

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**KENOSHA COUNTY**

and

**LOCAL 990 (JAIL STAFF), WISCONSIN COUNCIL 40, AFSCME, AFL-CIO**

Case 289  
No. 69695  
MA-14709

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**Appearances:**

**Nicholas Kasmer**, Staff Representatives, Wisconsin Council 40, AFSCME, AFL-CIO, P. O. Box 580734, Pleasant Prairie, Wisconsin, appeared on behalf of the Union

**Lorette Pionke Mitchell**, Senior Assistant Corporation Counsel, Kenosha County, 912 56<sup>th</sup> Street, Kenosha, Wisconsin, appeared on behalf of the Employer.

**ARBITRATION AWARD**

Local 990 (Jail Staff), Wisconsin Council 40, AFSCME, AFL-CIO, herein referred to as the “Union,” and Kenosha County (Sheriff’s Department), herein referred to as the “Employer,” jointly selected the undersigned from a panel of arbitrators from the staff of the Wisconsin Employment Relations Commission to serve as the impartial arbitrator to hear and decide the dispute specified below. The arbitrator held a hearing in Kenosha, Wisconsin, on July 15, 2010. The parties agreed to file post-hearing briefs, the last of which was received September 22, 2010.

**ISSUES**

The parties agreed to the statement of issues as follows:

1. Did the Employer violate the collective bargaining agreement when it gave Direct Supervisory Officer Randy Julius a one day suspension?
2. If so, what is the appropriate remedy?<sup>1</sup>

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<sup>1</sup> The parties stipulated that my recordings of the hearing were for my own notes and would not be available to either party.

**RELEVANT AGREEMENT PROVISIONS**

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**ARTICLE I - RECOGNITION**

**Section 1.2. Management Rights:**

Except as otherwise provided in this agreement, the County retains all the normal rights and functions of management and those that it has by law. Without limiting the generality of the foregoing, this includes the right to hire, promote, transfer, demote or suspend or otherwise discharge or discipline for proper cause; the right to decide the work to be done and location of work; to contract for work services or materials; to schedule overtime work; to establish or abolish a job classification; to establish qualifications for the various job classifications; however, whenever a new position is created or an existing position changed, the County shall establish the job duties and wage level for such new or revised position in a fair and equitable manner subject to the grievance and arbitration procedure of this agreement. The County shall have the right to adopt reasonable rules and regulations. Such authority will not be applied in a discriminatory manner. The County will not contract out for work or services where such contracting out will result in the layoff of employees or the reduction of regular hours worked by bargaining unit employees.

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**ARTICLE III - GRIEVANCE PROCEDURE**

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**Section 3.5. Work Rules and Discipline:**

Employees shall comply with all provisions of this Agreement and all reasonable work rules. Employees may be disciplined for violation thereof under the terms of this Agreement, but only for just cause and in a fair and impartial manner. When any employee is being disciplined or discharged, there shall be a Union representative present and a copy of the reprimand sent to the Union. After one (1) year, written reprimands shall not be considered in future cases to determine the level or progressive discipline, and will be removed to a closed file upon the employee's request.

The foregoing procedure shall govern any claim by an employee that he has been disciplined or discharged without just cause. Should any action on the part of the County become the subject of arbitration, such described action may be affirmed, revoked, modified in any manner not inconsistent with the terms of this agreement.

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## **RELEVANT COUNTY POLICIES**

### **Kenosha County Discipline Policy Report #139**

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#### **Policy**

The art of discipline is intended to be positive in nature and attempts to correct unacceptable employee actions. This attempt may include counseling sessions, personal improvement plans, and other help with the purpose of improving the behavior of an employee that may be detrimental and disruptive to the effective operations of a department, division and/or work program.

In the process of trying to assist the employee to resolve problems and improve his/her behavior, corrective action may be necessary. This corrective action may include discipline.

Progressive discipline is basically a series of disciplinary actions, corrective in nature, starting with a verbal or written reprimand. Each time the same or similar infractions occur, more stringent disciplinary action takes place. It is important when invoking progressive discipline, up to and including dismissal, that each time disciplinary action is contemplated, it must be definitely established that an infraction did occur which is organizationally inappropriate. To definitely establish that an infraction did occur means that a supervisor must be able to sufficiently substantiate the occurrence of any infraction.

After the infraction has been established, then an assessment of the type of corrective action required is made, taking into account the previous disciplinary actions that have been taken. It does not necessarily mean that an employee is required to violate the same rule or have the same incident occur in order to draw upon previous corrective disciplinary actions.

If there is a general pattern in the employee's behavior previous disciplinary actions can be used in determining the next level of progressive discipline. When there is a series of minor infractions and where there have been several verbal reprimands, written reprimands or suspensions occurring over a period of time, the previous disciplinary actions can be included and used in determining the next level of progressive discipline. If past behavior relates to the present problem, past action should be taken into consideration.

Where the County believes there has been a serious offense, suspensions and/or terminations may be the first and only disciplinary step taken. Any step of the disciplinary process may be skipped at the discretion of Kenosha County after investigation and analysis of the total situation, past practice, employee's record and circumstances.

Upon taking any of these actions, the employee must be notified at that time that any continued involvement in that particular negative behavior will result in progressive disciplinary action up to and including discharge. The various levels of discipline are: verbal reprimand, written reprimand, suspensions, demotion, and dismissal.

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#### **Levels of Disciplinary Action:**

##### **Verbal Reprimand:**

A verbal reprimand defines an inappropriate action or omission which includes a warning that the incident is not to be repeated. A verbal reprimand, when required, shall be given orally by the employee's immediate supervisor. The reprimand should be given in a private meeting. Verbal reprimands must be documented for the personnel file in order to substantiate the start of progressive discipline. The documentation should be recorded on the disciplinary action form. The employee must be told clearly, as is required at other disciplinary levels, what the infraction is, how to correct the problem and explicitly inform the employee what further disciplinary action may result for failure to comply with recommended corrective action.

Verbal reprimands will remain valid for six (6) months. Examples of first offense verbal reprimands (but not limited to those listed) are:

- First late arrival (tardy) for scheduled shift

- First time extending the length of your break or lunch period
- Isolated mistake with minor consequences or a job duty is done incorrectly
- Failure to complete and submit accident and sickness benefit forms on time.

### **Written Reprimand:**

A written reprimand may follow one or more verbal reprimands issued to an employee for a repeated offense. A verbal reprimand need not precede a written reprimand. A written reprimand should be used for repetition of an offense that originally caused a verbal reprimand. Infractions of a more serious nature may be disciplined initially by a written reprimand. The written reprimand shall be issued to the employee by the immediate supervisor in a private meeting. The immediate supervisor shall inform the employee of any past verbal reprimands issued to the employee for similar infractions. The supervisor shall explain the reasons for the issuance of the written reprimand; again, suggestions for correcting the behavior are issued together with a warning of what discipline, up to and including dismissal, may be taken in the future if behavior does not improve. The department will make an offer to the employee to have a union representative present.

Written reprimands will remain valid for one year. Examples of first offense written reprimands (but not limited to those listed) are:

- Inappropriate or rude interaction with a member of the public such as a raised voice, sarcastic comments, or impatience
- Failure to show up for a scheduled shift
- Insubordination such as talking back to a member of management
- Lack of adherence to performance standards
- Repeatedly failing to complete and submit accident and sickness benefit forms on time.

### **Suspension**

A suspension is a temporary removal of the employee from the payroll. A suspension may be recommended when lesser forms of disciplinary action have not corrected the employee's behavior. Suspension may also be recommended for first offenses of a more serious nature. A suspension will remain valid for an employee's entire length of employment.

Suspensions may be imposed on an employee for repeated offenses when verbal reprimands and written reprimands have not brought about corrected behavior, or for first offenses of a more serious nature. Examples of some of the more serious infractions (but not limited to those listed) are:

- Major deviation from the work rules, including a violation of safety rules
- Having any measurable level of alcohol while on the job
- Falsification or misuse of time sheets or records
- Fighting
- Excessive absenteeism
- Theft or any form of dishonesty
- Harassment
- An incident of verbal abuse to a member of the public, co-worker, management, or an individual in the County's care, custody or control.

The number of days recommended for suspension will depend on the severity of the act. Commission of the above offenses may also result in a recommendation for discharge.

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### **KENOSHA COUNTY SEXUAL HARRASSMENT POLICY**

Harassment on the basis of sex is a violation of Section 703 of Title VII of the Civil Rights Act of 1964 and the Wisconsin Fair Employment Act. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes sexual harassment when: (1) submission to such conduct is made either explicitly or implicitly as a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive work environment.

### **POLICY**

Kenosha County, through its commitment to affirmative action, will attempt to provide a work environment free of sexual harassment for all employees in accordance with the laws of the United States and the State of Wisconsin.

Sexual harassment of employees of Kenosha County is considered unacceptable and impermissible conduct which will not be tolerated. The County deprecates such conduct as an abuse of position and authority. Whenever knowledge is received that a sexual harassment condition is being imposed, prompt and remedial action will be taken.

In accordance with the sexual harassment policy any person who believes sexual harassment has taken place may file a complaint with the Personnel Director, their supervisor or any member of management. Allegations of sexual harassment will be investigated promptly and, if appropriate, disciplinary action will be taken, up to and including discharge.

### **SEXUAL HARASSMENT POLICY**

It is Kenosha County's policy to promote a productive work environment and not tolerate verbal or physical conduct by any employee that harasses, disrupts, or interferes with another employee's work performance or that creates an intimidating, offensive or hostile environment. Employees at all times should treat other employees respectfully and with dignity in a manner so as not to offend the sensibilities of a co-worker or a subordinate employee. Accordingly, the County is committed to vigorously enforcing its Harassment Policy at all levels of the organization, including management and supervisory positions. The County and its agents forbid retaliation against anyone for reporting harassment of any kind or otherwise assisting in the investigation of a harassment complaint, or filing a charge of discrimination with a government agency. The purpose of this policy is to encourage early reporting and early intervention before conduct rises to the level of harassment in violation of this policy. It is the policy of the County to investigate all complaints of harassment thoroughly and promptly.

In that regard, Kenosha County expressly prohibits any form of unlawful harassment based on race, color, religion, sex, sexual orientation, national origin, age, disability, status as a Vietnam-era or special disabled veteran or status in any group protected by federal, state or local law. Unlawful harassment that interferes with the ability of County employees to perform their expected job duties will not be tolerated and will be met with appropriate disciplinary action, up to and including termination.

Harassment on any basis (race, sex, age, disability, etc.) exists whenever

1. Submission to, or toleration of, such conduct is made either explicitly or implicitly a term or condition of an individual's employment;

2. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting the individual's welfare; or
3. Such conduct has the purpose or effect of unreasonably interfering with an individual's welfare or work performance, or creates an intimidating, hostile or offensive work environment.

### **Definition of Sexual Harassment**

Sexual harassment means unwelcome sexual advances, requests for sexual favors, or other verbal, visual or physical conduct of a sexual nature, submission to which is made a condition of a person's exercise or enjoyment of any right, privilege, power, or immunity, either explicitly or implicitly.

Prohibited acts that constitute sexual harassment may take a variety of forms.

Examples of the kinds of conduct that may constitute sexual harassment include, but are not limited to:

1. Repeated unwelcome sexual propositions, invitations, solicitations and flirtations.
2. Stated or implied threats that a person's employment, wages, opportunities for promotion, or other conditions of employment, may be adversely affected by not submitting to sexual advances.
3. Repeated and pervasive unwelcome verbal expressions of a sexual nature, including graphic sexual commentaries about a person's body, dress, appearance or sexual activities; the unwelcome use of sexually degrading language, jokes or innuendoes; unwelcome suggestive or insulting sounds or whistles; obscene gestures.
4. Unwanted exposure to sexual graffiti, photographs, electronically transmitted images or suggestive objects that substantially interfere with an individual's welfare or work performance.
5. Unwelcome and inappropriate touching, patting, pinching or unnecessary brushes.



## **Recognizing Harassment**

Harassment may be subtle, manipulative and is not always evident. It does not refer to occasional compliment of a socially acceptable nature. It refers to behavior that is not welcome and is personally offensive. Sexual harassment can occur in a variety of circumstances, including but not limited to the following:

1. The victim as well as the harasser may be a woman or a man. The victim does not have to be of the opposite sex.
2. The harasser can be the victim's supervisor, an agent of the employer, a supervisor in another area, a co-worker, or a non-employee.
3. The victim does not have to be the person harassed but could be anyone affected by the offensive conduct.
4. Unlawful sexual harassment may occur without economic injury to or discharge of the victim.
5. The harasser's conduct must be unwelcome.

## **Complaint Procedure**

Any employee who believes he or she is being harassed, or any employee, who becomes aware of harassment, should promptly notify his or her supervisor. If the employee believes that the supervisor is the harasser, the supervisor's supervisor should be notified. If an employee is uncomfortable discussing harassment with his or her supervisor, the employee should contact the Personnel Department. The complaint procedure is attached to this policy.

Upon notification of a harassment complaint, a confidential and impartial investigation will be promptly commenced and will include direct interviews with involved parties and where necessary with employees who may be witnesses or have knowledge of matters relating to the complaint. The parties of the complaint will be notified of the findings and their options.

## **KENOSHA COUNTY SEXUAL HARASSMENT COMPLAINT PROCEDURE**

1. The complainant should present the complaint as promptly as possible with the Personnel Director after the alleged harassment occurs.

2. The initial discussion between the complainant and the Personnel Director should be kept confidential, with no written record. Only those persons responsible for investigating and enforcing civil rights matters will have access to confidential communications.
3. The Personnel Director has the authority to make a good faith effort to resolve the complaint through informal processes at this stage. There may be cases that can be resolved through efforts of mediation and for which the alleged offender apologizes for her/his actions etc.
4. If the complainant, after the initial discussion with the Personnel Director, decides to proceed, the complainant should submit a written statement to the Personnel Director.
5. The Personnel Director then informs the alleged offender of the allegation and of the identity of the complainant in writing. A copy of this is sent to the complainant. Efforts should be made to protect the complainant from retaliatory action by the person(s) named in the complaint.
6. In the event that an employee within the Personnel Department is named in the complaint, said complaint shall be filed with one of the alternate Equal Employment Opportunity Officers designated by the County Executive who are: the Director of the Division of Workforce Development and the Director of the Division of Children and Family Services.
7. The Personnel Director or alternate will investigate the complaint and prepare findings within thirty (30) working days after receipt of the written complaint.
8. All findings shall be presented for approval to the County Executive before being released to the complainant.

**KENOSHA COUNTY SHERIFF'S DEPARTMENT POLICE  
AND PROCEDURE MANUAL**

**HARASSMENT IN THE WORKPLACE, POLICY NUMBER 157**

**I. PURPOSE**

To maintain a healthy work environment and to provide procedures for reporting, investigating and resolving complaints of harassment, sexual or otherwise.

## II. POLICY

It is the policy of the department that all employees have the right to work in an environment free of all forms of harassment. The department does not condone and will not tolerate any harassment. Therefore, the department shall take direct and immediate action to prevent such behavior and to remedy all reported instances of harassment, sexual or otherwise.

## III. DISCUSSION

The workplace is not always a bastion of civility. A certain amount of joking, brusque behavior, and foul language will always exist, but this type of action should not be allowed to degenerate into unwelcome discriminatory acts.

People have unusual ways of showing friendship and camaraderie, and friendly banter often arises between employees that may carry sexual or racist overtones. Where such banter is not found offensive by the parties present there is no actionable harassment. The key is whether all the parties find such banter objectionable. It becomes harassment when one of the parties finds the banter repeatedly offensive and unwelcome.

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## V. PROHIBITED ACTIVITY

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4. **Sexual Harassment:** Sexual harassment is a particular type of behavior to which either sex can be subjected. It includes sexual remarks and innuendo, unwelcome sexual advances, unwelcome physical contact of a sexual nature, or unwelcome physical or verbal conduct of a sexual nature. Unwelcome verbal or physical conduct of a sexual nature includes, but is not limited to, the deliberate, repeated making of unsolicited gestures or comments, or the deliberate, repeated display of offensive sexually graphic materials which is not necessary for business purposes.

- a. Different types of sexual harassment
  1. **Quid Pro Quo harassment:** An employee is given the message, either explicitly or implicitly, that employment decisions, conditions or terms will be affected based on whether the employee submits to or resists sexual advances or conduct.
  2. **Hostile work environment harassment:** The employee is subject to sexual conduct that interferes with his or her work performance or that creates an offensive or intimidating environment. Harassing conduct can be verbal, non-verbal, or physical in nature.
  3. **Third party harassment:** Anyone in the workplace not being directly harassed but who is affected by the behavior may be a victim. If the conduct is offensive and affects another in the same work environment, that third party – who is not the direct target of the behavior – may have a sexual harassment claim.

## VI. SUPERVISOR RESPONSIBILITY

- A. Each supervisor will be responsible in helping to prevent acts of harassment in the workplace. These responsibilities include:
  1. Monitoring the work environment on a daily basis for signs that harassment may be occurring.
  2. Counseling employees on the types of behavior prohibited, and the department's procedures for reporting and resolving complaints of harassment.
  3. Stopping any observed acts that may be considered harassment, and taking appropriate steps to intervene, whether or not the involved employees are within his/her line of supervision.
  4. Taking immediate action to limit the work contact between two employees where there has been a complaint of harassment, pending investigation.

- B. Each supervisor has the responsibility to assist any employee of the department who comes to that supervisor with a complaint or harassment. That supervisor will assist the employee in documenting and filing a complaint for an internal investigation.
- C. Failure to take action to stop known harassment shall be grounds for discipline.

#### **VII. EMPLOYEE'S RESPONSIBILITY**

- A. Each employee of the department is responsible for assisting in the prevention of harassment through the following acts:
  - 1. Refrain from participation in, or encouragement of, actions that could be perceived as harassment.
  - 2. Report acts of harassment to a supervisor.
  - 3. Encourage any employee who confides that they are being harassed to report these acts to a supervisor.

#### **VIII. COMPLAINT PROCEDURE**

- A. Employees encountering harassment shall tell the person that their actions are unwelcome and offensive. The employee shall document all incidents of harassment in order to provide the fullest basis for an investigation.
- B. An employee who believes that he/she is being harassed shall report the incident(s) to his/her supervisor as soon as possible so that steps may be taken to protect the employee from further harassment, and appropriate investigative and disciplinary measures may be initiated. Where this is not practical the employee may instead file a complaint with another supervisor, or with the Chief Deputy or the Sheriff.
- C. The Supervisor will contact the Office Manager to obtain an Equal Employment Opportunity Complaint form.

- D. The employee shall complete the Equal Employment Opportunity complaint form within fifteen (15) days of the alleged occurrence. The complaint form will then be turned into the Office Manager who will forward it to the Personnel Office in care of the EEO Coordinator.
- E. The EEO Coordinator or designee will investigate the complaint and prepare findings within thirty (30) working days after receipt of the written complaint.
- F. All findings shall be presented for approval to the Sheriff, or in his absence the Chief Deputy, before being released to the complainant.
- G. All complaints shall be responded to no later than ninety (90) days from the date of filing. A written determination as to the validity of the complaint and a description of the resolution, if any, shall be issued by the County EEO Coordinator and a copy forwarded to the complainant. A copy of the final findings and decision shall be provided to the Administration Committee of the County Board.
- H. It is the complainant's right to simultaneously file a claim with the Equal Rights Office, a division of the Department of Industry, Labor and Human Relations, which is charged with enforcing the Wisconsin Fair Employment Law.
- I. A complaint must be filed within 300 days of the harassing action. Filing later than the deadline will act as a bar to the alleged victim's sexual harassment claim.

### FACTS

The Employer is Kenosha County and its Sheriff's Department. The Sheriff's Department operates two correctional facilities, one of which is the Kenosha County Detention Center. The Union represents rank and file employees at the KCDC. Grievant Randy Julius is a Direct Supervision Officer (herein "DSO") who works at that facility and a member of the bargaining unit. It is his responsibility to directly supervise inmates. He is ordinarily assigned to do so at a pod. Part of his job is to maintain an appropriate demeanor in front of inmates and to model appropriate behavior.

The Sheriff's Department does not employ medical professionals. It contracts with Kenosha County Visiting Nurses Association, a private employer, to provide those services at

the KCDC. The complaining nurse, H, is a LPN employed by them. She graduated as an LPN about two and one half years prior to the hearing in this matter. Thereafter, she was one of two LPN's assigned by them to the KCDC. She normally works 12 hours per day, 36 hours per week.

One of DSO Julius' responsibilities is to watch inmates in a "pod" and, in part, to line them up to receive their medications at the appropriate time. He also assists in supervising inmates while receiving treatment by the LPN's. There is frequent contact between contracted nurses and DSO's.

H testified as follows to what occurred. Shortly after she started, she stated that DSO Julius was in the habit of telling her every time he saw her that she "smelled so good." This occurred on a regular basis. At first, she tried to laugh it off, but this persisted. On a daily basis he would pretend to take a "whiff" of her. On occasions he would seek her out and do this. He also frequently told her that she had a nice buttocks and that she moved it in a very feminine manner, swaying from side to side, when she walked. This also persisted. Over time she began to feel very awkward and intimidated. He tended to make comments of this nature in front of fellow employees and sometimes in front inmates. This continued to escalate over the year prior to the incident on June 1, 2009. As it escalated, he would seek her out, invade her personal space and pretend to "sniff" her. Her written statement, but not her testimony indicated that she had told him to "cut it out."

On June 1, 2009, she was at work and walked down a hallway. DSO Julius was in the hallway talking to co-workers and within earshot of nearby inmates. He loudly stated as she went by: "Hey, you shouldn't shake it that way." He and the other employees with him laughed. This upset her very much. One of the other DSO's in that conversation, DSO B at that time then started to repeatedly loudly say "dink, dink" in rhythm to her walking.

She went back to her office and considered her options. That evening she went to the pod where DSO Julius is assigned to perform her duties. This was very difficult for her. She directly told him that she was angry about the actions specified in the paragraph above and that she wanted him stop his comments of this nature. She then left and when she looked back she saw him press his body to the glass divider and stare in the direction of her buttocks. She concluded that DSO Julius would not voluntarily stop his behavior.

The next day she talked to her supervisor, who reported the matter to the CEO of Kenosha Visiting Nurses Association, who took the steps described below in her presence. After she reported this incident, the DSO's would not talk to her and often commented loudly to each other for her to hear that they should not talk to her or she might file a sex harassment complaint.

H's supervisor called Lt. Puidokas, the second level supervisor of DSO Julius. She told him that H wanted to just make sure the harassment stopped and was hoping to handle the

matter informally. Lt. Puidokas e-mailed Cpl, Levonowich who was then Julius' immediate supervisor and about "what was appropriate conduct in the work place and stated that the complaint was informal at this time. Neither Lt. Puidokas, nor Cpl. Levonowich was aware that any other complaint was going to be made to others.<sup>2</sup>

Cpl. Levonowich responded the next day by going to the lunch room where DSO Julius was socializing with DSO Jay DeBoer, a Union Steward. He asked to meet separately with DSO Julius. The steward asked if DSO Julius would need Union representation to which Cpl Levonowich said no. When they were alone, DSO Julius asked if he would need Union representation and Cpl. Levonowich stated that this was just an informal matter. It is unclear if DSO Julius persisted in his request for Union representation. No Union representative was brought into the meeting. He did not give DSO Julius a GARRITY warning, but proceeded to ask him if there had been an incident between him and H. the previous day to which DSO Julius acknowledge the comment about H's posterior, but asserted that he did not believe at the time she was able to hear it. It was one of the prime purposes of the meeting to inform DSO Julius to stop his behavior. This was done. In accordance with his normal practice Cpl. Levonowich wrote a "Performance Review" which he gave to DSO Julius, kept a copy in his file supervisory file and forward a copy to the Lt. Puidokas. Lt. Puidokas noted that a copy would be placed in DSO Julius evaluation file which is not the same as his personnel file (disciplinary) file

At about the same time the CEO from KVNA called both Sheriff David Beth and Personnel Director Robert Reidl on or about June 2, 2009 She stated that among other things that H might file a lawsuit. Normally, the Sheriff is not involved in discipline. However, he decided to act because he had been contacted. In response Sheriff Beth, in consultation with Personnel Director Riedl decided to start a criminal investigation. DSO Julius was placed on administrative suspension with pay later that day. Two detectives were involved. They interviewed H first and determined the complaint would not warrant criminal prosecution. They then interviewed DSO Julius and told him that the matter was not criminal. They asked if he wanted a Union steward and CSO Julius then declined.

DSO Julius was suspended for one day. He filed the subject grievance which was properly processed to arbitration.

### **POSITIONS OF THE PARTIES**

#### **Employer**

The Employer had proper cause to discipline Julius with a one day suspension. DSO Julius' conduct in repeating comments about female employee H's anatomy in front of other staff and in front of inmates after he was told to stop constitutes sexual harassment. It violates

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<sup>2</sup> When Lt. Puidokas later learned that a formal complaint had been filed, but unsuccessfully attempted to contact Cpl. Levonowich before he talked to DSO Julius



the County's policy against sexual harassment stated in Report 139 and it also violates the Sheriff's own policy against sexual harassment. The latter policy specifically requires employees to stop sexual banter when requested to do so. The Employer has proper cause to discipline for this conduct. The Union does not seem to have an issue with respect to the fact that this conduct merited discipline under the Employer's sexual harassment policy, but appears to challenge the severity of the penalty. While the Employer does maintain a progressive discipline policy which calls for warning, the policy provides that more serious situations may call for more serious discipline. It specifically lists sexual harassment as a more serious offense. Harassment involves bullying and affects the whole work place. The Union has characterized this conduct as part of the joviality and banter of the workplace. Nonetheless, the Sheriff must exercise his authority and intervene when the "play" intimidates an individual.

Julius' comments merit more severe discipline. His comments increased in intensity. It was intended to, and did, have the effect of humiliating her. Under the classic tests of sexual harassment it merits more severe discipline.

As to the alleged procedural violation, the agreement requires that a Union representative is to be present "when an employee is being disciplined or discharged." The agreement was not violated when Cpl. Levonowich met with Julius. While there was some confusion as to whether there was a formal or informal investigation, Cpl. Levonowich was directed to "talk" to DSO Julius, which he did. This is informal "counseling" which is not subject to the foregoing provision. Cpl. Levonowich was not part of the formal investigation that was conducted by others. There is no dispute that Julius had Union representation throughout that formal process. The grievance should be denied in its entirety.

### Union

DSO Julius meant his comments that the complaining nurse "smelled nice." DSO did make one comment about her buttocks to another employee in her presence. These comments were intended as compliment. DSO Julius's other comments were not directed to the complaining the nurse. All of this was in the context of common sexual innuendo in this work place.

Applying the Seven Tests, DSO Julius was treated differently than DSO B who also made comments but he was not disciplined. Thus, this is not equal treatment and the discipline should be set aside on this basis.

DSO Julius was also denied Union representation twice in the investigatory stage in violation of his *Weingarten* rights. This occurred first with the interview with the corporal and then, again, in the interview by the deputies. The deputies incorrectly identified the investigation as a criminal investigation rather than a disciplinary investigation. The reports show that it was never a criminal investigation. DSO Julius asked for union representation in both interviews. Under the circumstances this should void the discipline.

Arbitrators look at four factors in sex harassment cases; 1 Frequency of the conduct, 2 severity of the conduct, 3 whether the conduct is physical or verbal, 4 whether the conduct unnecessarily interferes with the complainant's work performance. Although the conduct seemed to occur on a semi frequent basis, it was not severe, physical, or of the type that interfered with her work performance. The talk should be considered shop talk.

Both the Sheriff's Department and the County have sexual harassment policies which provide for certain steps to be followed. None of those steps were followed. Instead the County disciplined him. It could have worked with the nurse's employer.

The penalty of a one-day suspension is inappropriate even if the Employer had just cause to discipline DSO Julius. This was his first instance of misconduct involving sexual harassment. As such it should have been an oral reprimand. The Union does not disagree that sexual harassment is a significant issue in the workplace, but it would contend that not every instance of sexual harassment amounts to skipping steps in the progressive discipline process. DSO Julius' conduct was not intended to harm the nurse and was simply every day conduct in the jail. As such at most a written warning was appropriate.

The Union notes that the reason that the facts are not seriously in dispute is that DSO Julius has admitted to the majority of the allegations made against him. The few things in dispute are whether the nurse ever told DSO Julius to stop his comments and whether he ever pressed his face against a glass pane when the nurse walked away. As he admitted to the majority of the allegations, it seems odd that he would lie about these. The Union asks that the grievance be sustained and that DSO Julius be made whole for all lost time and benefits as a result of this suspension.

## DISCUSSION

### *1. Credibility and Inferences*

DSO Julius testified in this proceeding. He acknowledged that he did make comments about H's posterior and about how nice she smelled. He denied that she ever told him to stop and denied that the exchange on June 1 in which H allegedly told him to stop ever occurred. He alleged that he did not know the conduct hallway comment about "shaking it" was offensive to her and that he only intended to be flirtatious and friendly. He suggested that the two had a "relationship" through Facebook outside of work.

I find that H's testimony is entirely credible. I find DSO Julius' response insincere and evasive. Specifically, he admitted those things for which he might have gotten caught not telling the truth and denied the final incident because it occurred in private. He minimized his conduct. There is a difference between H's written statement and her testimony in that only in the written statement did she say she had previously told DSO Julius to "cut it out." This appears to be a result of her nervousness in testifying in this proceeding. I conclude that she

had previously told DSO to “cut it out.” In view of the difficulty she had in confronting DSO Julius on June 1, it is not likely she did so very forcefully prior to the June 1 date. I also conclude that there was no significant contact between the two outside of work. It is unclear whether DSO Julius offered the “relationship” statements to hide his conduct or whether he believed a “relationship” existed. If he did believe that one did exist, it existed only in his mind.

The testimony of H demonstrates a pattern of behavior which was more than merely flirtatious, but an intense pattern consciously intended to break down her defenses to this type of behavior and essentially subjugate her to further and increasingly more direct action. This is not a case of mere differences of perception, but an intentional course of conduct. The foregoing is demonstrated by the fact that the behavior increased in intensity over time, involved seeking her out and isolating her with his “sniffing,” and repeated comments about her anatomy. It is unclear how much of this was done in front of inmates and fellow employees, but there was at least some in front of inmates and fellow employees. The conduct was at a level that no reasonable male could believe that his conduct was wanted. H’s testimony of the June 1<sup>st</sup> comment incident is clear. She testified that DSO Julius shouted to her: Hey, you shouldn’t shake it like that.” DSO Julius characteristically minimized this by falsely testifying that he was not talking directly to her and did not know she could hear him. This was done in front of other employees and in the presence of inmates. Thus, it was intended to leave her with a feeling of isolation and helplessness.

## 2. *Shop Talk*

One of the Union’s defenses in this case is that the conduct was part of “shop talk.” Without endorsing that conduct at all, the evidence including H’s testimony indicates that there is some sexual innuendo and commenting that occurs with some frequency in this work place. That behavior with sexual overtones is risky behavior. In any event, this circumstance is readily distinguished from “shop talk.” This was directed to H and DSO Julius went out of his way to find her and engage in this conduct. It was personal and unmistakable. By contrast, DSO B’s behavior was in extremely poor taste. Yet, it was isolated and thoughtless. The two are not at all comparable.

## 3. *Failure to Follow Sex Harassment Procedure*

H was not a direct employee of the Employer. The Employer could not directly apply either of its sex harassment procedures, the County’s or the Sheriff’s own policy. In any event, both policies reserve discretion to the Employer in handling these matters to protect the complainant. The Union correctly points out that neither of the two separate procedures were instituted. This is highly problematic. Nonetheless, the Employer has an obligation to take action to protect the complaining employee and a reasonable part of that function is to inform the offending employee of the existence of a complaint and to direct him or her as to how he or she should conduct him or herself while the complaint is pending. This was the essence of Cpl. Levonowich’s meeting with DSO Julius. Even though there may have

been technical flaws in how the matter was handled, it was in substantial compliance with the sex harassment procedures.

3. *Inconsistency with Progressive Discipline Policy*

In addition to the Union's argument that the discipline imposed was inconsistent between DSO B and DSO Julius, the Union argued that the Employer violated its progressive discipline policy by skipping steps to a one day suspension. The policy itself lists "harassment" as a more serious violation requiring a one-day suspension for the first offense. I have concluded that DSO Julius' behavior was not the product of differences in perception between males and females, but a course of conduct in which he intended to isolate and humiliate H. This conduct merits more severe discipline for the first offense under that policy.

4. *WEINGARTEN Rights*

The Union has raised a number of WEINGARTEN rights issues which in another context might be more worthy of note. Article 3, Section 3.5 provides that: "When any employee is being disciplined or discharged, there shall be a Union representative present." In *NLRB v. WEINGARTEN, INC.*, 420 US 252 (1975), the Supreme Court recognized a right of individual employees to request the presence of a union representative during an interview which was reasonably likely to result in discipline. The WERC has recognized essentially this same right under MERA in *CITY OF MILWAUKEE*, DEC. No. 13558-C (WERC, 5/76). This right may be incorporated into a collective bargaining agreement, *WSEU v. WERC*, CASE NO. 92 CV 1444 (Dane Co. Cir. Ct, 4/93) on review of WERC DEC. NO. 26739-C. The Union has raised a serious question as to whether the Employer violated DSO Julius' rights to have a Union representative present during the Sheriff's internal investigation of this matter. The facts are disputed. The Union raises these issues essentially for the purpose of seeking a reduction in the level of discipline. It is not necessary to address that issue more fully because under the circumstances of this case, any such failure would not affect the results herein. First, a one day suspension would have been imposed by the Employer solely upon H's statement had DSO not been interviewed. Second, DSO Julius' incredible testimony and his attitude demonstrate that he is still engaged in a test of wills with H. Any action short of sustaining the discipline imposed would unnecessarily denigrate the seriousness of the misconduct. Accordingly, the grievance is denied.

**AWARD**

That grievance filed herein is denied.

Dated at Madison, Wisconsin, this 19<sup>th</sup> day of November, 2010.

Stanley H. Michelstetter II /s/  
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Stanley H. Michelstetter II, Arbitrator