

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**WASHINGTON COUNTY CORRECTIONS  
AND COMMUNICATIONS ASSOCIATION**

and

**WASHINGTON COUNTY**

Case 169  
No. 68326  
MA-14197

(Kim Newman Discharge Grievance)

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**Appearances:**

**Noah Reinstein**, Attorney, Cross Law Firm, S.C., Lawyers' Building, 845 North 11<sup>th</sup> Street, Milwaukee, Wisconsin 53233, appearing on behalf of the Washington County Corrections and Communications Association.

**Nancy Pirkey**, Attorney, Davis & Kuelthau, S.C., 111 East Kilbourn Avenue, Suite 1400, Milwaukee, Wisconsin 53202, appearing on behalf of Washington County.

**ARBITRATION AWARD**

The above-captioned parties, hereinafter the Association and County, respectively, are parties to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to the parties' request, the Wisconsin Employment Relations Commission appointed the undersigned to decide the above-captioned grievance. A hearing was held on February 16, 2009 in West Bend, Wisconsin at which time the parties presented testimony, exhibits and other evidence that was relevant to the grievance. The hearing was transcribed. The parties filed briefs and reply briefs, whereupon the record was closed May 18, 2009. Having considered the evidence, the arguments of the parties, the applicable provisions of the agreement and the record as a whole, the undersigned issues the following Award.

**ISSUE**

The parties stipulated to the following issue:

Did the County have just cause under Article XXI of the collective bargaining agreement when it terminated the employment of Kim Newman on August 6, 2008? If not, what is the appropriate remedy?

### **PERTINENT CONTRACT PROVISIONS**

The parties' 2008-09 collective bargaining agreement contains the following pertinent provisions:

#### **ARTICLE II – MANAGEMENT RIGHTS RESERVED.**

**Section 2.01.** The County retains and reserves the sole right to manage its affairs in accordance with all applicable laws, ordinances and regulations. Included in this responsibility, but not limited thereto, is . . . the right, subject to the terms of this Agreement related thereto, to suspend, discharge, demote or take other disciplinary action;. . .

**Section 2.02.** In addition to the foregoing, the County reserves the right to make, adopt, enforce and amend from time to time, reasonable rules and regulations relating to personnel policy, procedures and practices and matters relating to working conditions, giving due regard to the obligations imposed by this Agreement and the provisions of Wis. Stats. Section 111.70. . .

. . .

#### **ARTICLE XXI – DISCIPLINE AND DISMISSAL.**

**Section 21.01.** Employees in this bargaining unit shall hold office on good behavior and shall not be suspended, demoted, dismissed or otherwise disciplined except for just cause, provided, however, that the same shall not apply to the suspension, demotion, dismissal or other discipline of an employee serving his or her initial probationary period provided for in Section 20.01.

**Section 21.02.** The Sheriff shall formulate and make available to all members of this bargaining unit, a Manual of Standard Operating Procedures, the violation of which may be cause for suspension, demotion, dismissal or other discipline. A complete set of such Standard Operating Procedures shall be kept current by the Sheriff and made available to all members of the bargaining unit at any time, at several locations within the department designated by the Sheriff. All members of the bargaining unit shall be provided with a copy of the work rules portion of the Standard Operating Procedures and any amendments or alterations thereto.

## **BACKGROUND**

### **A. Introduction**

The County operates a jail. The Association is the exclusive collective bargaining representative for the correctional officers at the jail. Kim Newman was a correctional officer with the County from 2002 until her discharge on August 6, 2008. This case involves her discharge.

### **B. Overview of the Jail**

The Washington County Jail is operated by the Washington County Sheriff's Department. The jail is a secure detention facility which uses a variety of methods to ensure the safety and security of inmates, correctional officers and others. One of these security measures is the placement of cameras throughout the facility that monitors the actions of inmates and correctional officers. These cameras are placed in a number of areas, including the work areas of the correctional officers.

The jail operates with twelve to fourteen correctional officers on the first and second shifts and nine to ten correctional officers on the third shift.

The jail is divided into various work areas, with different staffing levels in each area. The booking area is staffed with one to two officers per shift. The Juvenile facility is staffed with two officers per shift. The Special Management Unit (SMU) has one officer assigned per shift. Master Control monitors all of the secure doors and cameras throughout the facility and is staffed by one officer. The jail has two floors of Huber inmates: two officers are assigned to first floor Huber and one to two officers are assigned to second floor Huber, depending on the shift. The adult pod, which houses up to 84 medium/maximum security inmates, is staffed with two officers per shift. Two officers are assigned as court officers and one officer is assigned to the electronic monitoring system. Lastly, there is one rover, who is an officer who works between the adult pod, booking and the second floor Huber area.

A correctional officer is trained to work in all of these areas. The officers rotate through these different areas every 60 days. The officers are assigned to an area by the shift commander at the beginning of each shift, but typically they will remain assigned to the same area for a 60-day rotation.

Employees are supposed to stay in their assigned work area. This general principle is codified in Section 351.52(I)(c) of the Correctional Staff Rules of Conduct (i.e. the Employer's work rules). That section provides thus: "A corrections officer assigned to a post will restrict him/herself to the responsibilities of that assigned post unless directed otherwise by the shift supervisor." If an employee leaves their assigned work area to go elsewhere in the jail, they are supposed to either have permission from their supervisor or have lined up a replacement (i.e. arranged for coverage by another officer). One Association witness testified that he does

not always notify his supervisor when he leaves his assigned work area for just a couple of minutes. However, that witness also testified that he never leaves his assigned work area without first notifying the other officer assigned to that work area of his whereabouts.

Correctional officers are responsible for the supervision, care and custody of inmates as well as maintaining the safety and security of inmates, correctional officers, other employees and visitors. Their particular duties vary depending on the area of the jail to which they are assigned; however, all correctional officers are responsible for maintaining order and supervising the activities of inmates. To perform these job duties, correctional officers must complete 160 hours of training and be certified by the State of Wisconsin.

The correctional officers' conduct is governed by laws, rules and regulations which govern both the care of prisoners and the maintenance of security in the jail. These laws, rules and regulations, which are rigid and extensive, are designed to maintain safety and security in the jail and protect both inmates and jailers.

### Newman's Work History

Newman was hired as a correctional officer in 2002. After being hired, she was regularly trained during in-services on the specific policies and procedures of the jail.

For about the first five years of her employment, Newman did a good job and did not have work performance problems. During this time frame, her performance reviews were favorable and she received several commendations for her work.

Beginning in 2007 though, Newman's work performance became inconsistent and she started having work performance problems. She was counseled about her work performance by her supervisor. In May, 2007, she was formally disciplined for falling asleep on the job. She admitted that she did, in fact, fall asleep. The discipline which the Employer chose to impose for this misconduct was an oral reprimand. In her evaluation for that year, her supervisor commented as follows:

. . .She had some shortcomings in regards to safety and security issues earlier in the year but has been counseled on them and is improving; at this time, I have no issues concerning this. . . .

Employees can attach a self-evaluation to their official evaluation. In her self-evaluation for that year, Newman wrote the following:

This past year has been a very tough year for me, personally, emotionally and professionally, each one seemed to have an effect on the other and spiraled out of control. I am ashamed and embarrassed by my situation, and the things I have gone through the past year, I hope to never have to endure any of it again. This evaluation is very hard for me to write, since there has not been anything

that has been positive for me, until recently. Without going into too much detail, with the changes that have been made, I do feel as though I am back on the right track to becoming the officer I once was, and I know, will be again. I know that I can do this because I care about my job. I am determined to succeed in my duties, helping others, and to maintain safety/security. Again, I do feel that my job and common sense is something that does come naturally for me. I was part of an imminent medical incident a couple months ago, which resulted in a positive outcome. It was this incident that reminded me of my capabilities and started to give me my confidence back in knowing that I WILL be the officer that others can come to and count on.

My goals are just to take each day as it comes and hopefully regain the confidence and trust of my coworkers and supervisors. I realize that may take quite some time, but I am determined to do so. I have never lost my determination to do a good job here, and learned that I never will. From where I am, I only have one way to go. . .and that is up. I am working to do my best to improve me, my job performance and all aspects of my job.

Notwithstanding her professed desire to improve her work performance, Newman's work performance troubles continued into 2008. On March 12, 2008, her supervisor, Sgt. Fairly, counseled Newman about numerous topics. The topics covered in this counseling session were Newman's demeanor and attitude, her mood swings and odd behavior, her (perceived) diminished coping skills, her angry outburst at a briefing wherein she said "fuck it" to Sgt. Fairly, her angry outbursts directed at her fellow officers, and having "other officers relieve her while she is in Master Control (her roster duty assignment). . .for long periods of time, anywhere from 10 minutes to one hour". Sgt. Fairly warned Newman to change her behavior relative to the foregoing and improve her work performance. Sgt. Fairly subsequently memorialized the substance of her counseling session with Newman in a memo to the Sheriff.

A month later (in mid-April, 2008), Sgt. Fairly counseled Newman again on two successive days about several topics. The first topic was Newman's "not switching off between the two Huber floors with other female officers" despite "an unwritten procedure to switch off every other day." Fairly told Newman that henceforth, "she would be switching every other day between the two floors. . ." Another topic was Newman's not going directly to her work area immediately after briefing. Fairly told Newman to go to her work area immediately after briefing. Afterwards, Fairly told Administrator Miller that Newman "seems oblivious to [her] concerns" and she (Fairly) was "not sure what to do with Officer Newman. . ." Fairly memorialized the substance of her counseling sessions with Newman in a memo to the Sheriff.

On April 18, 2008, another shift supervisor, Sgt. Lehman, wrote a memo concerning Newman's work performance. In that memo, he memorialized an incident which he witnessed wherein Newman was confused and unable to follow directions.

In July, 2008, the following events unfolded.

### FACTS

The medications taken by inmates are stored in medicine carts which are placed in various locations around the jail. These medicine carts are supposed to be locked and only be accessed by correctional officers who are acting as a medication officer.

The jail nurse counts the narcotic medication that is stored in these medicine carts to ensure that the medication is being administered and maintained properly. When the jail nurse conducted a medicine count on July 17, 2008, he discovered that two Oxycodone pills were missing from an inmate's prescription bottle kept in the medicine cart in the first floor Huber office. The jail nurse confirmed that there were 14 pills in the bottle on July 16, and 12 pills on July 17, 2008. The jail nurse further confirmed that the two missing pills had not been dispensed to the inmate holding the prescription. After making this discovery, the nurse wrote a report documenting same.

The diversion of controlled substances is a serious issue at the jail. Upon learning of the missing medication, Lt. Weske, who is second in command, took the following action: first, he directed that all officers who worked any shift on July 16, 2008 submit a report regarding the medications they dispensed that day and describe their activities on or around the medication cart in the first floor Huber office. Over a dozen officers who worked that day complied with this directive and submitted reports. Second, Lt. Weske determined that the area where the medication cart was stored, the first floor Huber office, did have cameras, so he retrieved the video footage from July 16, 2008.

One of the officers who submitted a report was Newman. Her report was as follows:

On Wednesday, July 16<sup>th</sup>, 2008, I was setting up PM medications in the Adult Pod during the approximate time of the 1500 hour. While I was setting up the medication for Schmidt, Ronald in AE pod, a little yellow rubber duck poured out of the medication bottle. I had never seen anything like this before and it did make me laugh. I did then go over to the first floor where I knew Officer German was working and also wanted to make her laugh. So, as a joke I went to place the rubber duck in one of the med cart drawers, not sure what drawer it was, just one that she would notice it easily when she pulled it open. I did then hear Officer German coming so I put the duck back into the bottle and showed both Officer German and Officer Weddig my findings. At no time did I remove any inmate medications. I only had my bottle containing the little rubber duck.

On Thursday, July 17, 2008, I was questioned by Sgt. Fairly about the situation and explained what had happened. She asked for a Memo and, I am also making one for the Nurse.

Weske then reviewed the videotapes of the first floor Huber office from July 16, 2008. That video footage showed that Newman was one of the employees who was in the Huber office that day. That video footage also showed that Newman was in the medication cart in the first floor Huber office that day (where the missing medicine was stored). Those images caught Weske's attention for two reasons. First, after checking with Newman's supervisor (Sgt. Fairly) about Newman's work assignments for July 16, 2008, Weske learned that Newman had no work-related reason to either be in the Huber office that day or be in that medicine cart because she was assigned to work in the adult pod area. Second, Weske knew that the medicine cart was supposed to be locked and inaccessible to any employee except the medication officer. Weske knew that Newman was not the medication officer on that date. After watching the videotape, Weske directed Newman to supplement her original report to provide more specific information including the exact time she was in the first floor Huber office. In response to Weske's directive, Newman wrote the following supplemental report:

I have been asked to revise my original memo so I am going to include a summary the original first.

On Wednesday, July 16 2008 I was setting up PM medications in the Adult Pod during the approximate time of the 1500 hour. While I was setting up medications for Schmidt, Ronald in AE pod, a little yellow rubber duckie poured out of the medication bottle. I had never seen anything quite like this before and it did make me laugh. I did then go over to the First Floor where I knew Officer German was working and wanted to make her laugh. So, as a joke I went to place the rubber duckie in one of the med cart drawers, not sure which drawer it was, just so that she would be able to find it easily when she pulled the drawer open. I did then hear Officer German coming so I put the duck and the few Schmidt pills that were in my hand back into the bottle. I then showed Officer German and Officer Weddig my findings inside the pill bottle. AGAIN, at no time did I remove any first floor inmate medications. I only had my bottle containing the little rubber duckie.

You are looking for exacts, and I am not able to recall exacts and give them to you. I am guessing you will get better times from the DVR. I do know that I was in the office and even by the med cart more than once. Times? Exact? I do know I did leave one of the times with a soufflé cup of Lozenges as Davis (AH) was requiring them quite regularly, and that I left notes with musical quotations "Rubber Duckie, You're the One."

This is all I can report to you and do not have the absolutes that are looking for except for the fact that I did not steal those pills.

Weske then turned all of this information over to Jail Administrator Miller, who in turn notified the Sheriff. The Sheriff assigned Administrator Miller and Lt. Konstanz to conduct an internal investigation into whether Newman had violated the Department's rules and regulations.

Lt. Konstanz works in the Sheriff's Department, not the jail, and serves as the supervisor of the Detective Bureau. He conducts internal investigations in the department. While Lt. Konstanz knew Newman, he did not work with her directly nor did he have any prior knowledge about her work history, work performance or work ethic. As Administrator of the jail, Miller was familiar with Newman at the start of the investigation, but had no preconceived idea about whether Newman had engaged in misconduct on July 16, 2008.

As the first step in the investigation, Lt. Konstanz watched the videotapes of the first floor Huber office for all 24 hours for July 16, 2008. Administrator Miller also watched videotapes from that day, but it is unclear if she watched all 24 hours as Konstanz did.

The videotapes showed the following. First, they showed that Newman went into the first floor Huber office five different times during her shift on July 16, 2008. She was not assigned to the first floor Huber area that day, so she had no reason to be there. The time stamps on the videotapes indicate that Newman was in the first floor Huber office for a total of about 15 minutes during her shift. Second, the videotapes showed that while other employees were in the Huber office that day, no one other than Newman went close to the medicine cart. On three of her visits to the Huber office, Newman went over to the medicine cart and looked through different drawers in that cart. In doing so, she touched/handled various items. One of the items which she touched/handled was a pill bottle. One time when she left the Huber office she had a pill bottle in her hand. Third, the videotapes showed that one time when Newman visited the Huber office, Officer German was there and Newman placed something in German's hands and they laughed about it. Shortly thereafter, both German and Newman picked something up off the floor (exactly what cannot be seen on the videotape).

After reviewing the videotapes, Lt. Konstanz and Administrator Miller interviewed Officer German. German was in charge of the medicine cart in the Huber office on the second shift on July 16, 2008. German could not recall many of the events that occurred on that date, so she was shown portions of the videotape from that date (i.e. July 16, 2008). After watching the videotape, German made the following statements. First, she admitted that she did not lock the medicine cart on that day. The cart is supposed to be locked. Second, with regard to her interaction with Newman that day, German said that Newman came to the first floor Huber office that day to play a practical joke involving a rubber duck. German said that Newman poured medicine from an inmate's pill bottle into her (German's) hands. In doing so, a rubber duck came out of the pill bottle and some of the pills spilled onto the floor. German said that she and Newman then picked up the medicine that had fallen onto the floor.

Lt. Konstanz then interviewed three more people to try to determine how the rubber duck ended up in the inmate's pill bottle. He interviewed the inmate whose medication contained the rubber duck, Correctional Officer Valley who worked the first shift on July 16, 2008 and administered the medicine to that inmate, and the jail nurse. The inmate admitted that the rubber duck belonged to him; he speculated that his roommate's son had placed the rubber duck in the pill bottle as a joke when the medicine was dropped off at the jail. Officer Valley told Konstanz that the rubber duck was not in the pill bottle on July 16, 2008 during the



first shift. The jail nurse told Konstanz that he had not seen the rubber duck when he counted the medication when it arrived at the jail.

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The following events occurred on the second shift on July 25, 2008.

That day, Newman was assigned to work in the adult pod where the inmates are housed. As previously noted, two correctional officers are assigned to work in that area. One of them must always be inside the adult pod control room to monitor operations while the other is on the pod floor monitoring the inmates.

At the start of her shift, Newman did a head count on the inmates in the adult pod. One of the inmates was not in the proper location for a head count. That inmate's non-compliance irritated Newman. The inmate who did not comply was deaf. Newman then got on the intercom and yelled at the other inmates to get the (deaf) inmate up for head count. Newman admitted that she used the word "shit" over the intercom when she said: "I'm sick of this shit. Get him up." She also admitted that she said "this is fucking bullshit", but she testified she was not on the intercom when she said that. She also testified that she made that statement to the first floor officers – not the inmates.

After the head count was done, Administrator Miller called Newman on the phone and told her that she was going to be interviewed as part of the internal investigation into the missing medicine. Newman was calm and collected during the phone call with Miller.

After the phone call ended though, Newman was, in her own words, "very frustrated and upset" over the fact that she was going to be interviewed as part of the Employer's investigation into the missing pills. She felt she was being falsely accused of stealing the medicine. She expressed her anger and frustration by ramming a chair into the counter and then kicking the counter. Her response (meaning her ramming a chair into the counter and then kicking the counter) was witnessed by her co-worker, Officer Grunke, who subsequently reported the incident to management.

After that, Newman left her assigned work area and went to the nurse's office to commiserate with Nurse Beder over what had just happened. Before Newman left her work area though, she did not line up a replacement or tell either her supervisor or Officer Grunke that she was leaving the area. Newman was with Beder in the nurse's office for about 20 minutes. During that time, Officer Grunke manned the entire adult pod by herself. After Newman left her office, Nurse Beder contacted Jail Administrator Miller and told her that Newman was very angry, upset and emotional. After receiving this information, Miller directed Sgt. Fairly (Newman's supervisor) to monitor Newman for the remainder of her shift. Fairly complied with this directive and monitored Newman. Fairly concluded Newman could perform her work duties.

After she left the nurse's office, Newman did not return to the adult pod. Instead, she went to the first floor Huber office where she also commiserated with some co-workers over the fact that she had been notified by Miller that she was going to be interviewed as part of the Employer's investigation into the missing pills. Before doing that though, Newman did not line up a replacement or tell either her supervisor or Officer Grunke that she was leaving the area. During Newman's absence, Grunke manned the entire adult pod by herself. While Newman was in the Huber office, she turned toward the video camera that is in that office and extended her middle finger to the camera. In other words, she made an obscene gesture to the camera. The employees in the office saw Newman do this. One of them subsequently reported it to management.

After she left the Huber office, Newman did not return to the adult pod. Instead, she went into a classroom where she used the phone for about ten minutes.

After that, Newman returned to the adult pod where she and Grunke performed a work task known as a walk-through. While performing that task (which involves walking through the adult pod and checking on the inmates), Newman became angry with the inmates in J-Pod whereupon she yelled and screamed at them. Exactly what she yelled and screamed at the inmates is disputed. Grunke testified that Newman yelled "You guys stop playing these fucking games" and told the inmates their conduct was "bullshit". Newman admitted she used the words "games" and "shit" when she yelled at the inmates, but denied saying "fucking games". She testified she did not use any profanity during the walk-through. Grunke also testified that she felt Newman's conduct jeopardized both Newman's and her (Grunke's) safety because she did not know how the inmates would react to Newman's hostile behavior toward them.

Later on that same shift, Newman told Grunke that she had "flipped off" the cameras in both the first floor Huber office and the adult pod control room.

Grunke subsequently reported all of the foregoing to her supervisor, Sgt. Ackatz. Grunke followed that up with a written report.

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After receiving Grunke's report, Sgt. Ackatz retrieved video footage from the adult pod control room for July 24, 2008 and watched it to determine if it showed Newman making an obscene hand gesture. It did. He found video footage from that date (July 24, 2008) that showed Newman turning on the lights in the adult pod control room (which are normally turned off to protect the integrity of the one-way glass in that office), extending her middle finger in the direction of a hallway for about five seconds, and then turning the light off. When Newman did this (i.e. made her obscene hand gesture) she had her back to the camera. Although the video camera did not record who Newman gave the finger to, it can be inferred that she gave it to someone down that hallway. Sara Gaska, the County's Mental Health Therapist, saw Newman do this. Gaska subsequently told Administrator Miller that Newman gave the finger to Lt. Weske (who was walking down that hallway at the time).

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On that day (meaning July 25, 2008), one of Newman's work tasks was to be the medication officer for the adult pod. That task involves giving inmates their medication. At some point during her shift (the record does not indicate when), Newman performed that task and passed out medications to inmates on the adult pod. After one inmate used his inhaler, Newman put the inhaler into her sweater pocket. When she finished dispensing the medicine, she did not put the inhaler back in the medicine cart but instead left it in her sweater pocket. When her shift ended, she took the inhaler home with her.

Since Newman took the inhaler home with her, the inmate's inhaler turned up missing the next day. Newman was called at home about the missing inhaler because she was the last officer who dispensed that inmate's medication. She checked her sweater pocket, found the inhaler, and told the caller that she had the inhaler. The inhaler was returned to the jail that same day, but it apparently was not Newman who returned it.

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About that same time (July 26, 2008), Administrator Miller received two written anonymous complaints about Newman's work conduct. The complaints were that Newman was vocally disrespecting management staff, making obscene gestures to the camera, yelling at inmates and using inappropriate language to them.

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The following facts pertain to Newman's interview. On July 28, 2008, Newman was interviewed as part of the Employer's internal investigation into the missing medication. Newman had two union representatives with her and was given *Garrity* warnings prior to the interview. Lt. Konstanz conducted the interview. He first asked her if she had left her assigned work area on July 16, 2008 (i.e. the adult pod) to go to the first floor Huber office. Newman admitted that she had. She also admitted she did not have a work-related reason to do so. She also admitted that she did not get a replacement when she left the adult pod that day, nor did she tell her co-worker – Officer McCuller – that she was leaving the adult pod. Second, Konstanz asked Newman why she left her assigned work area on that date. She replied that she did so for two reasons. The main reason was to play a practical joke on some co-workers with the rubber duck she had found. She elaborated on this reason as follows. She said that on that day, she was the medication officer for the adult pod. When she was setting up the inmates' medicines, she found a foreign object in an inmate's pill bottle, namely a rubber duck. That had never happened before. She thought it was funny and decided to "share" it (i.e. the rubber duck) with some co-workers via a practical joke. To do that, she carried the inmate's pill bottle containing the rubber duck to the first floor Huber office where she "entered" the unlocked medicine cart and tried unsuccessfully to put the rubber duck into other inmate's pill bottles (where she thought Officer German would find it). She admitted that while doing that, she touched/handled the medicines in three drawers on the medicine cart.

She also wrote the phrase “Rubber Duckie, You’re The One” on a piece of paper and left it somewhere on the medicine cart. After doing that, Officer German entered the office and Newman told her to hold out her hands and close her eyes. German complied. Newman said she then poured the medicine inside the pill bottle into German’s hands to show her the rubber duck inside the pill bottle. When pouring out the medicine, some of the pills fell out of German’s hands onto the floor. Newman and German then picked up the pills off the floor, cleaned them up, and put them back into the pill bottle. After she left the first floor Huber office, Newman sought out Nurse Beder and showed her the rubber duck. Newman then sought out Officer Milella and showed her the rubber duck. With each one (meaning Beder and Milella), she told them to hold out their hands and close their eyes. Then Newman poured the pills from the pill bottle and rubber duck into their hands (just as she had done with Officer German). Newman said that the second reason she went to the first floor Huber office that day was to get more throat lozenges from the medicine cart in that office to restock the adult pod medicine cart. Third, Konstanz asked Newman if she took the two missing Oxycodone pills from the first floor Huber office medicine cart. She denied taking them. Fourth, Konstanz asked Newman if she made an obscene hand gesture at the camera in the first floor Huber office on July 25, 2008. She admitted that she had. When Konstanz asked who it was directed at, Newman said that the gesture was meant “in general” and was not directed at any particular member of management. She also admitted that she had made obscene hand gestures to the camera on other occasions, but could not give an exact number, except to say that it was “a number of times”. Fifth, Konstanz asked Newman if she had taken home an inmate’s inhaler on July 25, 2008. She admitted that she had, but said it was an accident.

At the end of the interview, Newman was placed on administrative suspension and told to not contact any witnesses. She was also directed to take a drug screen. She complied with that directive. Her drug screen came back negative.

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The next day (July 29, 2008), Newman sent Officer Grunke a text message on her cell phone. The text message was as follows:

So were u asked to write a memo that I was screaming at inmates too?  
Apparently Shirley is searching for anything new so she can fire me. Can u say harassment?!

Grunke did not send a reply.

Lt. Konstanz and Administrator Miller subsequently wrote reports concerning Newman’s conduct. Lt. Konstanz’s report only referenced the facts he had collected from his internal investigation. Miller’s report focused on the conclusions she reached from those facts. She concluded that Newman’s conduct violated various departmental rules and regulations. Both these reports were submitted to Sheriff Schmidt.

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Before Sheriff Schmidt made any decision on discipline, Administrator Miller learned that three Oxycodone pills were also missing from an inmate's prescription medication which was kept in the medicine cart in the Special Management Unit (known as the SMU). The medicine turned up missing on July 10, 2008. The SMU had video cameras in it, so the video footage from the SMU for July 10, 2008 was retrieved and reviewed. The videotapes showed the following. First, they showed that Newman went into the SMU four different times during her shift on July 10, 2008. The time stamps on the videotapes indicate that Newman was in the SMU for a total of about 10 minutes during her shift. Second, the videotapes showed that twice when she left the SMU, she had medication bottles in her hands. The record indicates that Newman was not assigned to the SMU that day, nor had she received permission to be there. Additionally, the record indicates she did not line up a replacement for her assigned work area when she went to the SMU, nor did she tell her co-worker she was leaving the area.

Administrator Miller then submitted a second report to Sheriff Schmidt. In this report, she referenced Newman's conduct from July 10, 2008 where she went to the SMU and her conduct on July 24, 2008 in the adult pod control room where she made an obscene hand gesture.

Sheriff Schmidt then reviewed the three reports which had been filed by Lt. Konstanz and Administrator Miller and about 30 reports submitted by various correctional officers and sergeants. He also reviewed Newman's personnel file and evaluations. He also watched all of the videotape recordings of Newman's actions on July 10, 16, 24 and 25, 2008. After doing so, he determined that by her actions, Newman had violated various department rules and regulations and that her conduct warranted serious disciplinary action. He was particularly concerned that Newman had left her assigned work area on numerous occasions without permission and/or having a replacement. In his view, that had jeopardized the safety and security of inmates and correctional officers. He decided to discharge Newman.

The Sheriff decided not to meet face-to-face with Newman to notify her of her discharge. His reason for not meeting face-to-face was because he knew that Newman had become very angry when she was notified of her interview as part of the internal investigation. On August 6, 2008, the Sheriff called Newman at home and told her she was discharged. The next day, he sent her a four-page document. The first page was the Employer's "Employee Disciplinary Notice" form which the Employer uses to notify employees they have been disciplined. That form lists numerous types of misconduct. Six of the categories were checked: "insubordination"; "use of profane or abusive language"; "violation of work rule"; "leaving post without permission"; "negligence"; and "poor performance". The second page was the actual discharge letter. It provided thus:

This letter is to confirm our phone conversation on 6-8-08 at approximately 12:00 p.m. and provide you with discipline documents.

As I informed you on 6-8-08, the investigation into possible policy violations has been completed. During this investigation it became very clear that you have over time repeatedly committed violations of policy in regards to your job performance. The list of policies violated is attached with a summary.

The violations show your actions put the overall security of the Jail at risk, including the safety of other Corrections Officers and inmates. Your actions also compromised the health of inmates and the integrity of Jail operations. Finally, your insubordinate actions demonstrate a complete lack of respect for supervisors and have a detrimental affect on Jail operations.

After an objective investigation and careful consideration of possible remedies to the violations, I believe there are none that will be effective in changing your behavior and performance. My only option then is to terminate your employment.

I request that you immediately return the department badges and door card to a Jail supervisor. You can also contact a Jail supervisor to arrange for your personal property to be returned to you. Your presence on county property should be limited to the business areas only at this time.

The third page was entitled "Attachment". It listed the various rules and policies which Newman had (allegedly) violated. It provided thus:

Attachment

Rules and Policies Violated.

**351.52(I)(C) Work Rules and Regulations.**

On July 16<sup>th</sup>, 2008, while assigned to Adult Pod Huber CO Newman left that assigned area at least three times, for lengthy periods of time. She did not arrange for coverage of her area by other officers.

On July 25<sup>th</sup>, 2008, while assigned to Adult Pod CO Newman left the assigned area several times without arranging for coverage.

On July 10<sup>th</sup>, 2008 while assigned to Adult Pod CO Newman was observed being in the Special Management Unit at least four times leaving her assigned area not covered. This occurred within a 24 hour period when three narcotic pills were unaccounted for from the SMU medical cart.

**351.52(J) Work Rules and Regulations.**

**353.163(I)A3 Pharmaceutical Operations – Responsibility.**

On July 16<sup>th</sup>, 2008, while assigned to the Adult Pod, CO Newman carried

inmate prescription drugs away from that area into other areas while attempting to play a joke. CO Newman poured inmate medications into other officer's hands on three occasions. The medications were spilled on the floor at least twice and then returned to the bottle.

**351.52(II)B Officer Attitude/Demeanor.**

On July 25<sup>th</sup>, 2008, CO Newman was yelling profanities in the A-J Pod in the presence of inmates and co-workers including on the PA system. She was also observed ramming a chair into a counter and kicking a counter. She was also observed displaying the middle finger to security cameras on several occasions in the presence of co-workers.

**102.1(II)D Work Rules – Performance.**

On July 24<sup>th</sup>, 2008, CO Newman was observed displaying her middle finger to Lt. Weske as he was walking away from her. This was observed by co-workers. CO Newman herself turned on the lights in the normally darkened area prior to doing this.

**353.163(I)A3 Pharmaceutical Operations – Responsibility.**

On July 16<sup>th</sup>, 2008, CO Newman entered an unlocked medical cart in 1<sup>st</sup> Floor Huber on several occasions. She was not assigned to that area or medical cart. This occurred within a 24 hour period when two narcotic pills were unaccounted for from that cart.

On July 26<sup>th</sup>, 2008, an inmate inhaler was discovered missing from the medical cart. When CO Newman was contacted, she stated she had mistakenly taken the inhaler home at the end of her shift. She had the inhaler in her sweater pocket in the course of her duties on the 25<sup>th</sup>, 2<sup>nd</sup> shift.

The fourth page was entitled "Previous counseling and discipline". It provided thus:

Previous counseling and discipline:

4-18-08 Memo. Sgt. Fairly counseled CO Newman on insubordination. Newman was given assignments and told to respond immediately. Newman instead did other paperwork. This was repeated the next day.

4-18-08 Memo. Sgt. Sterman documents CO Newman's inability to understand his simple questions.

4-18-08 Memo. CO Severson documents CO Newman's inability to gather a housing report to do a headcount.

3-18-08 Memo. Sgt. Fairly counsels Newman on outbursts of anger and leaving assigned work area for lengthy periods of time (master control), demeanor with public and speeding while on Electronic Monitoring duty.

5-13-07 Discipline. CO Newman received an Oral Reprimand for sleeping on duty in Master Control.

8-20-04 Memo. Administrator Miller counseled CO Newman on professional conduct while acting as a POSC instructor.

...

Newman grieved her discharge. It was ultimately appealed to arbitration.

...

Several officers were subsequently disciplined for leaving the medicine cart in the first floor Huber office unlocked on July 16, 2008. The record does not identify who was disciplined or what level of discipline was imposed.

The record indicates that other employees (besides Newman) have been "caught" outside their assigned area. When that happened, they were given a warning.

...

The Employer never learned what happened to the missing pills. No criminal charges were filed against Newman over the missing pills.

### **POSITIONS OF THE PARTIES**

#### **Employer's Initial Brief**

The Employer's position is that it had just cause to discharge Newman. Here's why. In July, 2008, she committed workplace misconduct when she did the following: 1) left her assigned work area for extended periods of time without permission; 2) yelled and swore at inmates; 3) made obscene hand gestures; and 4) negligently handled prescriptions for inmates. The County avers it conducted a fair and impartial investigation into these incidents which included taking a written statement from Newman and interviewing her. The Employer submits that following that investigation, the Sheriff determined that by her conduct, Newman jeopardized the safety and security of her fellow correctional officers and inmates, compromised the health of inmates, and showed a complete lack of respect for management. As the Employer sees it, these repeated acts of misconduct violated five of the Employer's policies. With regard to the level of discipline imposed, it's the Employer's view that Newman's conduct was so outrageous that termination was the only appropriate penalty. It makes the following arguments to support these contentions.



Before it delves into the facts, the Employer comments on the following. First, it asserts that the collective bargaining agreement gives management the exclusive right to determine when discipline and/or discharge are appropriate. Second, it addresses the arbitrator's role in the instant discipline/discharge case and avers in that regard that the arbitrator should not substitute his judgment for that of the Employer as to the level of discipline to impose, unless the penalty is excessive, arbitrary, capricious or constitutes an abuse of management's discretion. Third, it addresses the standard which the arbitrator should use to review this discipline. It contends that the arbitrator should use the following two-part test for determining just cause: the first part involves "a determination that the employer has established employee misconduct in which it has a disciplinary interest" and the second part of the test involves "a determination that the employer has established that the discipline imposed reasonably reflects that disciplinary interest." According to the Employer, it satisfied both parts of that test.

Next, the Employer addresses the various incidents involved herein. Before doing so though, it makes the following introductory comments. First, it avers that the facts here are largely uncontested because Newman earlier admitted to the conduct at her interview with management or she is seen on the videotape engaging in the conduct complained of. Second, it notes that all the conduct at issue here occurred over a two-week period. Third, the Employer acknowledges that while Newman had an explanation for all of her conduct, it's the Employer's view that her explanations are not credible and do not excuse her behavior. The focus now shifts to the incidents involved herein.

First, the Employer contends that Newman abandoned her assigned work area and went to other areas of the jail on multiple occasions on July 10, 16 and 25, 2008. It reviews the events of those days separately.

With regard to July 10, the Employer notes that on that date, Newman left her assigned work area (which was the adult pod) and went to the SMU four different times. The Employer further notes that she was in the SMU for 10 minutes. The Employer contends that she did not have permission from her supervisor to be in the SMU office, nor was she assigned to be there to assist other officers as she alleged at the hearing. According to the Employer, Newman had no legitimate business reason to leave the adult pod to go to the SMU office. While Newman claimed at the hearing that another officer provided coverage in the adult pod area during her absence, the Employer emphasizes that she could not identify which officer provided that coverage or whether this unnamed officer provided coverage on all four occasions when she left the adult pod to visit the SMU office. The Employer asks rhetorically if Newman was performing her job duties when she went to the SMU office, then why would she not have informed her supervisor of that fact? As the Employer sees it, the simple answer is this: Newman elected to leave her assigned post, for whatever reason, without notifying her supervisor on that date.

With regard to July 16, the Employer notes that on that date, Newman left her assigned work area (which was the adult pod) and went to the first floor Huber office five different

times. The Employer emphasizes that Newman did not go to the first floor Huber office for a work-related reason; instead, she went there to play a practical joke on some co-workers with a rubber duck she had found in an inmate's pill bottle. The Employer further notes that she was in the first floor Huber office for about 15 minutes during her shift. Since she was there (meaning the first floor Huber office), she was away from her assigned area (i.e. the adult pod) for that same amount of time. The Employer also emphasizes that in her interview, Newman admitted she did not notify her supervisor that she was leaving her assigned work area, nor did she arrange for coverage by another officer while she was away from her work area, nor did she tell the other officer assigned to the adult pod that she was leaving her assigned work area to go to the first floor Huber office. According to the Employer, Newman's conduct not only violated Sec. 351.52(I)(c) of the Correctional Staff Rules of Conduct, but it also put the other officer in the adult pod at risk because he had to then work alone with 84 inmates. The Employer notes that at the hearing, the Association tried to convince the arbitrator that the adult pod was larger than it actually is, which would mean that Newman never left her assigned work area. The Employer contends this argument is not plausible for several reasons. First, it notes that the Association does not get to decide on the parameters of a work area or assignment; that is a responsibility that is solely reserved to management. Second, it avers that it exercised that right by its staffing of the jail (namely, that Newman and another officer were assigned to the adult pod area while two other officers were assigned to the first floor Huber office). Thus, management views the first floor Huber office as a different work assignment than the adult pod area and assigns staffing on that basis. The Employer also calls attention to the fact that Newman's explanation of events changed from the investigatory interview to the arbitration hearing. What it is referring to is this: during the interview, Newman admitted that she had left her assigned work area without notifying her supervisor or obtaining replacement coverage; not once during the interview did she claim that she was still in her assigned work area while she was in the first floor Huber office playing her practical jokes. At the hearing though, she raised her "novel theory" that she was in her assigned work area when she was in the first floor Huber office playing her practical jokes on multiple occasions on July 16, 2008. According to the Employer, this explanation is not plausible or credible, especially since it was not offered until the arbitration hearing.

The Employer also asserts that Newman's explanation for why she was in the medication cart in the first floor Huber office that day is not plausible either. In making this argument, what the Employer is referring to is Newman's claim that she was there to get throat lozenges because one of the inmates was using them quite regularly. The Employer contends that explanation makes no sense because extra medical supplies are stored in the nurse's office, and Newman walked right by the nurse's office to get to the first floor Huber office. Thus, as the Employer sees it, there was no legitimate reason for her to be in the medication cart stored in the first floor Huber office.

With regard to July 25, the Employer notes that after Newman was notified she was going to be interviewed about the missing pills, she became very angry with management and left her assigned area without arranging for any coverage. First, she went to the first floor Huber office where she complained to other officers about the investigation and then made an

obscene gesture at the camera. From there, she went to the nurse's office where she spent 20 minutes complaining to Nurse Beder about being interviewed over the missing pills. The Employer emphasizes that while the nurse's office is located within the adult pod, Newman still left her job duties unattended and abandoned her co-worker for this 20-minute period. From there, she went into a classroom where she made a personal phone call which lasted for 10 minutes. As the Employer sees it, Newman's conduct that day was "particularly egregious". It opines that "apparently, the grievant's personal issues are more important to her than the performance of her job duties and the safety and security of her fellow officers and the inmates."

Second, the Employer contends that when Newman used an inmate's pill bottle to play a practical joke on her fellow officers, she negligently handled prescription medication. What the Employer is referring to is this: on July 16, Newman took a medication bottle belonging to an inmate and carried it to various parts of the jail, including both the first floor Huber office and the second floor Huber area. Then, she opened the medication bottle and poured an inmate's medication into several officers' hands. When she poured it into Officer German's hands, the medicine spilled onto the floor, and Newman picked up the pills and put them back into the bottle. According to the Employer, these actions violated the Employer's Pharmaceutical Operations policy as well as accepted standards of cleanliness, sanitation and personal hygiene.

Third, the Employer contends that on July 25, 2008, Newman used profanity and screamed at the inmates. For the purpose of context, the Employer acknowledges that Newman admitted she was extremely angry and upset about being interviewed regarding the missing pills. As the Employer sees it though, that does not excuse her angry outbursts and her taking out her aggression on the inmates. Here's what happened. First, during headcount, Newman got on the intercom and yelled profanities including "fuck" and "bullshit" at the inmates because the inmates had not gotten a deaf inmate out of his bunk for headcount. In response to Newman's contention at the hearing that her profanity was directed at the first shift officers and not at the inmates, the Employer avers that contention is just not credible. To support that contention, the Employer notes that Officer Grunke testified that Newman was using the intercom at the time and had the button pressed so that the inmates could hear her statements. It also calls attention to the fact that the Association did not present any of these first shift officers to confirm that Newman was yelling and screaming obscenities at them. That being so, the Employer maintains it is just not plausible that Newman was yelling these obscenities at her co-workers as they ended their work shift. Second, during the walk-through with Officer Grunke, Newman again shouted profanities at the inmates, telling them "you guys stop playing these fucking games" and telling the inmates that their actions were "bullshit". Officer Grunke became concerned for her and Newman's safety in case an inmate reacted to Newman's aggressive and angry behavior. The Employer notes that at the hearing, Newman admitted she yelled at the inmates, but denied using any profanity during the walk-through. The Employer argues that contention is not plausible or credible in light of the totality of her conduct that day. The Employer also points out that Officer Grunke had no reason to be untruthful in her testimony at the hearing, nor did she have any reason to falsify any of the

information in her report. In contrast, Newman clearly has a motive to recall events differently than a neutral witness who has no motive or interest in this case. According to the Employer, this conduct was not only outrageous and inexcusable, but it also constituted rule violations.

Fourth, the Employer points out that Newman was twice caught on tape making an obscene gesture: on July 25 to the video camera itself and on July 24 down a hallway by the control pod. The Employer notes that on the latter date, Newman went out of her way to turn on the lights in the control area so the camera could record her obscene gesture. While Newman denied making this gesture to anyone in particular, it's the Employer's view that she was directing it at Lt. Weske who had just left the control office and was walking down the hallway. Once again, the Employer argues that conduct was not only outrageous and inexcusable, but also constituted a rule violation.

Fifth, the Employer contends that Newman mishandled the medication for inmates on July 16 and 25. Here's what the Employer is referring to. On July 16, she entered the medicine cart three different times to play her practical joke involving the rubber duck. The problem with that was that she knew she was not allowed in the cart (even though it was unlocked). According to the Employer, that was unacceptable conduct. On July 25, she took an inmate's inhaler home with her. The Employer points out that it has strict rules on storing inmate medication, and its rules do not include a correctional officer carrying inmate medication in their pocket where it could easily be lost or misplaced.

Having reviewed all of the incidents involved, the Employer emphasizes that Newman admitted to most of them, but simply tried to downplay each incident. It's the Employer's position that their significance should not be downplayed. According to the County, they were all serious. Here's why. First, Newman's actions in leaving her assigned duty area, without notifying her supervisor or her fellow officer, jeopardized the security and safety of other correctional officers as well as inmates. The Employer views it as dereliction of duty, especially in light of the fact that she left her work area to play practical jokes and to engage in personal phone calls and visits. The Employer also emphasizes that her absences were not brief; one incident lasted for more than 30 minutes. The County contends it cannot tolerate an employee "who decides when she wishes to perform her job duties, and when she wishes to abandon her work assignment to play practical jokes or complain about management." The County believes Newman showed no consideration or concern for her fellow officers when she left the adult pod with a staffing ratio of one correction officer to 84 inmates, all so she could play a practical joke on some co-workers. Second, it emphasizes that she blatantly demonstrated her disdain for management when, on two separate occasions, she made an obscene gesture to the camera, knowing full well the video camera was recording her actions. She even turned on the lights in the adult pod to ensure "that the camera captured her opinion of management." Third, the County asserts that Newman has no respect for the inmates and their belongings. Not only did she use an inmate's prescription to play her practical joke, but when she dropped the inmate's medication on the floor, she simply picked it up and put it back in the bottle. Not only was that unclean and unsanitary, it also violated County policy.

Finally, there's what the County calls "the most emotional incident of all" – Newman screaming and yelling obscenities at inmates on two different occasions.

Next, it's the Employer's position that discharge was the only appropriate response in light of the severity of the grievant's misconduct. First, it avers that Newman was well aware that that conduct was likely to lead to disciplinary action. Second, it submits that Newman has shown no remorse for any of her five policy violations, has demonstrated she has no respect for management, and cannot conform her conduct to an acceptable standard of conduct. That being so, the Employer contends there is no level of discipline short of discharge that would change Newman's attitude, behavior and performance. It asks rhetorically "how can one rehabilitate an employee who, knowing she is under investigation for possible theft of medication, makes a concerted effort to show her disrespect for management by making an obscene gesture on camera – not once, but twice." Third, the Employer cites several arbitration awards where discipline imposed on correctional officers was upheld. According to the Employer, these cases stand for the proposition that "arbitrators have recognized that correctional officers should be held to a higher standard of conduct because the work they perform involves the safety and security of inmates." Fourth, responding to an anticipated Association argument that no harm occurred as a result of Newman's conduct, the Employer maintains that "the fact that nothing harmful or tragic happened does not change the significance of the grievant's rule violation or the severity of her misconduct." Finally, it's the Employer's view that Newman's conduct seriously compromised jail security.

Given all the foregoing, the Employer requests that the arbitrator uphold the termination and deny the grievance.

### **Employer's Reply Brief**

The Employer contends that the Association distorted, misrepresented and falsified various facts in its brief in an attempt to exonerate the grievant, rationalize her behavior, and "explain away" her misconduct. It elaborates on these contentions as follows.

First, it notes that the Association claimed that Newman was "exonerated of wrongdoing in regard to the pills." The Employer disputes that contention and avers that the evidence shows the investigation was inconclusive because Konstanz and Miller could not determine what happened to the missing pills.

Second, it notes that the Association claimed that "the County abandoned its initial investigation and focused on anything it could find against Newman." Once again, the County disputes that contention. It contends that Newman did not become the target of the investigation until she was observed on videotape out of her assigned area entering a medicine cart that was supposed to be locked and inaccessible to any employee except the medication officer. The County maintains that given that objective evidence, it had a reasonable, objective and factual basis for conducting an investigation into Newman's actions in July, 2008 to determine if she was engaging in misconduct.

Third, the Employer addresses the Association's claim that the Employer did not do a thorough investigation because no one reviewed video from the area where Newman was supposed to be working to see if there was coverage. It avers there is a simple reason for that, namely that Newman admitted – both during the interview and at the hearing – that she did not get a replacement when she left her work area (i.e. the adult pod) on numerous occasions on July 16, 2008. The Employer submits that given that admission, there was no need or reason for investigators to review any videotapes to confirm that fact.

Fourth, the Employer addresses the Association's claim that “despite the fact that other officers were involved with the handling of the medicine, only Newman was disciplined for it.” The Employer asserts the Association is just plain wrong on that fact. To support that contention, it notes that Administrator Miller testified without refutation that several other officers were disciplined for leaving the medicine cart unlocked.

Fifth, the Employer addresses the Association's claim that there is “no work rule that says an Officer cannot enter an unlocked medication cart.” It begins its response by noting that the Association does concede, as does the grievant, that the County has a policy that requires the medication cart to be locked at all times. According to the Employer, “it is counter-intuitive to have a policy requiring the medication cart to be locked at all times, while also adopting a policy that forbids an officer from entering an unlocked medication cart.” Moreover, it avers that an employer cannot regulate every possible act of misconduct in which an employee might engage. It believes common sense would tell anyone, except apparently the grievant, that if the medication cart is to be locked at all times, an officer should not be entering the medication cart to play a practical joke on her fellow officers.

Sixth, the Employer contends that the Association's claim that officers use profanity all the time when interacting with inmates lacks a basis in the record. It acknowledges that Officer Judkins testified that some officers use profanity with inmates as a personal communications “style”. Be that as it may, that communications “style” is not accepted or condoned by management. The Employer also cites Officer Grunke's testimony that when officers use profanity, it is not directed at inmates. Aside from that, even if profanity is occasionally used by officers, it's the Employer's view that that does not equate to what Newman did here (i.e. where she was angry and aggressive and yelled and screamed at the inmates).

Seventh, still dealing with the profanity matter, the Employer contends that when the Association argues that Newman simply “used some profanity in the presence of co-workers and inmates”, that contention “conveniently ignores” one critical fact. That fact, of course, is that Grunke testified Newman swore at the inmates. The Employer asks the arbitrator to not credit Newman's claim that her obscenities were directed at the first shift officers. Instead, the Employer asks the arbitrator to credit Grunke's testimony that when Newman screamed and swore, it was not at the first shift officers but rather at the inmates.

Eighth, the Employer addresses the Association's claim that Newman did not lose control when she pushed a chair into the counter and kicked the counter. The Employer disputes that assertion. The Employer notes that these events occurred immediately after Newman was told by Administrator Miller that she was going to be interviewed about the missing pills. The Employer avers that her emotional and angry reaction is inconsistent with one of the required abilities to be a correctional officer, namely the ability "to remain calm and control emotions under stress." According to the Employer, the fact that Newman engaged in those acts on September 25, 2008 demonstrates she does not have the temperament, patience or self-control to work at the Jail.

Next, the Employer argues that the Association distorts and mischaracterizes the job duties of a correctional officer "in a failed attempt to excuse the grievant's misconduct." The Employer maintains that the Association would like the arbitrator to believe that after the officers do certain tasks like dispensing medications, serving meals and doing head count, they are free to roam around, visit with other officers and play practical jokes. The Employer argues that is inaccurate and is a misrepresentation of the officers' job duties. In point of fact, officers are not free to roam the building doing whatever they please. When an officer does leave his/her assigned work area, he/she must either find a replacement or let his/her fellow officers know. If the officer is gone for more than a few minutes, the officer is to inform the supervisor, even if the officer has notified his/her partner. Here, though, Newman did none of those things: 1) she did not have permission from her supervisor to leave her assigned work area; 2) she did not line up a replacement for while she was gone; and 3) she did not inform her co-worker that she was leaving them alone. The Employer avers that by not doing those things, she put the safety of other officers, and even the inmates, at risk. As the Employer sees it, this conduct alone is sufficient grounds for termination.

When that conduct is considered along with her other misconduct, the only appropriate penalty was discharge. The County believes it should not be required to "remediate or correct behavior that is so blatantly disrespectful and harmful to management and other officers."

### **Association's Initial Brief**

The Association's position is that the County did not have just cause to discharge Newman. According to the Association, she did not engage in any misconduct by her actions and did not violate any rule. Even if she did engage in misconduct, all she did was what she and her fellow officers had been doing for years without any discipline. As a result, the Association sees the discipline imposed here (i.e. discharge) as unjust, excessive and unreasonable. It makes the following arguments to support these contentions.

Before the Association delves into what happened in July, 2008, it believes it is important to consider what happened in the following context. First, it avers that during her six years of employment, Newman had an "excellent" work record. To support that contention, it cites the fact that her performance reviews said she had met the Employer's expectations. Second, it cites the testimony of a co-worker who testified that Newman was a

“good employee” who would go above and beyond to help her fellow officers. Third, it notes that she had received several commendations for her professionalism and had once been called a role model for other correctional officers. Fourth, it notes that prior to the discipline imposed here, Newman had only been formally disciplined once before, and in that instance, she was given an oral warning (for sleeping on the job). According to the Association, after she got that warning, she “immediately corrected” the underlying problem (which the Association attributed to a new medication she was taking) because there were no other incidents of her sleeping on the job. As the Association sees it, this shows that when Newman is given the opportunity to correct behavior that the Employer has taken issue with, she has done so.

Next, the Association calls attention to the missing pills matter. What the Association is referring to, of course, is that in July, 2008, some pills turned up missing from a medicine cart. After that happened, the Employer started an investigation which focused on Newman. The Association avers that the Employer ultimately “determined that the pills were ‘missing’ because dosages were given out without being recorded and Newman was exonerated of wrongdoing in regards to the pills.” The Association also calls attention to the fact that Newman took and passed a drug test ordered by the County, and that no criminal charges were filed against her over the missing pills. The Association maintains that since the County was unable to prove that Newman was responsible for the “missing” pills, they tried to get her “any way they could”. According to the Association, the investigation then shifted away from the missing pills to “anything it could find against Newman.” To that end, the County reviewed digital recordings of Newman from July 10, 16, 24 and 25 and used the information in these tapes, plus other trivial and nitpicking offenses “to pin anything they could on Newman. . .no matter how unrelated to the initial investigation.”

Next, before delving into the facts, the Association tries to paint a big picture for the arbitrator that puts those facts in an overall context. According to the Association, the overall big picture is this: on the days in question, Newman did certain things that she and her co-workers had done numerous times before. When they did those things in the past, they were not punished/disciplined for them, nor did management ever tell them that their conduct was unacceptable. Thus, management condoned that behavior. What happened here though is that the Employer decided that behavior was unacceptable and “massaged the rules in a way that [made] Newman’s conduct appear to be a violation.” The Association argues it is unjust to hold Newman to a different standard than those other officers. It avers that if the County took issue with what Newman was doing, then all they had to do was tell her about it and she would have corrected it. That did not happen though. The Association submits that Newman’s punishment was excessive because she was never given the opportunity to correct the behavior that the County apparently had a problem with, especially when that very same behavior had been condoned for years.

The focus now turns to each of the factual matters involved. Broadly speaking, it’s the Association’s position that Newman did not engage in any misconduct and did not violate any rules. It elaborates as follows.



It makes the following arguments concerning the first claim referenced in the discharge letter (i.e. that Newman was “out of her area”). It begins by noting that Newman worked for the County for over 1500 days and what’s involved herein is her conduct on three of those days. Second, the Association acknowledges that on those three days, Newman left her assigned work area (i.e. the adult pod) to go elsewhere in the jail. The Association essentially sees that as no big deal. In its view, an employee can leave their work area because there’s no rule that ties them to a certain geographic boundary. Third, the Association asserts that on those three days, Newman was not out of her area for an unusually long period of time – it was just a couple of minutes each time. Fourth, the Association argues in the alternative that on July 25 when Newman went to the nurse’s office and the classroom, she was not technically out of the adult pod because those rooms are considered part of the adult pod. Fifth, the Association contends that when Newman was gone from her assigned area, she did not leave it unattended. What the Association is referring to is that there was still one officer left in that area. Sixth, the Association maintains that Newman performed all of her job duties on the days in question. The Association believes it is significant that the Employer never challenged that fact. The Association argues that since the Employer did not establish that Newman did not perform her normal responsibilities in the adult pod on those three days, there cannot be a rule violation. Seventh, the Association maintains that officers regularly go outside their assigned work areas for brief periods of time. According to the Association, it’s a “regular practice.” Building on that premise, the Association contends Newman regularly went outside of her assigned area, and the County was aware of it. The Association argues this proves that the Employer condoned employees being out of their area. Eighth, with regard to the work rule which Newman allegedly violated, the Association calls attention to the fact that that rule does not state that a correctional officer cannot leave a certain geographic boundary, nor does the rule require a correctional officer to arrange for coverage by another officer when s/he does leave the area. Even if the rule is read to say that an officer who leaves his/her area, even for a couple of minutes, does have to find another officer to cover the area, it’s the Association’s view that the County did not show that Newman did not have coverage in her area. What the Association is referring to is this: when the County reviewed what was on the videotapes, they did not bother to look into the adult pod to check if there was coverage. According to the Association, they should have. Since they did not, it’s the Association’s view that the County did not prove that Newman violated that rule.

The Association makes the following arguments concerning the second item referenced in the discharge letter (i.e. that Newman mishandled an inmate’s medication). It begins by giving some context. On July 16 when Newman set up the inmates’ medications, she found a rubber duck inside a pill bottle. That was not an everyday occurrence at the jail. Upon finding the rubber duck, Newman decided to “share” her unusual find (i.e. the rubber duck) with some co-workers. In the course of pouring the pills (and rubber duck) into Officer German’s hands, some of the pills spilled onto the floor. Having given that context, the Association makes the following arguments about this matter. First, it disputes the Employer’s assertion that Newman’s behavior constituted unethical behavior. Second, it maintains that Newman did not violate the Employer’s drug policy because she had the inmate’s medication “in her control at all times”. Third, the Association notes that the inmate never filed any

complaint or needed extra medical attention because the pills were dropped onto the floor. Fourth, it notes that only Newman was disciplined over the medication matter. Fifth, with regard to the fact that Newman went into the unlocked medicine cart, the Association avers “there is no work rule that says an officer cannot enter an unlocked medical cart.” Sixth, with regard to the missing inhaler matter, it submits that on July 25, Newman accidentally took an inmate’s inhaler home in her pocket. According to the Association, this was nothing more than a simple mistake on Newman’s part, and certainly was not an intentional act of misconduct on her part. The Association avers that the same thing has happened to other officers in the past (meaning other officers have accidentally taken home inhalers) and they were not disciplined for doing so.

The Association makes the following arguments concerning the next item referenced in the discharge letter (i.e. that upon being informed she was going to be interviewed about the missing pills, she pushed a chair into a counter and kicked the counter). The Association acknowledges Newman did those things, but speculates that her outburst only lasted a couple of seconds. Building on that premise, it’s the Association’s view that Newman’s response was not misconduct and did not violate any County rule.

The Association makes the following arguments concerning the “hand gestures”. It acknowledges that Newman did indeed make “a couple of uses of the middle finger” on July 24 and 25, and that these were caught on tape. With regard to her giving the finger on July 24, the Association contends it was not directed at Lt. Weske (as the Employer alleges). To support that contention, it cites Newman’s testimony in that regard. The Association further argues that the Employer did not “conclusively prove” that Newman gave the finger to Lt. Weske. With regard to her giving the finger to the camera on July 25, the Association avers it was not intended for anyone in particular – rather it was just given to the system “in general” – because Newman was upset over being interviewed about the missing pills. The Association compares both of the hand gestures to Newman’s outburst of kicking the chair and the counter in that the hand gestures lasted just a couple of seconds each. The Association argues that under these circumstances, Newman’s hand gestures did not constitute misconduct and did not violate any County rule.

Finally, the Association makes the following arguments concerning the profanity matter. It begins by giving some context. It asserts that profanity is used all the time in the jail by officers and inmates. It further submits that some officers direct profanity to inmates as a communication “tactic”. According to the Association, “the County does not normally impose discipline for swearing.” With regard to Newman’s conduct at the July 25 head count, the Association maintains that Newman directed one swear word (i.e. the word “shit”) at the inmates when she said to them over the intercom: “I’m sick of this shit. Get him up.” According to the Association, she said this to make a point to the inmates who were not getting the deaf inmate up for head count. The Association contends that the other swear words that Newman spoke (i.e. “this is fucking bullshit”) were not directed at the inmates, but rather were directed at the first shift officers. With regard to Newman’s conduct during the walk-through, the Association claims that Newman did not use any profanity towards the inmates.

To support that contention, it cites Newman's testimony to that effect. Overall, it's the Association's view that Newman's use of "a couple of swear words used in the presence of co-workers and inmates" should not form a basis for discipline. According to the Association, Newman's language did not constitute misconduct and did not violate any County rule. The Association argues in the alternative that if it was misconduct, the Employer does not normally discipline employees for profanity, but it did so here. The Association characterizes that as disparate treatment.

Next, the Association argues in the alternative that if the incidents involved herein do constitute misconduct, the level of discipline which was imposed was excessive and unjust. Here's why. First, the Association notes that the purpose of progressive discipline is to give an employee the chance to modify their behavior. It argues that here though, the Employer never gave Newman the opportunity to correct her behavior; instead, they just piled all the instances together and fired her for it. According to the Association, that defeats the purpose of progressive discipline and was unjust. Second, it again repeats its contention that she had an "exemplary" work record. Third, it again repeats its contention that whenever Newman has been given the opportunity to correct her behavior, she has done so. It argues that if Newman had simply been given a warning that what she was doing was inappropriate, she would have corrected her behavior. Fourth, the Association makes a disparate treatment argument. It contends that the Employer held Newman to a different standard than other officers. It avers that Newman's actions were no different than what she - and her fellow officers - had done previously. Building on that premise, it argues that she had no idea that the Employer considered her behavior inappropriate, nor did she know that engaging in that behavior would result in discharge. It elaborates on this contention as follows. With regard to her being out of her assigned area on July 10, 16 and 25, the Association asserts at the outset that officers are out of their area on a regular basis. It maintains that when they leave their area, they do not always get a replacement or tell their supervisor, particularly if they are just going to be out of the area for a couple of minutes. As the Association sees it, that's what Newman did (i.e. leave each time for just a couple of minutes). The Association also emphasizes that the officers who have been caught out of their area in the past were not fired for doing so; instead, they were given warnings. Finally, the Association notes that when Sgt. Fairly sent a memo to the Sheriff about Newman's conduct in March, 2008, Fairly indicated that Newman had been out of her area. As the Association sees it, Newman was not disciplined for that incident. Given the foregoing, the Association alleges it was unreasonable for the County to discharge Newman for being out of her area for a couple of minutes. With regard to the medication matters, the Association contends that Newman had no reason to believe her handling the inmate's medication with the rubber duck and dropping the pills on the floor would lead to termination. The Association characterizes the inhaler matter as "nothing more than an innocent mistake. . . [which] could happen to anyone and has happened to other officers in the past without discipline being imposed." Finally, with regard to the swearing and middle finger matters, the Association also asserts that Newman had no reason to believe those matters would be grounds for discipline, let alone discharge. The Association repeats its assertion that profanity is used regularly in the jail. It also notes that Newman once said "fuck it" to Sgt. Fairly, and was not disciplined over it. Given the foregoing, the Association alleges

it was unreasonable for the County to discharge Newman for some profanity and showing her middle finger to the camera.

In sum, it's the Association's position that the County did not have just cause to terminate Newman. The Association requests that Newman be immediately reinstated to her position with full back pay and other benefits.

### **Association's Reply Brief**

The Association contends that the Employer mischaracterizes various facts in their initial brief in an attempt to make Newman's behavior appear worse than it actually was. It elaborates as follows.

First, when the County summarized one portion of Sgt. Fairly's March 18, 2008 memo, it said that Fairly counseled Newman about "leaving her work area for long periods of time." The Association contends that is not an accurate summary of that portion of the memo. According to the Association, Fairly's concern was that Newman was taking too many breaks, and that's essentially what Fairly said in that portion of her memo. Thus, it's the Association's view that the memo does not support the County's contention that Newman was warned about leaving her work area.

Second, when the County summarized Sgt. Fairly's April 18, 2008 memo, it said that Newman was "switching work assignments with other corrections officers despite being assigned by her supervisor to a particular area of the jail." The Association contends that statement is false. According to the Association, what the memo actually said was that Newman had not been switching back and forth between floors despite the unwritten procedure to switch off every other day. The Association also calls attention to the fact that the County summarized that same memo to say that Neumann was insubordinate, uncooperative and refused to follow directions. As the Association sees it, Fairly's April 18, 2008 memo does not back up those assertions.

Third, the Association objects to the County's claim that when Newman showed her co-workers the rubber duck she had found, she was playing a practical joke on them. The Association avers it was not a practical joke – it was simply Newman sharing the rubber duck with her co-workers because it was such an unusual occurrence. The Association faults the County for taking Newman's explanation and stretching "it to try to create the impression of inappropriate behavior. The County makes it seem that Newman was taking an inmate's medication and tossing it all over the jail for her own amusement." The Association also avers that the County wrongly insinuates that Newman was somehow responsible for the rubber duck being in the pill bottle. It calls attention to the fact that when the inmate in question was asked about the rubber duck being in his medicine, the inmate said it belonged to his roommate's son. The Association contends that "this convenient omission by the County only serves to obscure the truth."

Fourth, the Association objects to the County's claim that Newman left her assigned area for lengthy periods of time. It avers that on the three days in question, Newman was outside the adult pod for about 23 minutes, only one of which was more than five minutes. According to the Association, that length should not be considered lengthy. While the Association acknowledges that Newman was in the nurse's office for 20 minutes and a classroom for ten minutes, it argues that Newman was not outside her assigned area during those times because, in its view, both those areas are "inside" the adult pod.

Fifth, the Association contends that the County mischaracterized the events of July 25, 2008. It notes that Newman's first interaction with the inmates for the headcount occurred before Miller contacted her about being interviewed regarding the missing pills. The Association reasons that since Newman had not yet been contacted by Miller about the missing pills, "she was not, as the County suggests, taking out her aggression" on the inmates. It further argues that the County mischaracterized "the language used by Newman by saying that it is not possible that Newman was directing profanities to her co-workers." According to the Association, officers use profanity "all the time, so on that basis alone, it is not incredible that Newman was using profanities with her co-workers."

Next, the Association notes that in its brief, the County suggested that the arbitrator should be limited in his authority in this matter. As the Association sees it, the County essentially argues that if the arbitrator finds there was just cause for any discipline, then the discharge must be upheld. The Association disputes that assertion. It argues that "idea goes against the language of the contract when looking at the issue that was stipulated at the hearing."

Finally, the Association addresses each of the rules which Newman was charged with violating. It argues that overall, the Employer stretched the interpretation of the work rules to find work rule violations when none existed.

With regard to Rule 351.52(I)(c), the Association avers that policy only covers "an officer performing the responsibilities of his/her post." It contends that on the days in question, when Newman was away from her assigned area, she was still "able to perform all of the responsibilities of her post and the County has offered no evidence" to the contrary. As the Association sees it, since Newman performed all of her work responsibilities, she could not have been in violation of that rule even if she was outside her assigned area. The Association further argues that Newman's leaving her assigned area did not create a safety risk for the remaining officer as the Employer contends. The Association also calls attention to the fact that the Employer never reviewed the videotape of the adult pod when Newman was gone to see if another officer was covering in her absence.

With regard to Rule 351.52(J), the Association contends Newman did not violate the rule regarding the storage and sanitation of drugs as the Employer contends. To support that premise, it first argues that "the medicine was in Newman's possession at all times in question so it certainly was secure." Second, with regard to the spilled pills, it submits it is unclear

whether it was Officer German or Newman who spilled the pills. The Association also calls attention to the fact that before Newman put the pills back in the bottle, she checked them (i.e. the pills) for “foreign objects”. The Association also believes it is significant that the inmate whose pills were spilled “did not require any additional medical attention or make any sort of complaint that his pills were unclean.”

With regard to Rule 351.52(II)(B), the Association argues Newman did not violate that rule when she used a couple of profanities. The Association notes that while Officer Grunke thought that some of the profanities were directed at inmates, Newman testified they were directed at her first shift co-workers. The Association characterizes Newman as honest, forthright and non-evasive.

With regard to Rule 102(II)(D), the Association contends Newman did not violate that rule when she displayed her middle finger to the video camera. According to the Association, there was “absolutely no evidence presented by the County that Newman was displaying her middle finger to Lt. Weske” as the Employer avers. It also notes that each time Newman was asked about this incident “she explained that the middle finger was directed at nobody and was simply ‘in general’”.

Finally, the Association contends that the various arbitration awards cited by the County are distinguishable on their facts and are therefore inapplicable herein.

### DISCUSSION

The parties stipulated that the issue to be decided is whether the County had just cause to terminate Newman. Since that stipulated issue deals with discipline, I’m going to first review the contract language which deals with same.

Section 21.01 provides that employees “shall not be . . . dismissed. . . except for just cause.” This language obviously subjects employee discipline to a just cause standard.

The threshold question is what standard or criteria is going to be used to determine just cause. The phrase “just cause” is not defined in the collective bargaining agreement, nor is there contract language which identifies what the Employer must show to justify the discipline imposed. Given that contractual silence, those decisions have been left to the arbitrator. Arbitrators differ on their manner of analyzing just cause. While there are many formulations of “just cause”, one commonly accepted approach consists of addressing these two elements: first, did the employer prove the employee’s misconduct, and second, assuming the showing of wrongdoing is made, did the employer establish that the discipline which it imposed was commensurate with the offense given all the circumstances. That’s the approach I’m going to apply here.

. . .

Before I review Newman's actions and conduct, I'm going to comment on the following matters for the purpose of context.

First, oftentimes when an employee is discharged, they have an extensive disciplinary history with the employer. That is not the case here because the only formal discipline Newman had received before being fired was an oral warning for sleeping on the job. While that establishes that Newman did not have an extensive disciplinary history, she had been having job performance problems for the past year or so. In March and April, 2008, Newman's supervisor counseled her about numerous problems she was having. The point of this counseling was to get Newman to improve her job performance in those areas.

Second, all the events involved herein occurred in July, 2008. What is significant about that time period is that it also is when some prescription pills turned up missing from a medicine cart in the first floor Huber office. After those pills turned up missing, the Employer started an investigation to try to determine what happened to them (i.e. the missing pills). As part of its investigation, the Employer reviewed the videotapes from that office for the day in question. That video footage showed that Newman was one of the employees in the Huber office that day. That video footage also showed that Newman was in the medication cart in the first floor Huber office that day (where the missing medicine was stored). After checking with Newman's supervisor about Newman's work assignments for the day in question, management learned that Newman had no work-related reason to either be in the Huber office that day or be in that medicine cart because she was assigned to work in the adult pod area. Management also knew that the medicine cart was supposed to be locked and inaccessible to any employee except the medication officer, and Newman was not the medication officer on that date. Because of the foregoing, Newman became the target of the Employer's investigation into the missing pills.

While Newman was admittedly the target of the Employer's investigation into the missing pills, she ultimately was not charged with taking the pills. The Employer decided it could not establish what happened to them (i.e. the missing pills). The Employer's investigation into that matter was inconclusive.

The Association argues that after that happened (meaning after the Employer decided it lacked sufficient evidence to charge Newman with taking the missing pills), the Employer abandoned the missing pills matter and "focused on anything it could find against Newman." While the Employer disputes that contention, for the purpose of discussion, let's assume that the Employer was indeed on a witch hunt to uncover damaging evidence against Newman. Rhetorically speaking though, so what? Employers have the right to monitor employee's work activities. In doing that, employers sometimes put employees under the proverbial microscope. Employers can do that if they want. Oftentimes it occurs after an employee gives the employer reasons to scrutinize their conduct. What happened here, of course, is that Newman gave the Employer reasons to further scrutinize her conduct because the videotapes from July 16, 2008 showed that Newman was out of her assigned area in an area where she was not supposed to be, and was rifling through a medicine cart she was not supposed to be in.

Those facts gave the Employer an objective factual basis to probe further into Newman's actions/conduct looking for questionable behavior on her part. That's exactly what it did.

The next part of the discussion deals with what the Employer discovered during their probe and chose to rely on.

Following their probe into Newman's actions/conduct in July, 2008, the Employer concluded she had engaged in over a half dozen acts of misconduct. An attachment to her discharge letter stated she was fired for the following reasons: 1) leaving her assigned work area four times on July 10, three times on July 16 and several times on July 25, 2008 without permission and without arranging for coverage of her area; 2) taking an inmate's prescription drug away from the adult pod into another area to play a joke with it, pouring the medicine into another officer's hands, spilling it onto the floor and then returning it (i.e. the spilled pills) to the bottle; 3) entering an unlocked medicine cart in the first floor Huber office on several occasions on July 16, 2008 without authorization to do so; 4) yelling profanities at inmates on July 25, 2008; 5) twice displaying the middle finger: once to a security camera on July 25, 2008 and once to Lt. Weske as he was walking away from her on July 24, 2008; 6) ramming a chair into a counter and kicking a counter on July 25, 2008; and 7) taking an inmate's inhaler home with her on July 26, 2008.

The focus now turns to a review of the record evidence relative to those seven charges. They will be reviewed in the order just listed. For each one, I will first decide whether Newman did what was alleged. After that, I will decide if it constituted misconduct.

I've decided to begin with the following introductory comments. In some disciplinary cases, the employee denies the factual allegations made against them by the Employer. That really didn't happen here. Newman admitted to doing much of the foregoing. Apart from her admissions, some of the foregoing matters were recorded on videotape. She only denied a small portion of the foregoing allegations.

Given those admissions and videotape, the real fight is over whether that conduct constituted acceptable workplace conduct (as the Association alleged), or misconduct (as the Employer alleged).

The first allegation is that Newman left her assigned work area on July 10, 16, and 25, 2008. On those three days, Newman was assigned to work in the adult pod where 84 prisoners are housed. The adult pod is staffed with two correctional officers: one officer must always be inside the master control area to monitor operations while the other officer is supposed to be on the pod floor observing the activities of the inmates. The videotape shows that on July 10, Newman was in the SMU office four times during her shift for about ten total minutes. The record establishes that she did not have permission from her supervisor to leave the adult pod to go to the SMU office, nor was she assigned to be there to assist other officers. Thus, she had no work-related reason to leave the adult pod to go to the SMU office. Additionally, while she was gone from the adult pod, she did not arrange for coverage by another officer nor did



she tell the other officer in the adult pod that she was leaving the area. Next, the videotape shows that on July 16, Newman was in the first floor Huber office five times during her shift for about 15 total minutes. She went there to play a practical joke on some co-workers involving the rubber duck she found in an inmate's pill bottle. The record establishes that she did not have permission from her supervisor to leave the adult pod to go to the first floor Huber office, nor was she assigned to be there to assist other officers. Thus, she had no work-related reason to leave the adult pod to go to the first floor Huber office. Additionally, while she was gone from the adult pod, she did not arrange for coverage by another officer, nor did she tell the other officer in the adult pod that she was leaving the area. Finally, the videotape shows that on July 25, Newman went to the nurse's office, the first floor Huber office and a classroom. She went to all three of these locations because she was angry at management after being notified she was going to be interviewed about the missing pills. Newman was in the nurse's office for 20 minutes and the classroom for 10 minutes. The record establishes that she did not have permission from her supervisor to leave the adult pod to go to these places, nor was she assigned to be there to assist other officers. Thus, she had no work-related reason to leave the adult pod to go to those locations. Additionally, while she was gone from the adult pod, she did not arrange for coverage by another officer nor did she tell the other officer in the adult pod that she was leaving the area.

The Association offers numerous defenses for Newman's leaving her assigned work area on those days. As the Association sees it, those reasons should excuse her conduct. Those defenses are addressed next.

The first defense is that officers regularly go outside their assigned work areas for brief periods of time. According to the Association, when they do so, they do not always notify their supervisor that they are leaving their assigned work area and do not always have a replacement lined up to cover their absence. Even if that's the case though, the Association's own witness testified that he **never** leaves his assigned work area without first notifying the other officer assigned to that work area. That officer testified that regardless of whether the reason for leaving his assigned work area is for a work-related reason or a personal reason, he **always** notifies his fellow officer of his whereabouts. Newman did not do that. When she left the adult pod a dozen times over the course of those three days, she never told her co-worker she was leaving him/her alone with the inmates. That being so, she failed to do what even the Association's own witness said he **always** did when he left his assigned work area.

A related defense is that the Employer has condoned employees being out of their assigned area. The record evidence does not support that assertion. Here's why. What the record shows is that when employees have been "caught" outside their assigned work area, they have been given a warning. This fact establishes that the Employer has not condoned employees being out of their assigned work area, but rather considers it to be a disciplinable act.

Another defense is that when Newman went to the nurse's office and the classroom on July 25, she was not technically out of the adult pod because those rooms are considered part

of the adult pod. Even though that's true, her absence was still problematic because when she was in those locations (meaning the nurse's office and the classroom), she was not on the adult pod floor watching the inmates as she was supposed to be doing. Additionally, it is noteworthy that she was in those two places for a half hour. That's not an insignificant amount of time to be gone from the adult pod floor.

Since the defenses referenced above do not excuse Newman's conduct, the next question is whether that conduct constituted workplace misconduct warranting discipline. I find that it did for the following reasons. Officers are supposed to stay in their assigned work area. They are not free to roam the building doing whatever they please during the course of their shift. This principle has been codified in a work rule which provides thus:

A corrections officer assigned to a post will restrict himself/herself to the responsibilities of that assigned post unless directed otherwise by the shift supervisor.

The record establishes that if an officer leaves their assigned work area to go elsewhere in the jail, they are supposed to either have permission from their supervisor or have lined up a replacement (i.e. arranged for coverage by another officer). If they don't do either of those things, they are supposed to notify the other officer assigned to that work area of their whereabouts. Newman knew that was the procedure because she had previously complied with it and gotten a replacement when she left her assigned work area. In fact, this was one topic which Sgt. Fairly counseled Newman about in March, 2008 (namely, that she was having "other officers relieve her while she is in Master Control (her roster duty assignment). . .for long periods of time, anywhere from ten minutes to one hour.") Here, though, Newman failed to follow that procedure and did not do any of the things she was supposed to do when she left her area: she did not have permission from her supervisor to leave the adult pod; she did not have a replacement lined up to cover the adult pod in her absence; and she did not inform her co-worker in the adult pod that she was leaving the area. Instead, she just left her co-worker to handle the adult pod alone. That was problematic from a safety perspective because the Employer has decided that officer safety requires two officers to be present in the adult pod. While it was Newman's view that she could safely leave the adult pod with just one officer present, that was not her call to make. The Employer gets to make that call, and they have decided that two officers need to be present in the adult pod for safety reasons. Newman knew all the foregoing, but on a dozen occasions on the three days in question, she inexplicably left her post without telling her supervisor or lining up a replacement or telling her co-worker she was leaving. She should not have done that. By leaving her post, she put the safety of the other officer, and even the inmates, at risk.

...

The second allegation is that on July 16, 2008, Newman took an inmate's prescription bottle away from the adult pod into another part of the jail to play a practical joke with it. The Employer further alleged that while Newman was in the first floor Huber office she poured

medicine from that pill bottle into another officer's hands. In the course of doing that, some of the pills spilled onto the floor, whereupon Newman picked them up off the floor, cleaned them off and put them back into the bottle.

Newman admitted that she did all the foregoing. However, as the Association sees it, her conduct was not misconduct.

Notwithstanding the Association's contention to the contrary, I find that the conduct just referenced qualifies as misconduct. Here's why. Newman should not have poured an inmate's pills into the hands of three people as she did. That action failed to comport with the basic and commonly-accepted standards of cleanliness, sanitation and personal hygiene, to say nothing of the Employer's policy on Pharmaceutical Operations. That also applies to Newman's actions in picking the spilled pills off the floor, cleaning them off and putting them back into the bottle. That was inappropriate too, and should not have occurred. The Association's contention that the inmate never filed any complaint about the spilled pills misses the mark because he (the inmate) was never told what happened to his pills.

...

The third allegation is that Newman entered an unlocked medicine cart in the first floor Huber office on three occasions on July 16, 2008 without authorization to do so.

Newman admitted that she did the foregoing. She testified that the reason she did it (i.e. "entered" the unlocked medicine cart) was because she had found a rubber duck in an inmate's pill bottle, and she wanted to "share" her unusual find (i.e. the rubber duck) with some co-workers by playing a practical joke on them involving the rubber duck.

The Association offers several defenses for Newman's conduct which, in its view, should excuse her conduct. Those defenses are addressed next.

The Association's first defense is that there is "no work rule that says that an officer cannot enter an unlocked medicine cart." That's true; there isn't a rule that says that. Be that as it may, there is a rule that says that the medicine cart is to be locked at all times. (Note: the fact that the medicine cart was unlocked on July 16, 2008 will be addressed next). Given the existence of that rule, common sense dictates that if the medicine cart is to be locked at all times, then an officer should not be "entering" an unlocked medicine cart for the purpose of playing a practical joke on her fellow officers.

The Association's second defense is that only Newman was disciplined over the medicine matter. That is not accurate. The un rebutted testimony of Administrator Miller was that several officers were disciplined for leaving the medicine cart unlocked.

Having considered the Association's defenses on the matter, I find that it was misconduct for Newman to "enter" the unlocked medicine cart on July 16, 2008 and rifle

through it. Here's why. First, Newman was not authorized to be in the medicine cart on that day. That being so, she should have known she was not to "enter" the cart (particularly for a non-work related reason like using the contents in the cart to play a practical joke). Second, one of the things Newman did while she was rifling through the medicine cart was to try to place the rubber duck into other inmate's medicine bottles. That was problematic for the following reason: pills are kept in bottles to keep them clean and uncontaminated. By trying to force the non-sterile rubber duck into other pill bottles, Newman contaminated those pill bottles and their contents. Once again, her action failed to comport with the commonly-accepted standards of cleanliness, sanitation and personal hygiene, to say nothing of the Employer's policy on Pharmaceutical Operations. Her conduct was inappropriate, and should not have occurred.

...

The fourth allegation is that Newman yelled profanities at inmates on two occasions on July 25, 2008. This allegation differs from the others discussed so far because some facts are disputed.

The first matter involves the head count which occurred at the start of the shift. One of the inmates (i.e. a deaf inmate) was not in the proper location for the head count. Newman admitted that inmate's non-compliance irritated her. Acting on that irritation, she got on the intercom and yelled at the other inmates to get the deaf inmate up for head count. She further admitted she said over the intercom: "I'm sick of this shit. Get him up." Newman admits she then said: "this is fucking bullshit." According to Newman, she was not on the intercom when she said that. She also averred that statement was not directed at the inmates, but rather was directed at the first shift officers. Newman's testimony on this point was contradicted by Officer Grunke who testified that Newman was on the intercom when she made her "fucking bullshit" statement and that it (i.e. her "fucking bullshit" statement) was directed at the inmates. I credit Grunke's account of the matter over Newman's because no evidence was offered why Grunke would make up her charge against Newman. Grunke had nothing to gain by making a false charge against Newman. In contrast though, Newman has a lot at stake in this matter.

The second matter involves the walk-through. While performing that task with Grunke, Newman yelled and screamed at the inmates. Exactly what she yelled and screamed at the inmates is disputed. Grunke testified that Newman yelled "You guys stop playing these fucking games" and told the inmates their conduct was "bullshit". Newman admitted she used the words "games" and "shit" when she yelled at the inmates, but denied saying "fucking games". Once again, I credit Grunke's account of the matter over Newman's for the same reason previously noted.

The Association attempts to minimize the impact of Newman's conduct by averring that officers swear at each other all the time. However, even if that's the case, the swearing involved here was not officer to officer - it was officer to inmate. The record establishes that

the Employer does not condone officers swearing directly at inmates. However, that's what Newman did.

Aside from that, the Association's argument on profanity implies that Newman was disciplined for simply using, as the Association put it in their brief, "a couple of swear words." That's not completely accurate because it ignores Newman's other conduct during the walk-through. I'm referring, of course, to her yelling and screaming at the inmates and being hostile and abusive to them. That conduct was problematic as well. It crossed the proverbial line because the Employer cannot have officers being abusive to inmates. It is apparent that when Newman performed the walk-through, she was still very angry and upset over the fact that she was going to be interviewed about the missing pills. She took her aggression out on the inmates. Her loss of self-control was inexcusable. The Employer can't tolerate that conduct from a correctional officer.

...

The fifth allegation is that Newman twice displayed her middle finger: once to a security camera on July 25 and once to Lt. Weske on July 24. Newman admitted that she displayed her middle finger on both those days, but denies that when she did that on July 24, it was directed at Lt. Weske.

I'm first going to address the July 25 incident. On that date, Newman went to the first floor Huber office to commiserate with some co-workers over the fact that she was going to be interviewed about the missing pills. She was angry and upset over that. While she was in that office, she gave the finger to the camera. She contends that when she did so, it was not intended for anyone in particular, but rather was given to the system "in general". I accept that explanation at face value. That said, giving the finger to a video camera, even as an expression of frustration, is still inappropriate workplace conduct. It should not have occurred.

I'm now going to address the July 24 incident. On that day, Newman also displayed her middle finger. Once again, Newman contends that when she did so, it was not intended for anyone in particular, but rather was given to the system "in general". This time though, I do not accept her explanation. Here's why. First, unlike what happened on July 25, she did not give the finger directly to the camera. On July 24, she had her back to the camera and gave the finger in the direction of a hallway. Although the camera did not record who Newman gave the finger to, it can reasonably be inferred under the circumstances that she gave it to someone down the hallway. I'm persuaded that the intended recipient down the hallway was an actual person, as opposed to say, the system "in general". Second, before Newman gave the finger, she turned the lights on in the adult pod control room for a few seconds. The lights in that room are normally turned off. It can reasonably be inferred under the circumstances that Newman was not at all concerned about being discreet. To the contrary, she turned the lights on to draw attention to herself and what she was about to do (namely, give the finger). Her attempt to draw attention to herself and what she did succeeded, because an

employee saw Newman give the finger and who she directed it at. Third, the eyewitness employee just referenced subsequently told management that Newman gave the finger to Lt. Weske (who was walking down that hallway at the time). The Association offered no evidence why that employee would make up her charge against Newman. That employee had nothing to gain by making a false charge against Newman. In contrast though, Newman has a lot at stake in this matter. Consequently, although Newman denied that her middle finger was intended for Lt. Weske, I conclude – as did the Employer – that he was indeed the intended recipient of Newman’s gesture. Employers have a legitimate and justifiable interest in maintaining the authority of their supervisors and preventing employees from disrespecting them. Giving the finger to a supervisor, particularly where the act is intentionally done in front of other workers, is an inappropriate workplace act. No employer can be expected to tolerate it. Newman therefore committed workplace misconduct by giving Lt. Weske the finger. In so finding, it is also noted that Newman did this the day before she was notified that she was going to be interviewed about the missing pills. That happened on July 25 while she gave Lt. Weske the finger on July 24. That being so, her reason for giving Lt. Weske the finger cannot be attributed to her being angry about being interviewed about the missing pills.

...

The sixth allegation is that on July 25, Newman rammed a chair into a counter and kicked the counter. Newman admitted that she did those things immediately after being notified by Administrator Miller that she was going to be interviewed about the missing pills.

While Newman’s physical outburst and loss of self-control only lasted a few seconds, it should not have occurred at all. It was inappropriate workplace conduct.

...

The seventh (and final) allegation is that Newman took an inmate’s inhaler home with her on July 26. Newman admitted that she did that, but contends she did so accidentally after leaving it in her sweater pocket.

The undersigned has no reason to think Newman intentionally took the inhaler home with her. That being so, I accept her assertion that she did so accidentally. Be that as it may, it should not have happened (meaning she should not have taken home the inhaler). The Employer’s policy on Pharmaceutical Operations prohibits officers from taking inmates’ medications home.

...

The above discussion establishes that Newman did all the things she is charged with doing. Thus, all seven of the charges made against her in the discharge letter were substantiated.

In my view, some of the charges are more serious than others. I consider charges one through four to be more serious than charges six and seven. In charge five, I consider Newman's giving the finger to Lt. Weske to be more serious than her giving the finger to the video camera. Notwithstanding that delineation of seriousness, all the conduct referenced above constituted workplace misconduct. Additionally, it violated various departmental rules.

...

Before I turn to the next part of the just cause analysis, I've decided to make the following comments.

Starting in mid-July, Newman had to know she was under the microscope because of the missing pills. What usually happens when an employee knows they are under the microscope is that they comport themselves accordingly. By that, I mean they keep their nose clean, so to speak, and don't give the employer anything more to work with. Newman did not do that. Instead, she gave the Employer a lot of new material to work with. Not surprisingly, the Employer chose not to overlook it. Said another way, the Employer did not have to disregard Newman's misconduct from late July, 2008. In some factual situations, fault for workplace misconduct can be allocated and/or apportioned to someone other than the grievant. Here, though, Newman alone is responsible for everything that happened because of her lack of self-control and poor judgment. As a result of her own misconduct, a lot of good lawyering on her behalf ultimately went for naught.

...

The second part of the just cause analysis being used here requires that the Employer establish that the penalty imposed for the employee's misconduct was appropriate under all the relevant facts and circumstances. In reviewing the appropriateness of discipline under this standard, arbitrators oftentimes consider the notions of due process, progressive discipline and disparate treatment. The undersigned will do likewise in reviewing the appropriateness of the discipline imposed here (i.e. discharge). These matters will be addressed in the order just listed.

With regard to the first matter referenced above (due process protection), there is no evidence that Newman was denied due process before she was fired. This finding is based on the following facts. First, prior to meeting with Newman, the Employer conducted an investigation which consisted of reviewing various videotapes and interviewing witnesses. One aspect of the Employer's investigation will be addressed below. Second, as part of that investigation, Newman was interviewed. In that interview, she not only gave her side of the story, but also admitted to doing much of what was later referenced in the discharge letter. Third, at the end of the interview, Newman was placed on administrative suspension. Fourth, before the Sheriff decided on discipline, he reviewed all the reports which had been generated in the Employer's investigation, watched the videotapes in question and reviewed Newman's personnel file, evaluations and disciplinary history. After reviewing all the foregoing, he

decided to discharge Newman. In my view, there is nothing in the facts just noted that raise any so-called red flags regarding procedural due process.

The Association's only due process argument deals with one aspect of the Employer's investigation. The Association contends that the investigation was flawed because "[n]one of the members of the jail administration who were involved in the investigation reviewed footage of the area where Newman was supposed to be to see if there was coverage." It's true that no one reviewed the videotapes of the adult pod to see if there was coverage in that area when Newman was gone. The reason was this: in her interview, Newman admitted she did not get a replacement or arrange for coverage when she left the adult pod on four occasions on July 16. She made the same admission at the arbitration hearing about her leaving the adult pod on July 10 and July 25. Given those admissions, there was no need or reason for the investigators to review the videotapes of the adult pod to confirm what amounted to a negative (namely, that the adult pod was not covered because Newman did not get a replacement or arrange for coverage when she was gone from the area). Consequently, the Association's challenge to the sufficiency of the Employer's investigation is rejected.

The focus now turns to progressive discipline. It is noted at the outset that the normal progressive disciplinary sequence in non-cardinal offense situations is for employees to receive a written warning and a suspension prior to discharge. That did not happen here. In this case, the Employer skipped both those steps and proceeded directly to discharge. The Association argues that discharge was too severe under the circumstances and it asks the arbitrator to reduce the level of discipline. The following reasons preclude me from doing that here. First, it is noted that nothing in the parties' collective bargaining agreement requires that a lesser form of discipline had to be issued in this particular case. Some labor agreements specify a particular sequence that must be followed by the employer when it imposes discipline (for example, a written warning must be imposed before a suspension). This collective bargaining agreement does not contain such language. Second, when the Employer decided what level of discipline to impose for the numerous acts of misconduct, it could have treated each disciplinary event separately. However, nothing in the collective bargaining agreement required it to do that. It decided to lump all seven of the disciplinary events together. It could do that. Third, the practical effect of this decision to lump all the disciplinary events together is that it justified more severe discipline. Fourth, after considering all the disciplinary events in the aggregate, the Employer concluded that no discipline short of discharge would correct the grievant's behavior because she lacked the temperament, patience and self-control to work at the jail. The record provides no objective basis for the arbitrator to find otherwise.

Finally, with regard to the third matter referenced above (disparate treatment), it is noted at the outset that the principle of equal treatment dictates that an employer must enforce rules and assess discipline in a consistent manner; employees who engage in the same type of misconduct are to be treated the same unless a reasonable basis exists for variations in the assessment of punishment. In order to prove disparate treatment, it is necessary to show that other similar factual situations occurred where the Employer imposed either lesser or no punishment. In this case, the Association tried to show that other employees have left their



assigned work area and not been fired for it. It also tried to show that other employees have used profanity and not been fired for it. It also tried to show that other employees have taken home an inmate's inhaler and not been fired for it. However, the problem with trying to prove disparate treatment in this case with that simplistic approach is that it fails to recognize that Newman did not commit just a single, solitary violation. She committed multiple violations. Take, for example, the subject of leaving her work area. Newman did not leave her work area just once; she left it a dozen times on the three days in question. Insofar as the record shows, no one else has done that. Aside from that, it is emphasized that Newman was not fired for just leaving her work area, or just using profanity, or just taking home an inhaler. She was fired for committing all those acts of misconduct together, plus the other acts of misconduct referenced above. The Association did not establish that anyone else committed all the acts of misconduct that Newman did, and was not fired for it. As a result, the Association did not prove that Newman was treated unfairly. I therefore find that Newman was not subjected to disparate treatment in terms of the punishment imposed.

Based on all the circumstances then, it is held that the severity of the discipline imposed here (i.e. discharge) was not excessive, disproportionate to the offenses, or an abuse of management discretion, but rather was commensurate with the grievant's proven misconduct. The County therefore had just cause within the meaning of Article XXI to discharge Newman.

Those arguments not addressed in my discussion were considered, but were deemed unnecessary to decide this matter.

In light of the above, it is my

### **AWARD**

That the County had just cause under Article XXI of the collective bargaining agreement when it terminated the employment of Kim Newman on August 6, 2008. Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 13th day of August, 2009.

Raleigh Jones /s/

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Raleigh Jones, Arbitrator

REJ/gjc

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