

BEFORE THE ARBITRATOR

In the Matter of the
Arbitration of a Dispute Between

**LAW ENFORCEMENT LABOR
SERVICES INC.**

and

BMS Case No. 09-PA-0748

STEELE COUNTY

Appearances:

Attorney Isaac Kaufman, General Counsel, Law Enforcement Labor Services, Inc., 327 York Avenue, St. Paul, Minnesota 55130-4039, appearing on behalf of the Union.

Attorney Joan M. Quade, Barna, Guzy & Steffen, Ltd., Attorneys at Law, 400 Northtown Financial Plaza, 200 Coon Rapids Boulevard, Minneapolis, Minnesota 55433-5894, appearing on behalf of the County.

ARBITRATION AWARD

Pursuant to the joint request made by Law Enforcement Labor Services, Inc., hereinafter referred to as the "Union", and the subsequent concurrence by Steele County, hereinafter referred to as the "County" or "Employer," the undersigned was appointed Arbitrator according to the procedure contained in the grievance –arbitration provisions of the parties' collective bargaining agreement to hear and decide a dispute as specified below. A hearing was conducted by the undersigned on July 14 and 29, 2009 at the Steele County Administration Center, 630 Florence Avenue, Owatonna, Minnesota. The hearing was not transcribed. The parties completed their briefing schedule on August 28, 2009.

After consideration of the entire record and the arguments made by the parties, the Arbitrator makes and renders his decision and Award.

STIPULATED ISSUES

1. Did the County have just cause to terminate Matthew Mollenhauer's employment?
2. If not, what is the appropriate remedy?

BACKGROUND

General Background

Steele County is located in southern Minnesota about an hour south of Minneapolis. The Steel County Sheriff's Office is a full-time law enforcement agency in the County with offices at 204 East Pearl Street, Owatonna, Minnesota.

Gary A. Ringhofer is the elected Sheriff of Steele County. He was appointed Sheriff in 2002 and first elected to the office the same year. He was re-elected as Sheriff in a hotly contested race in 2006. His opponent in 2006 was Steele County Sheriff's Office Investigator Troy D. Matejcek.

Milo J. Dahlin is Chief Deputy of the Sheriff's Office.

Dan Schember is the Jail Administrator. Pam Otto is the Assistant Jail Administrator. Dan Peterson, Dick Wandry and Ron Hammann are Sergeants in the jail.

Scott Ringhofer worked for the County as a Deputy Sheriff. He was Sheriff Ringhofer's nephew.

Richelle Olson-Cowden is a Detention Sergeant in the jail.

Facts Giving Rise to the Instant Dispute

Bowling Alley Incident

On May 4, 2006, a party celebrating the 30th birthday of Josh Ernste, an employee of the Steele County Sheriff's Office, was held at the South Park Lanes bowling alley in Owatonna. The party was attended by some employees of the Sheriff's Office, including Scott Ringhofer, Matthew Peter Mollenhauer ("Grievant"), Olson-Cowden and Jennifer Peterson.

Ringhofer, the Grievant, Olson-Cowden and Peterson were conversing in an area away from the others at the party. Their interactions included considerable sexual banter and horseplay, initially between Ringhofer and Peterson; and then between Ringhofer and Olson-Cowden. At some point Ringhofer ordered a pizza. When it arrived, Olson-Cowden teased, "What do I have to do to get a piece of pizza?" Ringhofer replied that she wasn't getting any pizza. She then shook her breasts and asked if that would be sufficient. Ringhofer said no. Olson-Cowden again asked Ringhofer what she would have to do for a piece of pizza and Ringhofer replied that she would have to grab his "crank" or "gum" or words to that effect. So Olson-Cowden walked over to Ringhofer; said all right; and put her hand in front of Ringhofer's crotch.

At this point, the evidence is disputed. According to the Employer, Ringhofer removed his penis from his pants and put it in Olson-Cowden's hand. The Employer bases this opinion, in part, on the Grievant's statement during the investigation noted below wherein he stated: "[h]e

reaches in, I seen his penis and scrotum come out at which point I turned and said I can't believe you're doing this and I turned away."

The Grievant testified that he was coerced into making this false statement. The Grievant admitted that he saw Ringhofer reach into his waistband but "turned away because he knew something good wasn't going to happen." The Grievant testified that he didn't see what came out of Ringhofer's fly and had no idea whether or not he actually exposed his penis. The Grievant added he had a "hunch", based on pranks that Ringhofer had played on him when they were ice fishing together, that Ringhofer stuck his thumb out the zipper.

The Aftermath and Subsequent Investigations

On May 8, 2006, Assistant Jail Administrator Otto learned about the incident at the bowling alley, including the allegation that Ringhofer had placed his penis in Olson-Cowden's hand. Otto asked Olson-Cowden about the incident. Olson-Cowden told her that "she put her hand in front of Ringhofer's crotch and smarted off to him. The next thing she knew she felt his dick in her hand." Otto later submitted a written incident report to Sheriff Ringhofer.

After learning of the incident, Sheriff Ringhofer requested assistance from the Dakota County Sheriff's Office to conduct a criminal investigation into the bowling alley incident. He requested this assistance because Ringhofer was his nephew and using outside investigators would avoid any conflict of interest. Dakota County Sheriff's Department Captain Brad Wayne and Sergeant Rob Shingledecker were assigned to conduct the investigation.

On May 9, 2006, Captain Wayne and Sergeant Shingledecker went to the Steele County Law Enforcement Center where they met with Sheriff Ringhofer and Chief Deputy Dahlin. They were briefed on the facts of the case and given the report prepared by Otto.

On May 11, 2006, Captain Wayne and Sergeant Shingledecker interviewed Olson-Cowden at the Steel County Jail. In summary, Olson-Cowden stated that on May 4, 2006 she had been with several members of the jail staff celebrating the thirtieth birthday of one of their co-workers. She said that she, Peterson and Ringhofer were sitting around a table. She stated there was some good natured sexual bantering back and forth between her and Ringhofer. She added that when Ringhofer ordered a pizza she asked him what she had to do to get a piece of pizza. After jiggling her breasts didn't entice Ringhofer into giving her some pizza, Olson-Cowden put her hand in front of his crotch without touching him, looked to the right while she tapped her foot and said "what are you gonna do, what are you gonna do about it, and felt something in my hand for a second and then it was gone." Olson-Cowden then looked to the left at the Grievant who said "I can't believe that you did that."

Olson-Cowden thought Ringhofer placed his penis in her hand but did not look down so she "can't say that with all certainty." She stated "it felt like skin" and "it wasn't very large" and indicated it could have been his penis because her hand was in front of his crotch.

After receiving a statement from Olson-Cowden, Captain Wayne and Sergeant Shingledecker drove to Geneva, Minnesota to obtain a statement from the Grievant.

At his home, the two investigators interviewed the Grievant concerning the events of May 4, 2006. His statement was recorded and transcribed. The Grievant told the investigators that he saw Ringhofer take out his penis and scrotum and place them in Olson-Cowden's hand. Upon observing this event, the Grievant stated that he turned and told Ringhofer, "I can't believe you did that."

The investigators submitted a report of their findings on May 16, 2006. The report concluded as follows:

In summary, after speaking with Sergeant Olson-Cowden, Correctional Deputy Jennifer Peterson, and Correctional Deputy Matt Mollenhauer, it is apparent in this case that Deputy Scott Ringhofer exposed himself at the South Park Bowling Alley in Owatonna, Minnesota on May 4, 2006. According to Deputy Mollenhauer's testimony, he placed his penis in the hand of Correctional Sergeant Olson-Cowden. It appears that the only party admitting to witnessing the exposing was Deputy Matt Mollenhauer.

On June 6, 2006, Captain Wayne filed a criminal complaint charging Ringhofer with Criminal Sexual Conduct in the Fifth Degree and Indecent Exposure. Thereafter, Sheriff Ringhofer retained Captain Wayne and Sergeant Shingledecker to conduct an internal investigation into the same incident.

During their internal investigation of Ringhofer, Captain Wayne and Sergeant Shingledecker received information from the Sheriff's Office that the Grievant might be recanting or changing his story. In response they met with the Grievant on or about June 27, 2006, at the jail.

The brief meeting was not recorded. Captain Wayne testified that when they met with the Grievant they showed him a copy of his May 11, 2006 interview transcript. They asked the Grievant: "Is there anything different than what was in the statement?" The Grievant replied that the whole incident had caused him great stress because he was very good friends with Ringhofer (the Grievant and Ringhofer had been friends since high school and were fishing and hunting buddies). The Grievant said that he had lost weight and "didn't know what to do anymore." Captain Wayne and Shingledecker again showed the Grievant his statement and asked if it was accurate. The Grievant told them "Yes," so they did not ask any additional questions and immediately left.

The Grievant testified that he did not review the statement at this meeting and never confirmed that the statement was true. He further testified that he told the investigators what he said at the earlier interview was wrong and he said it only because he was afraid he would lose his job. The Grievant added that he felt pressured by the investigators' questions and repeatedly asked unsuccessfully for Union representation and to leave.

On June 28, 2006, the Dakota County investigators submitted their narrative report of the internal affairs investigation into Ringhofer's conduct. The report made reference to the

Grievant as “a witness who was certain that they [sic] saw a penis” at the bowling alley. On July 5, 2006, the County terminated Ringhofer’s employment.

On July 18, 2006, the Grievant contacted Attorney James Ventura who was representing Ringhofer in the criminal case arising from the incident at the bowling alley. According to notes that Attorney Ventura took contemporaneously with the telephone call, the Grievant told him that the Dakota County investigators had arrived at his house with “no warning at all” and had “threatened him with his job.” The notes also mention that the investigators shut off the recorder three times during the Grievant’s statement. Further, the notes indicate the investigators told the Grievant “if you retract your statement you’ll be charged with perjury.”

On August 17, 2006, the Grievant had another telephone conversation with Attorney Ventura. At that time the Grievant described the pre-interview that had taken place before he gave his statement on May 11, as well as the second meeting at the jail on June 27. The Grievant stated that the investigators had threatened him with the loss of his job and with criminal prosecution.

On September 11, 2006, the Grievant gave a recorded statement to Investigator Donald Roggenbauer, who had been retained by Attorney Ventura. The Grievant described to Investigator Roggenbauer the events at the bowling alley on May 4, 2006, including that he had not seen Ringhofer expose his penis. The Grievant also described in detail the coercive methods which he said the Dakota County investigators employed to convince him to give a false statement.

The Grievant Changes His Story at the Kastigar Hearing

On August 31, 2007, a Kastigar Hearing was held at the Dodge County Courthouse, Mantorville, Minnesota. At the Hearing the Grievant changed his story from the statement made in the criminal investigation and indicated that he did not actually see Ringhofer take out his penis. He testified he was coerced and intimidated by the Dakota County investigators; he was warned about potentially adverse job consequences; and he was told to say in his prior statement that he observed genital contact. Because of this testimony, the criminal case against Ringhofer ultimately was dismissed.

Shortly after the Kastigar Hearing, the Grievant told Sergeant Peterson that he “just threw [himself] under the bus.” He also told co-workers on multiple occasions that he expected to lose his job.

The Grievant Repeats His Changed Story at the Ringhofer Arbitration

After the criminal charges against Ringhofer were dropped, he filed a grievance challenging his termination, which led to an arbitration hearing on August 5, 2008. At arbitration, Ringhofer told the same story – he reached into his pants; opened his zipper and put his thumb and hand out of his zipper to make Olson-Cowden believe it was his penis he was placing in her hand - he first told Captain Wayne and Sergeant Shingledecker during his interview as part of the internal investigation.

The Grievant's testimony at the arbitration hearing was substantially the same as his testimony at the Kastigar Hearing; specifically, he had not seen Ringhofer expose his penis at the bowling alley and he had been coerced by the Dakota County investigators into giving a false statement during the initial investigation.

On September 19, 2008, Arbitrator Steven Befort issued his decision denying Ringhofer's grievance and upholding his termination. In reaching his decision, Arbitrator Befort found the Grievant's testimony that he was coerced into lying during the criminal investigation not credible.

Mollenhauer Investigation and Termination

After the conclusion of Ringhofer's grievance arbitration proceeding, the County initiated a separate investigation of the Grievant. The County specifically was concerned that the Grievant knowingly provided false information either during the May 2006 criminal investigation into the bowling alley incident, during the August 31, 2007 Kastigar Hearing and/or during the August 5, 2008 grievance arbitration. The County contacted an independent investigator, Michelle Soldo of Soldo Consulting, P.C., and asked her to conduct an independent investigation of the Grievant. The investigation was begun and finished in October 2008. Soldo is an experienced attorney and investigator who works primarily in the public sector in Minnesota.

Soldo interviewed most of the relevant players involved in the Ringhofer matter, except Ringhofer, in addition to interviewing the Grievant. The Grievant's statement to Investigator Soldo was substantially the same as the testimony he gave in the Kastigar Hearing and the Ringhofer grievance arbitration hearing. In his statement the Grievant once again asserted that he had not seen Ringhofer expose his penis at the bowling alley and had been coerced into saying so.

Investigator Soldo made the following findings based on her interviews and reviews of the relevant documents, policies and procedures:

- Mollenhauer reported that on May 11, 2006, when interviewed by Dakota County Investigators Captain Brad Wayne and Sgt. Rob Shingledecker as part of a criminal investigation, he knowingly gave a false statement regarding his observations of the May 4, 2006 conduct of friend and co-worker Scott Ringhofer.
- During an August 31, 2007 Kastigar Hearing and during an August 5, 2008 grievance arbitration hearing: Mollenhauer provided false information regarding his observations of Ringhofer's conduct on May 4, 2006; and Mollenhauer falsely claimed that on May 11, 2006 and on or about June 27, 2006 Captain Wayne and Sgt. Shingledecker coerced him into giving a false statement about Ringhofer's conduct on May 4, 2006.

- Mollenhauer's conduct violates the Steele County Code of Ethics-Standards of Conduct and Steele County Sheriff's Department "Expectations for Staff."

Counseling for the Grievant

In December 2008 the Grievant began receiving psychological counseling from the South Central Human Relations Center. On December 19, 2008, psychologist David Moll provided a note stating that the Grievant was presenting significant emotional distress that would adversely affect his ability to function at work. Moll recommended that the Grievant take leave from his employment from December 14, 2008 through January 7, 2009. Accordingly, the Grievant began taking leave under the Family Medical Leave Act ("FMLA"). Following Moll's recommendations, this leave was continued to January 29, 2009 and again to February 20, 2009.

The Grievant is Terminated

On February 3, 2009, Sheriff Ringhofer sent a letter to the Grievant informing him he was being recommended for discharge. In this letter Sheriff Ringhofer stated his basis for this recommendation as follows:

on or about May 4, 2006 you witnessed an incident involving a Steele County Deputy and a female corrections Sergeant at Southpark Lanes in Owatonna. Resulting from this incident, a criminal investigation was conducted by Dakota County in which you gave a taped statement on May 11, 2006 as to the events which you said and signed as being true and correct. On June 27, 2006 Captain Wayne and Sgt. Shingledecker from Dakota County contacted you after hearing you might change your statement. You were asked if it was any different than the statement you made on May 11th and you said no.

On August 31, 2007 you testified under oath during a Kastig[e]r hearing that Captain Wayne and Sgt. Shingledecker falsely reported what you gave as a statement on May 11, 2006 and accused the investigators of coercing you. You also accused the investigators of turning the tape on and off. On August 5, 2008 during an Arbitration hearing it was determined that the statement you gave on May 11, 2006 was consistent with the evidence and that the testimony you gave at the grievance hearing and at the Kastig[e]r hearing was not credible. Your conduct violates county policies of Code of Ethics – Standards of Conduct and the Steele County Sheriff's Office expectations for staff.

While the seriousness of this action, standing alone, warrants your termination, there are several documented disciplinary actions for misconduct during your employment with Steele County. All incidents of this type of conduct discredit not only you, but the Sheriff's Office as well.

Please be advised that the County Board will consider this recommendation at its County Board meeting, on February 10, 2009 beginning at or about 7:15 p.m.

On February 10, 2009, the Steele County Board of Commissioners voted to terminate the Grievant effective immediately.

Further facts will be set forth in the **DISCUSSION** section below.

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE 9
DISCIPLINE

9.1 The following disciplinary procedures shall apply:

A. The EMPLOYER will discipline permanent employees for just cause only. Just cause will be reduced to writing when applied pursuant to the Article. Discipline will be in any one of the following forms.

- (1) Discharge
- (2) Demotion
- (3) Suspension
- (4) Written reprimand
- (5) Oral reprimand

PERTINENT STEELE COUNTY DETENTION CENTER
POLICY & PROCEDURE MANUAL PROVISIONS

. . .

POLICY:

The Steele County Detention Center shall maintain a written Code of Ethics and Standards of Conduct.

PURPOSE:

To provide staff with guidelines for professional conduct.

PROCEDURE:

CODE OF ETHICS

. . .

A. Staff members shall respect the importance of all elements of the criminal justice system and cultivate professional cooperation with each segment.

- B. Relationships with colleagues shall be designed to promote mutual respect within the profession and to improve the quality of service.
- C. Statements critical of colleagues, their agencies and/or elements of the criminal justice system shall be made in a constructive manner and limited to issues which are verifiable.

. . .

STANDARDS OF CONDUCT

. . .

- B. **Personal Conduct:** Staff members, on and off duty, shall conduct themselves in a manner which shall establish and maintain the respect of the public, staff and inmates. Any conduct which reflects unfavorably on the Steele County Sheriff's Department shall constitute grounds for disciplinary action.

. . .

- O. **Court Testimony:** When it becomes the duty of a Staff member to testify in court or furnish the Detention Center information to a public official or any representative of a duly constituted law enforcement agency the staff member shall furnish the requested information truthfully, objectively, accurately and completely.

. . .

- Q. **Performance of Duties:** Staff members are responsible for performing their duties in a professional manner. . . . All staff members shall cooperate to the fullest extent in any investigation authorized by the Steele County Sheriff's Department.

- R. **Professional Conduct:** All staff members shall conduct themselves in a professional manner intended to establish and maintain the respect of the public, staff, other members of the criminal justice system and inmates. . . .

. . .

The Standards of Conduct are designed to establish and maintain a high level of professional competence and integrity in each member of the Steele County Detention Center. They have been developed in conjunction with Steele County Detention Policies as well as nationally recognized and accepted standards in the field of corrections. These standards do not replace the Steele County Policies or the Steele County Sheriff's Department Standard Operating Procedures, but are to

be observed in addition to them. Failure to comply with any of the above listed policies, procedures, rules or standards may result in disciplinary action.

PERTINENT EXPECTATIONS FOR STAFF PROVISIONS

. . .

I expect you to be responsible and accept full responsibility for your actions. Please be the one to advise us when you make a mistake.

I expect policies and procedures to be followed. I also respect and trust your decisions when there might be some deviation when there is a good reason for this.

I expect you to be a progressive, positive, fair and consistent officer.

. . .

I expect you to maintain composure in high stress situations.

. . .

POSITIONS OF THE PARTIES

The parties filed thoughtful, well-reasoned briefs. The parties’ positions and arguments and cases cited are not reproduced in detail; instead the parties’ positions are summarized below. The parties’ main arguments are discussed below in the **DISCUSSION** section of the Award.

Union’s Position

The Union basically argues that the County did not have just cause to terminate the Grievant.

In support thereof, the Union initially argued at hearing that the Arbitrator should apply the seven elements established in *Enterprise Wire Company, 46 LA 359 (Daugherty, 1966)*.¹ However, after learning that the Arbitrator would not apply this test as the standard for establishing just cause unless the parties agreed to it, the Union stated in its brief that it is comfortable with the Arbitrator’s two-step inquiry in disciplinary arbitration cases: the Employer must prove first that the employee committed the acts complained of; and second, there is just cause for the level of discipline imposed.

¹ This is an analytical framework devised by the late Carrol R. Daugherty, a Professor of Labor Economics and Labor Relations at Northwestern University and well-established arbitrator. It was his attempt at defining just cause. His approach has its critics and its shortcomings. See, for example, John E. Dunsford, “Arbitral Discretion: The Tests of Just Cause,” Proceedings of the 42nd Annual Meeting, National Academy of Arbitrators, ed. Gladys W. Gruenberg (Washington, D.C.: BNA Books, 1990), p. 23.

In regard to the first element of the test, the Union argues that the Grievant was coerced into giving a false statement regarding Ringhofer exposing his genitals at the bowling alley and that the Grievant told the truth in subsequent proceedings when he said that he did not see Ringhofer expose his penis during the incident in question. In support thereof, the Union maintains that there are plausible and credible contrary explanations for the Grievant's statements which the County alleges incriminate him (for example, "I can't believe you did that" and "just threw [himself] under the bus" statements); that there is substantial evidence in the record that the Dakota County investigators coerced the Grievant into giving a false statement regarding Ringhofer exposing his penis at the bowling alley; that Soldo conducted an inadequate investigation; and that the Grievant's termination was part of a pattern of retaliation against County employees who opposed Sheriff Ringhofer and supported Investigator Matejcek in the 2006 election.

With respect to the second element of the test, the Union argues that the discipline imposed on the Grievant was excessive; violated the principles of progressive discipline and ignored his generally good work record which was previously devoid of any issues relating to his honesty.

The Union adds that the Grievant's FMLA leave does not prevent his reinstatement.

Based on all of the above, the Union concludes that the Grievant's termination was without just cause, thereby violating the terms of the parties' collective bargaining agreement, and asks that the Grievant be reinstated and made whole for all losses incurred as a result of his unjust termination.

County's Position

The County contends that it had just cause to terminate the Grievant.

The County argues that the test for establishing just cause for the Grievant's discharge is a four-part test: (1) the cause must specifically relate to and affect the employee's job; (2) it must be substantial; (3) it must directly affect the rights and interest of the public; and (4) the cause must touch the qualifications of the employee or the performance of his duties. *AFSCME Council 96 v Arrowhead Regional Corrections Bd.*, 356 N.W.2d 295, 298-99 n. 2 (Minn. 1984).

The County argues that it has satisfied this test because the Grievant's termination was based on his violation of the County's Code of Ethics-Standards of Conduct and the Sheriff's "Expectations for Staff." The County asserts that the Grievant's violations of these policies are substantial, affect his ability to continue serving as a police officer, affect the public interest and touch on his performance of his duties.

The County argues there is no evidence to support the Grievant's claim that he was retaliated against because he supported the Sheriff's opponent in the 2006 election or that he was coerced into giving a false statement during the criminal investigation into Ringhofer's conduct at the bowling alley.

Finally, the County opines that the Grievant cannot be reinstated because his mental health issues prevent him from performing essential job functions.

Therefore, based on all of the foregoing, the County requests that the discharge be upheld and the grievance be denied.

DISCUSSION

At issue is whether there was just cause to terminate the Grievant.

The County argues that there was just cause for the Grievant's discharge while the Union takes the opposite position.

Standard

The parties do not agree with respect to a standard to be applied herein. The Union agrees with the Arbitrator's two-part test.

The County, on the other hand, proffers a four-part test. The County asserts that the record evidence supports the County on all four tests.

Since the record does not indicate that the parties share an express understanding or agreement on the specifics of the just cause standard, the Arbitrator will apply his own test.

There are two fundamental, but separate, questions in any case involving just cause.² The first is whether the employee is guilty of the actions complained of, which the County herein has the duty of so proving by a preponderance of the evidence. If the answer to the first question is affirmative, the second question is whether the punishment is contractually appropriate given the offense.

Answering these questions will address the four elements articulated by the County in its test.

Basis for the Discipline

Applying the above standard to the facts of the instant case, the Arbitrator first turns his attention to the question of whether the Grievant is guilty of the actions complained of.

In making this determination as well as others, the Arbitrator has been presented with conflicting testimony regarding certain material facts. As a result, it has been necessary to make credibility determinations, based in part on such factors as the demeanor of the witnesses, material inconsistencies and inherent probability of testimony, as well as the totality of the

² Each disciplinary action involves two issues: whether there was just cause for the imposition of discipline for the particular wrongdoing, and whether there was just cause for the penalty – the quantum of discipline – imposed on the Grievant. Labor and Employment Arbitration, Volume I, Tim Bornstein, Ann Gosline and Marc Greenbaum General Editors, Chapter 14, Just Cause and Progressive Discipline by Arnold Zach, s. 14.03[1], 14-5 (1998).

evidence. Some of these credibility determinations are discussed within the context of the Award. All other conflicts in the evidence, although not specifically detailed or discussed, have been considered in reaching the Arbitrator's decision.

The basic question before the Arbitrator is whether to believe the Grievant's story that he was coerced into giving a false statement about the events of May 4, 2006 during the criminal investigation into Ringhofer's conduct at the bowling alley or to conclude, as the County did, that the Grievant's statement during the Dakota County criminal investigation was true and he lied during the Kastigar Hearing, the Ringhofer arbitration and on all subsequent occasions in order to protect his friend. For the reasons discussed below, the Arbitrator agrees with the County's version of what took place.

The Ringhofer criminal investigation record, the Ringhofer arbitration decision and Investigator Soldo's report all establish that the Grievant's statement during the Dakota County investigation that he had seen Ringhofer expose his penis and scrotum at the bowling alley was true and that the Grievant lied under oath when he recanted his statement at the Kastigar Hearing and the Ringhofer arbitration and when he gave a statement to Investigator Soldo during her investigation in October 2008. The record evidence in this case supports such a finding as well. The Arbitrator reaches this conclusion for the following reasons.

Captain Wayne and Sergeant Shingledecker both testified persuasively that they did not coerce the Grievant into giving his statement. They stated that the Grievant was relaxed and calm and seemed comfortable when answering their questions. On listening to the recorded statement, the Arbitrator agrees with the two Dakota County investigators' characterization of the Grievant; he does not sound like someone being coerced into giving a statement.

The two Dakota County investigators also testified that they were surprised at the length and detail of some of the Grievant's answers. As Captain Wayne stated, "We asked four or five word questions and he responded with forty to forty-five words." A review of the written copy of the Grievant's statement by the Arbitrator indicates that the Grievant often gave lengthy and detailed accounts of the May 4, 2006 incident at the bowling alley. The Grievant stated, for example, that Ringhofer removed his penis and scrotum from his pants and put them into Olson-Cowden's hand. The Arbitrator finds it unlikely that a person begin coerced to admit to a friend's genital exposure would name two parts of the genitalia. In addition, the Grievant provided a possible explanation for Ringhofer's conduct, citing in great detail some of the personal trials Ringhofer was experiencing, including a "horrible divorce" and counseling. The Arbitrator finds it not credible that the Grievant would be so expansive in his answers to questions involving the crux of the dispute if he were, in fact, lying, and saying what the Dakota County investigators wanted him to say.

In sum, the Grievant's calm, relaxed manner in answering Captain Wayne's short questions with often lengthy, detailed and unexpected answers belies the Grievant's claim he was forced to "get with the program" and adhere to an agreed-upon story. The Dakota County investigators' testimony, the recorded statement made by the Grievant and said investigators' report all indicate that the Grievant was a willing participant in providing a statement during the Ringhofer criminal investigation.

In partial support of his claim that he was forced to lie about what happened at the bowling alley, the Grievant testified that Captain Wayne “glared at him across the table” during their interview, like he was doing at hearing. The Arbitrator very carefully observed Captain Wayne during his testimony at hearing and saw no evidence that he was “glaring” at the Grievant. Instead, Captain Wayne testified in a professional, dignified manner, was almost professorial in his delivery and generally looked at the person asking him questions.

The Grievant next claimed that Captain Wayne’s coercive tactics included being “loud” and “in [his] face.” However, Captain Wayne testified that is not his style, which is consistent with the recorded statement, and his delivery at hearing.

The Grievant added that he felt pressured to tell the Dakota County investigators what they wanted to hear. No other witnesses testified that they felt pressured or coerced when questioned by the Dakota County investigators. Instead, they described the kind of behavior and demeanor that Captain Wayne testified he used during the investigation. As noted above, this was how Captain Wayne conducted himself at hearing. Therefore, the Arbitrator also rejects this claim.

The Union argues that its allegation that the Dakota County investigators coerced the Grievant into giving a false statement is supported by the evidence that Captain Wayne told his father that the Ringhofer investigation was a “witch hunt.” However, there is no persuasive evidence that the Dakota County investigators conducted anything other than a professional investigation into the events of May 4, 2006. To the contrary, Sheriff Ringhofer asked for outside help in the investigation to avoid a real or perceived conflict of interest since Ringhofer was his nephew. There is no evidence that Sheriff Ringhofer asked specifically for these two Dakota County investigators or told them what outcome he wanted. The Dakota County investigators testified that they would not participate in an investigation under such circumstances.

There also is no evidence that the Dakota County investigators had any stake in the outcome of the Ringhofer investigation or had any reason to “shape” the Grievant’s statement. To the contrary, the record evidence indicates that both Captain Wayne and Sergeant Shingledecker were good investigators who did a professional, competent job of investigating the disputed events.

The Union further attacks the conclusions and findings of Arbitrator Steven Befort, the arbitrator in Ringhofer’s discharge arbitration, which were incorporated by reference into Investigator Soldo’s internal affairs report.

For example, the Union points out that both Arbitrator Befort and Investigator Soldo noted the Grievant exclaimed “I can’t believe you did that,” or words to that effect, after seeing Ringhofer place his penis in Olson-Cowden’s hand. However, according to the Union, the Grievant testified that Ringhofer had a history of sticking his thumb through his zipper and touching people with it as though it were his penis, a prank he said he learned from his uncle, the Sheriff. According to the Union, this is what the Grievant assumed Ringhofer had just done

when he said “I can’t believe you did that.” The Union opines that this is an entirely plausible and credible explanation.

This misstates the Grievant’s testimony. The Grievant testified that Ringhofer played practical jokes on him when they were ice fishing. Twice when the Grievant fell asleep in the fish shanty, Ringhofer woke him up suddenly and startled him by sticking his thumb out his pants’ zipper. The Grievant did not testify that Ringhofer placed his thumb and/or genitals in the hand of the Grievant when playing this practical joke. The Grievant also did not testify that Ringhofer repeated this prank on anyone other than him. The Arbitrator concedes that an argument might be made that the Grievant’s statement, “I can’t believe you did that.” was in reference to Ringhofer placing his thumb on Olson-Cowden’s hand and pretending it was his penis. However, given the Grievant’s inconsistent testimony on the point, Olsen-Cowden’s testimony and statements on the matter, and the two Dakota County investigators’ testimony and report, the Arbitrator find this alternative theory is not credible or convincing.

The Union also challenges both Arbitrator Befort’s and Investigator Soldo’s finding that the Grievant’s tone of voice in his recorded May 11, 2006 statement did not suggest he was being coerced. The Union argues that this kind of voice analysis is surely an area where a fact-finder should obtain the assistance of an expert before reaching any reliable conclusions. Yet, according to the Union, no expert testimony was provided, either at the Ringhofer or the Grievant’s arbitration. The Union adds that there is no evidence that either Arbitrator Befort or Investigator Soldo have had any training or expertise in voice analysis. The Union believes their opinions should be given little weight in this proceeding.

The Arbitrator disagrees. The Union is correct that neither Arbitrator Befort nor Investigator Soldo is certified as an expert in the field of voice analysis. However, Arbitrator Befort has extensive civil litigation experience in labor and employment matters in private practice and as both Principal Assistant Ramsey County Attorney and Special Assistant Attorney General, Minnesota Attorney General’s Offices. *Bureau of Mediation Services bio*. He also has been a professor at the University of Minnesota Law School since 1982, teaching labor, employment and discrimination law. *Id.* He is a very experienced arbitrator having decided over 150 cases and has been a member of the National Academy of Arbitrators since June 2006. *Id.* Arbitrator Befort has made credibility determinations regarding witnesses for many years while teaching, prosecuting and deciding disputes in labor and employment law. As a result, the Arbitrator believes that Arbitrator Befort’s opinion carries great weight when assessing the credibility of witnesses.

Likewise, the Arbitrator believes that Investigator Soldo’s findings on this point should be given significant weight. She is an experienced attorney and investigator with a public sector employment law focus including law enforcement. She has a great deal of experience assessing the credibility of employees while making findings on internal complaints similar to the instant dispute and when responding to allegations of employee misconduct. Based on Investigator Soldo’s report and testimony, the Arbitrator is of the opinion that she is a savvy judge of people and their veracity.

Moreover, Arbitrator Befort's and Investigator Soldo's conclusions regarding the truthfulness of the Grievant's initial statement and the dishonesty present in his subsequent recanting were known by the Union prior to this proceeding. If the Union truly believed that the Grievant's recorded statement from the initial investigation did not support the conclusion drawn from it by the two aforesaid parties, the Union could have brought in an expert to refute their findings. The Union did not do so.

Arbitrator Befort made the following findings and conclusions regarding whether the Grievant told the truth in his initial statement to the Dakota County investigators:

Fourth, unlike the hearsay summary presented at the *City of Minneapolis* case, Mollenhauer was subject to extensive examination by both parties at the arbitration hearing. Of particular significance, I found that the explanation he gave for his change in testimony not to be credible. Mollenhauer testified that he was subject to continuous pressure and remarks by the investigators to confirm that Mr. Ringhofer made genital contact with Ms. Olson-Cowden. He testified that the investigators stopped the recording to tell him what they wanted him to say. The evidence, however, belies this explanation. The auditory playback of the tape revealed no tension or discomfort in the participants' conversation. The tape exhibited no sounds of stopping and starting. Moreover, the taped interview concluded in the thirteen minutes noted on the transcript, strongly suggesting the absence of any gap in recording time.

In sum, I find that Mr. Mollenhauer's initial statement, although technically hearsay in nature, constitutes credible evidence given the record of this case taken as a whole. Based on this record, it is far more likely that Mr. Mollenhauer altered his story because of his friendship with Mr. Ringhofer, than because of any coercion exerted by the Dakota County investigators. As a result, I believe that the Employer has carried its burden of establishing that the grievant engaged in the conduct alleged as the basis for discipline in this matter. (Employer Exhibit No. 33, p. 13).

Arbitrator Befort's rationale and decision, (Employer Exhibit No. 33), constitutes strong arbitral precedent for reaching the same conclusions regarding the Grievant's claim in this case. It would be difficult to improve upon Arbitrator Befort's rationale for concluding that the Grievant spoke the truth in his initial statement and lied thereafter.

Likewise, Investigator Soldo's report supports the Arbitrator's conclusion that the Grievant told the truth in his initial statement to Dakota County investigators. Notwithstanding the fact that she did not interview Ringhofer during her investigation, the Arbitrator finds Investigator Soldo's investigation and report thorough, (Employer Exhibit No. 43, p. 35), professional and persuasive.

Both Investigator Soldo and Arbitrator Befort reached similar conclusions regarding the Grievant's claims. Investigator Soldo found that during both an August 31, 2007 Kastigar Hearing and an August 5, 2009 grievance arbitration, the Grievant provided false information

regarding his observations of the conduct of former co-worker and friend Ringhofer and the Grievant falsely claimed that on May 11, 2006 and on approximately June 27, 2006, the two Dakota County investigators coerced him into giving a false statement about Ringhofer during the criminal investigation. Supra, p. 28. In addition to reinforcing the rationale put forward by Arbitrator Befort in reaching his conclusions, Investigator Soldo made a number of additional findings to support her conclusion that the Grievant had committed the acts complained of. For example, Investigator Soldo found that reports made near the May 4, 2006 incident were credible. Supra, p. 29. That makes sense. Peoples' memories are clearer closer in time to the event in question and there's less time and opportunity to make up or falsify a story. Investigator Soldo determined that in reports made by the Grievant, Olson-Cowden and others soon after the May 4, 2006 incident, all indicated that Ringhofer put his penis in Olson-Cowden's hand. Id.

Investigator Soldo also found that the Grievant's claim that the two Dakota County investigators coerced him into giving a false statement on May 11, 2006 by turning the tape recorder off and on and urging him to get with the program is not credible for a number of different reasons. These included the fact that the May 11, 2006 recording of the Grievant's statement "depicts a casual and fairly relaxed discussion" during which the two Dakota County investigators asked open ended questions and the Grievant responded, sometimes in greater detail than expected. The recording indicated no raised voices, no sudden changes in inflection to suggest the tenor or tone of the discussion had changed, no indication in the Grievant's voice that the stress he was under was anything more than what might be expected of a witness being interviewed during a criminal investigation. Supra, p. 30. Investigator Soldo added that "at the close of the Grievant's May 11th interview, Captain Wayne asked Mollenhauer if they or 'any other member of the Steele County Sheriff's Department, or anybody else threatened or coerced [him] into giving this statement today'". The Grievant "calmly and directly" replied "No." Id. "He did not hesitate or appear uncertain." Id. The Union asserts that the Grievant had no other choice but to answer in the manner that he did. However, in the Arbitrator's opinion, the Grievant's matter-of-fact answer to this question indicates that he was not coerced or bullied into making his May 11, 2006 statement.

Investigator Soldo also is critical of the fact that the Grievant did not take effective, affirmative steps to correct a record he asserted shows he was threatened and coerced to give a false statement on May 11, 2006. While it is true that the Grievant complained to his Union representative and Ringhofer's attorney that he was coerced into making a false statement, Investigator Soldo criticized the Grievant because he did not complain to anyone in management at the Sheriff's Department, and/or did not tell the County Coordinator, despite meeting with him in June 2006 to complain about conditions in the Sheriff's Department. The Arbitrator agrees with this criticism. Additional options for reporting such abuse at the state level were offered at hearing but the Grievant also did not avail himself of those opportunities.

Based on all of the above, and absent any persuasive evidence to the contrary, the undersigned finds that the answer to the first question before the Arbitrator is YES, the Grievant is guilty of the acts complained of. Specifically, based on the record evidence, including Arbitrator Befort's award and Investigator Soldo's report and crediting the two Dakota County investigators' testimony and report, the Arbitrator finds that the Grievant told the truth in his May 11, 2006 statement during the Ringhofer criminal investigation and lied, by

changing/recanting his story to protect his friend, during the Kastigar Hearing and the Ringhofer arbitration hearing and to Investigator Soldo.

In reaching the above conclusion, the Arbitrator rejects two other arguments raised by the Grievant.

First, the Union asserts that there is substantial record evidence regarding why the Dakota County investigators would coerce the Grievant into giving a false statement about Ringhofer exposing his penis at the bowling alley. The Grievant was allegedly the only witness who saw Ringhofer expose himself and without his statement to that effect, there would be no direct evidence against Ringhofer. Therefore, the criminal case against him would collapse, as it did, after the Grievant recanted his statement and testified truthfully at the Kastigar Hearing. The problem with this theory is that the Union failed to show that Sheriff Ringhofer sought to retaliate against Deputy Ringhofer by finding him guilty of indecent exposure; that the Dakota County investigators were tasked with this mission and that said investigators coerced the Grievant into making his statement. Unfortunately for Ringhofer, there was just cause to terminate him based on his prior escalating bad behavior and the incident at the bowling alley.

The Union next argues that the investigation, prosecution and termination of Ringhofer and the Grievant were part of a pattern of retaliation against County employees who opposed Sheriff Ringhofer and supported Investigator Matejcek in the 2006 election. However, the record does not support a finding regarding same. It is true, as pointed out by the Union, that the Sheriff and his supporters were well aware of County employees who supported his opponent in the election. However, there is no persuasive evidence in the record that the Sheriff was sufficiently offended by having a challenger so as to retaliate against his opponent's supporters. The Sheriff indicated in his testimony that he did not object to people expressing opinions different from his own and the only thing that bothered him in the 2006 election was the nasty nature of the campaign. But he did not attribute any of this nastiness to Ringhofer or the Grievant. The record further indicates the Sheriff went out of his way to accommodate Matejcek by changing his work schedule and giving him time off so Matejcek could effectively run a campaign for Sheriff. There is no persuasive evidence that the Sheriff took retaliatory disciplinary action against any other County employee for supporting his opponent in the 2006 election and he has since disciplined some of his supporters from the 2006 election for misconduct. Finally, all of the other County employees who supported the Sheriff's opponent in the 2006 election are still employed and at least one of them has been promoted.

The Union asserts this pattern of retaliation by the Sheriff against supporters of Matejcek is further demonstrated by Sheriff Ringhofer's threatening statements during a meeting with Matejcek shortly after the election; and in meetings with at least four Patrol Deputies, during which these Deputies were asked to resign because of their campaign activities. The County, on the other hand, insists that the recorded conversation between the Sheriff and Matejcek, Union Exhibit No. 14, assists the County's case. In this regard, the County asserts that in the meeting with Matejcek, the Sheriff was trying to reunify the Department after the election was over, so it could serve the citizens of the County. This is a rather benign view of the Sheriff's statements. He may have used appropriate words but his tone of voice, his phrasing when warning against the continuation of any of the election's "lies" against him and his promise to investigate them in

the future certainly could have given Matejcek the impression of possible retaliation. However, there is no persuasive evidence in the record that the Sheriff crossed the line and retaliated against Matejcek. To the contrary, the record indicates that the Sheriff has continued to permit Matejcek to adjust his schedule and take time off in order to watch his son participate in athletic events.

Likewise, the record contains no persuasive evidence that the Sheriff has retaliated against the four Patrol Deputies in question. It is true that the Sheriff may have very closely approached the line of improper conduct in asking them after the election if they wanted to resign; but in at least one instance there is some evidence that the Deputy in question had publicly expressed the possibility that she wouldn't want to continue working for him if he was re-elected. The Arbitrator is of the opinion that the Sheriff was simply reminding said Deputies in a strongly worded manner that, having been re-elected, he was still "top dog". There is no evidence that, following these meetings, they have been improperly disciplined by the Sheriff in retaliation for their support for his opponent in the 2006 election.

The Union also asserts that there was improper pressure on Joyce Drake, head of the County Jail nurse's station, to take down the Matejcek campaign sign at her house. Aside from the fact that Jail Administrator Schember blatantly expressed his displeasure over that campaign sign, perhaps on County time, there is no evidence that the Sheriff retaliated against Drake because of her support for Matejcek. To the contrary, she was promoted to her current position after the election.

A question remains as to whether the punishment is contractually appropriate given the offense.

Appropriateness of the Disciplinary Action

A review of this question may be undertaken within the context of the issues raised by the Union in arguing against termination as well as the arguments by the County supporting discharge.

The Union puts forward a number of arguments in support of its position that the Grievant's violations do not justify termination of his employment.

In support thereof, the Union first asserts that further evidence of the pattern of retaliation against Ringhofer is that Olson-Cowden, who engaged voluntarily in the same sexual banter as Ringhofer and challenged him to put his penis in her hand, received only a three-day suspension, while Peterson, who admitted to placing her hand on Ringhofer's crotch, received no discipline at all. The Union points out that unlike Ringhofer and the Grievant, neither Olson-Cowden nor Peterson was known to oppose Sheriff Ringhofer's reelection.

It is true that the penalties ultimately imposed on Ringhofer and the Grievant were significantly more severe than the penalty imposed on Olson-Cowden and that no penalty was imposed on Peterson as a result of her conduct. However, the examples of unequal treatment cited by the Union can be distinguished from the instant dispute.

Unlike the Grievant, Olson-Cowden consistently told the truth about what happened at the bowling alley. She did engage in sexual bantering but simply dared Ringhofer to put his penis in her hand apparently not thinking he would actually do so. Also, there is no evidence that Olson-Cowden had a period of escalating bad behavior like Ringhofer or a disciplinary record like the Grievant.

Similarly, Peterson put her hand on the crotch of Ringhofer's pants. The nature of her offense is quite different than Ringhofer's; there is no evidence that she ever lied during the investigation or any time thereafter and there is no evidence that she had a prior record of discipline.

For these reasons, the Arbitrator rejects this claim of the Union.

The Union also argues that prior to his termination; the most severe level of discipline received by the Grievant was a written warning in July 2007. (County Exhibit No. 15). The Union points out that the Grievant had received only two documented oral warnings and had never received a suspension prior to his termination. The Union asserts that this is a very flimsy foundation on which the County seeks to base progressive discipline leading up to the Grievant's termination. The Arbitrator agrees. Justification for the Grievant's termination rises or falls solely on the basis of the seriousness of the main offenses for which he is charged in this proceeding.

The Union further argues that the Grievant's violations are strongly mitigated by his strong work performance evaluations. Contrary to the County's assertion, the Grievant did have a good work record. The Arbitrator also notes that the Grievant's problems with using a taser and taser training are overblown and not supported by the County's own witnesses. (Testimony of Sergeant Peterson and Training Sergeant Ron Hammann).

Long service with the employer, particularly if unblemished, is a definite factor in favor of the employee whose discharge is reviewed through arbitration. Elkouri and Elkouri, How Arbitration Works, (BNA, 6th Ed., 2003) p. 983.

However, as pointed out by the County, lying is a serious offense. In cases of extremely serious offenses, including lying, arbitrators recognize the need to enforce the discharge penalty. Elkouri and Elkouri, supra, p. 965. Consequently, for the reasons discussed below, the Arbitrator finds that a less severe penalty will not protect the legitimate interests of the County.

The County has a Code of Ethics-Standards of Conduct and "Expectations for Staff". The Grievant's conduct violates many of those standards and expectations. For example, he knowingly gave false testimony, under oath, at two official proceedings (the Kastigar Hearing and the Ringhofer arbitration). This violated Section O of the Standards of Conduct. In addition, the consequence of providing false testimony during the various hearings tainted all phases of the process and in the opinion of the County would make it impossible to take the Grievant at his word in the future. It is true that the County allowed the Grievant to testify in court following the criminal investigation and prior to his termination. However, now that the

Ringhofer arbitration and this proceeding are complete, the Arbitrator can understand the County's concern that there will "always be a cloud of doubt about any statement or testimony given by Mollenhauer in relation to any investigation or official proceeding."

The Grievant's recanting of his story and attempt to blame the Dakota County investigators for coercive investigatory methods also violates the above standards of conduct and expectations, particularly Sections B, O, Q and R of the standards.

The Grievant's misconduct also was substantial. In this regard, the County's contends that "the truth" is simply too important of concept in any employment setting, especially a law enforcement or peace officer setting, to be deemed "not substantial." Being deceitful in and of itself can establish a cause for termination. *See Thoreson v. Civil Serv. Commission of the City of St. Paul*, 308 Minn. 357, 362, 242 NW. 2d 603, 606 (1976).

The rights and interests of the public also were directly and negatively affected by the Grievant's conduct. In this regard, the Arbitrator agrees with the County's assertion that any loss of trust in the law enforcement/public safety function irrevocably harms the sense of safety that citizens have the right to expect in their communities. There is no doubt that regular citizens expect law enforcement officers to tell the truth and to further the interests of justice. Knowledge that the County would retain a corrections officer who lied under oath would shake the public's confidence in the entire Sheriff's department. News stories of the incident at the bowling alley and the Grievant's recanting of his story confirm the truth of such a conclusion. (County Exhibit Nos. 40 and 41).

In addition, the Grievant's decision to "recant" his original statement in favor of a statement that protected his long-time friend from criminal prosecution allowed an individual charged with criminal misconduct to avoid effective prosecution of the matter.

Finally, the Grievant's conduct directly touched on his qualifications and the performance of his duties. In this regard, the record indicates that a Correctional Officer's duties and responsibilities include cooperating with investigations and testifying in official proceedings. The Sheriff's Department must be able to rely on its employees to tell the truth in these situations. The Grievant's conduct in this matter demonstrates that he has been untruthful about an investigation and has given false testimony in official proceedings. He has demonstrated that he cannot be trusted to tell the truth. This is a fatal flaw for a Correctional Officer and one that disqualifies the Grievant from his position

Based on all of the above, the Arbitrator finds that the County had just cause to impose the discipline that it did on the Grievant.³

³ Even if the Grievant had, as he claimed, originally been coerced into giving a false statement then changed his story to the truth, that still would violate County policies and expectations and his termination still would be justified. By his own admission, he either gave a false statement in an investigation or he gave false testimony under oath. Either one is a significant violation of County policies and undermines the Sheriff Department's credibility and support within the community.

Based on all of the above, and the record as a whole, the Arbitrator finds that the answer to the issue as stipulated to by the parties is YES, the County had just cause to terminate Matthew Mollenhauer's employment.

Based on all of the forgoing, it is my

AWARD

The grievance is denied and the matter is dismissed.

Dated at Madison, Wisconsin, this 11^h day of September, 2009.

By

Dennis P. McGilligan, Arbitrator