BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**WISCONSIN PROFESSIONAL POLICE ASSOCIATION/
LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION**

and

ST. CROIX COUNTY SHERIFF'S DEPARTMENT

Case 234
No. 70672
MA-15015

(Kristopher Stewart Discharge)

Appearances:

Attorney Andrew D. Schauer, Staff Attorney, Wisconsin Professional Police Association, 660 John Nolen Drive, Suite 300, Madison, Wisconsin 53713, appearing on behalf of the Association.

Attorney Thomas B. Rusboldt, Weld, Riley, Prenn & Ricci, S.C., 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of St. Croix County.

ARBITRATION AWARD

The Wisconsin Professional Police Association, hereinafter referred to as the Association, and the County of St. Croix Sheriff's Department, hereinafter referred to as the Employer, are parties to a Collective Bargaining Agreement (CBA) which provides for final and binding arbitration of certain disputes, which CBA was in full force and effect at all times mentioned herein. On March 21, 2011, the Association filed a Request to Initiate Grievance Arbitration and asked the Wisconsin Employment Relations Commission to assign a staff arbitrator to hear and resolve the Association's grievance regarding the termination of Kristopher Stewart. The Parties requested a member of the Commission's staff be assigned as Arbitrator and the undersigned was appointed as the Arbitrator to hear and decide the matter. Hearing was held on the matter on June 1, 2011, in Hudson, Wisconsin, at which time the parties were given the opportunity to present evidence and arguments. This matter is properly before the Arbitrator. The hearing was transcribed and is the official record of the proceedings.

After attempts failed to reach a resolution between the parties, they filed initial post-hearing briefs and replies by May 4, 2012, marking the close of the record. Based upon the evidence and the arguments of the parties, I issue the following Decision and Award.

ISSUES

The parties were able to stipulate to the issues to be decided by the Arbitrator as follows:

> Did the County have just cause to discharge Kristopher Stewart? If not, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS

ARTICLE 7 – DISCHARGE-SUSPENSION

Section 1: No employee covered by this Agreement shall be disciplined without just cause. (The question as to what conduct constitutes "just cause" is a proper subject for the grievance arbitration provisions of this Agreement.)

ARTICLE 8 – GRIEVANCE-RESOLUTION OF DISPUTES

. . .

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

OTHER RELEVANT DOCUMENTS

ST. CROIX COUNTY HUMAN RESOURCES

Policies and Procedures Handbook

. . .

Grounds for disciplinary action may include (but are not inclusive of) the following:

1) . . .falsification of any County records;

. . .

15) theft or embezzlement;

. . .

18) fraudulent claim for reimbursement, hours worked, etc.

ST. CROIX COUNTY SHERIFF'S DEPARTMENT

Subject Standards of Conduct
Number PP-21
Effective Date 10-04-2001
Distribution All Officers

. . .

2) Accountability, Responsibility, and Discipline

. . .

b) Officers shall cooperate fully in any internal administrative investigation conducted by this or other authorized agency and shall provide complete and accurate information in regard to any issue under investigation.

c) Officers shall be accurate, complete and truthful in all matters.

d) Officers shall accept responsibility for their actions without attempting to conceal, divert, or mitigate their true culpability nor shall they engage in efforts to thwart, influence, or interfere with internal or criminal investigation.

. . .

BACKGROUND

Grievant is a 15 year employee of the County Sheriff's Department. Over the years he has served in the Patrol Division. At the time of his termination he was a Patrol Sergeant. On August 3, 2010, Grievant was injured in a traffic accident during the pursuit of a suspect. As a result of this accident he suffered two herniated disks which in turn damaged his sciatic nerve causing trouble

walking and shooting pain in his legs. He also suffered a herniated disk in his upper neck and a whiplash-type injury.

He was unable to work from the date of his accident until January 25, 2011, during which time he was on medical leave and received chiropractic care as well as physical therapy. The chiropractic services were provided at Miller Chiropractic and the Physical Therapy services were provided at Physicians Neck and Back Clinic. Both of these entities are located in Hudson, Wisconsin within one mile of the St. Croix County Courthouse. Grievant lives in Wilson, Wisconsin, 69 miles (round trip) from Hudson, and was required to drive from his home to the entities where he received treatment for chiropractic and PT.

His chiropractic and PT appointments were generally scheduled on the same day – chiropractic in the morning and PT in the afternoon – and he alleges that he drove to the chiropractic appointment in the morning and returned home prior to his PT appointment in the afternoon. He then drove into Hudson again in the afternoon for his PT appointment and back to Wilson following that appointment. It is this allegation and the accompanying requests for mileage re-imbursement which gave rise to this grievance. Further background data will be provided in the Discussion section below.

THE PARTIES' POSITIONS

The County

A "just cause" analysis addresses two elements: 1. Did Stewart engage in misconduct? And, 2. If so, was the level of discipline imposed proper under the circumstances and under the contract?

Stewart is entitled to be reimbursed for his mileage expenses "to attend authorized treatment appointments for a work-related injury" at the rate of 48.5 cents per mile and in order for him to collect this reimbursement he must complete a mileage reimbursement form and submit it to the County's worker's compensation benefits administrator. Stewart lives 69 miles round trip from his home in Wilson to his two medical providers, Miller Chiropractic and Physicians Neck and Back Clinic. He estimates he can make the drive one-way in 30 minutes which would require an average speed of 69 mph over a combination of interstate highway, city streets and state highway.

During November, 2010, the County's Risk Manager Kristen Ziliak mentioned to Patrol Captain Knudson, Stewart's supervisor, that Stewart's mileage reimbursements were beginning to add up. Knudson thought he had seen Stewart in the Sheriff's Department on several occasions between appointments and so began to make notes of the days he saw Stewart in the Department. These dates were November 22, 2010; December 15, 2010; December 22, 2010; December 31,

2010; and January 12, 2011. He procured the times of Stewart's medical appointments and the key fob system records which record the times and dates an employee uses his key fob to enter the building. He also made note of the times he physically saw Stewart in the building and correlated this with the times of Stewart's entry into the building and the length of time he was observed in the building. Based on this, Knudson believed it was not possible for Stewart to have made two round trips on any of these days. On January 24, 2011, the day before Stewart returned to work without restrictions, he submitted his final mileage reimbursement request which contained 13 dates on which he claimed to have made two round trips from his home to Hudson; one each for his Chiropractic appointment and his PT appointment. Included in those dates were the dates referenced above.

As a result of his initial investigation Knudson interviewed Stewart on February 9, 2011. Initially, Stewart told Knudson that he (Stewart) always drove more miles than he actually put down on the form and that at the time he completed the form he thought the mileage was correct. Stewart never said "yes" in answer to the question whether he actually drove the miles he claimed. Rather, in answer to those questions he replied either "I drove more" or "I don't recall." The longest time between Knudson's observation of Stewart in the Department and Stewart's PT appointment was on December 22, 2010, a period of one hour and 15 minutes. On two other occasions, November 22 and December 15, there was exactly one hour. Knudson felt that Stewart's answers were evasive. Knudson did not believe the double entries in the request for reimbursement form were mistakes and believed that Stewart was defrauding the taxpayer.

John Shilts has been the Sheriff of St. Croix County since January, 2011, and has been with the Department since 1987. He has known Stewart for 15-17 years; has never had any fallings out with Stewart and considers Stewart to be his friend. Knudson asked Shilts to join in the interview and it quickly became apparent to Shilts that Stewart was being evasive and less than truthful. Shilts got the impression that Stewart thought he was smarter than Knudson and was going to get around the questions. Eventually, Shilts took over the questioning and told Stewart that his answers did not make sense and did not add up. Stewart was being evasive and giving canned answers. Shilts knows Stewart to be a detail oriented person and asked him if he had gotten "lazy". Stewart responded that he had had a long recovery process and battled through some depression and that he was on medications. Shilts did not accept this explanation and did not believe the entries were mistakes. He believed that Stewart knew what he was doing and did not believe that Stewart's assertion that the extra miles he claimed to have driven "evened out."

Sheriff Shilts was also involved in Stewart's discipline back in 2007 regarding his faulty entries on his activity reports which resulted in his being paid more hours than he actually worked. (Stewart reported overtime hours for compensation for court appearances that he did not actually work because they had been cancelled or dismissed.) Shilts considers the requests/payments for this overtime as a form of stealing from the County.

Shilts' decision to discharge Stewart was based on the following criteria: First, he was compensated for mileage he did not drive and recorded mileage that he knew was not truthful. Shilts believes that he stole from the County. Second, because of his behavior during the interview; that he was not being truthful and that he was being evasive. Finally, it was based on the Sheriff's Department policy and past practice. County policy regarding fraudulent submissions for reimbursement recommends two penalties: suspension or termination. Shilts refers to the following relevant policies and procedures of St. Croix County:

Grounds for disciplinary action may include (but are not inclusive of) the following:

1) . . .falsification of any County records;

. . .

15) theft or embezzlement;

. . .

18) fraudulent claim for reimbursement, hours worked, etc.

Shilts also relied on Sheriff Department standards of conduct as follows:

2) Accountability, Responsibility, and Discipline.

. . .

b) Officers shall cooperate fully in any internal administrative investigation conducted by this or other authorized agency and shall provide complete and accurate information in regard to any issue under investigation.

c) Officers shall be accurate, complete and truthful in all matters.

d) Officers shall accept responsibility for their actions without attempting to conceal, divert, or mitigate their true culpability nor shall they engage in efforts to thwart, influence, or interfere with internal or criminal investigation.

Shilts considered the years he had known Stewart in making his determination as to Stewart's truthfulness and concluded that Stewart was not being truthful with him during the interview. He believes that Stewart's veracity is such that it requires disclosure to the defense under BRADY V. MARYLAND, 373 U.S. 83 (1963); and STRICKLER V. GREENE, 527 U.S. 263 (1999) which require disclosure to the defendant of any exculpatory evidence, including any materials which may be used to impeach a witness. In the past Shilts has spoken to Stewart about his truthfulness and told him that there had been "rumblings" from the judges about Stewart's credibility and truthfulness.

The County responds that Stewart advances the following defenses:

1) **At the time he completed the mileage reimbursement, Stewart could not remember whether he had actually gone home or not between appointments.** He claims that during the interview with Knudson and Shilts on February 9, 2011, he could not remember the five days in question because they were three months old and he was still under the effects of the drugs. They are Temazepam and Valium. Temazepam does not cause one to "(do) things without recalling them" as Stewart testified. He testified that Valium had the same effects listed as Temazepam but the medication guide for Valium does not warn of any "sleep-driving" like effects such as claimed by Stewart. Dr. Leyda, Stewart's treating physician, was called and testified that early on in his treatment the pain and medication may have affected his demeanor and coherence but that during December and January he was doing great with regard to being clear minded, lucid and coherent. Although the Doctor testified that the drugs taken by Stewart could "generally speaking" cause memory loss he was never asked the specific question "Did Stewart suffer a memory loss that would explain his mileage reimbursement claims for multiple round trips on the same day for chiropractic and physical therapy?"

2) **Stewart may have, in fact, gone home between appointments on the dates in question.** The fact that Stewart testified that his PT appointments were "right around 1:00" and his chiropractic appointments were "around nine in the morning" illustrates his credibility. He gives himself an extra 30 minutes. The actual times do not give him enough time to go home and ice his back as he claims to have done. Regarding the interview with Knudson, Stewart claimed that he had no memory of the days in question and when asked if he had made two round trips home on those days he responded that he "did not." He claims to have gone to the Sheriff's Department to drop off paperwork or pick up pharmacy items, but by his own admission he did not make the two round trips for which he charged the County. He admitted

that, given the appointment times, key fob entries and Knudson's observations, he could not have driven home and back between appointments on December 31 and January 12. The balance of the trips in question left only four minutes, 11 minutes and 15 minutes which assumes a 30 minute driving time each way requiring clear traffic and good lights and an average speed of 69 mph.

3) **He had other appointments and injury-related errands which were not claimed.** Stewart claimed that, to the extent he did not make double trips in a single day, he still underestimated his mileage because of unreported errands for medications. Stewart testified "I do remember doing other running around, either coming to the office, getting pharmacy stuff." He got his pharmacy medications at Hudson Hospital which is located within blocks of Physicians Neck and Back Clinic and his over-the-counter meds at Walmart in Menomonie. He does not recall ever making an individual trip to Hudson for the purpose of picking up medication. Also, he testified that he did not believe that the forms ever intended to require a specific listing of the amount of miles driven on the specific days listed. There is no basis for this belief. The form is simple requiring that the employee fill out the date, the destination, the starting point and the mileage. There is no merit to the assertion that the employee can overstate the mileage for one trip and understate the mileage for another as a setoff. The County has never had other employees raise questions about how to fill out the form.

One does not need to be trained on the necessity of submitting accurate mileage reimbursement requests or that one is not permitted to claim mileage one is not entitled to. To conclude that Stewart drove home between each of his double appointments defies common sense.

This is a credibility case. The credibility in question is Stewart's alone: did he intend to defraud the County or was he simply guilty of laziness and a failure to remember whether he drove back and forth on the days he claimed. The Sheriff concluded, based upon his longtime association with Stewart, the facts and circumstances of the case, the 2007 incident and Stewart's demeanor during his interview, that Stewart was not being truthful and that he had stolen from the County. Paraphrasing Arbitrator Hahn in PLYMOUTH SCHOOL DISTRICT, Case 58, No. 61148, MA-11820 (Hahn, 2002) "when Stewart submitted his mileage requests, he stole the trust of his employer." Once Sheriff Shilts no longer trusted Stewart, there was little that could be done to restore that trust. At best Stewart requested reimbursement for mileage that he can't remember driving or were made up by other undisclosed miles; at worst, he is stealing. The Arbitrator must "decide what reasonable men, mindful of the habits and customs of industrial life and of the standards of justice and fair dealing prevalent in the community ought to have done under similar

circumstances. . .” A reasonable man, much less a law enforcement officer, would not tolerate such a reimbursement request. Discharge was warranted.

The Union

This arbitration concerns the appropriate extent of discipline for counseling that should be given to Stewart in response to the Formal Charges in which the County claims to have conducted a fair and objective investigation which resulted in the discharge of Stewart. The County’s investigation determined five specific things upon which the discharge was based:

1. Five dates were submitted where the mileage was false.

2. Payment was made to Stewart as a result of the fraudulent claims.

3. Stewart received a previous discipline in the form of a suspension on 1/10/2007 for submitting erroneous work records which resulted in his *receiving* overtime payments.

4. After receiving his *Garrity Warnings* (GARRITY V. NEW JERSEY, 385 U.S. 493 (1967)) as part of the investigation, he failed to answer all questions fully and truthfully.

5. Stewart’s actions are in direct conflict with St. Croix County Sheriff’s Office Policy “PP-21 Standards of Conduct.”

The Association was able to prove facts which are in direct conflict with these charges as follows:

1. The County had no proof to show that the mileage was not appropriate. Stewart testified that he estimated the mileage to come up with the 69 mile round trip. Risk Manager Ziliak testified that it was normal for people to estimate (or use Google or Mapquest) the amount of miles they travel for each trip and put in the exact same number each time.

2. Although payment was made for the mileage reimbursement, the miles were not fraudulent. Stewart has consistently claimed as much. It was surprising that on cross examination Sheriff Shilts agreed that Stewart’s entries were a result of “mistake” or “laziness” when he testified “I already know it was a mistake. He told me it was laziness. . . .(Laziness) was a term that I had suggested during the interview, yes, and he concurred.” Fraud requires an element of intent whereas a mistake or laziness does not, so Shilts cannot both say he was lazy and fraudulent.

3. Stewart's prior discipline resulting in the suspension was for erroneous work records not fraud, so he consequently chose not to grieve the discipline. The instant matter is Stewart's first allegation of untruthful behavior.

4. Knudson failed to record the interview with Stewart so there is no transcript of the interview for the record. Therefore, the only information about the interview for our record comes from the necessarily biased recollections of both the interviewer and the accused. Knudson did not like Stewart yet Shilts found it appropriate for him to conduct the interview. Stewart went into great detail on cross-examination (about) how he thought his words were twisted by Knudson during the interview. Without the transcript of what was actually said during the interview the County cannot sustain a charge of untruthfulness during that interview. Having a supervisor known to be biased against an employee (conduct an interview with that employee) is not conducive to a fair and impartial investigation, which is necessary under the statutory just cause standards to sustain discipline.

5. What the Sheriff called laziness, and which we attribute to oversight secondary to his necessary use of mind-altering pain medication, cannot be deemed and intentional violation of policy serious enough to cost a 15-year veteran his job.

The seriousness of Stewart's actual conduct warrants progressive discipline before termination. Elkouri and Elkouri is instructive:

> It is said to be "axiomatic that the degree of penalty should be in keeping with the seriousness of the offense." CAPITAL AIRLINES, 25 LA 13, 16 (Stowe, 1955).

The treatise continues to describe corrective action necessary to terminate an employee:

> Offenses are of two general classes: (1) those extremely serious offenses such as stealing, striking a foreman, persistent refusal to obey a legitimate order, etc., which usually justify summary discharge without the necessity of prior warnings or attempts at corrective discipline; (2) those less serious infractions of plant rules or of proper conduct such as tardiness, absence without permission, careless workmanship, insolence, etc., which call not for discharge for the first offense (and usually not even for the second or third offense) but for some milder penalty aimed at correction. HUNTINGTON CHAIR CORP., 24 LA 490, 491 (McCoy, 1955)

Discipline may be considered to be excessive if it is disproportionate to the degree of the offense, if it is out of step with the principles of progressive discipline, if it is punitive rather than corrective or if mitigating circumstances were ignored. *Discipline and Discharge in Arbitration*, 85 (Brand ed., BNA books 1988 & Supp. 2001) at 966.

The conduct here is more akin to careless workmanship. Despite Stewart's reasonable explanation for his actions, we would acknowledge that his actions in this case amount to careless workmanship and suggest that a counseling letter would be an appropriate level of response.

The record does not support a finding of intent to defraud. An employer must climb a steep hill to reach the level of discharge. The case of MENOMINEE COUNTY, Case 48, No. 50847, MA-8402 (Greco, 10/94) illustrates the great hill an employer must climb before taking such a drastic action. In that case the Arbitrator noted that the Chief Deputy had "orally warned her many times before her termination that her job was in jeopardy even though such warnings are not in writing."

In the case at bar Stewart only turned in one report following which the Sheriff ordered Knudson to do a full-blown investigation as opposed to simply asking Stewart about it. Stewart was still feeling the effects of the on-duty injury that caused him to be on workers compensation in the first place. His doctor testified, to a reasonable degree of medical certainty, that he suffered memory loss during the months of December, 2010, and January, 2011. The five instances of incorrect entries that Knudson cites in his investigative report occur during this same timeframe. What the Sheriff saw as "laziness" Dr. Leyda, Stewart's treating physician, saw as reasonable side effects of pain medication.

Finally, the term "fraud" or "fraudulent" includes a knowing or intentional act. It is "a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his detriment." *Black's Law Dictionary*, 7TH ed. Stewart entered 69 miles for each appointment because he could not specifically remember what he did on these days. He believed this was alright because he was never told by Risk Manager Kristin Ziliak that he needed to be specific on this form. He attempted to report a minimum amount of mileage without having to keep a specific reporting for each trip. Such actions cannot constitute a "knowing misrepresentation of the truth" which is needed to deem these actions fraudulent.

The 2007 two-day suspension given to Stewart was not for "fraud." Opposing counsel conflated "incomplete and erroneous" with such terms as "falsification" and "fraud." Because the Arbitrator ruled that the document would speak for itself we must now turn to the actual words used in that document. The first sentence states that Stewart engaged in "incomplete and erroneous daily activity reports," and the terms "stealing," "lying," "falsification" or "fraud" do

not appear anywhere in it. Had they been a part of that discipline Stewart testified that he would have grieved it. The 2007 suspension had to do with "daily activity reports" and the matter at bar deals with "mileage reimbursement forms." Therefore, this is actually a first offense of filling out the form and a counseling letter is an appropriate amount of discipline for this offense.

The County failed to train Stewart. This offense would not have occurred had Stewart been properly trained. Management shrugged off the responsibility of requiring the form be filled out properly. Citing MCQUAY INT'L, Case No. 99-06558, 1999 at 27 (Howell, 1999) "An employee can hardly be expected to abide by the 'rules of the game' if the employer has not communicated those rules, and it is unrealistic to think that, after the fact, an arbitrator will uphold a penalty for conduct that an employee did not know was prohibited." It is clear that Stewart filled out the form as well as he was ever trained to, and as well as he was able to considering all of the circumstances. The firm does not state, nor did Ziliak ever tell him, to be specific on that form or that a failure to be specific would lead to discipline up to and including discharge. Therefore, the estimated numbers that Stewart put on the form, and his forgetting whether he made a few of the trips he claimed on the form, cannot now be considered a terminable offense.

The County has no reasonable basis for concluding that Stewart defrauded the County. When called on it, Knudson was not able to state unequivocally that the actions Stewart engaged in were "fraud."

> Q. [Y]ou're choosing to disbelieve a 15-year veteran of this department with looking at just this one prior discipline?
>
> A. I believe anytime somebody gets financial gain from the taxpayers that hasn't earned that and now a second offense comes in, I do believe that that's a concern.
>
> Q. A concern grave enough to end his career?
>
> A. While defrauding the taxpayer, yes, I do.
>
> Q. So it's your statement that this is fraud?
>
> A. I don't know if that's my statement, but it could be construed as fraud. (Trans. at 58:4-18.)

Knudson admitted on cross examination that, except for the 2007 incident, he had no other documented instance of Stewart being untruthful. It is clear that Knudson wants to "construe" the

inaccuracies on the mileage forms as fraud, but when given the chance, he could not unequivocally state that Stewart committed fraud here.

It is well within the power of the Arbitrator to reduce the amount of the penalty imposed. Arbitrator Greco held that "to change or modify penalties found to be improper or too severe may be deemed to be inherent in the arbitrator's power to decide the sufficiency of cause. . ." TAYLOR COUNTY (SHERIFF'S DEPARTMENT), Case 88, No. 59145 (Greco, 2001)

Stewart's length of service with the Department and his stellar work history necessitate a mitigation of discipline. Stewart's personnel record is unblemished except for the 2007 discipline.

These factors (length of service and past record) differ from progressive discipline and knowledge of the rules, and need to be considered separately in the analysis of a proper amount of discipline. Here, we ask that the Arbitrator take into account Stewart's excellent performance evaluations and the 17 separate commendations of Stewart's work by this Sheriff's Department, other departments, and citizens. Finally, we ask the Arbitrator to review the 2008 Officer of the Year award given to Stewart.

Sergeant Stewart was a good deputy with a stellar 15-year work record, and according to at least three of his co-workers, has a reputation for honesty and veracity in the community. He had one bump in the road in 2007 and decided, as a "company man," not to challenge this discipline. Just as there was not intent to defraud the County in 2007, neither has the County proven any intent to defraud in this incident. Stewart acted not out of any malice, but out of an attempt to estimate his mileage with his limited ability to remember his exact actions on those days. He explained this was due to the medications he was taking and his doctor backed up his account.

Arbitral law is clear on how to deal with careless workmanship-type errors such as laziness or unintentional mistakes. Such violations demand progressive discipline short of termination.

This type of discrepancy happens in just about every office where there is a reimbursement program in place. In workplaces where people get along, such oversights are brought to an employee's attention, are corrected, and if appropriate, an adjustment in the employee's next check is made. Here, management was not up front with its legitimate concerns, and let this matter fester for an additional month. Knudson then spent his time playing private investigator and attempted to play "gotcha" in an unrecorded investigative interview. This type of management style should not be rewarded by sustaining the termination of a 15-year, decorated law enforcement officer.

The County's Reply

Stewart claims he could have driven home and back between appointments on four of the five dates listed by the County. It would have been physically impossible for Stewart to have made two round-trips on January 12, 2011. He only had one hour of open time on November 22, 2010, and on December 15, 2010. The Association claims that he could have driven home in that time. Knudson's

alleged concession that it would have been possible for Stewart to get home and back on those occasions is found at page 70: "I suppose if he's speeding both ways." This would require the absurd conclusion that Stewart raced home and raced back with no time to do anything whatsoever while at home.

On December 22, 2010, there is a one-hour and 15 minute gap, leaving Stewart 15 minutes at home. This would require a 69 mph average which is simply not possible. On January 12, 2011, he did have two hours and two minutes between his key fob entry into the Department and being observed by Knudson. Is it reasonable to conclude that approximately 40 minutes after the end of his chiropractic appointment he went into the Sheriff's Department, left immediately to go home, and returned to the Department 35 minutes before his PT appointment? This is implausible and Stewart had given no testimony that would render it so.

Stewart claims that he was inadequately trained on the completion of the mileage reimbursement form. The Association's brief mischaracterizes the evidence. Kristen Ziliak did not testify that it was common for people to estimate mileage. She said:

> I don't know. Nowadays with Google, most people Mapquest. They put in the two locations and they use that mileage. (Tr. at 149:10-12).

The form states its heading "Record Mileage Travel to Attend Authorized Treatment Appointments for a Work Related Injury" and then provides specific spaces for the date, start point, destination, and round-trip mileage. Also, Stewart made no attempt to show that his mileage exceeded, or even came close to, the excess mileage claimed.

Stewart's argument mischaracterizes the Sheriff's alleged concession that it was a "mistake." When asked directly, the Sheriff answered:

> In my opinion, it wasn't a mistake. It was Kris knew what he was doing. He was just putting down 69 miles for every trip. He knew what he was filling out. (Tr. at 97:8-11).

Later, in his testimony, Sheriff Shilts described that when considering whether Stewart's conduct constituted theft versus a mistake, he concluded that Stewart "was just not being truthful with me." (Tr. at 105:5-6). The Association's reliance on Sheriff Shilts' statement that he "already knew it was a mistake" is misplaced. (Tr. at 114:24). This is akin to any individual who, upon getting caught for doing something stupid or illegal, comes to the realization that they made a "mistake." Such use of the term is quite different from the definition advanced in Stewart's defense: an error or misconception.

Stewart argues that the investigation was biased. There are two prongs to this argument. First, because Knudson has a history of bad blood with Stewart his investigation and conclusions must be biased. In fact the Sheriff made the discharge decision based on his long history and knowledge of Stewart and the circumstances of this case and sat in on enough of the interview to draw his own conclusions on Stewart's truthfulness. The Association quotes Shilts as describing Stewart as a "good officer. I'd liken it to when the bullets are flying, you wanted Kris Stewart beside you." While this is commendable in a police officer, the rest of Shilts' testimony is more relevant to the issues at hand:

> But when that was done and it was time for the reports to get written, you didn't want to be anywhere around him because you weren't sure what he was going to put on paper. (Tr. at 108:10-19).

The second prong of the argument, that the County was obligated to talk to Stewart as soon as there was a question about his mileage reimbursement forms, seems to be one of entrapment. If an employer has a reason to believe that an employee is involved in a fraudulent scheme he has every right to watch what plays out so that the employer can know if the employee is trustworthy. The Department needs to know id Stewart can be trusted. As a law enforcement officer his trustworthiness is crucial, and his history raised a question about his truthfulness.

Stewart argues that this is not a matter of stealing but of careless workmanship. When the result of employee misconduct is that the employee takes permanent possession and ownership of the employer's property without the employer's permission that is stealing.

Stewart argues that he has no prior record of defrauding the County. His 2007 discipline was not for filing "fraudulent" reports but for filing "incomplete and erroneous daily activity reports." While the terms "stealing" and "fraud" do not appear in the 2007 documentation, the circumstances of what took place and the interpretation of the Sheriff are clear and well-founded. Stewart claimed overtime pay for which he was not entitled. Stewart claims he has never been disciplined for incorrect mileage reports. This is true. But, like the employee who argues he should not be disciplined more harshly for stealing gasoline because his prior disciplines had been for stealing motor oil or tools, Stewart overstated his mileage in this case and his overtime pay in the prior case, both of which resulted in the payment of money he was not entitled to.

Stewart argues that the mileage report form is explained by his injuries, pain and use of "mind altering pain medications." Stewart makes the claim that he does not remember if he made the trips home on the days he had multiple appointments, but if he did make the trips home on those days they were offset by other trips, without submitting any evidence of other trips. To substantiate this defense he relies on medication guides listing the side effects of his medications and the testimony of Dr. Leyda. The weakness of Dr. Leyda's testimony is that he spoke only in generalities and did not know if he had even seen Stewart as a patient during the months of December 2010 and January 2011. He told us that Stewart and his wife had told him that Stewart had suffered from memory loss during the months of December 2010 and January 2011 and that loss would be consistent with some of the drug interactions and side effects listed in the medication guide. Similarly, Dr. Leyda testified that he diagnosed Stewart with post-traumatic stress disorder and that PTSD can cause memory loss, but we have no testimony that Dr. Leyda believes Stewart's PTSD caused memory loss or the severity and nature of any such loss.

The Union's Reply

The "additional trips" testimony is not an argument for a setoff, but evidence as to his lack of intent to defraud. By arguing that "there is no merit to an assertion that the employee can overstate the mileage for one trip and understate or not claim the mileage for another trip as a setoff" is an attempt to downplay and misconstrue a significant defense of our case. The fact that he did not claim mileage was brought up to underscore the fact that if he were actually looking to maximize his mileage in an attempt to defraud the County, he would have included these trips. He explained that he traveled additional miles for work on the Sheriff Department's patrol boat and for picking up his prescriptions. The County knew he did not put in for mileage he had coming and yet somehow they still insist on arguing that he was attempting to defraud the County by putting in for the pittance of mileage that he did claim. If Stewart was so sneaky and conniving to come up with this grand plan why would he leave money on the table by failing to put in for the other mileage.

A higher burden of proof is required in a case where the employer is discharging the employee for illegal or immoral conduct. In terms of the quantum of proof, while arbitrators generally use a preponderance of evidence (standard) for ordinary discipline cases, most arbitrators require a higher burden of proof in discharge cases where, as here, the alleged misconduct contains the stigma of strong social disapproval, as well as being regarded as morally reprehensible conduct. In those cases a "clear and convincing" standard is typically employed.

If you believe that the County has proven, on this record, beyond a clear and convincing evidence standard, that Stewart actually intended to steal, even a cent, from the County, please sustain the termination. But if you believe this was laziness or that Stewart was simply attempting to estimate his mileage to the best of his ability considering the totality of his situation, this

termination must be overturned. Whether the Sheriff has "lost trust" in Stewart is not of appropriate concern. The Sheriff does not enjoy the luxury of making that final determination when he does not have a factual basis for his opinion. That is why the Association negotiated a just cause provision into the Agreement – so that a sheriff's unfounded feelings do not go unchecked.

The idea that this man, who literally risked life and limb, and endured serious physical injury in the protection of the citizens of St. Croix County, would then turn around and maliciously work the system for less than a couple hundred bucks, is preposterous. After review of the record please find for the Association accordingly.

DISCUSSION

This is a credibility case and it is Stewart's credibility which is at issue. The proper standard to be applied is "clear and convincing." The question is whether Stewart intended to defraud the County by claiming extra mileage or was he simply lazy or forgetful when he filled out the mileage reimbursement forms for the County claiming an extra trip back home between his two authorized medical appointments, a distance of 69 miles. In weighing the testimony in this termination case, the Undersigned recognizes that Stewart has a strong incentive to deny the charge of theft. I considered this fact and weighted it heavily. I also considered the weight of the testimony of the other witnesses. In the case of Sheriff Shilts, I see no incentive for him to lie about his perceptions and conclusions regarding Stewart's interview and I accept his testimony completely. Likewise, I accept the credible testimony of Ms. Ziliak. Regarding the testimony of Cpt. Knudson, his "bad blood" with Stewart (the record does not develop the specific nature of that "bad blood") may have given him some incentive to shade the events of the interview, but I did not get that impression. The fact that the interview was not recorded does not render it suspect. The parties to it testified about the contents of it and that testimony was subject to scrutiny. Knudson came across as honest and credible and I accept his testimony as such.

As for the 2007 incident, the Association argues that I not consider that episode in the instant matter. It argues that it is not similar to the present issue since that prior incident involved daily records and the present one involves mileage reimbursement forms. I don't agree. The 2007 incident is persuasive because it involves, at its core, an attempt to gain money from the County not otherwise owed to Stewart. That is also the core issue in this matter. Here, Stewart has claimed money for mileage he did not drive. If he was lazy or forgetful this claim may be forgiven; if not, it cannot be forgiven. Also, the prior incident was the subject of discipline and Stewart was given notice of the infraction, and a chance to contest the allegation. The decision to consider it is therefore more persuasive than had the County not disciplined him for it.

The Association argues that the County has no proof to show the mileage submitted on four of the five dates listed was not appropriate. I do not find this argument persuasive. The

County has proven that on the remaining four dates the Grievant had, at most, one hour and fifteen minutes between appointments. I do not find it reasonable that he could have driven home, iced his back, and returned in time for his next appointment in that period of time.

The Association maintains that the seriousness of Stewart's actions does not warrant the harsh penalty of termination. To be sure, termination is akin to the death penalty in the labor law domain and should not be used lightly or without significant proof of the actions of the employee. It cites HUNTINGTON, *supra*., for the proposition that:

> Offenses are of two general classes: (1) those extremely serious offenses such as stealing, striking a foreman, (etc.). . .(2) those less serious infractions of plant rules or of proper conduct such as tardiness, absence without permission, careless workmanship, (etc.). . .

The Association equates Stewart's actions with "careless workmanship" and argues that, as such, his punishment should not be termination but rather some much lessor form of progressive discipline such as a letter in his file. I would agree with this argument if I were convinced that Stewart's version of the events were true. I am not convinced of that however. On the contrary, I believe that Stewart is not being truthful and that his actions constitute stealing, an offense which calls for termination.

The Association relies on the case of MENOMINEE COUNTY, *supra*., for the proposition that the Employer must "climb a steep hill" in order to reach the lofty plateau of termination. The MENOMINEE COUNTY case is not instructive here for the same reason the "careless workmanship" argument fails. Here we are talking about stealing and dishonesty whereas in MENOMINEE COUNTY the issue was failure to respond to subpoenas and fill out complete incident reports. That case involved negligence on the part of the Grievant as opposed to an intentional effort to deceive.

Dr. Leyda's testimony is of limited value as it relates to Stewart's "forgetfulness" during the months of December, 2010, and January, 2011. The last time he saw the Grievant in his medical capacity (according to the medical records in evidence) is November 3, 2010, and he has no specific knowledge relating to the period in question.

Regarding the issue relating to the allegation that the County failed to properly train Stewart, the Form in question is about as simple as it could be. It contains only four columns: 'Date'; 'To'; 'From'; and 'Roundtrip Mileage'. I cannot imagine any training which may be required relative to this form other than an advisory that it is used to record and request reimbursement for authorized mileage traveled and that the form would be used to calculate the amount of money the recipient is due. In other words, it is an advisory that the recipient should be honest, truthful, and accurate when filling out the form so as not to receive an overpayment

(or underpayment). This is common sense and the acts committed are so clearly wrong that no training from the County was necessary or would have prevented this claim.

The Association argues that Stewart's length of service with the Department and his stellar work history necessitates a mitigation of discipline. Length of service can serve as a mitigating factor. The egregiousness of the instant conduct, however, renders his length of service moot. The acts of stealing and dishonesty, especially in light of Stewart's occupation as a police officer, absolutely support termination in this case. He has lost the trust of his Chief and created a situation where the Department and/or the Prosecutor cannot be sure if his testimony will be honest.

The Association argues that this same situation occurs in about every office where there is a reimbursement program in place." The Undersigned strongly disagrees with that assertion but, even if it were true, that would not excuse Stewart's behavior here. As I have said, I believe he intended to submit forms with additional mileage he did not travel in order to get money from the County he was not entitled to. This is theft and it is deceitful. In short, it is fraud.

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

AWARD

The County did have just cause to discharge Kristopher Stewart.

The grievance is denied.

Dated at Wausau, Wisconsin, this 27th day of June, 2012.

Steve Morrison /s/
Steve Morrison, Arbitrator

SM/gjc
7812