-turn and start to head south. I thought that that was strange that they would pull to the side of the road like that, possibly see the squad car stop and then make a U-turn and head back south. From my past experience like I said it has been a cell phone call or it could be a medical emergency, it could be a lost motorist or an impaired driver.

I did activate my emergency lights and the vehicle did pullover. I notified Dispatch of my location and the plates on the vehicle.

First Contact with Driver / Operator

I approached the vehicle and asked the operator what he was doing and he explained that he had missed a turn and they were going in the wrong direction and they were heading back to go in the right direction.

He seemed kind of strange, he would not look at me nor talk at me. His face was directed more towards the middle of the car and not at me. I did notice the odor of intoxicants on him and his speech was slurred and I could clearly see where in plain sight on the console a can of Miller Light beer.

I asked him for his drivers license and he said he didn't have one. I asked if he doesn't have a drivers license and he said no he doesn't carry it with him. I then asked him for his name and date of birth, which he gave me. I went back to my squad and ran it and found that he and the car were both valid.

I went back to the vehicle and again I asked him if he was lost and he said he was. I asked him if he had his directions now and if he knew where he was going and he said he did. I asked him what that can was on the console and he didn't seem to know. I explained to him that it looked like a can of beer to me, and he said it was empty and it wasn't his. I asked him if he had anything to drink this evening and he said that he had had a couple.

I asked him to shut the car off and to exit the vehicle and we would do a Field Sobriety. He did shut the car off and he did get out of his vehicle. He was unsteady and he did use the side of the car for support, however, I did have him move to the back of his vehicle where we would do the Field Sobriety between the back of his vehicle and the front of my squad out of the traffic way. At that point he said he wondered if there would be a professional courtesy and I asked

him what he meant by that and he said that he was a deputy sheriff. I asked him for what county and he told me Dodge.

The next section of Higgins' report details the three field sobriety tests Higgins administered and the Grievant's failure to successfully respond to them. That section of the report closes by noting that the Grievant agreed to submit to a PBT test, which Higgins administered, and which "came back with a reported value of .10." The report continues thus:

Arrest

I then explained to him I was placing him under arrest for Operate a Motor Vehicle while Intoxicated. I asked him if he had ever been arrested before and he said he had not. He said he's never had any citations on his driving record. I then asked him what we were going to do with his car and he didn't seem to know. I asked him if there will be somebody to come and pick him up, he had a family member that was also heading Waterloo that they were able to call that would come and pick him up.

He did have a shotgun in the back seat of his car and he did tell me that he had had a few beers because he had shot his first 100. In trap shoot that means he shot 100 out of 100 targets and that would be the reason for celebrating. He did place the shotgun in the trunk of his car, his wife did secure the car and I did take the empty can of Miller Light beer and placed it in the rear of my trunk and it was disposed of at the Richland County Sheriffs Department garage.

MS. WEIHERT did secure the car and she did keep the keys. He asked if I could PBT her and I did give her a **PBT** and she had a reported value of a .05. By our policy we will not allow someone to drive unless it's a .04. . . .

ACTION RECOMMENDED

He did tell me several times before he was placed under arrest that he was a Sheriffs Deputy. He did mention a couple of times about professional courtesy. He did have a shotgun in the back of his car and he did place it in the trunk of his car and secured it. His wife secured the car and left the flashers on and she kept the keys. . . .

Higgins' dictated this report on August 31, and it was transcribed for him on September 2.

The Grievant phoned his immediate supervisor, Steve Allermann, the following day and informed him of the OWI citation. Allermann instructed the Grievant to meet with Nehls personally to advise him of the matter. The Grievant did so the following day.

Tom Hougan was the Chief Deputy of Richland County and Andrew Sharp was Richland County's District Attorney at all times relevant here. In a September 8 memo to Higgins, Sharp noted:

I have reviewed the above case at the request of the Chief Deputy.

I have also reviewed the recent case of State v. Kramer, which talks about a Community Caretaker duties of an officer.

There clearly was no basis for the stop for law enforcement purposes.

You mention that you felt there might have been a problem with the car, but it reads that he just pulled over, sat for a minute, then did a u-turn and drove away.

You need SOMETHING to make you believe that the person or vehicle in question needed some kind of help. Merely pulling over is insufficient.

Was there something else about this that wasn't in the report that gave you an objective, reasonable belief that the person in the car needed assistance of some type?

Please let me know. Tom is holding the tickets until we can decide upon this.

In a memo dated September 15, Hougan asked Higgins to complete his investigation, noting, "If you have something more for the DA – then get it to him – if not- wrap it up and submit for review." Hougan summarized his review in a memo dated September 25, which reads thus:

The citations in this case were not submitted to the Richland County Clerk of Court at the Request of District Attorney Andrew Sharp.

There are severe issues with the "reasonable suspicion" for the stop of this vehicle which resulted in the arrest of the defendant. This came about during a request shortly after the incident that included a question to me that stated, "What was the reason for the stop?" After reading the report on the back of the citation compiled by the arresting officer to the requestor, I immediately noted to myself that there appeared to me to be no "reasonable suspicion" for the stop of the vehicle involved in this arrest.

It has been my duty to review and "supervise" all the OWI reports of the Richland-County Sheriffs Department for more than the last 20 years. At this time I cannot recall a report with a more glaring lack of reasonable suspicion for an OWI traffic stop.

Because of this I continued to check on the matter and had the full officer's report typed up where I found no additional reasonable suspicious reason for the traffic stop. I then contacted Assistant District Attorney Amy Forehand who does traffic cases in Richland County and she refused to look at the case after hearing who the arresting officer was.

I then contacted Richland County District Attorney Andrew Sharp to see if he could see any reasonable suspicion for the stop. In reviewing his memos of September 8, 2008 and September 15, 2008 It appears he came to the same conclusion as I-there is no reasonable suspicion for the stop. The arresting officer asserts that a legal driving maneuver performed by the defendant prior to the stop seemed "strange" to him.

My conclusion is that a legal driving maneuver should not seem "strange" or be the basis of any traffic stop for any reasonable officer of the law unless there are other mitigating "reasonably suspicious" or "illegal activities" witnessed.

The bottom line is that the stop of this vehicle was at least improper and at the most illegal in the first place and that no matter how "text book" the actions of the deputy were "after" the stop-the fact that the stop should not have occurred in the first place must be the prevailing focus of this case.

There remains no doubt to me that the driver was intoxicated. That the driver should not have been driving and that he was impaired to the extent shown on the alcohols testing device. However in law enforcement and in any ethical endeavor which law enforcement certainly must be, the "ends do not justify the means" and this case must "cleared" as a no prosecution. . . .

I have been confronted by the arresting officer in this case that my actions described in this report were done because the driver arrested was a law enforcement officer. Nothing could be more further from the truth.

My actions in this case were all done as a reaction to his improper conduct the moment he decided to stop this vehicle for no reasonably suspicious reason. During my career I have legally investigated a sitting sheriff and assisted in obtaining criminal convictions against that sheriff. I have legally investigated and arrested numerous retired or active law enforcement officers during my 31 year career. I wasn't happy about doing it but I did it because it was my duty and I did my duty legally.

What I see here is an improper stop that led to an arrest. Because of the improper stop the arrest cannot stand up in court and thus this case is filed as "cleared."

The Grievant and Nehls continued to meet after they learned that the charges had been dropped. Nehls started an investigation of the matter and his investigation prompted the Charges.

The balance of the **BACKGROUND** is best set forth as an overview of witness testimony. The parties submitted a transcript of the October 31 hearing and the overview will incorporate portions of that testimony. Direct quotation from the transcript will be noted by page number, prefaced by “Tr. at”.

Paul Higgins

Higgins dictated a report of the August 31 incident at the close of the shift on which he made the arrest. A clerical employee transcribed the report and he signed it on September 17, after Hougan directed him to complete and to sign it. The first “professional courtesy” request took place as noted at the final paragraph of the “**First Contact with Driver/Operator**” section of his report. The next occurrence of the “professional courtesy” request is noted under the “**ACTION RECOMMENDED**” portion of the report, which also notes that the Grievant told Higgins of his status as a Deputy “several times.”

After the Grievant pulled his car over in response to Higgins’ flashers, Higgins spoke to him at his window. The Grievant could not produce identification, but supplied Higgins with his name and date of birth. He did not mention his status as a deputy at that point. After obtaining the information, Higgins returned to the Grievant’s car. Only after Higgins had asked the Grievant to leave the car to take the field sobriety tests did the Grievant request “professional courtesy.” At the Committee hearing, he put the point thus:

Q At what point did he tell you?

A When I first got him out of the car to do a Field Sobriety Test, he asked me for a professional courtesy.

Q And when he used the term professional courtesy, what did you think that meant?

A I asked him what he meant by that. He said he was a deputy sheriff. And I said, what county? And he said, Dodge County. And . . . I told him we would still need to do a Field Sobriety Test. (Tr at 67)

The Grievant and Higgins spoke in normal conversational tones throughout the stop. During the field sobriety tests, the Grievant noted he had an eye condition which might affect his visual acuity during the testing. Weihert informed Higgins of his shotgun when the car was being secured. The Grievant locked the car and moved the shotgun to the trunk. He could not recall when or how Weihert informed him of the shotgun. Weihert never objected to being handcuffed and did not mention being embarrassed in front of his wife. At the Committee hearing, he described the second mention of “professional courtesy” thus:

Q All right, in your report you indicate that there were – there was more than one occasion you felt that Deputy Weihert was asking for professional courtesy besides the one that you indicated initially in the stop. When else did that occur?

A If I recall, it was either at the time I placed him under arrest or right before I placed him under arrest. (Tr. at 68)

At the arbitration hearing, Higgins stated he could not recall specifically when the Grievant mentioned “professional courtesy” for the second time.

Higgins has worked with Hougan for thirteen years and felt that he had a good working relationship with the District Attorney and Assistant District Attorney Forehand. She experienced some dismissals following citations he had issued perhaps several years ago, but he did not see them as “that big a deal.” Hougan and Higgins disagreed on whether he had probable cause to stop the Grievant, but Higgins felt it was “a good arrest.”

Todd Nehls

Nehls became Sheriff in January of 2003, and served the County as a Deputy Sheriff starting in December of 1987. Although the department has had experience with OWI charges against Correctional Officers, the Grievant’s was the first involving a sworn officer. The incident was further complicated by the Grievant’s involvement. Nehls has known the Grievant since his date of hire, has worked with him closely as a Deputy and, as Sheriff, has come to consider him one of the best, if not the best, Deputy the County employs.

The Grievant reported to Nehls’ office to inform him of the incident. When the Grievant informed Nehls that he had been arrested for OWI, Nehls asked the Chief Deputy into the office and the three of them discussed the matter. Nehls asked the Grievant to detail the stop and the Grievant did so. Each participant doubted whether the stop had a legal basis. Nehls told the Grievant he would obtain a copy of the arrest report, but that he would not involve the department in any way in the Richland County investigation. Nehls perceived the Grievant’s demeanor during this meeting to show great remorse and extreme humiliation. The Grievant apologized for his conduct. Nehls thought the Grievant seemed so low that he tried to encourage the Grievant, making a comment to the effect that maybe a day off would be the worst the Grievant might face.

After this meeting, Nehls directed his staff to contact Richland County regarding the progress of their investigation. Within a couple of weeks Hougan informed Nehls that the District Attorney was unsure there was probable cause for the stop. Shortly after this, Hougan informed Nehls that the County had determined not to prosecute. The Grievant and Nehls continued to discuss this matter during this period of time.

Nehls perceived a change in the Grievant's attitude after he had learned there would be no prosecution. After the charges were dismissed, the Grievant's apologetic attitude seemed to change. Nehls did not take the dropping of charges to exhaust the County's disciplinary interest in the Grievant's conduct, and he directed Captain Molly Soblewski, the Grievant's Supervisor, to prepare charges and to take the Grievant's statement. The statement, dated October 3, states:

...

I do take responsibility for the error in judgment on that day. I am approaching twenty years of service for the Sheriff's Department without any disciplinary actions against me. I believe that a suspension, after being cleared of all charges stemming from the improper/illegal stop conducted by the Richland County Sheriff Department, to be excessive.

...

The Department interviewed no other witnesses.

Nehls believed the incident posed a significant disciplinary problem demanding a measurable, but reasonable response. He surveyed County department heads to determine how they believed an OWI should be sanctioned. Those responses averaged a suspension of something greater than twenty days. He used a network shared by Wisconsin Sheriffs to put the question to Sheriffs throughout the state via e-mail. The responses varied widely, from a minor reprimand through discharge. In his view, the most serious aspect of the misconduct was the OWI charge. Closely behind this was the significance of the Grievant's request for "professional courtesy." The open intoxicant in the vehicle was also a serious matter, but was an aggravating factor of lesser significance. These factors pointed to a significant suspension at a minimum. The Grievant's stellar service record had to be weighed against this. That complicated the issue because the Grievant's status in the department pointed to a higher standard of conduct to be expected of him, yet his record and reputation counseled for some lenience. The twenty day suspension balanced these factors and was, in Nehls' view, lenient.

The Grievant's testimony on October 31 disappointed Nehls. Although the Grievant appeared remorseful, he was unapologetic, appearing to take the dismissal of charges as exoneration. He seemed, at one point, to challenge the imposition of any suspension but seemed, at another point, to think a one day suspension might be appropriate. Nehls stated at the arbitration hearing that "a one day suspension would seriously undermine the authority of the Sheriff."

Prior to the October 31 hearing, there was little, if any, departmental or public awareness of the charge. After the suspension became public knowledge, Nehls received e-mails. None were supportive of the Grievant and most viewed the suspension as too lenient. The charges did not affect Nehls' assignment of work to the Grievant, nor did they seem to

affect the Grievant's performance. Nehls did hear from officers who felt the charges undermined the department's credibility with the public.

Ken Neumann

Neumann is the Chair of the Committee. The Determination reflects a unanimous vote. In his view, the Grievant's request for "professional courtesy" was an extremely important part of the need for the twenty day suspension. The Committee considered a range of sanctions, including discharge. The Committee considered the Grievant's service record "to some extent", treating it as a reason to restrict the suspension to twenty days.

In Neumann's view, Higgins was more credible than the Grievant. Higgins was calm while the Grievant appeared quite nervous. At times, the Grievant's testimony appeared not remorseful, but "more or less arrogant." Neumann was not necessarily comfortable with the term "arrogant" but could think of no better word to reflect what caused the Committee's unease with the Grievant's testimony.

Molly Soblewski

Soblewski has served the County as Jail Administrator and currently serves as Patrol Captain. She noted that one Correctional Officer, Daniel Knueppel, had received a three day suspension in March of 2004, including a suspension from transport officer assignments, for conduct surrounding an automobile accident. Knueppel admitted alcohol consumption was a factor. Knueppel later received a two week suspension for "operating while intoxicated" on March 27, 2006. In December of 2006, Knueppel received an eight day suspension, which Soblewski extended to ten days, for repeated tardiness. Knueppel understood the basis for the ten day suspension, was apologetic, and accepted the suspension. Arthur Elsner received a ten day suspension for OWI. He was also suspended from eligibility to serve on the transport team. This has significant financial ramifications. Neither Knueppel nor Elsner had an open intoxicant in their vehicle and neither requested a "professional courtesy". As Knueppel, Elsner was apologetic and accepted the suspension without a grievance.

Soblewski noted that while a Supervisor of the Dispatch Center, she learned that a Correctional Officer, Chad Riter, had his driver's license suspended for six months starting on June 15, 2000. She discovered this in a check of employee driving records that took place roughly one year after the suspension. At the time of Riter's arrest for OWI, the County had no policy regarding the immediate reporting of an off-duty incident. She discussed the matter with the then incumbent Jail Administrator. They did not consider giving Riter time off, but did suspend his privilege to be on the transport team. This action reduced Riter's annual income by perhaps \$15,000.00. Riter ultimately promoted to a non-unit position.

Greg Weihert

Weihert stated it was hard to relax as a witness. He acknowledged he asked Higgins for a professional courtesy. He did so when Higgins produced handcuffs, outside of Higgins'

squad. The courtesy Weihert sought was not to be handcuffed in front of his wife. In Dodge County, an officer has discretion regarding whether or not to handcuff an arrested individual. He did not know Richland County policy, but hoped Higgins had that discretion and hoped Higgins would exercise it to reflect Weihert's cooperation. Higgins cuffed him, indicating to the Grievant that it was "a safety issue." Weihert did not make any other request for a "professional courtesy." He did not see the request as a "quid pro quo" between fellow law officers. He did not mention the handcuffs because Higgins knew exactly what he was referring to. At the time Higgins handcuffed him, his wife, Barbara, was seated in the back seat of the squad.

Weihert did not inform Higgins that he was a deputy when they first spoke. After Weihert informed Higgins that he did not have his license, Higgins returned to his squad to verify Weihert's driver's license and registration. Having done so, Higgins returned to Weihert's car. Weihert then informed Higgins that he was a deputy. He did so "to take the edge off", because the shotgun he used at the trap-shooting event was in the back seat of the car. He did not want Higgins to feel that the shotgun posed a safety issue. Higgins asked him where he was a deputy and Weihert told him. Weihert did not recall any other mention to Higgins that he was a deputy. Prior to handcuffing the Grievant, Higgins allowed the Grievant to take the shotgun from the back seat of his car and place it in the trunk.

The Grievant's wife was seated next to him at the time Higgins stopped their car. The beer was hers. When it was apparent that Higgins was going cite him for OWI, the Grievant asked Higgins to administer a PBT for his wife to determine if she could operate their vehicle. Barbara agreed, Higgins administered the test, and the result was a .05.

Prior to August 31, the Grievant had no disciplinary history with the County and had never been arrested or pulled over for a traffic violation. He felt "very ashamed" throughout the incident and was particularly embarrassed to have this happen in his wife's presence. This sense of shame followed August 31, and led to his apologizing to Nehls. He had "never been that low in my life." Nehls treated incident lightly in their first meeting, and attempted to joke about it. The Grievant did not find it humorous. Nehls asked the Grievant what his opinion was of a one or two day suspension. The Grievant formally apologized to the bargaining unit at a Union meeting. He acknowledged that his October 31 testimony reflected nervousness and his being "on the defensive side" regarding the suspension's length. His testimony at the arbitration hearing varied on what, if any, length of suspension was appropriate, but he viewed ten days or more as excessive.

Steve Allermann

Allermann is a Sergeant in the patrol division, and is the day shift supervisor. He has been a patrol sergeant since 1990 and has served as a County employee for thirty-four years. He is the Grievant's immediate supervisor by rank, but is a member of the bargaining unit. He is Sergeant-Major in the Marine Corps Reserves, and has one to three thousand troops under his oversight. Ten deputies report to him as day shift supervisor.

He has known the Grievant for many years and considers him the best deputy on the day shift. The Grievant phoned Allermann on September 1 to advise him of the OWI arrest. The Grievant apologized for the call and for what prompted it. He offered no excuses. Allermann advised him to report to Nehls as soon as possible upon his return to work. Allermann did not accompany him, as this was the Grievant's sole responsibility.

Allermann did not view the Grievant's request for "personal courtesy" to pose a major issue because his testimony reflected what he told Allermann on September 1. Allermann stated the Grievant's reputation for truthfulness is beyond question. If Higgins' testimony is credited, the "personal courtesy" request poses a major issue. He has not changed his assignment practices regarding the Grievant since the OWI and has perceived no problem in the Grievant's ability to work with other officers.

Barbara Weihert

Personal references to Barbara Weihert will be to "Barbara" and references to Gregory Weihert will be to "Weihert" or "the Grievant." Greg and Barbara Weihert have been married for sixteen years. She accompanied him to the trap shooting event on August 31. They were together throughout the event. He is not a big drinker, and she mixed him two drinks the entire afternoon. The drinks were Southern Comfort and Diet Pepsi. She drank beer. He was done shooting at 6:30 p.m., and she made him a drink at 6:45 p.m. Weihert drove the car because she had to work at 2:00 a.m. and was tired.

She heard all of the conversations between the Grievant and Higgins. Weihert did advise Higgins he was a Dodge County Deputy, but did so while he was alerting him to the shotgun in the back seat. At no time while she was in her car did she hear Weihert seek a "professional courtesy." After the field sobriety tests, Higgins administered a PBT to Barbara. When that was done, he advised her that she could not drive; that she should turn the car's flasher's on; and that she should sit in the back seat of his squad. She watched Weihert take the shotgun from the back seat and place it in the trunk of her car. The beer can in their car's console was hers, and she handed it to Higgins.

While seated in the back seat of Higgins' squad, and while Higgins and Weihert were still outside of the squad, Barbara heard Higgins say he was going to handcuff Weihert. At that point she heard Weihert ask not to be handcuffed in front of her as a professional courtesy.

The incident hurt her husband, who lost sleep and appetite after it. She put the effect thus, "It's been horrible on him." She did not appear before the Committee because she did not know she could. She was unaware of Higgins' report until the arbitration hearing and felt that Higgins lied in it as well as in his testimony.

Further facts will be set forth in the **DISCUSSION** section below.

THE PARTIES' POSITIONS

The County's Brief

The County prefaces its arguments with an extensive review of the evidence, including: the grievance's procedural history; the events of August 31, the criminal prosecution decision; the County's investigation; and "other relevant information" including other disciplines involving OWI allegations as well as testimony bearing on the Grievant's acceptance of responsibility for his misconduct. With this as background, County notes that "the Grievant engaged in serious misconduct on August 31, 2008" and that "(t)here can be no serious dispute that the Grievant should receive discipline for his misconduct."

The Grievant's assertion that the OWI stop was illegal affords no basis to conclude his actions "were less culpable or deserving of a lesser punishment." Richland County law enforcement officials determined that they would not seek the Grievant's prosecution. This is traceable to the District Attorney, who relied on a Court of Appeals decision defining the "community caretaker function" regarding a stopped motorist. After Richland County dropped its prosecution of the Grievant, the Court of Appeals decision was reviewed and overturned by the Wisconsin Supreme Court. Beyond this, *STATE V. TRUAX*, 2008AP70-CR, (Ct.App., 4/8/09) "is fundamentally indistinguishable from the actions . . . in this matter." Against this background, the Grievant's view that the stop was "illegal" is without foundation.

Even if it was, whether or not the Grievant was prosecuted or convicted for his conduct on August 31 "is completely irrelevant to this case." Rather, the sole factual issues are whether "he in fact engaged in illegal conduct by driving his vehicle while intoxicated, asked for 'professional courtesy' as alleged in the Charges, and had open intoxicants in his vehicle." The absence of prosecution is no more than the Grievant's "good fortune" and cannot mask the fundamental misconduct at issue.

Significant arbitral authority establishes that, "This Arbitrator should not disturb the County's judgment concerning the penalty unless it is shown to be 'unreasonable, arbitrary or capricious.'" On a general level, published awards establish that "disciplinary penalties which are within the range of reasonableness are not subject to the whim of an arbitrator to substitute his own personal judgment or opinion". Beyond this, a line of cases establishes that "mitigation" must be distinguished from "leniency." In any event, a specific penalty should not be disturbed absent proof of an abuse of discretion.

The evidence establishes that the twenty day suspension is well within the range of reasonableness. On a general level, a series of arbitration awards establish this. *ROGERS CITY, MICHIGAN*, 110 LA 92 (Daniel, 1997) highlights the reasonableness of the Sheriff's decisional process and more specifically that his early effort to reassure the Grievant that "there would be some time off as a result of the OWI" did not restrict his need to view all the

relevant facts. That the Committee made the final decision on penalty and considered facts beyond those before the Sheriff establishes that, "Like the decision in ROGERS CITY, careful consideration of all the facts and circumstances lead to a proper judgment as to penalty."

PAULDING COUNTY SHERIFF'S DEPARTMENT, 105 LA 1100 (Bittel, 1996) highlights the need to address credibility issues of the deputy as well as of witnesses. Beyond this, PAULDING COUNTY underscores "the differing treatment which must be applied to law enforcement officers compared to other public employees" as well as the significance of a law enforcement officer's unwillingness to acknowledge culpability. BROWARD COUNTY SHERIFF'S OFFICE, 115 LA 708 (Richard, 2001), CITY OF LAS VEGAS, 105 LA 398 (Robinson, 1995), and CITY OF OKLAHOMA CITY, 110 LA 385 (Greer, 1998) afford guidance regarding deference to the penalty decision reached by command staff in the presence of solid work records or long-term service. Beyond this, the decisions establish that significant off duty misconduct can warrant significant discipline without regard to the existence of negative publicity. In this case, a negative reaction from the public was "reasonably predictable" and "did, in fact, occur." The cases also underscore that discharge "of long term members of the public safety profession, even in the face of a good work record, is supportable for acts of misconduct less serious than that engaged in by the Grievant in our case." Beyond this, the precedent underscores "the high level of importance arbitrators can and should place on the fact that we are dealing with a law enforcement agency which must maintain a high degree of public trust in order to be effective." The cases also establish the need for caution from an arbitrator "when substituting their judgment for that of the employer on the important issue of the penalty." The penalty decision impacts other departmental employees, the Grievant and the general public. The careful consideration of the Grievance Committee and the Sheriff should not be treated lightly.

The twenty day suspension was proven reasonable. The suspension's length is unremarkable, even in light of the Grievant's work record, because Nehls took his record into account. Both the Grievance Committee and the Sheriff "clearly considered the Grievant's misconduct to be far more serious than the Grievant himself wants to admit." His decision to drive is, standing alone, serious. The presence of an open intoxicant in his car makes the serious lack of judgment more egregious. Most significant of all the considerations pointing to a severe penalty is "the request for 'professional courtesy'". The evidence shows the Grievant never took responsibility for this request. Detailed review of the evidence surrounding these matters establishes the twenty day suspension "is quite lenient." No assertion that the Grievant "has learned his lesson" can address this and any lesser penalty sends "a very troubling message" to departmental employees and to the public at large.

The County concludes that the record viewed as a whole should result in the dismissal of the grievance in its entirety.

The Union's Brief

The Union's review of the evidence highlights four themes: "The Grievant is a long-term employee with a great record who made a mistake"; He reported the August 31, 2008 incident

immediately and “has been remorseful”; the incident was off duty and “had no tangible impact on the workings of the department”; and the suspension imposed was excessive in light of other departmental discipline.

“Cause” breaks down to two elements, whether the Grievant’s August 31 conduct merited discipline and, if so, whether the penalty imposed was reasonable. That he drove and tested above the legal limit is acknowledged. The “open intoxicant” issue “appears to be part of a strategy to pile on charges to make the incident look worse.”

The assertion that the Grievant sought “professional courtesy” to avoid being arrested is problematic and not well supported in the record. The discrepancy between Higgins’ testimony, the Grievant’s and the Grievant’s wife is a significant factor. The significance should not, however, be overstated. Higgins “testified that Greg was extremely cooperative throughout their encounter.” The discrepancy concerns what the Grievant said as he was being placed under arrest. The credible testimony establishes the Grievant sought the courtesy of not being handcuffed in front of his wife, not that he sought to avoid arrest “because he is a law enforcement officer.” His conduct at the time and his exemplary work record caution against drawing the inference the Sheriff made and the Grievance Committee confirmed. The Grievant’s or his wife’s testimony cannot be summarily dismissed based on their interest. Many other witnesses, including departmental supervision, confirmed his reputation for truthfulness. Evaluation of Higgins’ credibility must be more critical than the County’s. His conduct in making the stop as well as his conduct in prior stops has not held him in good standing in his own department or in the District Attorney’s office

The County has similarly overstated the nexus between the Grievant’s off-duty misconduct and his work as a Deputy. He fully complied with his duty to report the incident promptly to his supervisor. There is no reliable evidence that there had been “any public knowledge of these charges” prior to the imposition of discipline. A subsequent newspaper article did trigger some e-mails from the public, but “all this came after the decision on penalty to be imposed.” The dropping of all charges against the Grievant was known to the Sheriff and this diminished “any potential for the public being aware of this.” In fact, little public outcry has resulted. Arbitral precedent confirms that the nexus between off-duty conduct and harm to the employer cannot be presumed. Here, there was “at most minimal harm” to the department. There has been “zero affect on the performance of Officer Weihert in performing his functions as a Dodge County Deputy Sheriff.” Beyond this, there is “no evidence that this had any perceptible impact” on the Grievant’s ability to work with other deputies.

With this as background, and acknowledging “that sworn police officers are held to a different standard than most employees”, the penalty “is way too severe”. Arbitral precedent, such as ADAMS COUNTY COURTHOUSE, MA-11767, DEC. NO. 6691 (Levitan, 6/04); TAYLOR COUNTY, MA-11196, DEC. NO. 6236 (Greco, 6/01); MILWAUKEE COUNTY (SHERIFF’S DEPARTMENT), MA-12564, DEC. NO. 6750 (Burns, 11/04); and IRON RIVER POLICE OFFICERS’ ASSOCIATION, (Opperwall, 2/07) establish the authority of an arbitrator to reduce discipline where appropriate as a matter of remedy and to do so specifically in the law enforcement context in factual situations comparable to that posed here. More specifically, the penalty imposed here was

too harsh because the County based “the penalty first off on alleged affects on the department rather than any tangible effects.”

Beyond this, the County only paid “lip service” to the Grievant’s exemplary record. He has no prior discipline; his record is long-term; his personnel file is full of positive recognition, including “one from a truck driver who Greg ticketed.” Nehls acknowledged the Grievant has been one of his best deputies. In spite of this, the County “misses the concept of progressive discipline.” Nehls appears to have used the Grievant to make the Grievant an example to others. In doing so, however, Nehls punished the Grievant rather than using discipline as a rehabilitative tool. CITY OF MANSFIELD, 105 LA 935 (Shanker, 1995) highlights this distinction. That Nehls held the Grievant “to a higher standard” cannot be squared with progressive discipline, and turned “the entire issue of mitigation upside down.” Nor can the evidence be squared with the County’s assertion that the Grievant showed no remorse. Ample testimony highlights that he showed “remorse from day one forward.” The County mistakes the Grievant’s attempt to challenge the degree of penalty with an attempt to avoid responsibility. Here, “the charges were dropped because there was no good reason for him to be pulled over” yet “he is receiving a greater monetary penalty than someone who is convicted of an OWI.” The Grievant has an unblemished work and driving record. These factors should mitigate, not aggravate, his penalty.

Other departmental discipline does not involve sworn patrol officers, but highlights that the County has chosen a far more lax course in disciplining Correctional Officers who were convicted of OWI. One officer, who failed to report the citation, “was subsequently promoted to a management position”. This disparate treatment highlights that the twenty day suspension was excessive.

With this as background, the Union concludes by requesting “that the Arbitrator sustain the grievance and reduce the excessive penalty.”

DISCUSSION

The stipulated issue questions cause for the Grievant’s twenty day suspension. While the Union is correct that I apply a two element test to define “cause”, I do so in cases where the parties do not stipulate the standard. I view the standard applicable here to be stipulated. The joint exhibits contain a copy of Sec. 59.26(8)(b)5m., Stats., which states:

No deputy may be suspended, demoted or discharged by the grievance committee . . . based on charges filed by the sheriff . . . unless the committee determines whether there is just cause, as described in this subdivision, to sustain the charges. In making its determination, the committee shall apply the following standards, to the extent applicable . . .

Subsections a through g establish the “standards”, which are the “seven steps of just cause.” The parties raise, and I see, no conflict between the statutory reference to “just cause” and the reference in Section 3.1 to “cause”. “The term ‘just cause’ is generally held to be synonymous with “cause,” “proper cause,” or “reasonable cause.” Hill & Sinicropi, *Management Rights*,

(BNA, 1986) at 99. See also Bornstein, Gosline & Greenbaum, *Labor and Employment Arbitration*, (Matthew Bender, 1999) at Section 14.01.

The sole standard in dispute is Subsection g, which states:

Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the deputy's record of service with the sheriff's department.

The County's arguments note concern that the Union challenges any discipline. The Union's citation of the two-element test opens that possibility since the first element is whether or not the Grievant's "actions on August 31st merit disciplinary action." I do not read the Union's arguments to question whether the County has proven a disciplinary interest in the Grievant's August 31 conduct. Rather, I read their arguments to question whether Subsection g supports a twenty day suspension as a reasonable expression of a proven disciplinary interest.

The focal point for Subsection g is the Determination. Subsection g demands discipline "reasonably relate" to "the seriousness of the alleged violation" in light of "the deputy's record of service." Taken literally, this is troublesome, since the seriousness of an "alleged violation" is debatable on its face. An allegation that an officer failed a drug test on duty is serious. If, however, the allegation rests on a false positive, it is difficult to see how the undoubtedly serious "alleged violation" can support discipline. Sec. 59.26(8)(b)5, Stats., highlights that Subsection g cannot be applied literally, since the Committee "shall determine in writing whether or not the charge is well-founded". Thus, application of Subsection g must reach whether the Determination is well-founded on the evidence.

The County contends that the grievance questions the deference appropriate to the Committee. The precedent cited by the parties states the appropriate deference in varying terms, but Subsection g states a reasonableness standard. Thus, the deference issue is not addressed by reconciling various arbitral definitions, but by examining the reasonableness of the Committee's conclusions. This is not just a function of the statutory "reasonableness" standard. Rather, it recognizes the applicability of Section 3.1, harmonizing the contractual and statutory standards. This does not substitute an arbitrator as an original decision-maker. Rather, it demands examination of the strength of the relationship of the Committee's conclusions to proven fact. Deference to the original decision-makers is at its most where the connection between proven fact and conclusion is sound, and at its least where the connection is unsound.

Subsection g demands the seriousness of the alleged violation be considered with the Grievant's work record. There is no dispute that, excluding this incident, the Grievant has an unblemished eighteen year work record. There is no dispute that his work has been and continues to be excellent. Thus, the dispute on the suspension's reasonableness turns initially on the seriousness of the misconduct.

The Charges state the facts critical to application of Subsection g at Paragraph 8 and further specify them at Paragraphs 9a, 9b, 9c and 9d. The Charges state the bases of the impropriety of the Grievant's conduct at Paragraphs 9e, 9f, 9g and 9h. The Committee's Determination found "all of the charges are well-founded", stating the facts relevant to Subsection g at Paragraphs 14, 15 and 16 of the factual findings. The Determination notes the bases of the impropriety at Paragraph 18 of the factual findings and Paragraph 7 of the standards.

A tension between exists the Charges and the Determination. The Charges specify the open intoxicant while the Determination does not, beyond noting that all the charges were well-founded. This is a technical point, but some of the tension bears more directly on the Committee's conclusions. The assertion that the Grievant violated State Statutes or Richland County Ordinances is flawed by the fact that this allegation is unproven, given Richland County's decision not to process the citations. Whether or not the Grievant violated State statute or Richland County Ordinance is not posed for decision here. As written, Paragraphs 14 and 15 of the Determination, which draw from Paragraphs 9b, 9c and 9e of the Charges, cannot support the twenty day suspension.

These technical considerations preface more closely disputed points. The Sheriff and the Committee considered the County's disciplinary interest to exist independent of a proven violation of State statute or Richland County ordinance. Thus, the findings noted above stand as a statement of Nehls' and the Committee's evaluation of the seriousness of the offense to underscore that the absence of prosecution cannot obscure the severity of the misconduct in light of Departmental Policy and of the Department's effective operation.

The Charges and the Determination rest on a core of undisputed fact: (1) the Grievant drove a vehicle under the influence of alcohol; (2) the Grievant was driving a car with an open beer can on the console between the front seats; and (3) the Grievant made a request for a "professional courtesy" at the point at which Higgins indicated that he would be handcuffed.

Beyond this, the record supports the legitimacy of Nehls' and the Committee's broader concern for the Department's operation. The Union questions whether the Committee's finding on this point (Paragraph 7 of the standards' section of the Determination) can be considered persuasive. More specifically, the Union asserts that no disruption of departmental operations or undermining of public confidence has been proven.

The Committee's conclusion on this point flows directly from Nehls' opinion and warrants deference. Nehls never challenged the quality of the Grievant's work and did not assert that the misconduct specifically damaged the department's day-to-day operation. Rather, the disputed conclusion is policy-based and more subtle. It focuses on the standard Nehls wants to set for the department and the image that standard projects to the community. Nehls and the Committee members stand for election and answer to the public for these standards. This cannot be said of a grievance arbitrator and there is no evidence that warrants arbitral questioning of their evaluation of the impact of the misconduct on the department's reputation and its standing in the public eye. If the Charges or the Determination asserted that the Grievant had in fact

compromised his ability to function as a law enforcement officer, the Union's view would be persuasive, for the asserted conclusion would rest on no proven fact. Here, the governing fact is the reasonableness of the Sheriff's and the Committee's professional and personal evaluation of the department's operation and public standing. Neither acted to aggravate or to inflame the issue and both reacted to their good faith perception of the opinion of their constituency.

The suspension's length is the most closely disputed point, and its resolution requires determination of fact. The disputed facts turn on the request(s) for professional courtesy and the Grievant's statement(s) that he was a Dodge County Deputy. The record on these points is troublesome. Paragraph 9d of the Charges is unclear on the number of requests for professional courtesy; is silent on the number of times the Grievant identified himself as a Deputy; and appears to state the misconduct as an "appearance of impropriety" matter by the use of "as if", noting conduct at least appearing to seek the avoidance of arrest. The Determination, however, finds an improper a series of requests for "professional courtesy" and couples them to a series of statements by the Grievant noting he was a Dodge County Deputy. Paragraph 16 of the Determination does not state whether these contacts are improper as a deliberate request of Higgins to be lenient to a fellow deputy, or are improper for having that appearance.

Under Paragraph 16, the tension between the Charges and the Determination turns into a discrepancy. The discrepancy is not a technical point. The factual imprecision of the Charges and the Determination is troubling. The imprecision of Paragraph 9d of the Charges is less troubling than the detail of the Determination. Paragraph 9d has the virtue of stating an appearance of impropriety standard, which implies that any request for a professional courtesy whether or not accompanied by an identification of deputy status, is improper. Paragraph 16 of the Determination complicates this point. The general assertion that the all of the Charges were well-founded incorporates the "appearance" standard of Paragraph 9d, but this only underscores the difficulty posed by Paragraph 16, which states in detail a series of contacts, thus asserting an ongoing dialogue by which the Grievant actively sought a quid pro quo. This asserts no "appearance of impropriety" but an ongoing and deliberate effort to trade on deputy status for a personal benefit.

Examination of the testimony at the arbitration hearing and at the Committee hearing will not support the Committee's finding of fact, and affords limited support for Paragraph 9d of the Charges. While this poses a credibility issue, none of the evidence indicates that finding fact on this point turns on whether the Grievant or Higgins lied. The two accounts, where there is detail in the testimony, mesh well.

The difficulty posed for the Determination is that Higgins' testimony, standing alone, will not support Paragraph 16. At the arbitration and the Committee hearings, Higgins testified less on his original recall than on his written report. In either event, the evidence affords no persuasive reason to believe the Grievant and Higgins engaged in an ongoing dialogue about a quid pro quo. Outside of the first request for "professional courtesy", Higgins' testimony affords no certainty on how often or when the Grievant mentioned he was a deputy. Beyond this, there is no clarity on when the Grievant made the second request for "professional courtesy." If

Higgins' uncertainty on when the second request came is ignored, then the first and second requests had to have come closely together. This implies an ongoing dialogue, but nothing in Higgins' report or testimony supports this. Neither puts any request for courtesy occurring during the field sobriety tests. It is undisputed that Weihert informed Higgins about an eye condition during the eye test. Higgins' report and testimony afford no clue on why a deputy who was actively seeking a quid pro quo before and after the field tests became factual during them. The absence of clarity in Higgins' report on this ongoing dialogue is a strong indication that no such dialogue occurred. Beyond this, Higgins' report indicates the Grievant was sufficiently intoxicated that he slurred his speech and needed to use his car for support to prepare for the field tests. Higgins also noted that the Grievant's tone of voice was normal throughout the stop and that he was "very cooperative." (Tr. at 72). It is undisputed that Higgins permitted the Grievant to handle a shotgun while securing his vehicle. The difficulty of squaring the precision of Higgins' account of these details with the imprecision of his account of an ongoing dialogue with a drunk who was in effect trying to bribe him is evident.

The Grievant's and his wife's testimony account for the events of the stop more coherently. They put the first mention of deputy status at the point at which the Grievant sought to "take the edge off" the stop by alerting Higgins to the reason for the shotgun in the back seat. The "appearance of impropriety" implications of this conduct are addressed below, but more to the point on finding fact here, the reference offered Higgins a non-threatening reason for the shotgun as well as for the Grievant's training in how to handle it. This prefaces a consistent theme in all the testimony, which is that the Grievant's conduct, apart from his judgment in driving under the influence and requesting "professional courtesy", was impeccable. He fully and matter-of-factly cooperated with Higgins under all of the testimony. That Higgins allowed him to secure the shotgun confirms this. That the Grievant sought a PBT test for his wife establishes that in the midst of a stop that had significant overtones for his job, he was rationally attending to the business of how to handle his car after the stop. His recounting a single mention of a "professional courtesy" is more easily squared with the totality of his conduct than with Higgins' account, which has the Grievant, drunk enough to be unsteady on his feet, swinging between matter of fact cooperation and an ongoing and repeatedly ineffective effort to use sworn status to get off the hook.

The balance of witness testimony affords significant support for the Grievant's testimony. No witness questioned his reputation for veracity. There is perhaps no better measure of his credibility than his admission that he sought a professional courtesy at the point at which Higgins was going to handcuff him. Weihert's and his wife's accounts place the single request alongside Higgins' squad, with Barbara seated in the back seat of the squad. Higgins' only clear recollection of a "professional courtesy" request placed it somewhere outside of Weihert's car, perhaps close to the squad. He had no specific recall of when or where the second request occurred, but thought it might have been at the point of handcuffing Weihert. In any event, the Grievant's testimony accounts for his behavior and fits within the core of undisputed fact surrounding the stop. Each of the accounts places a single request outside of Weihert's car, within the hearing of Weihert's wife. It is apparent why the Grievant made the single request he and his wife testified to. It is not evident why the Grievant would make the request at the point

in time Higgins first places it. It was, under any view, too late to spare the Grievant from what was to come by way of proof for an OWI charge. That the three accounts that include detail are close on the specifics is easier to reconcile with the Grievant's testimony that there was only one request. It is difficult to reconcile to Higgins' very limited recall of the second exchange. That Higgins' report and testimony indiscriminately link "professional courtesy" with "Dodge County Deputy" references further undercuts the likelihood that the Grievant sought "professional courtesy" more than once.

Significantly, the Grievant's testimony at the Committee and the arbitration hearing is the clearest evidence supporting Paragraph 9d of the Charges. It is evident that the Grievant's unwillingness to unequivocally take responsibility for the appearance of impropriety implicit in his request for "professional courtesy" colored the Committee's and Nehls' view of his testimony. The Grievant's equivocation on this point continued at the arbitration hearing, and is the weakest point in the Union's defense of his conduct. The request, on its face, is improper, because only the Grievant's Deputy status can account for the reference to "professional". Had the Grievant sought the "courtesy" of not being handcuffed, the statement would seek no more than any member of the public could seek. The reference to "professional", however, bound Higgins and the Grievant together as law enforcement professionals, thus separate and unique from the general public. There is no defense for the Grievant's use of this reference, and the embarrassment he stated prompted his request was no more and no less than that felt by any member of the public put in the same straits. More to the point here, the Grievant's testimony, standing alone, establishes the impropriety unequivocally. Higgins' testimony is more difficult to place in the context of the stop and is unclear on when and where it occurred. This is not to say it is incredible. Rather, it serves more persuasively as corroboration of the Grievant's testimony than an independent basis to determine fact contrary to the Grievant's testimony. The Grievant's candor confirms a course of conduct that extended throughout the stop. It is easier to reconcile with that course of conduct than Higgins'.

In sum, the record will not support the Committee's determination of fact at Paragraph 16 nor will it establish the fact implied at Paragraph 9d of the Charges that the Grievant sought to avoid arrest. It will, however, support the fact implied in Paragraph 9d that the Grievant sought improperly to use his status as a Deputy, through a single reference to "professional courtesy", to obtain from Higgins an act of discretion not available to him as a member of the public.

This, coupled with the core of undisputed fact noted above, constitutes the well-founded fact upon which the severity of the alleged violation rests. The reasonableness analysis of the County's application of Subsection g turns on balancing this with the Grievant's service record. The Award states my view that although the County proved the reasonableness of a significant suspension, it failed to prove the reasonableness of a twenty-day suspension. "Cutting the baby in half" is not to feign Solomon's wisdom, but to highlight that neither party's conclusion on the suspension has a sound link between it and proven fact.

As the County persuasively argues, the appropriate length of a suspension permits a broad range of reasonableness. Nehls' testimony concerning his informal survey of Wisconsin Sheriffs

confirms a range of opinion from a reprimand through discharge. Although the Sheriff urges that a one-day suspension would undermine his authority, a single day suspension puts an employee on the brink of discharge or additional suspension dependent only on the Sheriff's discretion. In my view, it is a poorly advised employee that takes a single day suspension as something other than the brink of termination, cf. DUNN COUNTY, MA-6769, DEC. NO. 4345, (McLaughlin, 2/92). It is not, however, my view of a reasonable suspension that turns the operation of Subsection g. If the Determination's acceptance of Nehls' recommendation of a twenty-day suspension rested soundly on proven fact, it would fall within the range of reasonableness. A deliberate effort by a Deputy to use law enforcement status to avoid arrest could reasonably warrant discharge, much less a twenty-day suspension. Here, however, the proven fact turns as much on the appearance as on the reality of impropriety. To find the Determination reasonable demands equating an aggravated course of conduct by which a law enforcement officer deliberately seeks to use his position for personal advantage with that of a single, unrepeatable and indiscrete use of "professional". Paragraphs 9a, 9b, 9c, 9d and 9e of the Charges and Paragraphs 14 and 15 of the Determination overstate proven fact. Paragraph 16 of the Determination misstates proven fact. Against this background, finding the suspension reasonable would render the Grievant's distinguished record meaningless, for it would assert that any length of suspension given to him could stand as reasonable without regard to the soundness of its link to proven fact. Given the Grievant's exemplary work record, the County cannot persuasively claim the reasonableness of a twenty day suspension.

Nor will the record support the reasonableness of the Union's assertion that the Grievant deserved no, or a minor, suspension. The Union's questioning of the County's overcharging the Grievant as well as its questioning of County "lip service" for his work record is persuasive. However, the Grievant's testimony, no less than his poor judgment on August 31, will not support its application of Subsection g. The core of proven fact warrants a suspension, and the Grievant's ongoing reluctance to acknowledge responsibility for the impropriety of a single request for "professional courtesy" during his arrest poses a fact that renders the Union's conclusion unsound. In my view, the Determination's expansion of the facts alleged in the Charges reflects the Committee's disappointment with the Grievant's testimony on this point. Nehls' conclusion that the Grievant's perception of his own misconduct changed after Richland County dropped the charges against him has solid evidentiary support. A conclusion that a significant suspension is necessary to drive the disciplinary interest home thus has a reasonable basis that is well rooted in the Grievant's conduct and his testimony.

Against this background, the Award "splits the difference." This reflects that the core of proven fact cannot soundly be linked to a conclusion either that the Grievant should receive a minor suspension or that the Grievant should receive a twenty day suspension. Whatever is said of the logical purity of "splitting the difference", neither party can reasonably claim "victory" on this record.

Before closing, it is appropriate to tie the conclusions stated above more closely to the parties' arguments. The County addressed Richland County's decision not to prosecute as a matter of law, but did so in the alternative, since it views its disciplinary interest to be more than

Richland County's prosecutorial interest. I agree that the legal issue regarding Higgins' stop of the Grievant on August 31 does not bind Nehls' or the Committee's exercise of the County's disciplinary interest. The Union is hard-pressed to contend the Committee and Nehls have no interest in an employee's misconduct if it is not prosecutable, or that there is no link between a Deputy's conduct during an off-duty arrest and that Deputy's ability to function with the power of arrest. In any event, the Committee's and Nehls' perception of the impact of the OWI on department administration as well as its public image is reasonable.

The County's exercise of its disciplinary authority regarding three Correctional Officers has little bearing on the Grievant's discipline. The weight to be afforded the treatment of non-unit employees is debatable under Section 3.1 or Subsection g, particularly in light of the power of arrest complications posed by the off-duty arrest of an employee with the power of arrest. The Committee affirmed Nehls' view that how the Grievant was handled was a matter of first impression in the department and had to stand on its own. That determination reasonably reflects the public authority lodged in the Sheriff and those whom he deputizes.

Difficult credibility determinations are too often cast as an "either/or" choice between a liar and a truth-teller. Concluding that neither Higgins nor the Grievant lied does not avoid a credibility determination. Rather, it poses its full difficulty. The credibility determination is less a matter of assessing a personal quality than undertaking the recreation of past events filtered through individual interest and emotion. Saying that Higgins' and the Grievant's accounts "mesh well" does not make them identical. Weihert's and his wife's testimony "meshed well" but were not identical. Barbara's testimony, unlike Weihert's and Higgins, had Weihert expressly mention his desire not to be arrested in front of her. If credibility is an either/or choice, the choice on this fact lumps the Grievant together with Higgins, opposing both to Barbara. Higgins acknowledged Barbara could have overheard his conversations with Weihert. This indicates truth-telling.

That the Grievant's and Barbara's testimony more readily account for his conduct than Higgins' does not make Higgins a liar. It does not assist the fact finding posed here to analyze who had an incentive or an interest to lie. Individual interest is inextricably woven into perception and arguably more tightly woven into recall, where interest has the luxury of time to shade fact. It is evident that Higgins and his supervisors parted company on the legality of the arrest. This arguably gave Higgins an incentive to shade fact. There was a delay between his dictation of the report and its final preparation. The incentive of the Grievant and his wife to shade fact is evident. How to balance these incentives is not evident. The difficulty with Higgins' testimony on the "professional courtesy" request(s) has less to do with lying than with meaningfully fitting it into the proven core of fact regarding the sequence of events of August 31.

AWARD

The County did not have just cause to impose a twenty day suspension without pay for Deputy Gregory Weihert for off-duty misconduct that occurred on August 31, 2008, because a twenty day suspension is excessive under Section 3.1 as applied through the standard set by Sec. 59.26(8)(b)5m.g., Stats. The County did have cause to suspend him for ten days.

As the remedy appropriate to the County's violation of Section 3.1, the County shall amend the Grievant's personnel file(s) to reflect a ten day suspension for off-duty misconduct that occurred on August 31, 2008. The County shall also make the Grievant whole by compensating him for the difference in wages and benefits he actually earned under the twenty day suspension and those he would have earned had the suspension been for ten days.

Dated at Madison, Wisconsin, this 30th day of June, 2009.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

