

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
**WISCONSIN PROFESSIONAL POLICE ASSOCIATION/
LAW ENFORCEMENT EMPLOYEES RELATIONS DIVISION**

and

LA CROSSE COUNTY

Case 225
No. 71108
MA-15092

Appearances:

Attorney Roger Palek, Staff Counsel, Wisconsin Professional Police Association, 660 John Nolen Drive, Suite 300, Madison, Wisconsin 53713, for the Union.

Weiss, Berzowski and Brady LLP, by **Attorney Anna M. Pepelnjak**, 700 North Water Street, Suite 1400, Milwaukee, Wisconsin 53202-4222, for the County.

ARBITRATION AWARD

The Wisconsin Professional Police Association (herein the Union) and La Crosse County (herein the County) were, at all times relevant hereto, parties to a collective bargaining agreement covering the period from January 1, 2011 through December 31, 2011, which provided for binding arbitration of grievances arising thereunder. On September 30, 2011, the Union filed a request to initiate grievance arbitration with the Wisconsin Employment Relations Commission (WERC) over a grievance filed by the Union concerning the termination of bargaining unit member Trisha Stratman, and requested a panel of WERC staff members from which to select an arbitrator. The parties selected John R. Emery to arbitrate the matter and a hearing was conducted on August 23, 2012, August 24, 2012 and September 28, 2012. The proceedings were transcribed and the transcript was filed on July 21, 2011. The parties filed initial briefs December 21, 2012 and reply briefs by January 25, 2013, whereupon the record was closed.

ISSUES

The parties stipulated to the issues, as follows:

Did La Crosse County have proper cause under Article 2.01 to discharge the Grievant?

If not, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

ADMINISTRATION

2.01 Except as otherwise provided in this Agreement, the County retains the normal rights and functions of management and those 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...

OTHER RELEVANT LANGUAGE

**La Crosse County Sheriff's Department
POLICIES AND PROCEDURES**

AUTHORIZED EMERGENCY POLICE VEHICLE AND ITS USE #2.2

PURPOSE

The purpose of this policy is to establish and provide guidelines in the use of the authorized emergency vehicle. It is the policy of the department to use red/blue lights and siren and all emergency equipment available when responding to an emergency call for services. Various state statutes provide that before an authorized emergency vehicle is entitled to its special status under the law, it display red/blue lights or sound a siren and in some cases, it requires both.

...

346.03(2-4)

PRIVILEGES AND EXEMPTIONS [sic]

The operator of an authorized emergency vehicle may:

1. Stop, stand, or park irrespective of the provisions of this chapter;
2. proceed past a red or stop signal or stop sign, but only after slowing down as may be necessary for safe operation;

3. exceed the speed limit;
4. disregard regulations governing direction of movement or turning in specific directions.

...

OFFICER'S RESPONSIBILITIES

- 1 346.03(5)
 - a. The exemptions granted to the operator of an emergency vehicle by this section do not relieve such operator from the duty to drive with due regard under circumstances for the safety of all persons nor do they protect such operator from the consequences of his/her reckless disregard for the safety of others.
2. 346.19(2)
 - a. Nor does it relieve the operator of an authorized emergency vehicle from the duty to drive with due regard under the circumstances for the safety of all persons using the highway.

PUBLIC'S RESPONSIBILITIES

...

2. 346.19(1)
 - a. Upon the approach of an authorized emergency vehicle giving audible signal by siren, the operator of vehicle shall yield the right of way and shall immediately drive such vehicle to a position as near as possible and parallel to the right curb or the right hand edge of the shoulder of the roadway clear of any intersection and unless otherwise directed by a traffic officer, shall stop and remain standing in such position until the authorized emergency vehicle has passed.

THE OPERATION OF THE EMERGENCY VEHICLE

POLICY

It will be the policy of the La Crosse County Sheriff's Department to operate emergency vehicles in accordance with State Statutes 346.03 and with due regard for the safety of all persons. The following guidelines will be followed:

GUIDELINES

1. Emergency Response

- a. Officers are authorized to exercise the exemptions provided in 346.03 when responding to emergencies. Emergencies include incidents where there is a threat of physical violence or a need for immediate assistance is required. Emergency light and siren and all other emergency equipment available will be used when exercising the exemptions under 346.03 except as provided for in these guidelines.

...

3. Considerations

- a. In all cases when an officer decides to exercise the exemptions provided under 346.03, he/she shall consider the following factors and will drive accordingly.
 - (1) Time of Day: Emergency response occurring during a time when there is a high level of business activity or school is in session or other activities are deemed more hazardous than those occurring during times of low activity.
 - (2) Volume of Vehicular Traffic: Emergency response occurring during heavy traffic flow are deemed more hazardous than those occurring at other times.
 - (3) Density of Population: Emergency response to residential areas or along streets near or adjacent to schools are viewed as more hazardous than those in lightly populated areas.

- (4) Weather Conditions: Emergency responses during periods of inclement weather which restrict visibility are viewed as more hazardous than during good weather.
- (5) Road Conditions: Rain, snow, ice, pavement defects and other obstructions will make emergency response more hazardous.
- (6) Severity of Reported Crime: The exercise of emergency response exemptions are more justifiable when responding to serious crimes or serious threats to public safety than when responding to the less serious incidents.
- (7) Volume of Pedestrian Traffic: Emergency responses occurring in areas where pedestrian traffic is heavy is viewed as more hazardous than at times when it is light or absent..

4. Intersections

- a. When operating an authorized emergency vehicle under the exemptions of 346.03, officer shall slow upon approaching an intersection and be prepared to stop if necessary. When proceeding past a red light or stop sign or stop signal, officers shall proceed at speeds when [sic] enable them to stop or yield to any vehicle that has the right of way or is unable to stop.

STIPULATIONS

Prior to the arbitration, the parties entered into the following Stipulation of Facts regarding the grievance:

1. The matter is properly before the arbitrator.
2. The 2011 collective bargaining agreement between the parties signed February 21, 2011 was in effect during all times relevant to this dispute.
3. During all times relative to this dispute, Sheriff's Department Policy and Procedure No. 2.2 Authorized Emergency Police Vehicle and Its Use was in effect.
4. During all times relative to this dispute Sheriff's Department Policy and Procedure No. 2.3-Vehicle Pursuits was in effect.

5. The Grievant, Trisha Stratman (Stratman) was hired by the County as a Deputy on June 11, 2007
6. On July 18, 2010, while on patrol during the 10:00 p.m. to 6:00 a.m. shift, Stratman was responding to a call for assistance from a Holmen officer when she was involved in a collision with another vehicle. The 16-year old male driver of the other vehicle died as a result of the injuries he suffered in the collision.
7. Neither the 16-year old driver nor Stratman were under the influence of drugs or alcohol at the time of the collision.
8. On July 20, 2010, Stratman was placed on administrative leave.
9. On September 16, 2011, Stratman's work status was modified in that her work assignment was changed from patrol to training and court services.
10. On January 20, 2011 as a result of a criminal complaint being filed by the Wisconsin Attorney General's Office, Stratman was placed on paid administrative leave without assignment to any official duties.
11. On July 20, 2011 Sheriff Helgeson served a Statement of Charges on Stratman and proposed her discharge.
12. On August 20, 2011, Sheriff Helgeson discharged Stratman.
13. On September 11, 2011 County Administrator Steven O'Malley held a "Step 3" grievance hearing to determine whether to uphold Sheriff Helgeson's discharge of Stratman.
14. On September 23, 2011, County Administrator O'Malley issued a written decision upholding Sheriff Helgeson's decision to discharge Stratman.
15. Stratman did not appeal County Administrator O'Malley's decision under Wis. Stat. Section 59.26(8)(b)6.
16. Stratman's final day in paid status was October 8, 2011.
17. Stratman had received no other discipline prior to her discharge from the County.

BACKGROUND

At all times pertinent hereto, Trisha Stratman, the Grievant, was a Deputy with the La Crosse County Sheriff's Department and a member of the bargaining unit represented by WPPA/LEER. She was hired in 2007 and went through a standard course of training for a Deputy Sheriff, including training in proper emergency vehicle operation. Previously, she had been employed by the Racine County Sheriff's Department. During her employment prior to the events recorded herein she had an exemplary record with the Department, which included uniformly positive performance reviews, no disciplinary or corrective actions and one Medal of Valor.

On the night of January 17/18, 2010, she was on patrol in the central section of La Crosse County, which includes the City of La Crosse and its immediate environs. She was working the third shift, which went from 10:00 p.m. until 6:00 a.m. It had been raining earlier in the evening and the roads in the area were wet, but at the time of the events pertinent hereto the rain had ceased and visibility was unobstructed for a distance of 10 miles.

At approximately 1:03 a.m. on Sunday, January 18, the County Dispatcher received a call for assistance from Lieutenant Shane Collins of the Village of Holmen Police Department requesting aid at a bar fight in Holmen, which he was handling unassisted. Deputy Megan Hartman, who was patrolling the north section of the county, which included Holmen, responded that she was in Stevenstown, several miles away, and would answer the call. Deputy Stratman likewise responded that she would answer the call because she reasoned that she had a more direct route to Holmen than Hartman and could arrive sooner.

Stratman immediately began heading toward Holmen, first on Interstate Highway 94 and then on State Highway 35, which runs North and South between La Crosse and Holmen. As she went, she activated her emergency lights and siren, which also activated a dashboard camera in her police cruiser. Highway 35 is a two lane highway which runs through the City of Onalaska and thence north past a variety of residences and crossing roads. Highway 35 in Onalaska passes a number of businesses, including taverns, that are open late at night. As Stratman was heading to Holmen, Collins called in again to request more units, at which point the dispatcher advised an additional car from Onalaska would be dispatched to the scene and additional units indicated they would also respond. Collins called in again shortly thereafter and said, "Give them up here 33 now - I've got a whole crowd." A 10-33 call is an emergency indicating an officer needs immediate assistance.

As she passed through Onalaska, Stratman travelled at speeds between 38 and 89 mph. On reaching the north side of Onalaska, Stratman began accelerating as she headed up Highway 35, at one point reaching a top speed of 122 mph. The speed limit in this section of Highway 35 is 55 mph. Traffic was light at that hour, but Stratman did pass a few vehicles as she responded to the call.

Some distance north of Onalaska, Highway 35 intersects with County Highway OT, which is controlled by a stoplight. The light at OT is traffic controlled. As she approached OT, Stratman noted that the light was changing to red, indicating that a car was approaching the intersection on OT. At this point, Stratman began decelerating by taking her foot off the accelerator. Stratman noted a car, driven by Angela Barclay, crossing the intersection from east to west. She tracked the vehicle as it crossed the intersection and then checked to the west to see if more traffic was coming from that direction, since OT was a blind intersection from that direction. At this point, Stratman was still travelling at more than 100 mph. As she looked back to the east, Stratman saw another car, driven by Brandon Jennings, entering the intersection of Highways 35 and OT. Stratman realized at that point that Jennings was not going to stop and that a collision was probably imminent. Stratman immediately applied her brakes and began to veer left to attempt to pass in front of Jennings' vehicle. She impacted the left front of Jennings' vehicle with the right front of her police cruiser. As a result, Jennings, who was not wearing a seatbelt, was ejected from his vehicle and thrown a distance of approximately 70 feet, where he struck a road sign. Stratman's car came to rest and she exited the vehicle attempted to aid Jennings, who was unresponsive. She then called the dispatcher for assistance and other emergency vehicles, including some who were on the way to the Holmen incident, were diverted to the scene of the accident. Jennings was transported to a local hospital, where he was pronounced dead without ever regaining consciousness. Stratman suffered minor injuries. It was later determined that at the time of impact Stratman was travelling at approximately 86-90 mph.

After the accident, Sheriff Steve Helgeson ordered an investigation of the incident. The La Crosse County Sheriff's Department has an Accident Review Board comprised of other members of the Department and a policy that requires that the Board investigate all fleet accidents. Helgeson, however, determined that, due to the seriousness of the incident, the policy should be overridden and that the internal investigation would be conducted by himself and Chief Deputy Jeff Wolf. Additionally, a separate investigation of the accident was conducted by the Wisconsin State Patrol. Stratman was placed on administrative leave pending the outcome of the investigation.

On July 30, 2010, twelve days after the accident, Wolf met with Stratman and her Union representatives and conducted a Garrity interview, wherein Wolf questioned Stratman about the incident and reviewed the dashboard camera video of the incident with her. The video records the entirety of Stratman's progress from the point at which she engaged her lights and siren until just before the accident. Due to loss of power to the vehicle's computer during the accident, the video record ends just before the vehicles collided. Wolf reviewed with Stratman her knowledge of the relevant Department policies regarding emergency vehicle operation and her assessment of the relevant factors and conditions applicable to the event, such as time of day, traffic, weather, road conditions, etc. Under questioning from Wolf, Stratman recalled that the traffic light at Highway 35 and OT was red just before she reached the intersection and that she saw the Barclay car pass through the intersection ahead of her.

She could not recall seeing the Jennings vehicle until just before the accident and could not recall if the light was still red when she reached the intersection. ¹

When Wolf completed his investigation, he met with Helgeson to discuss his findings and the appropriate discipline to be meted out to Stratman. On July 20, 2011, Helgeson issued a Statement of Charges and Notice of Intent to Impose Discipline. The statement included the following factual basis for proposed discipline:

“On July 18, 2010, at 1:07 a.m., La Crosse County Deputy Sheriff Trisha Stratman was involved in a motor vehicle crash. While on duty and responding to a call of a “fight in progress” at Smokey’s Bar, 112 Mill Street, Holmen, WI, Deputy Stratman’s squad (2010 Ford Crown Victoria) struck a vehicle (2001 Pontiac Grand Am) driven by Brandon Michael Jennings, N6211 Eric Avenue, Onalaska, WI, 54650. The collision occurred at the intersection of STH 35 and CTH OT in the Township of Onalaska, WI. Deputy Stratman’s emergency lights and siren were activated and operational at the time of the collision.

The speed limit for STH 35 in that area is 55 mph. The nighttime weather conditions were partly cloudy skies, 69 degrees F, with very light or intermittent rain and 10 miles’ visibility. The roadway was wet, but in relatively good condition. Data analysis shows Deputy Stratman’s squad car was travelling at approximately 106.4 mph 1.6 seconds before the accident and that the squad’s impact speed was 86-90 mph. The Pontiac was travelling at 20 mph one second before impact, with impact speed of approximately 15-22 mph. In squad video shows that Deputy Stratman was travelling North on STH 35 and had a red light at the intersection Brandon Jennings was travelling west on CTH OT.

Mr. Jennings was not wearing a seat belt. He was ejected from his vehicle after impact. He came to rest on the outside shoulder of northbound STH 35 approximately 70 feet to the north of his vehicle, after striking a road sign. At 1:45 a.m. on July 18, 2010, Mr. Jennings was pronounced dead as a result of injuries sustained in the collision.

Deputy Stratman’s speed may have significantly reduced the time and distance available to respond to the path intrusion.”

¹ Months later, Stratman’s memory improved as a result of therapy and the passage of time. Her later recall was that she saw the Jennings car approaching the intersection, but that the light facing OT was cycling from green to yellow and that she saw the brake lights illuminated on his car, indicating to her that he was stopping. It was after she looked to the west and then looked back that she saw Jennings entering the intersection. Stratman testified to her improved recollection at her subsequent criminal trial and at the arbitration, but this information was not shared with the Sheriff prior to her termination. The fact that Jennings did apply his brakes when approaching the intersection was later confirmed by the State Patrol accident analysis.

The Statement of Charges further alleges violations of Sheriff's Department Policy 2.2 – Authorized Emergency Police Vehicle and Its Use, and 2.3 – Vehicle Pursuits.

On August 10, 2011, Helgeson issued a termination letter to Stratman, effective immediately, and stating, in pertinent part:

“I have reached this decision in consultation with Corporation Counsel after carefully considering the standards set forth in Sec. 59.26(8)(b)5m of Wis. Stats., the findings of the internal investigation, and the comments in Attorney Palek's July 25 letter. In the end, I could not ignore the fact that as a result of your misconduct a young boy lost his life. Any form of discipline short of termination would be inappropriate in light of the effect of this event on the victim's family and friends, the community, and the La Crosse County Sheriff's Department.”²

Subsequent to her termination, Stratman filed a grievance contesting the County's action.

On September 1, 2011, the matter went to a Step 3 hearing before the County Administrator, who upheld the Sheriff's decision. The matter was then advanced to arbitration. Additional facts will be referenced, as necessary, in the DISCUSSION section of this award.

POSITIONS OF THE PARTIES

The Employer

The County asserts that it had proper cause for terminating the Grievant. It further maintains that the proper analysis is to determine initially whether the Grievant committed conduct in which the County had a disciplinary interest. If it is determined that the Grievant committed acts for which discipline is warranted, it then must be determined whether the discipline issued is commensurate with the seriousness of the offense. The County maintains that, although the Union may seek to apply the seven tests articulated by Arbitrator Carroll Daugherty in Grief Brothers Cooperage Corp., 42 LA 555 (Daugherty, 1964), these tests are not mandated by the contract, nor was their use stipulated to by the parties and are, therefore, precluded. Brown County (Human Services), MA-11535 (McLaughlin, 2002).

² Subsequent to the issuance of the Wisconsin State Patrol's investigation report, but prior to Stratman's termination, the Wisconsin Department of Justice charged Stratman with homicide by negligent operation of a motor vehicle. The case went to trial subsequent to Stratman's termination and she was acquitted of all charges.

The County asserts that Stratman committed several violations of Department policies and State statutes, subjecting her to discipline. These regulations require officers driving vehicles in emergency mode to act responsibly and with due regard to the safety of other drivers and members of the public using the roadway. This requires the officer to take account of all factors that may increase the risk of harm, such as time of day, weather, condition of the roadway and the presence of others on the roadway, and to adjust their driving accordingly to reduce the potential risk.

In this case, Stratman failed to drive in a safe and responsible way under the circumstances and thereby violated the pertinent policies. She operated her squad car at an excessive rate of speed throughout her response to the call from Lieutenant Collins despite the fact that the roadway was wet and her route took her past open businesses and residences that had driveways entering onto the highway and despite the fact that at that time of day there was a likelihood of encountering drivers who may have been impaired by alcohol. After leaving Onalaska, her speeds exceeded 100 mph until just before the accident with Brandon Jennings. Upon approaching CTH OT, she did not apply her brakes and did not reduce her speed to a point where she could safely stop or avoid other drivers in the intersection, despite the fact that the light was red on STH 35. This conduct was in intentional disregard of the relevant policies requiring police personnel to act with due regard for the safety of others, notwithstanding the requirement that other drivers yield the right of way to emergency vehicles operating with lights and siren. Her conduct was reckless and irresponsible and resulted in the death of a 16-year old boy, causing grief to his family and friends and bringing discredit on the Department.

The investigation revealed substantial misconduct by Deputy Stratman. The Sheriff reviewed the entire record of the incident and properly weighed the factors in favor of Stratman, as well as those adverse to her. The Sheriff also was cognizant of the fact that the accident was caused by Stratman's excessive speed, which made it impossible for her to avoid the collision, and which resulted in Brandon Jennings' death. The Sheriff was thus confronted with a devastated family and a public that demanded accountability for Stratman's actions. He also was aware of the sensitivity of the situation, given that Stratman was the daughter of the previous Sheriff, and was concerned that there be no suggestion of favoritism. At hearing, he stated:

“And what led up to Brandon's death was Deputy Stratman's intentional reckless, in my opinion, disregard of policies and training. And this crash was completely preventable. And this crash would not have happened if Deputy Stratman had followed policy, procedures and training.”

He considered discipline short of termination, but concluded that Stratman was beyond salvage, that she would not learn from the experience and that remedial training would be of no avail. His opinion was not altered by her testimony at hearing, which gave an alternative version of the events based on her improved recollection. The County points out that a single event of misconduct can justify termination, citing Melrose-Mindoro School District, MA-9942 (Crowley, 1999), and asserts that Stratman's disregard of law and policy, resulting in the death of a young boy, is sufficiently egregious to warrant termination here.

The Union

The Union points out that in a discipline case the burden is on the Employer to establish proper cause for discipline, which it likens to the just cause standard generally adopted in collective bargaining agreements. The Union agrees, in principle with the two-prong analysis proffered by the County, but asserts that the standard of proof in a termination case must be higher than the “preponderance of the evidence” standard applied in most cases. Rather, the County must prove its case by either the middle standard of “clear and convincing evidence,” or the highest standard of “beyond reasonable doubt.” The Union further asserts that a disciplinary interest based on Policy 2.2-Authorized Emergency Police Vehicle And Its Use is reasonable, but that Policy 2.3-Vehicle Pursuits is irrelevant to this case in that Deputy Stratman was not in a pursuit situation.

The Union asserts that the County minimalizes the seriousness of the situation at the bar in Holmen. Deputy Stratman was responding to a call for help from an officer who was dealing with a bar fight involving a crowd of intoxicated people without assistance. She reasonably concluded that her immediate assistance was necessary and properly went to emergency mode to answer the summons. The Union argues that it is irrelevant whether or not the light at STH 35 and CTH OT was red, because in any event Stratman was required to be driving in a way that would permit her to stop, if necessary and the Union concedes that she was unable to stop to avoid the accident. The Union notes, however, that a violation of the policy almost by definition requires that there be an accident, because only in that way can an inability to stop be determined. Thus many deputies may have been in violation of the policy at various times, but, because there was no accident no violation of policy was found.

The Union also points out that Brandon Jennings also bore responsibility for the accident and his demise. He had an unobstructed view of the intersection and Deputy Stratman was operating with emergency lights and siren. He had a duty under the law to yield the right of way, but did not. It remains unknown whether he failed to see or hear Stratman’s car, or whether he believed he could cross the intersection before she arrived. He also was not wearing a seatbelt, which caused him to be ejected from the car upon impact. This would not have occurred if he had been properly restrained and though a serious accident would likely have resulted anyway, it would not necessarily have resulted in a fatality.

In assessing the propriety of discipline, the arbitrator must focus on the actual error made, and not on the outcome. Here, the outcome was clearly the determining factor as the Sheriff specifically testified. He further stated that the policy may be violated by negligent action, not only reckless or intentional behavior. The Union cites the arbitrator in T.W. Recreational Services, 93 LA 303, (Richard, 1989) to the effect that it is “...arbitrary to weigh the consequences only if they are realized and ignore them if through good fortune, they are minimized or avoided altogether.” In this case, Stratman was guilty of a good faith error in judgment, which needs to be identified and corrected, not merely punished. It is improper to lump willful misconduct together with faulty errors in judgment and punish them alike. At worst, Stratman’s behavior was negligent and does not warrant summary termination.

In determining the appropriateness of discipline, the arbitrator should adopt a standard of reasonableness under the circumstances, which includes considerations of due process. The Union asserts that here the Sheriff acted unreasonably and violated due process by becoming emotionally involved with the family of the decedent and thereby losing his objectivity. The Sheriff was faced with the dual responsibility of acting as a supervisor and objectively responding to the conduct of his employee and, as Sheriff, of addressing the concerns of the family of the decedent and the community. By too closely identifying with the family of the decedent and trying to avoid charges of favoritism, he lost his objectivity and denied Stratman due process. He could have assigned the task of dealing with the family to another Officer, or he could have assigned the task of investigating the accident to the Accident Review Board, but he did neither. He also placed himself in an awkward position by discussing the State patrol report with the family, which could have compromised Stratman's Garrity rights, whether or not it actually did so.

He should have turned over the investigation to the Accident Review Board, which exists for just this purpose. Instead he overrode his own policy and conducted the investigation himself. Such policies exist specifically to prevent the decision maker from treating one employee differently from another. Deputy Zwicker's squad video shows that he, too, was travelling at speeds approaching 100 mph and went through a stop sign at high speed. All officers who testified at the hearing, including the Sheriff and Chief Deputy, admitted to driving at speeds in excess of 100 mph when responding to emergencies. Further, the policy does not state that there is a specific speed at which emergency response is unreasonable. Rather, it is discretionary with the deputy under the prevailing circumstances.

Stratman was also treated differently than other officers who have been found to have violated the policy. Other deputies have been found to have caused accidents, or to have been driving at high speed against traffic, but have only received reprimands and orders for additional training, or in one instance to have his probation extended. None were terminated. By determining that these responses to policy violations were reasonable, the Sheriff eliminated termination as a reasonable response in Deputy Stratman's case. Finally, there was a complete disregard of principles of progressive discipline. Stratman had never been disciplined in the past. She received routinely good performance reviews. She had been commended for a number of notable achievements and had received the Department's Medal of Valor. The Sheriff admitted, however, that the discipline he imposed was intended to be punitive, not corrective, due to the severity of the infraction. In his mind, however, the infraction was the accident itself, not Stratman's error in judgment. The record shows her to be an excellent officer, who is dedicated, hard-working, caring and willing to listen and accept correction. She will learn from her mistake and become a better officer and the arbitrator should uphold the grievance and return her to service.

DISCUSSION

This case involves a dispute over whether the County had proper cause for terminating Trisha Stratman's employment as a result of her actions on the night of July 18, 2010. The

parties agree that the appropriate analysis for making this determination is a two-prong test which determines, first, whether the County had a disciplinary interest in the Grievant's conduct and, if so, whether the discipline imposed was appropriate in light of the County's disciplinary interest. For this purpose, the term "proper cause," as used in the collective bargaining agreement may be equated with the concept of "just cause" commonly used in labor agreements in addressing disciplinary issues. The parties are also in accord that the seriousness of the issues involved, and the fact that the Grievant was discharged, requires that the County meet a higher standard of proof than the "preponderance of the evidence" standard typically used in arbitration. Thus, the arbitrator adopts the middle standard, which requires proof by "clear and convincing evidence."

Disciplinary Interest

The first prong of the proper cause analysis examines whether Stratman engaged in conduct which properly subjected her to discipline under the applicable policies and statutes. For this purpose, the arbitrator considers County Policy 2.2-Authorized Emergency Police Vehicle And Its Use, and the statutes cited therein, to be the relevant language to this situation. The County asserts that Policy 2.3-Vehicle Pursuits is also on point, but the arbitrator disagrees. Stratman was not in a pursuit situation on the night in question, as defined by the policy. Further, the County's reliance on this policy is based on the fact that it underscores the importance of safe operation in emergency situations, which is also a significant component of Policy 2.2. To that extent, therefore, Policy 2.3 is mere surplusage, neither adding nor detracting from the officer's duty of care.

The language of the policy first of all states that emergency operation, and the statutory exemptions from otherwise adhering to the rules of the road, are only available when the officer is responding to an emergency situation. In this case, Stratman was responding to a call for assistance from a police officer in Holmen, Wisconsin who was responding to a bar fight involving a large crowd of individuals. Dispatch records reveal that the officer issued a "10-33" call, which Chief Deputy Wolf testified signified an emergency situation. Further, Stratman testified that the urgency in the officer's voice also indicated a need for immediate assistance and that she knew she was in the position to respond most quickly. As the County points out, it turned out later that the situation was controlled without serious incident and that ultimately there was no evidence of weapons being present at the fight, of individuals being seriously injured, or that the officer was in physical danger. These things were unknown to Deputy Stratman, however, as she was responding and she felt she could not afford to assume these circumstances did not exist. For the purposes of the policy, therefore, I find that a legitimate emergency did exist and Deputy Stratman was authorized to operate in emergency mode.

Policy 2.2 also requires an officer in emergency mode to consider a variety of factors and to drive accordingly. These include the time of day, volume of vehicular traffic, weather conditions, road conditions, severity of the reported crime and the volume of pedestrian traffic. The County points out that STH 35 is a two-lane road and that at the time in question it was

late at night and the road was wet due to recent rain. Further, the area in question is subject to wildlife walking into the roadway and that at that hour there was a higher probability of intoxicated drivers being on the road. There are also numerous intersections and driveways entering on the highway, requiring additional caution. The County asserts that Stratman's high rate of speed, particularly after she left Onalaska, indicates that she disregarded these factors in violation of the policy. Both of the County's chief witnesses, Sheriff Helgeson and Chief Deputy Wolf, asserted that Stratman's speed was excessive under the circumstances. The problematic aspect of this argument from the arbitrator's standpoint is that the policy does not provide benchmarks to gauge reasonableness, so the officer is required to use his or her discretion in assessing the various factors. Thus, one can comfortably assume that if a car suddenly pulled out of a driveway, or if a deer jumped into the road, a police car travelling in excess of 100 mph could likely not avoid a collision, but there is no guidance to show at what speed an officer should be travelling to eliminate these hazards. Further, it is undisputed that all officers who testified at the hearing admitted to driving in excess of 100 mph at various times while answering emergencies, and one supposes that some or all of the hazards listed were at least potentially present at those times. In my view, therefore, it cannot be said that driving at the speeds reached by Deputy Stratman, while troublesome, is *per se* a violation of the policy. Further, in her testimony, Stratman explained assessment of the various factors on the night in question, such as time of day, vehicular traffic, road conditions and the seriousness of the reported incident, and how she incorporated them into her decision-making. I cannot say on that basis that she disregarded these factors, although she may have evaluated them incorrectly. Certainly, it is within the Sheriff's discretion to question her judgment, however, and I likewise cannot say that his assessment was wrong. I cannot disagree with the Sheriff's finding, therefore, that Stratman did not properly assess the various factors included in the policy as she answered the emergency.

Finally, the policy mandates that an officer operating in emergency mode must slow when approaching intersections and, when approaching a red light, must slow to a speed that would enable him or her to stop or avoid a vehicle that has the right-of-way or is unable to stop. Clearly, the evidence establishes that, as she proceeded north from Onalaska, Stratman passed several intersections without slowing. Further, at the critical intersection of STH 35 and CTH OT she was not able to stop or avoid the Jennings car. Stratman admitted as much in her own testimony and in the Garrity interview and Union concedes that there was an error in judgment at this point. At this critical juncture, therefore, there was an unquestioned violation of the policy. Given all of the above, I find, by clear and convincing evidence, that on July 18, 2010 Stratman committed acts in which the County had a clear disciplinary interest.

Severity of Discipline

The crux of this case does not center on whether Deputy Stratman made mistakes on the night in question. As noted above, the record reflects that violations of the relevant policy did occur. The principal analysis must, therefore, be on whether her actions warranted her discharge and this analysis incorporates considerations of the seriousness of her actions, the

investigation that was performed and whether the discipline was reasonable when compared to other similar situations.

I begin by noting the rationale cited by the Sheriff for the termination decision in his discharge letter. Therein, he stated that he considered the standards set forth in Sec. 59.26(8)(b)5m, Wis. Stats., which governs grounds for discipline of deputies. Those standards are:

- a. Whether the deputy could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct.
- b. Whether the rule or order that the deputy violated is reasonable.
- c. Whether the sheriff, before filing the charge against the deputy, made a reasonable effort to discover whether the deputy did in fact violate a rule or order.
- d. Whether the effort described under subd. 5m.c. was fair and objective.
- e. Whether the sheriff discovered substantial evidence that the deputy violated the rule or order as described in the charges filed against the deputy.
- f. Whether the sheriff is applying the rule or order fairly and without discrimination to the deputy.
- g. Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the deputy's record of service with the sheriff's department.

The Sheriff went on to state that he "...could not ignore the fact that as a result of your misconduct a young boy lost his life. Any form of discipline short of termination would be inappropriate in light of the effect of this event on the victim's family and friends, the community, and the La Crosse County Sheriff's Department." At hearing, the Sheriff amplified his opinion by stating, "...what led up to Brandon's death was Deputy Stratman's intentional reckless, in my opinion, disregard of policies and training. And this crash was completely preventable. And this crash would not have happened if Deputy Stratman had followed policy, procedures and training."

The problem with the statutory standards cited above is that whether they are met is not to be determined by the sheriff, but by a grievance committee reviewing the sheriff's proposed action. Because they focus largely on the reasonableness of the sheriff's decision, it would be difficult, at best, for the sheriff, himself, to determine objectively whether they have been satisfied. That duty falls, therefore, to the arbitrator.

Standards a.-e. are easily resolved. One could reasonably expect a deputy to understand that travelling at high speed at night on wet roads carries inherent risks. These risks are adequately summarized in the factors set forth in Policy 2.2 and in hearing testimony. They include the possibilities that wildlife could wander on to the roadway, that there might be intoxicated drivers on the road, and that another driver might suddenly turn on to the roadway or fail to yield the right-of-way at an intersection. Stratman was aware that if any of these risks materialized, she could be in an accident. Policy 2.2 is reasonable on its face. It incorporates the duties of law enforcement officers operating in emergency mode set forth in state statutes and has not been challenged by the state or grieved. The Sheriff conducted an investigation before rendering his decision, which included review of Stratman's dashboard camera video, the statements of Stratman and other witnesses and the accident investigation of the Wisconsin State Patrol. The investigation was thorough. There is no evidence that the investigation into whether Stratman violated the policy was not fair and objective, or, as described above, that the investigation discovered substantial evidence that Stratman violated the policy.

Standards f. and g. are more problematic and require further analysis. Standard f. requires that the sheriff apply the rule or order fairly and without discrimination to the deputy. By his own admission, Sheriff Helgeson was faced with a difficult personal and political decision. In the first place, the decedent was a popular youth, so the situation was widely reported and stimulated significant interest throughout the County. The Sheriff was also in personal contact with the boy's grieving family and could not but be affected by their loss, which he admitted. Further, Stratman is the daughter of the preceding sheriff and she and her family have been friends of Sheriff Helgeson and Chief Deputy Wolf for many years. The Sheriff was, therefore, zealous to avoid any show of favoritism toward her, which he also admitted. One can sympathize with his emotional reaction and his dilemma. Such considerations, however, do not insulate him from the requirement of fairness.

Fairness and lack of discrimination, in my view, requires that the Grievant be treated in the same way as other officers in similar circumstances, without respect to extraneous considerations. Whether Stratman was dealt with in the same way as other similarly situated deputies is open to debate. Evidence was received regarding a number of other officers who have been in fleet accidents or who have been found in violation of Policy 2.2. One deputy had been in numerous accidents with his squad car in non-emergency situations resulting in property damage, but no injury or loss of life. His accidents were reviewed by the Accident Review Board. He was determined to have been at fault and he was ultimately issued a written reprimand. Another deputy was in a fleet accident when she pulled in front of another vehicle on the highway in a non-emergency situation, resulting in property damage and minor injury. Again, the deputy's accident was reviewed by the ARB. She was found to have failed to properly yield the right-of-way and was issued a written reprimand. A third deputy was found to have violated the policy when he drove up the shoulder of a divided highway at 70 mph against traffic. He was a probationary employee and, so far as this record shows, his penalty was to have his probation extended. The County distinguishes these incidents primarily because of the outcomes. The fact is, however, that each of these incidents could have resulted in loss of life as easily as in Stratman's case and, at least in the first two instances, under

circumstances where the deputies involved did not have the additional complication of being in an emergency situation where a quick response was needed and where the statutory exemptions to adhering strictly to the rules of the road did not apply. The Department's responses to these incidents were different, not because the violations were necessarily less serious, but clearly because the outcomes were different. In those cases, the Sheriff relied on the ARB to investigate the incidents and was able to make an objective decision because the cases were not subject to the same degree of public scrutiny, nor was he burdened with the need to address the feelings of a grieving family. In my opinion, in Stratman's case, those factors deprived the Sheriff of the ability, albeit unintentionally, to objectively weigh the seriousness of her conduct.

The question of whether the Sheriff's decision was not discriminatory is, likewise, troublesome. Stratman's relationship with the Sheriff and Chief Deputy, as well as her being the daughter of the previous sheriff, are matters of record. These facts were also known to the public and the Jennings family. The Sheriff was aware of this and testified that he took those factors into consideration because he wanted to avoid any impression of favoritism. The fact is, however, that who Stratman was should have played no role in determining how she was dealt with, difficult as that may have been. Stratman was entitled to the same degree of objectivity as any other deputy regardless of who she was. Unfortunately, the Sheriff's testimony reveals that he was influenced, at least to some degree, by a need to avoid any show of favoritism, which could only be guaranteed by imposing upon her the harshest penalty possible. While it is not known the degree to which the Sheriff was influenced by this consideration, therefore, the fact that he considered it at all gives rise to a perception of disparate treatment and must be weighed in Stratman's favor.

Factor g. asks whether the proposed discipline reasonably relates to the seriousness of the alleged violation and the deputy's record of service with the department. One cannot overestimate the seriousness of a policy violation which can result in the death of a member of the public. That such was the case here is manifest by the result. Stratman ignored her duty to proceed through the intersection with care and Brandon Jennings was killed as a result. The same could have occurred at any of the previous intersections she passed at high speed. The Sheriff was clear that in his opinion Stratman's intentional reckless behavior caused Brandon Jennings' death. This was a serious error in judgment. The Union has strenuously argued, however, that an arbitrator must not consider the consequences of the act alone in determining the appropriateness of the discipline. To that end, it cites Arbitrator Richard in T.W. Recreational Services, 93 LA 303, as follows:

"It seems to this arbitrator arbitrary to weigh the consequences only if they are realized and ignore them if through good fortune, they are minimized or avoided altogether. Under such a practice an employee guilty of gross negligence involving a total disregard for his employer's property or the safety of others, with the likely potential for resulting fatalities or severe damages may go uncorrected because through some unseen good fortune the likely result didn't pertain, while an employee who commits the least degree of ordinary negligence

may be severely punished, because, due to some fluke, the results are disastrous and of far greater magnitude than could be foreseen. That offends the arbitrator's sense of fair play and justice." Id at 309.

Arbitrator Richard's finding is not directly on point here, because, as has been seen, the outcome here was predictable and not the result of a fluke with unforeseeable consequences. Nonetheless, the rule does apply to the extent that this arbitrator cannot ignore the Sheriff's response in other cases where the same result was equally predictable, but did not occur. As has been noted, in other cases, where deputies committed violations that did not result in fatalities, the imposed discipline was a written reprimand, a significantly less harsh penalty than termination. It must also be taken into account that here, unlike in most of the other cases, Stratman was responding to an emergency wherein she had some authorization to ignore the ordinary rules of the road, which is a mitigating factor.

It is clear from the record that the Sheriff's determination of the seriousness of Stratman's violation was based, in large part, on the outcome of the accident. As he stated in the charges, "I could not ignore the fact that as a result of your misconduct a young boy lost his life. Any form of discipline short of termination would be inappropriate in light of the effect of this event on the victim's family and friends, the community, and the La Crosse County Sheriff's Department." Further, in his testimony, the Sheriff stated, "The outcome of the policy and training violations were, were my consideration in this case, and the outcome was the death. If the outcome had been different then, then if the outcome to the rules violations were different, then I would take that into consideration." Equating the seriousness of the violation with the outcome alone, in my view, is not an appropriate means of assessment under factor g.

Factor g. also requires an evaluation of the deputy's entire record of service with the department. Here, Stratman's previous record was unblemished. She had uniformly positive performance evaluations and had no prior discipline. She had been awarded the Department's Medal of Valor for her actions in dealing with a potential suicide. Other officers who testified at the hearing spoke of her positively and stated that they had no concerns about her judgment or reservations about serving with her in the future. The charges state that the Sheriff considered these factors in making his determination, and he testified to the same. There is no evidence as to what weight he placed on these factors, but neither is there evidence that they were not properly considered.

At the end of the day, it must be acknowledged that this was a tragic event for all concerned. Brandon Jennings lost his life and his family and friends will be forever impacted by his loss. Sheriff Helgeson and the other members of the Department were impacted by the tragedy and the reputation of the Department suffered in the public eye. Not least, Trisha Stratman will never be able to erase the memory of that night and will be burdened with questions from within and without about the decisions she made. The arbitrator, however, must rule according to the principles of industrial justice, which require that she be found to have committed the violations charged, and that the response to her actions, if proved, be made as

objectively as possible, and properly balance their seriousness with the appropriateness of the response.

I take note of the fact that law enforcement officers confronted with emergency situations are endowed with a tremendous amount of discretion. They, alone, must assess the seriousness of the situation with which they are confronted and determine the proper response, taking into account not only the risks inherent in the response, but also the nature of the emergency. This involves a constant balancing of risks, often requiring split-second decisions and suppositions on how likely the risks are to materialize under the circumstances. In keeping with that degree of discretion, they are also custodians of the public trust and must use that discretion wisely, keeping in mind the number of variables that are always present and weighing the safety of the public into the equation. In this case, Stratman was responding to a bar fight where a single officer was dealing with an unruly crowd and she was in the closest position to respond. Her information about the nature of the imbroglio was imperfect, but she was aware the officer had indicated he needed immediate aid and might have been in physical danger. She did not feel she could afford to assume less. She rushed to the scene and, in so doing, exceeded the bounds of safe operation of her vehicle. Due to the unfortunate coincidence of Brandon Jennings arriving at the intersection of STH 35 and CTH OT at the same time as she, and his failure, for whatever reason to stop at the intersection, a fatal accident occurred. That Stratman committed violations of Policy 2.2 has been established, and I do not deny that the violations were serious. The Sheriff, however, characterized her actions as intentionally reckless, with which I disagree. I am convinced that she was aware of the risks involved with responding at high speed under the conditions and weighed those risks against the seriousness of the emergency. Her judgment was flawed, and a tragedy resulted, but I believe she was trying to do her job, and while one can find fault with her decisions, I do not believe one can say she acted with the heedless disregard with which she was charged.

With respect to the penalty imposed, it is clear to me that the response was significantly harsher than in other cases of serious violations. In my view, this was due to the fact that, unlike the other situations, her accident resulted in the death of another. It is also due, in part, to a concern for the potential reaction from the public and the decedent's family were a lesser penalty imposed. It is unfortunate, in my opinion, that the Sheriff decided to bypass the Accident Review Board and conducted the investigation himself. There is no evidence that the Board, which is made up of other Department officers, was not competent to conduct the investigation or that, had it done so, Stratman's Garrity rights would have been compromised, as the County maintained. Absent, that, a supervisory officer from a neighboring county could have been enlisted to perform the task. The Sheriff could have easily justified such a decision on the basis of his longstanding relationship with Stratman and her family. Had he done so, he would have been insulated from the pressures attendant to the public's concerns over favoritism, especially since all previous fleet accidents had been dealt with in this way. That decision alone signaled that Stratman was to be treated differently than other officers, in part because of her status, and put the Sheriff in the position of having to assure that the penalty he imposed was harsh enough to dispel any concerns of favoritism. Unfortunately, it is clear to me that under the circumstances it was virtually impossible for him to act with the necessary degree of objectivity.

I do not fault him for this, but do find that his decision to terminate Stratman was, in part, impermissibly based on factors that do not comport with the principles of proper cause. I find, therefore, that the County has not met its burden of proving by clear and convincing evidence that termination was the proper level of discipline.

Remedy

In proposing a remedy in this case, the parties have obviously widely disparate views. The Union proposes that Stratman receive no more than a written reprimand and an order for remedial EVOC training. Its position is based on its assertion that Stratman's violation was a momentary lapse in judgment and that the County has imposed this penalty on other deputies for similar violations where the outcomes were not so tragic. This is in keeping with its position that outcome should not be the deciding factor in assessing the seriousness of wrongful conduct. The Union also notes that Stratman has no prior disciplinary history, so a written reprimand, in its view, would comport with principles of progressive discipline. The Union notes, in this regard, that the purpose of progressive discipline is corrective, not punitive. The County, of course, seeks to have the discharge upheld and cites Arbitrator Levitan to the effect that the role of the arbitrator is "...not to declare what I believe the proper discipline should have been; my responsibility is to determine whether the employer violated the terms of the collective bargaining agreement by the discipline it imposed." School District of River Falls, MA-14435, (Levitan, 2010). The County also relies on the Sheriff's opinion that Stratman's lack of judgment was so severe as to be irremediable and that no amount of remedial training would make her fit for service.

I begin with the County's position. In the first place, in keeping with Arbitrator Levitan's proposition, I do find, as noted above, that the County did violate the collective bargaining agreement by terminating Deputy Stratman. It remains, therefore, for me to decide what, if any, discipline is warranted and, indeed, this is also in keeping with the River Falls case, because Arbitrator Levitan's next statement in that award, after the quote cited by the County, is, "I do have the authority to modify that discipline, but *only* after making a determination that the employer acted without just cause for discharge."

As to the Union's position, I do not believe that a written reprimand, alone, would adequately address the seriousness of the matter before me. It is true that other deputies who likewise were at fault in fleet accidents were disciplined in this way. In some important respects, however, those cases can be distinguished. The deputies involved in those accidents were guilty of momentary lapses of judgment, which resulted in them striking fixed objects or failing to yield right-of-way to oncoming traffic. Stratman's violation was over an extended period of some minutes, wherein she traveled at breakneck speeds through numerous intersections, as noted above. It just so happened that at only one intersection did she encounter another car, but the same could have occurred at any number of points on her route. Further, the deputies in the other instances were not operating in emergency mode and Stratman was. I have noted that the emergency situation provided Stratman with discretion to operate outside the rules of the road, but, because of that, it also imposed a higher duty on her to use due care

because of the increased risks inherent in such a circumstance. With increased duty, and an attendant failure to observe that duty, the consequences must, in my view, be greater. I also note that, while the contract does incorporate a policy of progressive discipline, it also makes provision for disregarding that policy based on the seriousness of the conduct. I further note that, while I agree that the purpose of progressive discipline is corrective, rather than punitive, these are not necessarily mutually exclusive terms and that punishment, properly applied, may have a corrective component.

Weighing all of the facts and circumstances, therefore, it is my judgment that Deputy Stratman should be returned to duty forthwith, subject only to passing a fitness for duty examination and satisfactorily undergoing remedial Emergency Vehicle Operation and Control training and any other necessary training. She has no history of other similar lapses and her overall record does not suggest to me that she is beyond redemption as a law enforcement officer. The Sheriff, himself, was unwilling to give an opinion as to whether she could at some time return to law enforcement with another department, but would only state that she could not serve in La Crosse County. I further hold that her termination should be reduced to a thirty day suspension, commencing October 9, 2011, and that she is entitled to back pay with offsets for the suspension and any income she has earned in the interim. For the foregoing reasons, therefore, and based upon the record as a whole, I hereby enter the following

AWARD

La Crosse County did not have proper cause under Article 2.01 for terminating Trisha Stratman. The grievance is sustained and the remedy is, as follows:

1. Stratman is to be reinstated forthwith and returned to duty, subject only to passing a fitness for duty examination and satisfactorily undergoing remedial Emergency Vehicle Operation and Control training and any other necessary training.
2. Stratman's termination is reduced to a thirty-day suspension, without pay, effective October 9, 2011, which is to be reflected in her personnel file.
3. Stratman is to receive backpay from October 9, 2011 to the date of her reinstatement at the rate of pay she was earning as of her separation from employment, to be offset by the thirty-day suspension and any income she has earned from other sources in the interim.

The arbitrator will retain jurisdiction over this award for a period of thirty days to resolve any issues that may arise in the implementation of the award.

Dated at Fond du Lac, Wisconsin, this 21st day of June, 2013.

John R. Emery /s/

John R. Emery, Arbitrator