BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

AFSCME LOCAL 990C, WISCONSIN COUNCIL 40, AFL-CIO

and

KENOSHA COUNTY

Case 298
No. 70650
MA-15007

Appearances:

Attorney Nick Kasmer, Staff Representative, AFSCME Local 990C, Wisconsin Council 40, AFL-CIO, Southeastern District, P.O. Box 580734, Pleasant Prairie, WI 53158, appearing on behalf of the Courthouse and Social Services Clerical Union.

Attorney Lorette Pionke Mitchell, Kenosha County Courthouse, 912 56th Street, LL13, Kenosha, WI 53140-3747, appearing on behalf of Kenosha County.

ARBITRATION AWARD

Pursuant to the terms of a collective bargaining agreement (CBA) between Kenosha County and Local 990, AFSCME, Council 40, AFL-CIO (the Union), the parties selected the undersigned from a panel of arbitrators provided by the Wisconsin Employment Relations Commission to hear and resolve a dispute between them. The dispute involves whether the County breached the CBA by ordering the Grievant to submit to a fitness-for-duty evaluation (FFDE or psychological evaluation). A hearing in the matter was held on October 21, 2011, in the Kenosha County Administration Building, 1010 56th Street, Kenosha, Wisconsin. No formal record of the proceedings was taken. The parties filed written briefs, the last of which was received on December 9, 2011.

STIPULATED ISSUES

The parties stipulated in writing to two issues:

1) Did the County violate the CBA when it ordered [the Grievant] to obtain a fitness for duty evaluation in 2010?

2) If so what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

The relevant contract language includes the following:

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. . . .

. . .

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. . . .

. . . Should any action on the part of the County become the subject of arbitration, such described action may be affirmed, revoked, [or] modified in any manner not inconsistent with the terms of this agreement.

. . .

ARTICLE XII – ACCIDENT AND SICKNESS PAY MAINTENANCE PLAN

. . .

Section 12.4. Injury or Illness on Job. If any employee appears to be injured or ill while on the job, or there is reason to believe that an employee needs medical attention, his supervisor shall have the right to require the employee to furnish a statement from a licensed physician before returning to work that the employee is capable of performing the work required by his job. The County shall send such employee to the doctor at its expense on working time.

. . .

FACTS

Overview of Grievant's Employment with Kenosha County

The Grievant has been a full-time employee of Kenosha County since January of 2005. As of approximately April, 2010, she has held an Office Associate position in the Kenosha County Sheriff's Department. In that capacity, she has worked in civil process and as a relief clerk. Her job duties and responsibilities are primarily secretarial and clerical in nature. Her job description states in part:

OFFICE ASSOCIATE
CLASSIFICATION SPECIFICATION

GENERAL STATEMENT OF DUTIES: *The purpose of this classification is to perform a variety of clerical and secretarial duties* to support a department, division, or program.

DISTINGUISHING FEATURES OF THE CLASS: Under general supervision, *performs a variety of routine with some moderately complex clerical and secretarial functions* which may include word processing or data entry of a variety of moderately complex documents; scheduling appointments; providing assistance to the public; preparing vouchers and requisitions for payment; drafting routine correspondence as directed; transcription from a recorded source and considerable record-keeping responsibilities.

The distinguishing characteristics of this classification are work within the clerical series which involves performance of a variety of routine with some moderately complex clerical and secretarial tasks; performed in accordance with department policies and procedures and federal and state regulations; requiring the exercise of judgment and the application of procedures and regulations to routine matters. Work in this class allows limited independence of action and requires a correspondingly high degree of accuracy. Requires knowledge of procedures and terminology pertinent to the department.

ESSENTIAL JOB FUNCTIONS: (This is a list of representative tasks performed in positions within this classification. A single position may not include all of these tasks, nor do these examples include all tasks which may be found in this classification).

- *Performs general secretarial and clerical duties for department or program area* such as typing/word processing letters, reports, memos, meeting minutes, and other documents; may draft letters from general instructions.

- Assists the public, clients or citizens requesting information or service provided by the program assigned either over the telephone or in person; answers questions regarding the department or program and provides forms, applications, and other information.

- Answers the telephone and contacts clients, parties and others to relay or gather information.

- Compiles data and prepares a variety of reports and records for assigned program area.

- Prepares vouchers and requisitions for payment.

- Schedules hearings and makes appointments.

- Performs cashier duties including receiving money and writing receipts.

- Maintains clerical and bookkeeping records and prepares reports.

- Attends meetings, transcribes from a recorded source as required.

- Maintains inventory and related records and may order supplies.

- Performs other duties as required or assigned.

(Italicized print added for emphasis.)

Grievant's Personal Relationship with Inmate

The Grievant had a relationship with an individual who, in August 2009, was incarcerated by Kenosha County, and this relationship influenced her conduct for which she was suspended and on which the FFDE was based.

As of the hearing date, she had known the inmate for approximately fifteen years. At some point during that period, she became involved in a personal relationship with him that lasted approximately two to three years. During part of this relationship in 2008, they lived together. The inmate developed a close relationship with the Grievant's daughter, who referred to him as "daddy", even though he was not her biological father.

The Grievant's relationship with the inmate changed in September 2008, when the Grievant discovered items in their home that did not belong to her. At that time, she reported these items to the Kenosha County Sheriff's Department, gave a statement about the items to a

Detective, and turned the items over to the Detective Bureau. Further investigation revealed that the items had been stolen from homes. Within a week of the Detective's interview of the Grievant, the latter informed the Detective that the inmate had left Wisconsin and was believed to be in California; therefore, a warrant for his arrest was issued. In July 2009, authorities from the Scottsdale, Arizona Police Department apprehended the inmate and requested that the Kenosha Sheriff's Department confirm the warrant and extradite the inmate. In August 2009, the inmate was extradited from Arizona to Wisconsin, and he was booked in the Kenosha County jail on August 11, 2009. On or about August 17, 2009, the Grievant was served with a subpoena to appear in court on August 19th to testify in the criminal case against the inmate. The developments described above were emotionally challenging and confusing for the Grievant, especially because of the close relationship that the inmate had had with her daughter.

During the inmate's incarceration, the Grievant both called and visited him multiple times while off work. She placed approximately 85 telephone calls to him from January 2010 to April 2010, and she visited him approximately 14 times from the time he was first incarcerated (August 2009) to the beginning of Kenosha County's investigation of the Grievant's actions in April 2010. She disclosed her desire to, and obtained prior permission from, her employer to visit him. Moreover, her telephone calls were recorded, and an automated message informed her as much prior to each call.

The Grievant's telephone calls and visits to the inmate were financially and emotionally taxing. The Grievant paid a flat fee and a per-minute charge for the telephone calls. Most of these calls reached the 15-minute limit. She also deposited money to the inmate's commissary account (allowing him to purchase various sundries such as toiletries and snacks.) At times during their telephone discussions, the Grievant discussed the possibility of moving to Arizona with him, but she maintained at hearing that she never actually would have done so. Sergeant Benn perceived the telephone conversations as becoming progressively more angry and volatile, and during some of them, the inmate called the Grievant demeaning names. Both Sergeant Benn and Office Manager Brumback characterized the inmate's conduct toward the Grievant during some of the calls as emotionally abusive. In a conversation in early May, the inmate even threatened physical harm to the Grievant upon his release.[1] The Grievant, for her part, made comments that Sergeant Benn interpreted as suggesting that the Grievant might harm herself.[2]

[1] Because the recordings of the phone conversations were never proffered as evidence, Mr. Benn's and Ms. Brumback's perceptions and characterizations are based on hearsay. I nonetheless believe that they testified honestly about their perceptions. I also believe that the inmate did call the Grievant demeaning names and threatened her with physical violence. Such testimony was unrebutted; in fact, the Grievant herself expressed concern about the inmate's threats during her meeting with Mr. Benn and Ms. Brumback on May 4, 2010 (discussed further below).

[2] For example, Sergeant Benn testified that the Grievant told the inmate during one conversation, "I'll see you in another life", or words to that effect.

Grounds for Discipline: Grievant's Unauthorized Usage of Work Computer

During the period beginning just prior to the extradition of the inmate in August 2009 and continuing while he was incarcerated until April 7, 2010, the Grievant used the County computer system in an unauthorized manner to "run out" the inmate – *i.e.*, to run criminal history checks on him in various states in which the Grievant knew or suspected he had been. More specifically, the Grievant accessed the TIME system on the following dates and at the following times:

- 08-04-09 at 0844 hours
- 10-27-09 at 1415 hours
- 12-03-09 at 1542 hours
- 12-09-09 at 1616 hours
- 04-07-10 at 1608 hours

The TIME system (Transaction Information for Management of Enforcement System) automatically returns information from the Department of Transportation, the CIB (Wisconsin Criminal History), the NCIC (nation-wide warrant check), FBI files, and NLETS (intrastate crime information). Prior training and certification is required to use the system, and using it for personal reasons (as did the Grievant) is prohibited.

In addition to accessing the TIME system, on March 10, 2010, the Grievant accessed without proper authorization work-crew files containing *inter alia* a list of those inmates waiting to be granted work-crew privileges, including the inmate with whom the Grievant was in communication. By accessing the work-crew waiting list file, the Grievant locked out a deputy who was legitimately attempting to access it. This computer lock out prompted an email inquiry to Office Manager Brumback regarding why the Grievant had been accessing the file. The following day, March 11, 2010, Ms. Brumback, in turn, asked the Grievant to explain why she had accessed the file. The Grievant gave a technical explanation that she had been missing icons on her computer, and that this presented problems while she was attempting to obtain a distribution list for another employee. At the time, Ms. Brumback found this explanation to be plausible.

Events Leading to, and Including, Suspension and Mandate for FFDE

On or about April 7, 2010, the Grievant was alleged to have made a comment regarding two fugitives publicized in a recent press release, which led Pam Brumback to believe that the Grievant may have "run out" their names on the TIME system. When she expressed her concern to Sergeant Benn the following day, he had the Records Department run an audit of the Grievant's computer usage, which disclosed that the Grievant 1) had not run out the fugitives, but 2) had run out the inmate with whom she had a personal history on the five occasions listed above. This new information not only caused concern about why she was running criminal history checks on an inmate with whom she had a personal connection but also aroused suspicion that the Grievant had not been entirely forthright when asked on March 11th why she had accessed the work-crew list. Accordingly, the issue of why the Grievant had

accessed the work-crew file was revisited, and she admitted that she had looked up information on the inmate – a detail that she had omitted from her explanation on March 11th.

The Grievant was thus asked *via* memo dated April 14, 2010, to answer four questions regarding each of the five occasions on which she had used the TIME system to run out the inmate: 1) which supervisor had given her the assignment to run the criminal history for the inmate; 2) what the purpose had been for running the history; 3) whether she had divulged verbally or in writing, any of the information she had obtained; and 4) where the hard copies of the criminal history checks were located. On April 16, 2010, the Grievant turned over the hard copies of the searches to the County. Moreover, in a letter bearing the same date and presented to Sergeant Benn on April 19th, the Grievant responded in part by admitting having run the five above-listed criminal history checks. However, she denied that she had divulged any of the information obtained from them (and no credible evidence suggests otherwise). In her written response, she added that she never had been instructed by a supervisor to run the checks, but rather had done so "[d]ue to prior and emotional involvement" with the inmate relating to the bond he had established with her daughter. Her response continued in part as follows:

> In July 2009, I discovered [the inmate] had been arrested for the burglaries. At this time my emotions got the best of me. I now had to face him, his court case and personal emotions. Even though time has passed, my daughter still asks for daddy and wants to see him more than anything; that becomes an emotional challenge for me. I can not accept his actions, but I hurt knowing my daughter won't have her daddy. As previously stated, due to prior and emotional involvement, I ran the above Criminal History checks. I did this to see if [the inmate] had warrants anywhere and I thought it would help me cope, deal with the situation and provide closure to what we previously had. . . .

After receiving this response, Sergeant Benn and Office Manager Brumback reviewed visitation logs and select excerpts from phone calls between the Grievant and the inmate around the dates when the Grievant had run the criminal histories to determine whether the Grievant had disclosed any of the information she had acquired from those queries. Neither Mr. Benn nor Ms. Brumback was able to detect any disclosure by the Grievant of any such information to the inmate. From the recordings, however, Sergeant Benn concluded that the relationship was emotionally abusive, and, as noted above, perceived the calls as becoming progressively more angry and volatile from January to April of 2010.

Because the Grievant's response in her April 16 letter appeared somewhat vague and unclear to Benn, and because he perceived some correlations in time between her visits and calls to the inmate, on the one hand, and her TIME system queries, on the other, a meeting was scheduled with the Grievant on May 4, 2010. Sergeant Benn, Office Manager Brumback,

and the Grievant attended. The latter appeared at this meeting without union representation, even though she was advised that she could have it.[3] During the meeting, the Grievant admitted to running the five criminal histories and withholding information regarding her access of the work-crew files in March 2010. She also expressed concern regarding what might happen when the inmate was released from jail. Mr. Benn and Ms. Brumback discussed options including obtaining a harassment restraining order and seeking counseling. The Grievant responded that restraining orders are only so good and that she was checking into counseling for her daughter and attempting to set up an appointment for herself. During this meeting, the Grievant was emotional and cried.[4] The Grievant requested and was granted casual time for the remainder of the day.

On May 7, 2010, the Grievant was placed on administrative leave with pay and restricted from Sheriff's Department access pending further notice. In a memorandum to Captain Apker dated May 13, 2010, Sergeant Benn and Office Manager Brumback presented a summary of their findings, including a description of the Grievant's five unauthorized criminal history checks and access of work-crew files, her volatile relationship with the inmate, and the events leading to their recommendation for discipline. They concluded that the Grievant had violated various policies and work rules and further opined:

> It is questionable that [the Grievant] will be able to function in her current assignment due to a lack of trust and confidentiality concerns. Lisa has repeatedly shown an inability to control her inappropriate interest in the confidential records of others. This is demonstrated by her repeated Criminal History queries on five separate occasions, and her unauthorized access to a number of Work Crew files.
>
> She states closure is her reason for these acts. However, closure is an implausible excuse as she accessed those records five times over a period of nine months. This clearly demonstrates her disregard for Sheriff's Department protocols concerning confidentiality. These deficiencies point to a real concern for future officer safety issues.
>
> It is our strong recommendation that [the Grievant] transfer to a different County Department outside of the Sheriff's Department.
>
> Disciplinary recommendation:

[3] The Grievant responded to the County's advice by stating that she did not want union representation unless termination or criminal charges were possible. The County replied that the meeting was to ask questions regarding the April 16 written response that she had provided and to get clarification. Whether, in light of these communications, the County should have rescheduled the meeting to afford her union representation is beyond the scope of this Award.

[4] The Grievant also became emotional and cried during the hearing.

- Unpaid fifteen (15) day scheduled workday suspension
- Independent psychological evaluation.

Assistant Personnel Director Diane Yule (now Diane Leiting) consulted with Sergeant Benn and Office Manager Brumback and concurred with the proposed discipline, including the requirement that the Grievant undergo an independent psychological evaluation (FFDE). All

discipline must be approved by either Ms. Leiting or the Personnel Director. Ms. Leiting did not listen to the recorded phone conversations between the Grievant and the inmate but conferred with Sergeant Benn about them. She also had previous familiarity with the Grievant, because she had been involved in hiring the Grievant full time. Moreover, the Grievant's father had been Ms. Leiting's son's fifth-grade teacher, and Ms. Leiting credits him as contributing to her son's success.

A Notice of Pre-Disciplinary Hearing dated May 13, 2010, from Captain Apker to the Grievant apprised the latter of a hearing to be held on May 19, 2010, advised her of her right to have a representative present at the meeting, and recommended discipline. The notice quoted the Kenosha County and Sheriff's Department rules that the Grievant was charged to have violated, but it did not specify the Grievant's acts or omissions on which the County based its conclusion that she had violated those rules. The County summarized its charges and quoted the allegedly violated work rules as follows:

1. Violating Kenosha Sheriff's Department Policy #165 Department Work Rules

   II. Work Habits

      K. An employee shall not restrict the amount of work he/she can perform, interfere with others in the performance of their work, or engage or participate in any interruption of work.

   III. Deportment

      C. Employees will not give false testimony, fabricate, withhold, alter, or destroy evidence, nor will they falsify or withhold information from any official report, whether verbal or written, nor fail to perform duties prescribed by law.

   V. Use of Property and Equipment

D. Unauthorized use of County property or equipment including, but not limited to, vehicles, telephones, cell phones, recording devices, computers, or mail service.

2. County Work Rule

Work Habits

12. Employees shall not give any incomplete, misleading or false information of any kind. This includes, but is not limited to, records, time cards, absences, time off, incident, accident, injury or illness records.

21. Employees must comply with all federal or state codes, local ordinances, and regulations that govern their respective departments.

23. County telephones, electronic e-mail and other types of communication devices are to be used for conducting County business and are to be used in a professional manner. Employees shall not use such equipment for personal business without supervisory permission. Long distance calls even in emergency situations must be paid for by the employee.

The notice recommended discipline as follows:

As a result of the above listed infractions of the rules of the Sheriff's Department and of Kenosha, the following is recommended:

- Independent psychological evaluation[5]
- Unpaid ten (10) day scheduled workday suspension

On May 19, 2010, by agreement with the Union, the Grievant was issued a ten-day suspension without pay; however, the Union contested the requirement that the Grievant undergo an FFDE. The last day of the Grievant's ten-day suspension was Friday, June 4th, and she was allowed to return to work the following Monday, June 7th. However, her access to the TIME system was suspended. In addition, at the County's request, I.S. personnel made technical adjustments to allow only necessary users access to the work-crew files.

[5] The entire notice was typed, with the exception of the bullet point, "Independent psychological evaluation", which was hand-written, presumably at a later date.

Although the Grievant was allowed to resume work, as a condition of her continued employment, she was required to, and did, undergo an FFDE on May 26, 2010. A letter to the Grievant from Risk Manager and Personnel Analyst James Olson, dated May 20, 2010, advised the Grievant:

> Sheriff's Department administration has brought to my attention concerns they have regarding your ability to effectively perform the essential functions of your job as an Office Associate. The Sheriff is requiring you to undergo an independent fitness-for-duty evaluation to address their concerns. As such, I have arranged for you to be examined by Dr. Calvin J. Langmade, who will evaluate your current status from a psychological perspective. This evaluation will determine whether or not you are able to work, with or without conditions, restrictions, or within certain work environments. . . .
>
> This examination will take approximately three (3) hours, please plan accordingly. Reading will be required. Please wear or bring with you corrective lenses or reading glasses if needed. Due to the length of this examination, you may wish to bring with you a beverage and a snack. . . .
>
> Please note your participation in this evaluation is mandatory and noncompliance is subject to discipline, up to and including termination. . .

(Underlining in original).

In August 2010, Dr. Langmade completed a report of the results of the FFDE, but he revised it at the County's request because it had exceeded the scope of what the County was seeking. Neither the first, nor the revised, report was made a part of the record. Other facts are set forth below where appropriate.

ANALYSIS

I. RELEVANT PRINCIPLES OF CONTRACT LAW

Resolving this dispute requires me to interpret and apply § 12.4 of the CBA. In so doing, I may apply principles of contract law. *See* MADISON TEACHERS INC. V. MADISON METROPOLITAN SCHOOL DIST., 2004 WI App 54, ¶ 17, 271 Wis. 2d 697, 711, 678 N.W.2D 311, 318 ("Arbitrators have the authority to use principles of contract law in resolving disputes under collective bargaining agreements.") Principles that assist my interpretation of § 12.4 include the following. "The primary goal in contract interpretation is to 'give effect to the parties' intent, as expressed in the contractual language.'" MARYLAND ARMS LTD. PARTNERSHIP V. CONNELL, 2010 WI 64, ¶ 22, 326 Wis. 2D 300, 311, 786 N.W.2d 15, 20, *citing* SEITZINGER V. CMTY. HEALTH NETWORK, 2004 WI 28, ¶ 22, 270 Wis. 2D 1, 676 N.W.2D 426. "In ascertaining the intent of the parties, a court must adhere to the plain meaning of the contract if a contract is unambiguous." TOWN BANK V. CITY REAL ESTATE

DEVELOPMENT, LLC, 2009 WI App 160, ¶ 11, 322 Wis. 2D 206, 217, 777 N.W.2D 98, 104, *citing* HORTMAN V. OTIS ERECTING CO., INC., 108 Wis. 2D 456, 461, 322 N.W.2D 482 (Ct.App.1982). "In the interpretation of a contract the contract must be considered as a whole in order to give each of its provisions the meaning intended by the parties." MCCULLOUGH V. BRANDT, 34 Wis. 2D 102, 106, 148 N.W.2D 718, 720 (1967), *citing* KETAY V. GORENSTEIN (1952), 261 Wis. 332, 53 N.W.2D 6 (1952). "Sometimes it is necessary to look beyond a single clause or sentence to capture the essence of an . . . agreement." FOLKMAN V. QUAMME, 2003 WI 116, ¶ 21, 264 Wis. 2D 617, 633-634, 665 N.W.2D 857, 866. "One of the cardinal rules for the construction of a contract is that a meaning should not be attributed to its language which will make the agreement absurd or so unreasonable that one could not be fairly thought to have so intended, if a different meaning can be found in the words which will avoid that result." RUST V. FITZHUGH, 132 Wis. 549, 112 N.W. 508, 512 (1907). *See also* ESTATE OF ERMENC BY ERMENC V. AMERICAN FAMILY MUT. INS. CO., 221 Wis. 2D 478, 484, 585 N.W.2D 679, 682 (Ct. App. 1998) ("We are duty bound to avoid unreasonable interpretation of contracts.")

II. APPLICATION OF CONTRACT PRINCIPLES TO § 12.4

Applying these principles, I first conclude that the County's conditional right under § 12.4 of the CBA to demand an FFDE cannot be read in isolation without creating an unreasonably broad and unintended scope of that right. Section 12.4 states:

> Section 12.4. Injury or Illness on Job. If any employee appears to be injured or ill while on the job, or there is reason to believe that an employee needs medical attention, his supervisor shall have the right to require the employee to furnish a statement from a licensed physician before returning to work that the employee is capable of performing the work required by his job. The County shall send such employee to the doctor at its expense on working time.

The first sentence is structured as a conditional clause, consisting of a condition or hypothesis – *i.e.* the "if" portion – followed by a conclusion or consequence. Interpreting the conditional clause in isolation would afford the employee's supervisor the right to mandate an FFDE if the "employee appears to be injured or ill while on the job, or there is reason to believe that an employee needs medical attention". Under such an interpretation, a highly functioning autistic employee presenting with conspicuous symptoms of his mental illness that nevertheless do not interfere with his job responsibilities could be forced to undergo an FFDE, because he "appears to be . . . [mentally] ill while on the job".[6] To like effect, an employee with a casted ankle and crutches but with sedentary job responsibilities unaffected by her injury could be ordered to submit to an FFDE, because she "appears to be injured . . . while on the job". I conclude that the parties did not intend for the conditional clause to be interpreted so broadly as to permit an employer to mandate an FFDE in situations wherein the employee's apparent injury, illness, or need for medical attention does not interfere with her job. Such a reading

[6] Neither party suggests, nor do I conclude, that the ambit of § 12.4 is limited to physical injuries or illness.

would permit an employer to impose an inherently intrusive examination on employees without a reasonable basis, or, worse yet, with an illicit objective – a result that must be avoided.[7] *See* RUST V. FITZHUGH, 132 Wis. 549, 112 N.W. 508, 512 (1907); ESTATE OF ERMENC BY ERMENC V. AMERICAN FAMILY MUT. INS. CO., 221 Wis. 2D 478, 484, 585 N.W.2D 679, 682 (Ct. App. 1998); Frank Elkouri & Edna Asper Elkouri, *How Arbitration Works* 470 (Alan Miles Ruben ed., 6th ed. 2003) (noting that a contractual interpretation leading to just and reasonable results is preferred over one leading to harsh or nonsensical results.)

Reading the condition and the conclusion together in the first sentence of § 12.4 leads to a more reasonable interpretation that the scope of the condition itself is implicitly restricted by, and commensurate with, the scope of the conclusion. Under § 12.4, if the condition discussed above is met, then "[the employee's] supervisor shall have the right to require the employee to furnish a statement from a licensed physician before returning to work *that the employee is capable of performing the work required by [the employee's] job.*" (Emphasis added.) I conclude that just as the scope and objective of the physician's evaluation are limited to determining whether "the employee is capable of performing the work required by [the] job", the same limitation also applies to the condition itself. That is, the employee must "[appear] to be injured or ill while on the job, or there [must be] reason to believe that an employee needs medical attention", in such a manner as to interfere with her capability of performing the required work.[8]

I next address the standard that Kenosha County must meet under § 12.4 before concluding that an employee is, or may be, injured, ill, or in need of medical attention so as to interfere with her required work. Discussing various arbitration awards, the Union asserts, "[a]rbitrators have consistently held that a psychological evaluation can only be ordered when a *substantial basis* exists to conclude that said employee would be a danger to others or would be unable to perform the duties of his or her position because of a mental impairment." (Union Br. 6) (emphasis added). The Union also 1) notes that in an award involving Kenosha County

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[7] Legal commentators and courts have recognized the intrusive nature of mandatory psychological and psychiatric evaluations and the potential for employers to misuse them. According to one authority, "mental and psychological examinations implicate significant, well-recognized privacy rights and represent substantial intrusions on those rights." David E. Peebles, *Psychiatric and Psychological Examination of Employment Discrimination Complainants: Fundamental Fairness or Unwarranted Invasion of Privacy?*, 69-Oct N.Y. St. B.J. 26 (1997). Such an evaluation, moreover, "involves a loss of the power individuals treasure to reveal or conceal their personality or their emotions as they see fit, from intimacy to solitude." MCKENNA V. FARGO, 451 F.Supp. 1355, 1381 (D.N.J. 1978). Worse yet is "the potential for employer abuse of such exams." BROWNFIELD V. CITY OF YAKIMA, 612 F.3D 1140, 1146 (9th Cir. 2010). In the context of protections afforded by the ADA, the BROWNFIELD Court cautioned,

> we must be keen to guard against the potential for employer abuse of such exams. [Federal law (*i.e.* 42 U.S.C. § 12112(d)(4)(A))] prohibits employers from using medical exams as a pretext to harass employees or to fish for nonwork-related medical issues and the attendant "unwanted exposure of the employee's disability and the stigma it may carry."

Id., quoting EEOC V. PREVO'S FAMILY MKT., INC., 135 F.3D 1089, 1094 n. 8 (6th Cir.1998).

[8] My conclusion 1) does not address *prospective* employees, all of whom the County asserts are required to undergo an FFDE; and 2) accords with the County's argument that in this case, "there [was] a question whether the employee [was] capable of performing [her] job duties." (County Br. 9).

and another AFSCME unit, KENOSHA COUNTY, MA-14180 (Houlihan, 6/09), the arbitrator "applied the same substantial basis test"; and 2) calls attention to the "reason to believe" language in § 12.4. (Union Br. 8). The Union then proposes, "[b]ased on the prior award and the [reason-to-believe] language of the CBA, the County could not order an exam like the one in question without a reasonable basis and as such the standard set for[th] by Arbitrator Houlihan should apply to this case." (*Id.*) Thus, the Union appears to equate a substantial basis with a reasonable basis.

I nonetheless consider whether these two standards are synonymous, because although the phrase, "reason to believe", from which a reasonable-basis standard derives, appears in § 12.4, the word "substantial" does not. Thus, for a substantial-basis standard to apply, there must be either some rationale for concluding that a rational basis is synonymous with a substantial basis, or, if the meanings differ, there must be a persuasive reason that a substantial basis standard is implied in § 12.4. "When determining the ordinarily understood meaning of a [contractual] word or phrase, it is appropriate to look to definitions in a recognized dictionary." JUST V. LAND RECLAMATION, LTD., 155 Wis. 2D 737, 745, 456 N.W.2D 570, 573 (1990), *citing* LAWVER V. BOLING, 71 Wis. 2D 408, 414, 238 N.W.2D 514 (1976). "Reason" is defined in pertinent part as "a rational ground or motive"[9]. "Substantial" is defined in relevant part as "considerable in quantity: significantly great".[10] Thus, "reason to believe" or "a rational ground" appears to refer to the *qualitative* nature of the connection between the evidence of an employee's need for medical attention and the conclusion that the employee is indeed in need of such attention. "Substantial", however, appears to refer to the *quantitative* nature of the evidence required – *i.e.* "significantly great" – to support a rational conclusion. Accordingly, if these meanings are accepted, a "rational basis" is not necessarily synonymous with a "substantial basis", and, therefore, if the latter is to apply herein, I must find a persuasive reason that that standard is implied in § 12.4.

As noted, the Union in this case relies on the adoption of the substantial basis standard in KENOSHA COUNTY, MA-14180 (Houlihan, 6/09), a case involving Kenosha County and another AFSCME unit. Nevertheless, the CBA in KENOSHA COUNTY did not include the contractual language at issue herein. Rather, the KENOSHA COUNTY arbitrator's adoption of that standard was based on prior arbitration awards, none of which contained contractual language identical or even similar to § 12.4.

While the absence in such prior awards of contractual language identical or even comparable to that of §12.4 might alone suffice to dismiss the import of those awards herein, I nevertheless address one such award cited in KENOSHA COUNTY, namely, MILWAUKEE METROPOLITAN SEWERAGE DISTRICT, MA-11343 (Hahn, 12/01) (hereinafter *MMSD*). This award merits further consideration, because it ostensibly maintains that in BUCYRUS-ERIE CO. V. STATE, DEPT. OF INDUSTRY, LABOR AND HUMAN RELATIONS, EQUAL RIGHTS DIVISION, 90

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[9] *Merriam-Webster Online Dictionary* (visited April 19, 2012), <http://www.merriam-webster.com/dictionary/reason>.

[10] *Merriam-Webster Online Dictionary* (visited April 19, 2012), <http://www.merriam-webster.com/dictionary/substantial>.

Wis. 2D 408, 424, 280 N.W.2D 142, 150 (1979), the Wisconsin Supreme Court established a mandatory threshold standard for FFDE's:

> I find in this case before me that the Employer did not have cause to order a psychiatric fitness for duty exam of the Grievant. *The Wisconsin Supreme Court has used "reasonable probability" and "substantial" as the necessary evidence needed to order such an exam*. I do not find that test met in this record even under an arbitral preponderance of the evidence standard.

MMSD at 14 (footnote omitted) (emphasis added), *quoting* BUCYRUS-ERIE*,* 90 Wis. 2D at 424.

I disagree, however, that BUCYRUS-ERIE necessarily establishes a universal standard that an employer must satisfy to mandate an FFDE, because the prospective employee in that case challenged not the employer's requirement of a physical examination but rather the employer's decision not to hire him, based on the purported *results* of such an examination. More specifically, the employer appealed a finding by the Department of Industry, Labor and Human Relations (DILHR) that the employer had violated the proscription under the Wisconsin Fair Employment Act (WFEA) against disability discrimination by failing to hire an applicant for a welder position. Based on a pre-employment interview and welding test, the employer had found the applicant to be qualified as a welder; however, a required pre-employment physical had disclosed that the applicant had various congenital back defects. *Id.* at 411. The employer's medical director determined that these conditions would restrict the applicant's ability to work as a welder, because they substantially increased the likelihood that he would injure his back in the normal course of his job duties. *Id.* at 413. The Supreme Court disagreed; in the passage from which the arbitrator in MMSD selectively quoted the language, "reasonable probability" and "substantial" as the putative standard required for an FFDE, the Court stated:

> This court in CHICAGO, M., ST. P. & P. RR. CO. V. ILHR DEPT., *supra*, recognized that aggravation of the employee's physical disability should be considered as well as the risk of injury the employee poses to himself and others. If the evidence shows that the applicant has a present ability to physically accomplish the tasks which make up the job duties, the employer must establish to a *reasonable probability* that because of the complainant's physical condition, employment in the position sought would be hazardous to the health or safety of the complainant or to other employees or frequenters of the place of employment. However, in the instant case, Bucyrus-Erie has not proved such facts and there is *substantial evidence* to support the findings of DILHR.

BUCYRUS-ERIE CO*.,* 90 Wis. 2D at 424 (emphasis added). Thus, BUCYRUS-ERIE's standard of "reasonable probability" addresses not when an employer may order an FFDE, but rather when, consistent with the WFEA, it may refuse to hire an applicant with a physical condition that does not impede her present ability to fulfill her job duties but that may endanger her or others while on the job. Moreover, the "substantial evidence" standard quoted above refers to

the standard of review of administrative agencies' findings of fact, as set forth in Wis. Stat. § 227.20(6), and not, as the arbitrator in MMSD ostensibly suggests, to a standard for mandating an FFDE. Accordingly, I conclude that neither BUCYRUS-ERIE nor past arbitration awards necessarily *mandate* any standard that the employer must meet to order an FFDE in this case; BUCYRUS-ERIE does not squarely address the issue, and the arbitration awards are not binding.

Rather, the standard to be applied derives from the contractual language, "appears to be" and "reason to believe" in the first sentence of § 12.4. Based on that language and relevant principles of contractual interpretation noted above and applied below, I conclude that under § 12.4, the County can only order an employee to undergo an FFDE if 1) it actually perceives an injury, illness, or need for medical attention that interferes or may interfere with the employee's ability to do the required work; and 2) its belief is reasonable, based on significant evidence. The conditional clause in the contract describing when the employer may order an FFDE consists of two express parts: 1) whether an employee appears to be injured or ill while on the job, or 2) whether there is reason to believe that an employee needs medical attention.[11] Reading each of these two parts of the conditional clause in isolation would establish two separate standards, depending on whether the employee may be injured or ill, on the one hand, or whether she may be in need of medical attention, on the other – *i.e.* 1) the *appearance* of injury or illness; or 2) a *reasonable basis for believing* medical attention is needed. However, the two sets of circumstances (injury/illness or need for medical attention), if not synonymous, overlap substantially; for example, if an employee appears to be injured or ill while on the job so as to interfere with her job responsibilities, she may very well be in need of medical attention. Applying two different standards depending on the existence of two potentially overlapping and indistinguishable circumstances would be unreasonable if not unworkable and not, in my view, what the parties intended. Thus, I conclude that both the "appears to be" and the "reason to believe" language should be read together as applying to both situations expressly set forth in the conditional clause: injury/illness and the need for medical attention. Moreover, I interpret the "appears to be" language as a subjective standard – *i.e.* what the County actually perceives, whether accurately or inaccurately. By contrast, I read the "reason to believe" language as an objective standard – *i.e.* what a reasonable person would believe.

I further conclude that the Union's proposed "substantial basis" test, though not expressly set forth in § 12.4, applies to this objective standard, if "substantial basis" is interpreted to require evidence significant enough to persuade a reasonable person that an employee is injured, ill, or in need of medical attention so as to interfere or potentially interfere with her job responsibilities. My conclusion is based on: 1) the "reason to believe" language (discussed above) as setting forth an objective test; 2) the principle that "an interpretation [of a contract] which gives a . . . lawful . . . meaning to all the terms is preferred to an interpretation which leaves a part . . . unlawful . . .", SEITZINGER V. COMMUNITY HEALTH NETWORK, 270 Wis. 2D 1, 52, 676 N.W.2D 426, 451, n. 62 (2004), *citing Restatement (Second) of Contracts, § 203(a)(1981)*; and 3) the legal requirements of the

[11] As discussed above, the conditional clause is subject to the implicit additional requirement of interference with job duties.

Americans with Disabilities Act (ADA) regarding psychological examinations, insofar as such requirements may be applicable. In BROWNFIELD V. CITY OF YAKIMA, 612 F.3D 1140, 1146 (9th Cir. 2010), the Court clarified the objective test that such exams must satisfy to comply with the ADA's "business necessity" requirement:

> We agree with these courts that prophylactic psychological examinations can sometimes satisfy the business necessity standard, particularly when the employer is engaged in dangerous work
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> We reiterate that the business necessity standard "is quite high, and is not to be confused with mere expediency." CRIPE, 261 F.3D at 890 (quotations and alteration omitted). Nevertheless, we hold that the business necessity standard may be met even before an employee's work performance declines if the employer is faced with
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> > *significant evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his job*. An employee's behavior cannot be merely annoying or inefficient to justify an examination; rather, there must be genuine reason to doubt whether that employee can perform job-related functions.

BROWNFIELD, 612 F.3d at 1146, *quoting* SULLIVAN V. RIVER VALLEY SCH. DIST., 197 F.3D 804, 811 (6th Cir.1999) (quotation omitted) (emphasis added). While I need not determine herein whether, when, or to what extent § 12.4 of the CBA must comport with the ADA, an issue not raised by the parties, I do favor a reading of the contract that is consistent with principles of contract law, including an interpretation that is both reasonable and in accordance with statutory law, to the extent that law may apply. *See* SEITZINGER V. COMMUNITY HEALTH NETWORK, 270 Wis. 2D at 52, 676 N.W.2D at 451, n. 62; Frank Elkouri & Edna Asper Elkouri, *How Arbitration Works* 474 (Alan Miles Ruben ed., 6th ed. 2003) ("The parties are presumed to have intended a valid contract.") Finally, I note that the County quotes a standard for FFDE's proposed by the International Association of Chiefs of Police Psychological Services Section, 2004, which, though not based on the contractual language herein and thus not binding, essentially accords with the objective test described above.[12]

Accordingly, the County can only order an employee to undergo an FFDE consistent with § 12.4 of the CBA if two requirements are met: 1) the employer must actually perceive an injury, illness, or need for medical attention that interferes or may interfere with the employee's ability to do the required work, and must actually base its order for an FFDE on

[12] Under this standard, "[a] fitness-for-duty evaluation can best be described as a specialized, psychological examination of an individual that results from (1) objective evidence that the employee may be unable to safely or effectively perform a defined job function and (2) a reasonable basis for believing that the cause may be attributable to psychological factors." (County Br. 13).

any such perceived injury, illness, or need and such interference; and 2) the employer's belief and order must be reasonable and based on significant evidence.

III. WHETHER CONTRACTUAL REQUIREMENTS SATISFIED

To determine whether the contractual requirements for mandating an FFDE were met, I first identify the Grievant's conduct on which the County based its decision to order the examination. I then consider whether the County's mandate meets the contractual requirements.

A. Grievant's Conduct Prompting Mandate for FFDE

The mandate for a psychological examination was part of the discipline that the County recommended and ultimately imposed. Under the heading, "Disciplinary recommendation", the memorandum from Sergeant Benn and Office Manager Brumback to Captain Apker dated May 13, 2010, listed both an "Unpaid fifteen (15) day scheduled workday suspension" and an "Independent psychological evaluation." Moreover, Risk Manager and Personnel Analyst James Olson's letter to the Grievant dated May 20, 2010, emphasized that her "participation in this evaluation is mandatory" and that "noncompliance is subject to discipline, up to and including termination. . ." Accordingly, the Grievant's conduct on which the County's order for an FFDE was based is limited to that which the County identified to the Union as the grounds for disciplining the Grievant. *See* Frank Elkouri & Edna Asper Elkouri, *How Arbitration Works* 406 (Alan Miles Ruben ed., 6th ed. 2003) (internal quotations and citations omitted) (noting that "arbitrators generally hold that a discharge must stand or fall upon the reason given at the time of discharge; the employer cannot add other reasons when the case reaches arbitration.") [13]

The Notice of Pre-Disciplinary Hearing dated May 13, 2010, is the document apprising the Union of the recommended discipline and the grounds therefor. (As noted, on May 19, 2010, the date of the pre-disciplinary hearing, the Union and the County reached an agreement, whereby the Grievant would accept a ten-day suspension but continue to contest the County's asserted contractual right to order an FFDE.) The May 13th Notice of Pre-Disciplinary Hearing does not specify the Grievant's conduct on which the County based its conclusion that she had violated various quoted work rules. I nevertheless conclude that the conduct subject to discipline in part consisted of the Grievant's unauthorized use of the County computer system to 1) run criminal history checks on the inmate on five occasions between August 2009 and April 2010; and 2) access work-crew files containing *inter alia* a list of those individuals waiting to be granted work-crew privileges, including the inmate with whom the Grievant was in communication. The other conduct on which the discipline was based was the Grievant's failure to be entirely forthright in her initial, technical explanation of why she had accessed the work-crew files.

[13] I interpret this general rule as also applying to discipline short of discharge.

That the Grievant's conduct described above comprised the conduct subject to discipline can be inferred from: 1) the May 13th Memorandum from Sergeant Benn and Office Manager Brumback to Captain Apker; 2) the substance of the allegedly violated work rules; and 3) a memo dated September 15, 2010 from Assistant Personnel Director Diane Yule (a.k.a. Leiting) to the Chairman and members of the Administration Committee, regarding the already filed grievance.

The May 13th Memorandum from Sergeant Benn and Office Manager Brumback specifically references the Grievant's "repeated Criminal History queries on five separate occasions, and her unauthorized access to a number of Work Crew files" as the basis for their questioning whether she "will be able to function in her current assignment due to a lack of trust and confidentiality concerns."

Moreover, the substance of the allegedly violated work rules quoted in the May 13th Notice of Pre-Disciplinary Hearing inferentially relates to the Grievant's unauthorized and improper computer usage and her failure to be completely forthright when questioned about it. The Grievant's criminal history checks on the inmate, access to the work-crew files, and impedance of authorized users' access to the work-crew files presumably were interpreted to violate Department Work Rule V.D. (prohibiting unauthorized use of County equipment, including computers); Department Work Rule II.K. (prohibiting employee's restriction of amount of work she can perform and her interference with others' work); County Work Habit Rule 23 (prohibiting use of County equipment for personal business without supervisory permission and limiting use of such equipment to conducting County business); and County Work Habit Rule 21 (mandating employee's compliance with applicable federal or state codes, local ordinances, and regulations). Moreover, the Grievant's initial decision not to volunteer that she had been trying to ascertain whether the inmate was on the work-crew list and her resort to an evasively limited, technical explanation for her access to the work-crew files presumably were interpreted to violate Department Work Rule III.C. (prohibiting withholding evidence/information) and County Work Habit Rule 12 (prohibiting employees from giving any incomplete or misleading information of any kind).

Lastly, Assistant Personnel Director Diane Yule's September 15th memo regarding the already filed grievance summarized the Grievant's conduct giving rise to the discipline (including the FFDE) as follows:

> In April it was discovered that [the Grievant] repeatedly ran confidential criminal history searches and accessed department computer databases for her own personal use and mislead [sic] her supervisor when questioned about same, in violation of Sheriff's Department policy and Kenosha County work rules (Attachment 1). The information sought by grievant was in regard to an inmate at the Kenosha County Detention Center with whom grievant had a personal relationship.

> [The Grievant] received a ten (10) day unpaid disciplinary suspension for her actions. In addition to the disciplinary suspension the County required [the Grievant to] submit to a Fitness for Duty – Psychological Evaluation.…

In sum, the documents and work rules described above establish that the Grievant's conduct on which the County based its discipline, including its mandate for an FFDE, consisted of her five, unauthorized criminal history checks on the inmate, her unauthorized access of the work-crew files, and her failure to be entirely forthright in her initial, technical explanation of why she had accessed those files.

B. Absence of Reasonable Basis for Mandating an FFDE

I conclude that the County's mandate for an FFDE violated § 12.4 of the CBA, because even assuming *arguendo* that the County met the subjective part of the two-fold test discussed above, the County failed to satisfy the other, objective requirement.[14] More specifically, the Grievant's conduct on which the County's mandate was based did not constitute significant evidence for a reasonable person to believe that the Grievant had an injury, illness, or need for medical attention that interfered or might interfere with her ability to do the required work. In so concluding, I find especially significant the particular nature and limited scope of the Grievant's conduct, the vagueness of the County's concerns regarding both the Grievant's illness or need for medical attention and the potential interference with her work, and the absence of any reasonable basis to conclude that any illness or need for medical attention might interfere with her work, given the restrictions placed on her computer access.

1. Nature and Scope of Grievant's Conduct

The Grievant's unauthorized computer usage and initial lack of complete candor regarding that usage all relate to her relationship with the inmate and its psychological impact on her. Her decisions to run the criminal background checks and to access the work-crew files sprang from her desire to acquire information about *the inmate*. There is no credible evidence of record that she ever ran unauthorized background checks regarding anyone else, that she ever accessed the work-crew files to ascertain information other than that which related to the inmate with whom she had been involved, or that she might have any interest in the future in using a County computer to acquire, without proper authorization, information regarding anyone other than the inmate. Nor is there any credible evidence that the Grievant manipulated the waiting list or disclosed the TIME system information to the inmate. Rather, the Grievant's (albeit improper) interest in the information she acquired related solely to the inmate; as she informed the County in her April 16, 2010 letter, she had particular difficulty coping with the loss of the inmate as a father figure for her daughter:

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[14] Where appropriate below, however, I do note evidence that undermines the County's fulfillment of the subjective test.

> Even though time has passed, my daughter still asks for daddy and wants to see him more than anything; that becomes an emotional challenge for me. I can not accept his actions, but I hurt knowing my daughter won't have her daddy.

Accordingly, I find Sergeant Benn and Office Manager Brumback's characterization of the conduct subject to discipline to be inaccurately over-generalized; that is, the Grievant did not, as they asserted, "repeatedly [show] an inability to control her inappropriate interest in the confidential records of others" (*i.e.* persons other than, or in addition to, the inmate) (May 13, 2010, memo to Captain Apker) (emphasis added).

2. Vagueness of Grievant's Illness/Need for Medical Attention and Interference with Work

I also find problematic the vagueness of the County's identification of the Grievant's illness or need for medical attention and any interference with her work. Neither Captain Apker's May 13th Notice of Pre-Disciplinary Hearing nor any other document provided to the Grievant or the Union identifies any suspected illness or need for medical attention. Moreover, although the May 13th internal memorandum refers to the recorded phone conversations between the Grievant and the inmate and opines from those recordings that their relationship "was very manipulative and emotionally abusive", this internal memorandum was not provided to the Grievant or Union as a basis for discipline. As noted above, "[discipline] must stand or fall upon the reason given at the time of [discipline]; the employer cannot add other reasons when the case reaches arbitration." Frank Elkouri & Edna Asper Elkouri, *How Arbitration Works* 406 (Alan Miles Ruben ed., 6th ed. 2003) (internal quotations and citations omitted).

Yet even if considered, the internal May 13th memorandum, with one exception, does not identify an illness or need for medical attention. The memorandum does refer to a "lack of trust and confidentiality concerns", as indicated by the Grievant's "repeated Criminal History queries on five separate occasions, and her unauthorized access to a number of Work Crew files." Nevertheless, the County's "confidentiality concerns" and "lack of trust" 1) describe the County's reaction to the Grievant's infractions, rather than any illness or need for medical attention, and 2) at best vaguely intimate a perceived but unidentified illness or medical need. The memorandum does document Sergeant Benn's perception that the inmate's relationship with the inmate was manipulative and emotionally abusive, and that the telephone conversations became progressively more manipulative and volatile. In addition, the memorandum notes that the inmate even threatened physical violence upon his release, and that the Grievant was funding the inmate's commissary account and paying for the telephone calls. However, as further discussed in the following section (III.B.3.), the County neither asserts as a basis for the FFDE, nor offers significant evidence to reasonably conclude, that the Grievant's emotional state might interfere with her job responsibilities in the future.[15]

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[15] Even more speculative and removed is Sergeant Benn's hearsay testimony that he suspected the Grievant might harm herself. He testified that during one telephone conversation with the inmate, the Grievant said, "I'll see you in another life." Even assuming *arguendo* that such a general concern about the risk of self-harm could itself constitute not being "capable of performing the work required" within the meaning of § 12.4 (and I am not necessarily

3. Absence of Reasonable Nexus Between Illness/Need For Medical Attention and Interference With Work, Given Restrictions on Grievant's Computer Access

Even if I were to assume that the County has sufficiently identified an illness or medical need, I do not find significant evidence for the County to conclude reasonably that any such illness or medical need may interfere with the Grievant's job responsibilities. For example, even assuming *arguendo* that the County's asserted "lack of trust" and "confidentiality concerns" imply an unidentified illness or medical need that is likely to engender in the Grievant an uncontrollable, improper interest in confidential information in the future, it is not clear whether, according to the County, the scope of the Grievant's improper interest extends to confidential information regarding individuals other than the inmate. If so, as discussed above, I do not find sufficient evidence to support a reasonable basis for the County's asserted concerns and lack of trust. Again, while I believe that the Grievant's unauthorized computer access of confidential information regarding the inmate created a reasonable basis to question whether she could be trusted not to access the work-crew files and not to run out *the inmate* in the future, the County's concerns do not reasonably extend to others' confidential information. By contrast, if the County's distrust and concerns were limited to the possibility of the Grievant attempting to run out *the inmate* and/or access the work-crew files again in the future, the County took measures to prevent such repeated infractions that obviated the need for an FFDE: suspension of her access to the TIME system and technical adjustments by I.S. personnel to prevent unauthorized users' access to the work-crew files. There is no credible evidence, moreover, to suggest that excluding the Grievant's access to work-crew files or the TIME system prevented her from carrying out required work.[16]

Similarly indefinite is the memorandum's conclusion, "It is questionable that [the Grievant] will be able to function in her current assignment", due to the County's asserted distrust and concerns about confidentiality. If the County's doubt that the Grievant "will be able to function in her current assignment" extends beyond its concerns over her possible future, unauthorized access of information pertaining to the inmate, I do not believe that the County has sufficiently articulated in what manner it believes she may be unable to fulfill her job responsibilities or on what basis it draws such a conclusion. In addition, while the County does conclude that the Grievant's unauthorized access of the TIME system "point[s] to a real concern for future officer safety issues", I am left to wonder 1) what these "future officer safety issues" are, especially given the clerical nature of her job, and 2) what evidence

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convinced of the merits of such an interpretation), I do not find the evidence of such a concern significant enough here. Sergeant Benn's concern is based on hearsay, because the telephone recording was not introduced as evidence. Moreover, even if I were to conclude that the Grievant made this statement, Sergeant Benn's concern about self-harm is but one possible interpretation of it that I cannot fairly evaluate out of context.

[16] In fact, the testimony suggested that the Grievant had no legitimate reason to access the work-crew files. In addition, the May 13th internal memorandum from Sergeant Benn and Office Manager Brumback noted in relevant part that "Lisa was given no specific assignment, nor would she have any legitimate need to run someone out, *considering her current assignment*." (Emphasis added.) I interpret this statement to mean in part that the Grievant's job responsibilities did not include the need to run out anyone. In addition, the Grievant testified that she is unaware whether she currently could access the TIME system, because she has not needed to access it.

supports a reasonable conclusion that the Grievant's illness or need for medical attention has created any such safety issues. Diane Leiting testified that based on what she had heard about the recorded telephone conversations between the Grievant and the inmate, Ms. Leiting was concerned not only for the Grievant's welfare but also for the safety of the public and the potential liability of the County. She identified a possible jail break as one such safety concern. However, I do not find significant evidence to support a conclusion that any such concern was reasonable. While Ms. Leiting consulted with Sergeant Benn, she did not listen to the recordings, and, in any event, they were not introduced into evidence. Moreover, even if I were to consider hearsay testimony of what was said on the telephone recordings, no specific testimony was proferred from which to reasonably conclude that the Grievant may have been somehow conspiring with the inmate to attempt a jail break. To the contrary, it was the Grievant who: reported to the Kenosha County Sheriff's Department items that she had discovered in her home and that did not belong to her; gave a statement about the items to a Detective; turned the items over to the Detective Bureau; and testified against the inmate when subpoenaed.

The County also introduced evidence at hearing of alleged performance deficiencies that were not included in any disciplinary notice to the Grievant or Union; accordingly, I do not believe that such evidence should be considered. However, even if I were to consider it, I would find it unavailing. The Grievant, according to Office Manager Brumback, did not catch on quickly and had to be retrained in many areas. Sergeant Benn, moreover, testified that because the Civil Process office was falling behind, in March or April of 2010, management took measures to determine the reasons, such as identifying employees' duties and how long they should take. Sergeant Benn also noted that on one occasion when the Grievant was the primary processor, she failed to timely post open positions, resulting in the need to repost them and the assessment of fines. Furthermore, according to Sergeant Benn, despite having compiled detailed notes, the Grievant was sometimes unable to answer callers' questions and sometimes carried on detailed conversations about irrelevant issues. However, even assuming for the sake of argument the accuracy of these shortcomings, they partly predated the Grievant's unauthorized computer usage and prompted neither an FFDE nor other discipline – only retraining. Thus, to the extent that the County may imply a causal relationship between the Grievant's fragile emotional state and the various alleged performance deficiencies noted above, I find such a relationship to be an *ex post facto* justification for the FFDE; in reality, the County focused on her unauthorized computer usage as the basis for discipline (including the FFDE).

AWARD

For all of the foregoing reasons, I find that the County's mandate for the Grievant to undergo an FFDE violated the CBA. In so finding, I emphasize my belief that the County did not order the FFDE to harass the Grievant, to fish for confidential information, or to

intentionally effectuate some other illicit objective. To the contrary, I believe that the County meant well but simply did not establish a sufficient evidentiary basis for me to conclude that the relevant contractual requirements of the CBA were met. Accordingly, the County must remove from the Grievant's file the results of the FFDE and any references to it.

Dated at Madison, Wisconsin, this 21st day of May, 2012.

John C. Carlson, Jr. /s/
John C. Carlson, Jr., Arbitrator

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