

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CITY OF RACINE

and

LOCAL 67, AFSCME DISTRICT COUNCIL 40

Case #780
No. 68380
MA-14215

Appearances:

Scott Letteney, Deputy City Attorney, 730 Washington Avenue, Racine, WI 53403, appearing on behalf of the City of Racine.

Nicholas Kasmer, Staff Representative, PO Box 580734, Pleasant Prairie, WI 53158, appearing on behalf of Local 67, AFSCME District Council 40.

ARBITRATION AWARD

The City of Racine (hereinafter City or Employer) and AFSCME Local 67 (hereinafter Union) are parties to a collective bargaining agreement covering the period January 1, 2006 through December 31, 2008, that provides for the final and binding arbitration of grievances. The Union, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission to appoint a WERC Commissioner or staff member to serve as the sole arbitrator of the instant dispute. Commissioner Susan J.M. Bauman was so appointed. In accordance with the collective bargaining agreement, the parties met to resolve the matter through mediation on January 30 and March 26, 2009¹. Settlement discussions having failed to resolve the matter, a hearing was held on July 9, 2009, in Racine, Wisconsin. A transcript was filed on July 24, 2009. The record was closed on September 16, 2009, upon receipt of all post-written argument submitted pursuant to a briefing schedule and notification that no reply briefs would be filed.

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¹ The matter was set for hearing on March 26. However, due to newly identified matters, the case did not proceed on that date and the parties engaged in another attempt to mediate the dispute.

This award addresses the termination of evidence property clerk C.D.

ISSUE

The parties agreed that there are no procedural issues and the substantive issue to be decided is:

Did the City of Racine/the City of Racine Police Department violate the collective bargaining agreement between itself and AFSCME Local 67, Police Department unit, when it terminated C.D.? If so, what is the appropriate remedy?²

FACTS

The City of Racine, hereinafter City or Employer, is a municipal employer that provides the full panoply of municipal services. In particular, the City maintains a Police Department (Department) which is charged with protecting the public. Among its many functions, the Department maintains an evidence property room. The grievant herein, C.D., was an Evidence/Property Clerk, also known as an evidence custodian, at the time of her termination.

C.D. began her employment with the City in July 1988, working in the Health Department. She then worked in the Purchasing Department for approximately six years, after which she became a warrant clerk in the Police Department. Subsequently, sometime in 2001, C.D. became an Evidence/Property Clerk, a position she held for about eight years and at the time of her termination.

The position description for the Evidence/Property Clerk states the purpose of the position as:

This is a clerical position designed to meet the needs of the Police Department-Court Section. The functions to be performed for the Evidence Section will include the storage and control of evidence, release of evidence and property to authorized personnel, obtain dispositions for property, transfer property for testing, and destroy property according to proper procedures.

The essential duties of the position include, but are not limited to, the following:

² The parties stipulated that this award would only address the termination and, should it be determined that the collective bargaining agreement has been violated, an additional hearing will be held on the question of remedy.

- Receive and properly package and store all evidence/property obtained by Department personnel.
- Properly dispose/release/transport all property/evidence received, including drugs for chemical testing, according to mandatory procedures.
- Answer questions from the public on procedural aspects of evidence storage/disposal, and testify in court on storage and handling procedures.
- Responsible for evidence keys, lockers, the storage room and its contents, plus stocking the packaging room with ample supplies.
- Maintain accurate and legible records of items disposed/received.
- Maintain a consistent and reliable attendance record.

Evidence custodians must establish and maintain a good working relationship with all sworn members of the Department in addition to the people that they work with on a daily basis. Persons in these positions are responsible for maintaining the chain of custody of property and evidence obtained by police and may be called upon to testify in court proceedings regarding the chain of custody. During the course of her employment in this capacity, C.D. was called upon to testify on three separate occasions.

Thomas Christensen is a Deputy Chief in the Department. He is in charge of Support Services, a section which includes the evidence functions. Deputy Chief Christensen has held his position since 2005, having been promoted through the ranks of the Department, starting with patrol officer. Christensen had been responsible for Support Services for approximately 18 months at the time of the hearing in this matter. Ultimately, he is responsible for the proper handling and maintenance of evidence and property collected by the Department. According to him, an evidence custodian must be completely trustworthy and his or her integrity must be unquestionable inasmuch as compromising evidence can lead to defendants being found not guilty based on the technicality that evidence was not handled properly. Evidence clerks handle the three big liability items for police departments: money, drugs and guns. As an Evidence/Property Clerk, C.D. came into contact with drugs, money and guns on a daily basis.

Generally, C.D. performed at a satisfactory to above satisfactory level in her position as evidence custodian. Over the course of her employment in the Department, she was disciplined and counseled on a number of occasions due to her failure to come to work on time and on a regular basis. She was disciplined, up to and including a one day suspension, for her failure to report to work on a consistent, timely basis. At one point at least, her supervisors had a concern that some of her difficulty might be related to alcohol use/abuse and suggested that she participate in the Employee Assistance Program in lieu of a one day suspension. She also received a written reprimand for engaging in a verbal altercation with S.A. in January 1999. However, it was off-duty conduct that resulted in the City's decision to terminate C.D.'s employment.

Just after midnight on July 18, 2008, the police were dispatched to the home of C.D.'s former boyfriend. They had argued and C.D. had broken a double pane window on his house by banging on it. In the process, she cut herself and, from the amount of blood seen by the responding officers, she was bleeding profusely when she left. Before leaving, however, C.D. attempted to break another window and also banged on the window of a car in the driveway. Sgt. Macemon was advised of the incident and attempted to make contact with C.D. He checked her residence, but she was not there. He then called her on her cell phone. During this conversation C.D. told Macemon that she had injured herself but did not want to seek medical attention because she did not want to be arrested. C.D. refused to advise Macemon of her location.

At about 6:30 a.m., C.D. left a message on her supervisor's voicemail in which she stated, "if it's okay I'd like to take a vacation day today . . ." The supervisor, Sgt. Mauer, did not play this message until about 7:50 a.m., after C.D.'s normal start time, and did not acknowledge the call or authorize the absence. C.D. did not report for work that day, but she did turn herself into the police department around 9:00 a.m. that morning, was placed under arrest for criminal damage to property and disorderly conduct. She bailed herself out immediately thereafter.

Based on these events, Deputy Chief Christensen initiated an investigation into whether C.D. had violated Department Rules of Conduct 400.10(c) Reporting for Duty and 400.2(b) Compliance with the Law. He reviewed departmental records which included three arrests of C.D.: June 3, 2000 when she was charged with Domestic Abuse Battery which was subsequently amended to Ordinance Disorderly Conduct; July 12, 2006 when she was arrested for Battery which was subsequently amended to Ordinance Disorderly Conduct; and the July 18, 2008 arrest for Criminal Damage to Property and Disorderly Conduct. Deputy Chief Christensen also reviewed the police reports and 911 call reporting the incident; as well as C.D.'s personnel file including awards, discipline and non-disciplinary performance history. He interviewed Ms. Sawyer DeMint, an individual C.D. called at about 6:00 a.m. on the morning of July 18 acknowledging that she had been drinking when the incident occurred, and reviewed the telephone interview conducted by Sgt. Macemon during the morning of the incident.

Deputy Chief Christensen concluded that both allegations of rule violations were substantiated. With respect to the Reporting for Duty allegation, the Deputy Chief indicates that C.D. received a suspension for a remarkably similar incident occurring on October 27, 2006³, and states "At the time the suspension paperwork was served she was advised that 'Any further violations will result in appropriate disciplinary action taken, up to and including dismissal.'" With respect to the Compliance with the Law

³ There is some confusion in the record as to whether the October 27, 2006 incident was one of the prior occasions on which C.D. was arrested and charged with a crime. A review of the documents indicates that although the police were called at that time, C.D. being identified as an "unwanted party", this was not one of the occasions on which C.D. was arrested. The facts of that event, however, are remarkably similar to the July 18, 2008 event and involved the use of alcohol by C.D.

allegation, the Deputy Chief concluded that C.D. “probably should also have been arrested for obstructing for evading the police department’s efforts to take her into custody.”

The investigative report was sent to Chief Wahlen and concludes with the following Recommendation:

C.D. has a demonstrated history of attendance issues for which she has received progressive discipline. The most recent discipline was the result of C.D.’s failure to appear for her scheduled shift the morning following an incident in which she was an unwanted party. During that incident, also occurring on Indiana St.,⁴ C.D. was observed by the responding officers to be intoxicated. Documented in the Employee Disciplinary Notice was her supervisor’s belief that many of C.D.’s attendance and performance issues were the result of alcohol problems. C.D. was offered the opportunity to participate in the Employee Assistance Program in Lieu [sic] of serving her suspension. C.D. chose to serve the suspension.

This arrest is the continuation of a pattern of conduct which calls into question her fitness for duty. C.D.’s behavior suggests an alcohol abuse problem. As part of her job, C.D. routinely handles drugs, money and guns. Based upon my training these items [sic] most commonly misappropriated from evidence storage facilities. While there is no suggestion being made that C.D. has engaged in such acts, her character and decision making abilities do appear to be compromised. An essential function of her job is testifying as to the chain of custody in criminal court cases. Her behavior creates a scenario in which her character can be called into question on the stand.

As responsible administrators we cannot allow C.D. to continue to work in an area which presents such great liability for our failure to act. My recommendation is that C.D.’s employment be terminated.

Chief Wahlen concurred in the recommendation. By letter dated July 25, 2008, C.D. was advised of the City’s intent to terminate her employment based on her violations of the law that affect her ability to perform the essential duties of her position, and was offered the opportunity to provide any mitigating circumstances as to why the City should not carry out its intended action. C.D. responded by letter dated July 29. In pertinent part, her letter states the following:

⁴ This is the same location at the July 18 incident – the home of C.D.’s ex-boyfriend.

. . . For the jobs I have listed, I have never enjoyed doing my job as much as I've enjoyed being the Property/Evidence Clerk for the City Of Racine Police Department. Being a Property/Evidence Clerk, I take my job seriously and know I wouldn't do anything within the department to jeopardize my job. I honestly did not take the time to analyze the whole situation when I made the poor decision outside of work. I did not think it would jeopardize my job in the manner that it has. . . .

I truly understand the severity of my actions, but I do not feel it constitutes the termination of my employment. Considering my past performance evaluations since I've been with the Racine Police Department, I believe my yearly overall performance evaluations should prove the kind of worker I am and still can prove to be. The following are my Overall Performance Evaluations for the previous years:

. . .

I take full responsibilities for my actions and can only hope the city of Racine give me another chance to prove that I can and will perform my essential job duties as Property/Evidence Clerk to the best of my abilities.

I have taken it upon myself to enroll into the Employee Assistance Program (E.A.P.) . . . I am also willing to make any side agreements with the City Of Racine/Racine Police Department to not have any negative Police contact outside of my job for the next 6 months.

By letter dated August 5, C.D. was advised that her employment relationship with the City of Racine was terminated. A timely grievance was filed and this arbitration ensued.

Additionally, on July 24, 2008, at approximately 2:28 a.m., Sgt. Macemon again responded to C.D.'s ex-boyfriend's home because the ex-boyfriend contended that C.D. had shown up there again and was an "unwanted party." C.D. had left the location by the time the officers arrived, but the complainant indicated that he had a TRO (temporary restraining order) against C.D.⁵ It had not yet been served. Macemon proceeded to C.D.'s address and waited for her. He advised C.D. that he was following up on a complaint that she was causing problems at her ex-boyfriend's house and she denied having been there. The TRO was served on C.D. at that time. On August 5, 2008, an injunction was granted which includes a restriction on C.D.'s handling of firearms. That injunction is in effect until August 5, 2012.

⁵ C.D. denied that she had been at his house that evening. A determination of whether she had been there or not is not relevant to this proceeding inasmuch as she had not yet been served with the restraining order and, therefore, could not have violated it.

Additional facts are included in the **DISCUSSION**, below.

RELEVANT CONTRACT PROVISIONS

ARTICLE IV

MANAGEMENT RIGHTS

The City possesses the sole right to operate City government and all management rights repose in it, but such rights must be exercised consistently with the other provisions of this contract and the past practices in the department covered by the terms of this Agreement unless such past practices are modified by this Agreement, or by the City under rights conferred upon it by this Agreement, or the work rules established by the City of Racine. These rights which are normally exercised by the various department heads include, but are not limited to, the following:

1. To direct all operations of City government.
2. To hire, promote, transfer, assign and retain employees in positions with the City and to suspend, demote, discharge or take other disciplinary action against employees for just cause.
...
4. To maintain efficiency of City government operations entrusted to it.
...
10. To take whatever action is necessary to comply with State or Federal law.
...

In addition to the management rights listed above, the powers of authority which the City has not officially abridged, delegated or modified by this Agreement are retained by the City. The Union recognizes the exclusive right of the City to establish reasonable work rules. The Union and the employees agree that they will not attempt to abridge these management rights and the City agrees that it will not use these management rights to interfere with rights established under this Agreement or the existing past practices within the departments covered

by this Agreement, unless such past practices are modified by this Agreement, or by the City under rights conferred upon it by this Agreement, or the work rules established by the City of Racine. Nothing in this Agreement shall be construed as imposing an obligation upon the City to consult or negotiate concerning the above areas of discretion and policy.

ARTICLE X

GRIEVANCE PROCEDURE

. . .

G. Arbitration: If the Union grievance is not settled at the third step, or if any grievance filed by the City cannot be satisfactorily resolved by conferences with the appropriate representatives of the Union, the grievance shall be submitted to arbitration upon request of either party within thirty (30) calendar days of receipt of the Step 3 answer.

H. Selection of Arbitrator: In the event any grievance remains unresolved after exhausting the grievance procedure, either party may request the Wisconsin Employment Relations Commission (with a copy of the request to the other party) to submit a panel of seven (7) impartial arbitrators to resolve the dispute. The Union and the Employer shall alternately strike names from the panel and the remaining arbitrator shall be immediately notified of his/her selection.⁶

I. Arbitration Hearing: The Arbitrator shall use his/her best efforts to mediate the grievance before the final arbitration hearing. The parties shall agree in advance upon procedures to be used at the hearing and the hearing shall follow a quasi-judicial format. The Arbitrator selected shall meet with the parties as soon as a mutually agreeable date can be set to review the evidence and hear testimony relating to the grievance. Upon completion of this review and hearing, the Arbitrator shall render a written decision as soon as possible to both the City and Union, which shall be final and binding upon both parties.

. . .

⁶ This process was not followed in this matter. The Union submitted the request for arbitration to the WERC and requested that a Commissioner or staff member be assigned to serve as the arbitrator. Inasmuch as no objection to the method of selection of the arbitrator has been raised, the requirements of this section for a panel of arbitrators is deemed waived.

K. Decision of the Arbitrator: The decision of the Arbitrator shall be limited to the subject matter of the grievance and shall be restricted solely to interpretation of the contract area where the alleged breach occurred. The Arbitrator shall not modify, add to or delete from the express terms of the Agreement.

L. Discipline: The Union shall be furnished with a copy of any written notice of reprimand, suspension, or discharge. The City agrees that it will attempt at all times to use the disciplinary process as a means to correct shortcomings on the part of City employees in terms of their overall work performance. Discipline shall be imposed as soon as possible after a complete investigation has been conducted. Discipline, therefore, is intended to initiate a corrective action on the part of the employee. A written reprimand sustained in the Grievance Procedure or not contested shall be considered a valid warning. The Union agrees upon receipt of the reprimand notice to review the situation with the employee in an attempt to correct the problem. When an employee's record is cleared of minor infringements for a year, all previous records of minor infringements shall be removed from his/her personnel file. The City reserves the right to determine the seriousness of the offense for which the employee is being disciplined and the degree of discipline which will be imposed.

M. Discharge: Although the City continues to exercise its sole discretion in determining when it will discharge an employee (subject to the requirement of discharge for just cause), when practical, in its discretion, the City will advise both the Union and the individual employee that his/her job is in jeopardy. Probationary and student employees are subject to discharge without recourse to the grievance and arbitration procedures of this Agreement. Receipt of reprimands or suspensions will be deemed to serve as such notice to the individual employee. Upon receipt of copies of such notices, the Union agrees that it will meet with the individual employee in an attempt to correct his/her inadequate job performance.

When a grievance involves discharge, it shall be reduced to writing and referred directly to a special committee consisting of the Human Resources Director, the head of the department concerned, and a member of the City Attorney's office or the labor negotiator. Steps 1 through 2 would not apply in this type of case, and the decision of the special committee shall be subject to arbitration as provided in Section G of the present grievance procedure.

The parties recognize that immediate discharge without prior notice of [sic] warning may be appropriate in cases of serious misconduct.

POSITIONS OF THE PARTIES

The Employer contends that the Grievant is unsuitable to continue in her position in light of her off-duty misconduct. The position of Evidence/Property Clerk is extremely sensitive, requiring absolute propriety of conduct and character. The incumbent must maintain the chain of custody of the evidence, and must have absolute integrity. The position has daily contact with money, drugs, and guns which present significant potential temptation to persons in this position.

According to the City, the pattern of C.D.'s behavior calls her judgment and integrity into question and compromises her ability to work within the court system and testify on behalf of the prosecution. The Grievant's behavior, including her pattern of fighting, brings her to this point. Her misconduct escalated and accelerated over the years. The July 2008 incident occurred upon the backdrop formed by prior, repeated misconduct. C.D.'s off-duty misconduct demonstrates an utter lack of integrity, and the Racine Police Department cannot trust her to properly perform her duties as an evidence custodian. She has caused the diminution of the reputation of the evidence storage function in the eyes of the County District Attorney and has damaged the Police Department's reputation. Her re-employment would negatively affect her co-workers, especially police officers who would be required to work with an off-duty offender.

For these reasons, the City urges that the grievance be dismissed.

The Union contends that the City did not have just cause to terminate the Grievant because she only had one relevant discipline in her file at the time of discharge; she was not disciplined for any prior acts of off-duty misconduct; she was given a higher form of discipline than a sworn officer who committed a similar crime; and no nexus exists between C.D.'s off-duty conduct on the night in question and her employment with the City.

According to the Union, C.D.'s actions did not affect the reputation of the City or the property room as they were not made public. C.D. was not convicted of a crime that called into question her ability or capacity to tell the truth. There is no evidence that C.D.'s record would cause a defense attorney to question her integrity as it relates to her role in the property room and the chain of custody of evidence. Although the restraining order against C.D. prevents her from handling firearms without an exemption from the Court, the Union contends that this does not entirely prevent her from handling evidence as other employees could handle firearms. Alternatively, C.D. could be granted an exception from the Court to handle firearms.

Based on these rationales, the Union argues that C.D. be reinstated to her position as an Evidence/Property Clerk in the Racine Police Department.

DISCUSSION

The essential facts of this case are undisputed. Although there were some prior issues with C.D.'s attendance and punctuality, her employment was terminated as a direct result of off-duty misconduct that occurred on July 18, 2008. The issue to be decided is whether this misconduct was sufficient to fulfill the just cause provision of the collective bargaining agreement between the City and the Union.

As with many collective bargaining agreements, no definition of just cause is included in the contract. Absent such a definition, or agreement between the parties as to the standard to be utilized, the undersigned utilizes a two-prong analysis which requires the Employer to establish the existence of conduct by the Grievant in which it has a disciplinary interest and then establish that the discipline imposed for that conduct appropriately reflects that disciplinary interest in light of the totality of circumstances, including the Grievant's prior employment record.⁷

In this case, the conduct complained of occurred while the Grievant was off-duty, as well as her actions thereafter as it relates to reporting for work that day. As such, it is imperative that the City establish the existence of a connection, or nexus, between the conduct and the Employer's interest. As both parties acknowledge, an employer's right to question an employee's conduct is generally limited to behavior that occurs while the employee is on duty. There is a general presumption, to which the undersigned subscribes, that an employee's private life is beyond the employer's control. However, when the employee's off-duty conduct affects the employment relationship, the off-duty conduct can have repercussions to the continued employment relationship. See, generally, Brand, ed., *DISCIPLINE AND DISCHARGE IN ARBITRATION*, pp. 303-304. Hill and Wright, in *EMPLOYEE LIFESTYLE AND OFF-DUTY CONDUCT REGULATION*, at 171, summarize a number of standards or criteria that arbitrators use to evaluate discharge or discipline in off-duty conduct cases:

1. Injury to the employer's business
2. Inability to report for work
3. Unsuitability for continued employment
4. Co-employee refusal to work with the off-duty offender or danger to other employees.

While there are many variations in the manner in which these criteria can be stated, if an employee's off-duty conduct fits in any one of these four areas, or a combination thereof, discipline or discharge may be upheld, provided however that the disciplinary action taken is commensurate with the employee's conduct and other disciplinary actions by the Employer under similar or related circumstances. The City of Racine contends that C.D.'s behavior fits into categories one and three: injury to the employer's business and unsuitability for continued employment.⁸

⁷ Although the Union cites the seven tests of just cause as expressed by Arbitrator Daugherty in *ENTERPRISE WIRE*, the parties have not agreed to this standard, nor does the Union attempt to utilize them in its arguments.

⁸ Chief Wahlen testified that C.D.'s co-workers are afraid of her. However, none of the co-workers testified as to either their fear of C.D. or any refusal to continue to work with her.

Distilled to its essence, it is the position of the City that C.D.'s off-duty actions resulting in allegations of disorderly conduct, battery, criminal damage to property and disorderly conduct had escalated to the point where her judgment and integrity, essential elements of her position, were in question. In the 2000 and 2006 incidents, C.D. pled no contest to ordinance disorderly conduct charges. In the 2008 incident which resulted in her termination from employment, C.D. was charged with two statutory violations. She pled no contest to disorderly conduct, and the criminal damage to property charge was dismissed but read in. Though not criminally charged, the evidence is clear that C.D. took action in July 2008 to avoid being taken into custody, including attempting to take a vacation day without following proper procedures. Deputy Chief Christensen's memorandum to Chief Wahlen recommending C.D.'s termination alleged violation of two rules of conduct: Reporting for Duty and Compliance with the Law. The first of these allegations references the manner in which C.D. sought to take a vacation day without following procedure so as to not report to work on July 18; the second refers to her law violations.

As the Evidence/Property Clerk, C.D.'s position requires that she work in a cooperative manner with, among others, members of the Racine Police Department. Her behavior on July 18, the criminal damage to property, the disorderly conduct, and her clearly articulated intent to evade the police in order to avoid arrest, demonstrate that she lacks, at least under some circumstances, the proper respect for the sworn members of the police force, people she has to work with on a daily basis. She deliberately undermined their ability to perform their duty. Her breakage of property belonging to another, without that other person's permission, demonstrates additional lack of respect for the law. C.D.'s position as evidence custodian, even though an unsworn position, is part of the law enforcement continuum. By her actions, she demonstrated disregard and disrespect for the law and the officers that are charged with upholding the law.

Although C.D. has not been charged with, or convicted of, fraud or embezzlement, these are not the only crimes that bear on a person's integrity and ability to perform a particular job. C.D.'s actions are not ones that the City must tolerate in an employee in the position of evidence custodian. The City has demonstrated that C.D.'s behavior properly can lead to the conclusion that she is no longer suitable to perform the duties of her position.

With regard to the City's apparent contention that C.D. caused injury to its business, the evidence presented was either pure speculation or hearsay. The Chief and Deputy Chief are, correctly, concerned that defense attorneys, learning of C.D.'s arrest and conviction record, could undermine prosecutions through questioning about the chain of custody of evidence that she is supposed to maintain. They could not, however, demonstrate that this had actually occurred. The Racine County District Attorney (DA) did not testify that he had such a concern. Instead, a letter from the DA was introduced. The City acknowledged that it had solicited this letter from the DA,

months after they had already terminated C.D.'s employment, reducing any weight that might be ascribed to its contents. While the City does have a legitimate concern about potential injury to the reputation of the Racine Police Department and/or its handling of evidence, the City has failed to establish actual injury.

The Union has presented four arguments in support of its contention that the Employer did not have just cause to terminate C.D.'s employment. The first two, that C.D. had only one relevant discipline in her file at the time of the discharge⁹ and that she was not disciplined for any prior acts of off-duty misconduct, go to the question of whether the City was required to impose progressive discipline under the circumstances presented here. Although it is clear that the City considered that the July 18 incident was not the first time that C.D. was involved in a situation that required police intervention and charges were filed against her, and there is no indication that the City would have terminated C.D. if this was the only incident of its nature, the undersigned is of the opinion that C.D.'s behaviors, taken as a whole, indicate that termination could be appropriate for a first offense. The collective bargaining agreement, by its terms, does not require progressive discipline be imposed, for off-duty misconduct or otherwise.

Although it would have been preferable for the City to have disciplined C.D. on each of the prior occasions of off-duty misconduct, discipline that the Union would certainly have grieved, the fact that it failed to do so does not, in any way, limit the ability of the City to take the ultimate action of terminating C.D.'s employment at this time. Interestingly, the Union appears to argue that termination is inappropriate because there was no prior discipline for off-duty misconduct at the same time as it is arguing that there is no nexus between C.D.'s off-duty misconduct and her employment. Unfortunately, the Union cannot have it both ways. Neither can the Union succeed on an argument (which it does not appear to make) that the City waived its right to discipline or discharge C.D. for her off-duty activity.

Failure on the part of the Employer to discipline C.D. on the two prior occasions of off-duty misconduct does not, in any way, suggest that the City condoned the conduct or that the City was not concerned about the conduct. In October 2006, C.D. was disciplined for violations of work rules relating to punctuality and unauthorized absence associated with an incident remarkably similar to the July 18, 2008 event. The Disciplinary Notice of Suspension indicates that on October 27, 2006, C.D. had been involved in an "Unwanted Party" incident on October 26 during which she had been intoxicated, a situation not unlike the 2007 and 2008 events. C.D. did not report to work as scheduled the following day, and was disciplined for her involvement in the

⁹ The Union discussed, at length, the other records of disciplinary actions that were produced by the City at hearing. It concludes that all but one, a one-day suspension from 2007 dealing with attendance and punctuality issues which has been grieved, should have been removed from C.D.'s file and cannot be considered by the Arbitrator. Inasmuch as I have concluded that no prior discipline need have been imposed for the termination to be upheld, I do not address the Union's contention that all of the other disciplinary actions should have been removed from C.D.'s record.

action and counseled regarding her alcohol-related behavior. In fact, she was given the opportunity to have the suspension vacated if she participated in the Employee Assistance Program (EAP), an option that she rejected. She was also advised that repeating such behavior would result in greater disciplinary action, up to and including termination. It is important to note, however, that the discipline at the time was for failure to report to work, not for being an “unwanted party.” The written document does not make clear that C.D. was counseled regarding this behavior, but there are indications that C.D.’s use of alcohol was a factor and was considered by the City in making the EAP referral as an alternative to suspension. C.D. rejected the EAP at that time.

After being notified that the City was considering terminating her employment because of the July 18 event, including her failure to report to work that day as scheduled, C.D. reconsidered the Employee Assistance Program (EAP) and took it upon herself to enroll. C.D.’s acknowledgement that she has a problem was too little, too late. Although her decision to enroll in EAP was well-advised, it is the statement in her letter requesting that she not be terminated regarding future action that the undersigned finds to be unsettling:

I am also willing to make any side agreements with the City of Racine/Racine Police Department to not have any negative Police contact outside of my job for the next 6 months.

Six months is a shorter time than had elapsed between any of the other times that she had “negative Police contact.” This statement can hardly be read as C.D.’s having realized the significance of her off-duty conduct and its impact on her position as an employee of the Police Department. It supports the City’s contention that C.D. is unsuited for the position of Property/Evidence Clerk and the decision to terminate C.D. without further opportunity for her to engage again in unlawful, albeit off-duty, activity.

The lack of prior related discipline in C.D.’s file does not prevent the City from terminating C.D. after the July 18 event. The off-duty conduct that occurred on July 18 included an element that appears to be absent from any of the other occurrences: C.D. purposefully and consciously made herself unavailable for apprehension by the police, and she advised Sgt. Macemon of that fact. Indeed, C.D. was injured and refused medical attention so as to avoid being arrested. Though she was not charged with evading arrest, this was part and parcel of her off-duty conduct that resulted in her termination. This cannot be ignored, and makes the events of July 2008 significantly different from C.D.’s prior off-duty misconduct. It demonstrates the spiraling down of C.D.’s behavior that the Chief and the Deputy Chief testified about, and warrants the Department’s taking severe and significant action even in the absence of prior discipline or prior warnings regarding off-duty misconduct. In addition, the 2008 event resulted in conviction for committing a criminal act, rather than an ordinance violation. While the City did not impose progressive discipline on C.D. for her off-duty misconduct, the criminal justice system clearly recognized the escalating and repeating nature of C.D.’s behavior.

Additionally, it is inconceivable that the Union is contending that C.D. did not have notice that her off-duty misconduct could have repercussions on her employment status in the absence of discipline resulting from the events of 2000 and 2006. As a member of the Police Department, albeit unsworn, C.D. had to be aware that there was stigma attached to being arrested. In fact, in the 2006 incident, the individual with whom C.D. had exchanged blows specifically expressed concern that C.D. was getting preferential treatment because she was an employee of the Police Department. The line between C.D.'s private life and her employment situation is crossed whenever she comes into contact with the Police Department as a direct result of her inappropriate behavior. C.D. knew her behavior was problematic without specifically being disciplined for her off-duty conduct.

The Union's next contention is that C.D. was given a higher form of discipline than a sworn officer who committed a similar crime. The Union is correct that a sworn officer should, as a rule, be held to a higher standard of conduct than an individual in a clerical position such as C.D. The City is of the opinion that criminal charges against non-sworn personnel may be treated differently for disciplinary purposes, depending on the crime. The Employer acknowledges that there are sworn employees who have been charged with a law violation who have not been fired. In particular, T.W. a sworn police officer was charged with municipal disorderly conduct arising out of an incident in Milwaukee County. The circumstances of this incident are not clearly developed in the record herein, but it is clear that T.W. entered into a deferred prosecution or sentence agreement in October 2007 which was fulfilled by May 2008, and that T.W. was found to be guilty of a municipal law violation rather than the statutory violation with which he was initially charged. T.W. was placed on administrative leave for a time while the circumstances of the matter were investigated and was ultimately suspended for a period of three days, with additional days held in abeyance.

The Union contends that the circumstances surrounding T.W. are similar to those involving C.D. and, therefore, C.D. should have suffered the same sort of suspension as T.W. However, T.W. was not convicted of criminal conduct, as was C.D.¹⁰ There are other, significant, differences as well. All of C.D.'s negative interactions with the Police were with members of the Racine Police Department, people she had to work with on a daily basis. T.W.'s incident occurred in Milwaukee County. This was the first disciplinary action the City took against T.W. C.D. had numerous disciplinary

¹⁰ In her prior interactions with the Racine Police Department, C.D. was ultimately convicted of ordinance, not statutory violations, as was T.W. in this matter. In the matter leading to her termination, C.D. was convicted of a crime.

actions in her file already¹¹ and there was a sense on the part of the command staff that C.D. was spiraling down due to excessive alcohol use, something that had been addressed with C.D. prior to the events of July 18.

Although it is tempting to equate T.W.'s circumstances with C.D.'s and agree with the Union that a non-sworn employee was treated more harshly than a sworn officer under the same circumstances, this would require ignoring the facts. C.D. engaged in repeated activities that had a negative influence on her ability to work with fellow employees in the Department. Even if the prior incidents and her prior disciplinary record regarding attendance and punctuality were ignored, the circumstances are very different. It is not merely the fact that C.D. was guilty of disorderly conduct. C.D. attempted to avoid arrest, she failed to seek medical treatment for a profusely bleeding wound, she failed to report for work that morning¹², and she continues to fail to recognize the severity of the situation.¹³ While C.D. may have been charged with the same crime as T.W., C.D. was also charged with Criminal Damage to Property, a charge which was dismissed but read in. The circumstances were not the same, and different treatment is appropriate.

Other than the T.W. matter, neither party introduced other cases where an employee was disciplined or discharged due to off-duty misconduct. To the undersigned, it seems unlikely that T.W. and C.D. are the only two employees of the Racine Police Department to have engaged in off-duty misconduct, but it is not possible to draw any inferences from a lack of information. T.W.'s case is distinguishable from C.D.'s. Accordingly, C.D.'s case must be evaluated on its own merits.

Finally, the Union argues that no nexus exists between C.D.'s off-duty conduct and her position. Were this to be the case, no discipline at all would be warranted for C.D.'s off-duty conduct inasmuch as it is well established that an employee's off-duty conduct is of no concern to an employer except where a nexus exists between that conduct and the employee's job. To find that there is no nexus between C.D.'s position and her off-duty conduct would require the undersigned to ignore the fact that C.D. is an employee of the Police Department, that she avoided arrest until she was able to post bail the next morning, that she is under a restraining order until 2012 that prohibits her from handing firearms, and that she has demonstrated that she does not "get it."

¹¹ Even if the prior disciplines were, as the Union argues, supposed to have been removed from C.D.'s personnel file, this does not mean that the events giving rise to the discipline did not occur. While prior discipline is to be removed from the personnel file in accordance with the terms of the collective bargaining agreement upon which the parties do not agree so as to not form the basis of a higher level of discipline, the events themselves can be considered for the purpose of establishing that C.D. did not have a "clean" record.

¹² Admittedly, C.D. did call in and attempt to take the day as vacation time but she failed to follow clear rules for requesting vacation time off and having it approved.

¹³ This is demonstrated by her letter presenting mitigating factors as to why she should not be terminated.

It is important to note that C.D.'s off-duty conduct resulted in the issuance of the restraining order. The order (not a TRO but an injunction against C.D. until 2012) has direct implications for C.D.'s ability to do her job. The Union addresses the restraining order against C.D., and the prohibition against her handling firearms, in two ways. First, it suggests that the handling of firearms, an essential part of C.D.'s job duties, could be done by a co-worker. However, there is nothing in the record to establish that a co-worker is always present when C.D. works. Furthermore, the Union fails to address the impact that such a division of labor might have on the functioning of the evidence/property section of the Police Department. Is it the norm for one Evidence/Property Clerk to handle all the evidence from one case? If such is the case, and C.D. cannot handle firearms, would this put a disproportionate workload on the co-worker? Would such a division of labor result in additional questions regarding the chain of custody, such that defense attorneys would be more likely to require testimony from the evidence custodians? There are too many unanswered questions regarding the practicality of this suggestion for it to negate the fact of the injunction.

Alternatively, the Union suggests that C.D. could return to court and seek to have the restraining order amended to allow her to handle firearms as part of her job. On its face, this option has some attraction. However, there is nothing on the record to indicate that the court would amend the restraining order. Why did C.D. not argue when the injunction was issued that her job required her to handle firearms and obtain the exception at the time? Even though C.D. had been terminated prior to the hearing where the TRO was converted into an injunction until 2012, she could have returned to court to seek to have the firearms prohibition lifted as it related to her employment prior to the hearing in this matter. Though an appealing way to get around the restriction on C.D.'s handling of firearms, it is much too speculative for the undersigned to find that this ban on C.D.'s performance of the essential functions of her job can be ignored.

Beyond the restriction on handling of firearms, the off-duty conduct in which C.D. engaged does have a strong nexus with her position. Had C.D. held a clerical position with the City in a department other than the Police Department, termination of her employment would not have been appropriate or upheld by this arbitrator. C.D. did work in the Police Department. She had to work with police officers on a daily basis. They need to have confidence in the work that she performs, they need to have a belief in the integrity of the work that she does. She must be able to testify at court hearings regarding the chain of custody, and her testimony should not be suspect. Although no rank and file members of the Department testified, the Deputy Chief and the Chief of the Department both testified as to their doubts about C.D. They expressed concerns about her honesty and her integrity, as well as her work ethic. These doubts arose from C.D.'s behavior outside of the workplace and are clearly related to the work that she was hired to do.

It is true, as the Union contends, that C.D.'s arrest and conviction have not been publicized. Thus, it argues, these events could not have a detrimental impact on the Department and could not result in questioning of C.D.'s integrity should she be called upon to testify in court. The fact that there had been no publicity about this matter does not preclude a defense attorney from discovering that C.D. had been arrested and found guilty on several occasions. The Wisconsin Circuit Court Access (CCAP) system is available for anyone to access and discover that persons named as witnesses by the prosecution have records. The Union is correct that this had not happened after C.D. was convicted on the prior occasions. However, as noted above, the conviction in those cases differed from the instant one in that previously she was only convicted of ordinance violations. This time she was convicted of a crime.

This case is different from the situation in Adams County¹⁴ where insurance fraud committed by an employee was in all of the newspapers and various witnesses testified that they could not, or would not, continue to work with her. The publicity, and the testimony of various persons who would have to interact with that individual, resulted in the arbitrator upholding the termination as to the emergency government position, but not a clerical position that the same individual held. Publicity is not the issue here, nor is it a refusal of co-workers to work with C.D. Rather, it is a lack of confidence in her integrity and honesty, at the top of the command of the Police Department, which leads to the conclusion that C.D. is unsuited to continue in her position. The nexus between C.D.'s off-duty conduct and her job is strong, and lack of confidence in her ability to perform at the level required, support the termination of her employment.

Because of her off-duty conduct, Racine Police Department officers were called to a scene. They had to investigate her actions, arrest her, and be prepared to testify against her. She handled evidence from other cases these same officers handled. These other cases could be put at risk due to C.D.'s off-duty conduct. Though she was not a sworn officer, she played an integral role in the law enforcement system and proved that she lacked the integrity necessary to maintain that position.

It is unfortunate that C.D. did not think before she acted on the night of July 18, 2008. It is unfortunate that she acted without thinking, and acted in an illegal manner. She compounded her own problems by her failure to allow herself to be apprehended that night, and by the manner in which she sought to have her absence from work turned into vacation time. Although she had not been served with the restraining order on the night of July 24, C.D. should not have returned to her ex-boyfriend's house.

¹⁴ ADAMS COUNTY AND ADAMS COUNTY PROFESSIONAL EMPLOYEES UNION LOCAL 1168, AFSCME, AFL-CIO, MA-12732 (2005)

Although she did not violate the TRO at that time as it had not been served, she clearly was not thinking about the possible repercussions of another altercation with her ex-boyfriend. To reinstate C.D. to her position as an Evidence/Property Clerk would be putting the entire Department at risk – jeopardizing the ability of the Racine Police to effectively carry out its responsibilities to the people of Racine. Had C.D. held a different position, in a different department, reinstatement might have been a possibility, but where as here, her position was a part of law enforcement, she is clearly unsuited.¹⁵

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

The grievance is denied and dismissed.

Dated at Madison, Wisconsin, this 5th day of October, 2009.

Susan J.M. Bauman /s/

Susan J.M. Bauman, Arbitrator

¹⁵ It should be apparent from this statement that C.D. is eligible for other positions and any rights that she might have pursuant to the collective bargaining agreement(s) between the City and the Union to be placed in a different position should be exercised. It is not clear from the record whether there might be other positions within the Police Department for which C.D. might be a suitable candidate.