

**IN THE MATTER OF ARBITRATION BETWEEN**

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**CARVER COUNTY  
(Employer)**

**and**

**DECISION AND AWARD  
(Discharge Grievance)**

**BMS Case No. 12-PA-0401**

**MINNESOTA PUBLIC EMPLOYEES  
ASSOCIATION  
(Union)**

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**ARBITRATOR:**

James N. Abelsen

**HEARING:**

August 30 & 31, 2012

**POST HEARING BRIEFS RECEIVED:**

October 22, 2012

**APPEARANCES:**

**FOR THE EMPLOYER:**

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**FOR THE UNION**

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## **INTRODUCTION**

This matter came on for hearing on August 30 and 31, 2012, at the Carver County Justice Center Building in Chaska, Minnesota. The parties submitted post hearing briefs on October 22, 2012, at which time the record was closed.

Upon motion of counsel for the employer, certain private and protected law enforcement documents were admitted into evidence subject to a protective order limiting the Union and Grievant to access and use of the documents only during the proceedings, and only as necessary for proper representation of the Grievant.

The parties agreed that there were no procedural defects, no issues of arbitrability, and that this matter was properly before the arbitrator.

## **ISSUES**

Was the Grievant Derek Sanderson terminated from his employment for just cause, and if not, what is the appropriate remedy?

## **RELEVANT FACTS AND BACKGROUND**

The facts in this case are essentially undisputed. The way the parties present and argue those facts do of course differ, but for purposes of background and framing the issues for discussion, the relevant facts are these:

The Grievant, Derek Sanderson, was terminated from his employment as a Carver County deputy sheriff following a criminal investigation conducted by the Wright County Sheriff's Department and an internal investigation by the Carver County Sheriff's

Department, both of which arose out of an incident involving the Grievant and a former girl friend.

While visiting a local bar with friends, and while off duty, the Grievant unexpectedly encountered a former girl friend (referred to hereinafter as CC). The two became involved in an unpleasant confrontation which led to CC filing an assault charge against the Grievant with the Carver County Sheriff's Office, the Grievant's employer.

Shortly after the incident but before he was aware of the complaint, the Grievant heard from a friend that CC had claimed that the Grievant had assaulted her and that she was going to be filing a criminal complaint. Grievant's response upon hearing that was to return to the bar the next day, while in uniform and on duty, to view the surveillance tape and attempt to secure and preserve a copy.

Upon receiving the criminal complaint, the Sheriff's office outsourced the investigation to Wright County for criminal investigation, and following their report and decision not to prosecute, the Employer conducted an administrative review of the incident and then commenced its own internal affairs (IA) investigation.

The focus of the IA investigation was on the incident at the bar, the Grievant's visit to the bar in uniform to view the tape, the appropriateness of the Grievant conducting his own investigation concerning the criminal charge brought against him, and his accessing law enforcement data through the Department of Vehicle Services (DVS) site for non work related purposes.

The IA investigation report concluded that the Grievant had violated various Rules and Policies of the Sheriff's Office by engaging in a domestic dispute in a public

setting, by then going to the bar while on duty to view the surveillance tapes, and by inappropriately accessing law enforcement data.

Following the issuance of that report an audit of the Grievant's DVS usage was conducted by the Sheriff's Office and the IA investigation was essentially reopened to more thoroughly investigate that issue. The supplemental report which followed indicated that there had in fact been a large number of unexplained queries to the DVS site by the Grievant, and in addition, the investigators concluded that the Grievant had made a number of untruthful statements to the investigating officers during the IA investigation. That information, along with the prior report and investigative materials were presented to the Sheriff for his consideration and decision.

The Grievant had been employed by Carver County as a Sheriffs Deputy since 2005. He is a southern Minnesota native, well educated, an experienced law enforcement officer with over ten years experience, and overall strong credentials. During his early years with Carver County he had positive evaluations, he was well regarded by his fellow officers and department leaders, and was promoted quite quickly within the department. He took on a number of extra duties in the department, was scheduled for a life saving award, and the Sheriff considered him early in his career to be a "rising star".

At some point however, things started to change. One particularly significant incident was a claim by a homeowner that the Grievant had gone into that person's home uninvited and without consent. The Grievant admitted to the offense, offering as an explanation that he was off duty, golfing with a friend, and had entered the home only because he was interested in buying real estate in the area. While there seemed to be no

improper intentions, to the Sheriff, this incident was an example of extremely poor judgment and reflected poorly on the department.

This incident then, factored into the Sheriff's thinking as he considered the reports and investigation results, and based on the totality of facts and circumstances, the Employer terminated the Grievant's employment.

## **EMPLOYERS POSITION**

### **Unprofessional Conduct**

The Employer argues first, that the Grievant's conduct following the incident at the bar violated the Carver County Law Enforcement Code of Ethics and Sheriff's Policy 1062 - Rules of Conduct. In Particular, the employer contends that the Grievant violated the public trust and the public's faith in the integrity of the department by being involved in a public altercation, going to the scene while in uniform and on duty, investigating his own conduct, failing to immediately report the incident to his superiors, and generally engaging in a course of conduct that was unprofessional and unethical. In support of this argument the Employer cites a number of court cases and arbitration decisions supporting the contention that violation of policy and conduct of the sort exhibited by the Grievant, warrant termination.

### **Untrue Statements**

The Employer next argues that the Grievant made untruthful statements during the investigation which violates explicit policies of the department and the sheriff's expectations of all deputies. In particular, the Employer claims that the Grievant's statement to investigators that he did not know there were assault allegations made

against him was false, in that there were a number of statements by the Grievant and others indicating that he absolutely knew of the charges. Secondly, the Grievant's statement that he waited for his former girlfriend CC to move away from another individual before he approached that person was also untrue, based on the video evidence submitted. And finally, that he falsely claimed during the investigation that he did not recall if he accessed the DVS site to view CC's data, but then, on several other occasions acknowledged doing so.

These untrue statements, the employer claims, are a basis for termination, citing a number of court and arbitration decisions in support of the proposition that false statements made during an investigation warrant termination, particularly false statements by law enforcement officers where honesty and integrity are paramount.

#### **Misuse of the DVS Site**

The Employer next contends that the Grievant's misuse of the DVS site justifies his termination. Over a relatively short period of time the Grievant accessed the DVS site hundreds of times, the vast majority of those site visits being for non law enforcement purposes. Most inquiries were on single, younger women, and clearly were not related to a law enforcement activity.

The Grievant himself admitted as much but contends that this casual, personal use of the site is a widespread practice in law enforcement, and that he had no particular motive, and certainly no inappropriate motives in making these inquiries.

The Employer again cites various statutes, regulations, training materials, and internal communications, all clearly communicating to users that the DVS site is to be accessed only for law enforcement purposes, and noting the serious personal

consequences that can befall an offender as well as the potentially serious consequences to the offender's employer.

### **Prior Illegal Conduct**

In addition to those specifics which arose from the IA investigation, the Sheriff also considered at least one prior incident involving the Grievant, which when added to the specifics, led him to the decision to terminate the Grievant.

In 2009, while off duty and playing golf with a friend, the Grievant saw a house he was interested in. He went to the door and knocked, there was no response, so he entered the home apparently to just look around. The homeowner arrived just as the Grievant was exiting the home, she became quite upset and called 911. Two officers from that county responded and interviewed the homeowner and the Grievant. The officers reported that the Grievant was under the influence of alcohol and determined that his actions constituted a criminal trespass under Minnesota law. Following their investigation, the homeowner chose not to pursue the matter, so no criminal charges were brought.

Upon receiving a report of the incident, the Carver County Sheriff initiated an IA investigation which found the Grievant had violated the Minnesota trespass statute, which constituted a violation of the Sheriff's Office Policy on Standards of Conduct. For that, the Grievant received a four (4) day suspension.

## **UNIONS POSITION**

### **Unprofessional Conduct**

The Union believes that the off duty activities of the Grievant which resulted in the criminal complaint by CC did not constitute any kind of punishable behavior. They argue that while at the bar, the Grievant acted appropriately under very uncomfortable circumstances, that he tried to avoid a confrontation, and that the video clearly shows that no assault took place, that the Grievant was not disorderly, and that there was no untoward behavior on his part.

When the Grievant heard about CC's claim of assault, he simply went to the bar where the incident took place only to see the video, which he believed would be exculpatory. That visit to the bar, the union argues, is entirely understandable and appropriate and does not constitute a violation of any department rules or code of conduct, nor was it in any way unprofessional.

### **Untrue Statements**

The Union argues that the Grievant's statements made during the IA investigation were not untrue, but instead they were his honest recollection of what had happened. When questioned during the IA investigation, which was some months after the incident, the Grievant recalled as best he could what happened at the bar and what he did when he heard about the possibility of a complaint. He explained his actions in visiting the bar to view the video, and believes he was forthcoming and cooperative during all interviews. The Union also points out that at least one of the Employer's witnesses also had some inconsistencies in their testimony, which only shows that anyone, including the Grievant,

can get some facts wrong without being intentionally untruthful, especially when trying to recall facts some months after an incident.

### **Misuse of the DVS Site**

Both the Grievant and Union admit that the Grievant misused the DVS site; however the Union argues that such misuse does not justify termination. As support for that position they contend that misuse of the DVS system was, until just recently, widespread throughout the Minnesota law enforcement community and few, if any police officers have been disciplined for such misuse.

They also argue that in Carver County misuse of the site is widespread and openly acknowledged by members of the department. And in the few instances where violations have occurred in the past, the discipline in one case was a verbal reprimand, in another case a one day suspension, and in another a written reprimand.

The Union believes that this history of misuse within law enforcement, and a pattern of relatively minor sanctions against violators in this department, makes the termination of the Grievant unjust and discriminatory

### **Prior Illegal Conduct**

In response to the prior unrelated trespassing issue, the Grievant admitted that he entered the home without permission. He testified however, as noted earlier, that he had no intention of doing anything illegal, that he was interested in the home as a possible real estate investment, and that if he had been charged with an offense he would have contested that charge.

## **DISCUSSION OF THE PARTIES POSITIONS**

To summarize, the Employer cites three distinct policy violations (i.e. the unprofessional conduct, the untruthfulness, and the DVS misuse), along with the prior trespassing incident as the bases for the Grievant's termination. The Grievant denies that his actions related to the bar incident were violations of policy, he claims to have been truthful during the IA investigation, and he believes that being terminated, based in large part on his DVS misuse was excessive, discriminatory and disparate treatment. These opposing positions are discussed below.

### **1. Unprofessional Conduct**

#### **(a) Grievant's involvement in a domestic dispute in a public setting.**

The domestic dispute occurred at a chance meeting of the Grievant and CC at a local bar while the Grievant was off duty and out of uniform. There was evidence presented that the Grievant had intentionally avoided CC earlier in the evening and only by chance did they eventually cross paths at the same bar, late in the evening. For whatever reasons, the two became engaged in an unpleasant conversation which lasted no more than a minute or two and ended when the Grievant left the bar. Several shadowy video tapes of the incident, viewed from several different angles were not particularly helpful in determining who initiated the conflict, nor was there any evidence as to what was said by either party. But from that incident came a charge of assault by CC, a criminal investigation by the Wright County Sheriff's office (with a decision not to prosecute), and an IA investigation which contributed to the Grievant's termination. The Employer believes this conduct at the bar violates Office Policy and the Department

Code of Ethics which requires all deputies to "...keep (their) private life honorable, unsullied as an example to all..."

In a subsequent, unrelated, harassment hearing involving the Grievant and CC, the presiding Judge of the District Court viewed the video tapes from the bar incident and commented in his memorandum that he "...would characterize the conduct of the parties as disorderly within the definition under Minn. Stat. Section 609.72..." While that conclusion is understandable, it has no influence or effect on this matter, and as I view the same video tapes I cannot agree that the conduct seen in the video, showing a crowded local bar, late at night, where no one seemed to be paying any particular attention to these two people, could possibly be considered disorderly. Certainly it was unpleasant, but it seemed to bother no other patrons. So on that issue I do not believe the Grievant acted in a manner that violated the Sheriff's Office Rules of Conduct or Code of Ethics to such an extent that it alone could serve as the basis for termination.

**(b) Grievant's investigation of the criminal charge brought against him**

After hearing that CC was about to file an assault charge against him, and then learning early in his shift the next day that she had in fact done so, the Grievant contacted the bar owner, and while on duty and in uniform, he went to the bar to view the tape. At that point he knew of the charge, he failed to tell his shift supervisor about it, and he began a personal pursuit to obtain what he felt would be exonerating evidence. The IA investigators concluded that this was inappropriate and should have been handled as an unbiased department investigation into a criminal charge brought by a citizen.

While the Grievant's actions are understandable, particularly when in his mind he had done nothing wrong and was concerned about preserving the "truth", nevertheless,

his actions were not in keeping with the Department Code of Ethics or the Sheriff's expectations of his deputies, and could affect the public's faith in the integrity of the criminal justice system. (see Policy 1062.2).

Such conduct taken by itself may, like the bar incident, not be so improper as to justify termination, but conducting a personal investigation of a criminal charge against oneself is inappropriate and unprofessional and would warrant some level of discipline.

## **2. Untruthful statements during the IA investigation**

The Grievant was interviewed on at least two separate occasions by members of the IA investigative team, and prior thereto was given the Garrity Warning which requires truthful answers under penalty of termination.

The Employer cites a number of comments made by the Grievant which they characterize as untruthful. In several instances the Grievant "hedges" a bit when asked whether or not he knew he had been charged with assault by the time he went to work the day after the bar incident. The Employer characterizes that "hedging" as being untruthful. In response to another question the Grievant indicated he did not approach the area of the bar where CC was talking with someone else until she had walked away. The video shows otherwise and again, the Employer characterizes that statement by the Grievant as untruthful. And finally, the Employer believes the Grievant was untruthful in his claim that he did not recall accessing CC's private data.

In viewing the video tapes and reading the transcripts of the Grievant's interviews it is clear that the Grievant's view of what happened at the bar, and his recollection of when he knew about the complaint, and his explanation for accessing the DVS site, were

not entirely accurate. So at least some of the Grievant's statements during the IA investigation could rightfully be characterized as untruthful.

That being said, it is also possible that the Grievant's statements were nothing more than a very biased view that someone in trouble might give to shed a more positive light on a bad situation. That would be a very human and understandable thing for someone to do who is facing the prospect of losing their job.

Nevertheless, the fact remains that a sheriff's deputy, committed to a Code of Ethics and obligated to follow specific Rules of Conduct, should never put himself in a position where his professional responsibility is overridden by his own personal bias and instinct for self protection. So whether the statements are labeled as untruthful or a biased interpretation of a set of facts, the reality is that the Grievant was not forthcoming during the IA investigation and the Employer justifiably took that into consideration in the decision making process.

### **3. Misuse of the DVS site**

What was probably the major factor in the decision to terminate the Grievant was his excessive use of the DVS system for personal reasons.

Evidence was presented indicating that information in the DVS system is to be accessed only for law enforcement purposes, and that serious consequences to employees and their employers may result from improper access and use. The state of Minnesota regularly provides law enforcement personnel with educational materials regarding these limitations on accessing the system, and the Sheriff's department provides regular training sessions and other reminders that this system is for law enforcement purposes

only. The Sheriff and others testified that it is common knowledge in his department that misuse of the DVS system is a serious offense.

It is also noted that the Grievant admitted during the IA investigation that he knew the DVS system was for legitimate law enforcement purposes only, he acknowledged receiving training on that topic, and yet he knowingly accessed the site on numerous occasions for his own non law enforcement reasons. So misuse of the system is not at issue here. What is at issue is the fairness of the penalty suffered by the Grievant.

**(a) Disparate and discriminatory treatment for similar offenses**

The Grievant testified that virtually “everyone” in the Sheriff’s department misused the DVS system. He claims that fact was well known and well accepted in the department. He testified that during this whole investigative and termination process, many deputies and department employees confirmed this with him and admitted their own misuse. Understandably, no names, dates, places, or circumstances were offered by the Grievant, and no supporting testimony was presented to support that claim.

But while no proof was offered of widespread misuse, evidence was presented showing that there have been at least a few instances of misuse by other department personnel. And in all those known cases, none of the violators were terminated.

In the case of Lieutenant EK, the officer used the system on a number of occasions in 2006 to search the names of a former girlfriend and one or more of her acquaintances. For that violation he received a verbal warning. During the course of this investigation Deputy RR accessed the system to search CC’s name with no legitimate law enforcement purpose. For that he received a written reprimand. And in the case of

Detention Deputy KI, she accessed private information concerning Lieutenant EK's former girlfriend nearly fifty (50) times in 2006, and received a one day suspension. That inconsistent and unequal treatment, argues the Union, is inappropriate and indicates disparate and discriminatory treatment of the Grievant.

The Employer distinguishes those cases from the Grievant's by noting first, that in the cases of Lieutenant EK and Detention Deputy KI, the queries were made in 2006, well before the current Sheriff took office, and in addition, those searches were limited to two individuals, not the hundreds queried by the Grievant. Secondly, in the case of Deputy RR, there was a single query but with no inappropriate intentions or personal reasons behind the search. And thirdly, the Employer notes that in all three of these cases there were reasonable explanations for the misuse, the individuals involved were highly regarded in their positions, and all had good employment records. The disparity in treatment was because the employment histories were different, the reasons behind the violations were different, and the extent of the misuse was much different.

**(b) Widespread misuse of DVS site in the law enforcement community**

In support of the Grievant's claim of widespread and well accepted misuse, testimony was received from a former metro area police officer who now serves as President of the Minnesota Fraternal Order of Police. He testified that in his opinion, upwards of 90% of the police officers in the state misuse the system but he knew of only one officer, out of the 3,200 members of his organization, who had ever been terminated for that reason. And in that case the officer had previously been warned and had "other problems".

In recent years the misuse has dropped significantly as a result of a lawsuit brought by a former police officer implicating hundreds of DVS violators throughout the state. That testimony was supported by testimony from the attorney for the Minnesota Fraternal Order of Police, who also added that none of the identified DVS violators in that pending lawsuit have been terminated.

The evidence presented on this issue clearly shows that misuse of the DVS system has been widespread throughout the state. And even though there was no evidence to support the claim of misuse in Carver County, it is quite possible that such misuse may also have been common and well accepted under prior administrations. But even assuming that to be true, the current Sheriff and his administration should not be bound by what other agencies or prior sheriffs have done about this issue, as long as this Sheriff's deputies are aware of his policies and understand that these policies will be enforced. And that seems to be the case here.

#### **4. Prior Illegal Conduct**

In addition to the specifics which arose from the incident at the bar and the misuse of the DVS site, the Sheriff also took into consideration the prior disciplinary action resulting from the Grievant's off duty trespassing incident. The facts were undisputed and well documented, and the Grievant essentially admitted to everything, claiming in his own defense that he had no unlawful intentions and felt he would have a good defense had a criminal charge been brought against him. No suggestion was made by the Union that it would be unfair or inappropriate for the Employer to consider this incident in its decision making process.

## ANALYSIS AND CONCLUSIONS

### Establishing “Just Cause”

The fundamental issue for decision in this case is whether or not the Employer had “Just Cause” to terminate the Grievant. This issue has of course, been the subject of numerous court and arbitration cases, debates, and treatises for decades. Just cause tests have been developed, variations of those tests have been proffered, and arguments have been advanced from all sides about these tests and their variations, to the point where it is safe to say that there is no clearly established and universally accepted definition or analysis that can fairly be applied to every fact situation. (*see Roberts’ Dictionary of Industrial Relations, 3d ed.; Rily Stoker Corp, 7 LA 764 (1947); In re: Discharge of Kelvie, 384 N.W.2d 901 (1986); Abrams & Nolan, Toward a theory of “just cause” in Employee Discipline Cases, 1985 Duke L.J. 594*) Each employer is different, each bargaining unit is different, each contract is different, and each fact situation is unique.

But regardless of these variables, what seems to be fair to the parties in a case like this is an analysis and decision that ensures, at the very least, that before this deputy is terminated from his chosen profession and life’s work, that these basics are in place:

- (a) that the rule being violated or the behavior deemed unacceptable is well understood in the law enforcement profession or has been clearly communicated to the Grievant,
- (b) that the rule or required behavior is important for the proper functioning of the Sheriffs department,
- (c) that the Employer has fully investigated the matter before passing judgment on the Grievant,

(d) that the Grievant has been given an open, fair, unbiased forum in which to explain the complained of behavior,

(e) that the Employer has not acted arbitrarily, capriciously, or discriminatorily, and

(f) that the violations are of a nature or severity that this ultimate sanction is justified.

Once these basics have been established by an employer and the decision has been made to terminate, an arbitrator should be mindful not to simply substitute his or her own judgment for that of the employer. Nevertheless, by collectively bargaining and agreeing to discipline only for just cause, the employer has agreed to allow a third party to review the employers action and pass judgment on whether or not the cause for termination is truly “just”. If it is not, if there is evidence of prejudice, bias, personal animosity, or a fundamental unfairness that has crept into the decision making process, there should be no reluctance to overturn such a decision.

In this case the Sheriff’s decision to terminate the Grievant was based on a number of factors that developed over time, culminating in the bar incident and the findings from the IA investigation which followed. While the Grievant’s conduct at the bar and his personal follow up investigation may not, on their own, justify termination, when added to the other reasons cited by the Employer, there does become a basis for more serious discipline. Of particular concern are the untruthful, or less than forthright statements made by the Grievant during the investigation. These statements have put the Employer in a position where the Grievant may very well be unable to testify in court should the need arise. (*see Giglio v. United States 405 U.S. 150 (1972); The Police Chief, vol. 72, no.*

11, Nov, 2005). This not only creates a serious dilemma for the Sheriff, and affects the Grievant's effectiveness as a law enforcement officer, but it causes a complete loss of confidence in the Grievant's credibility. Add to that the earlier trespassing incident, which reflects poorly on the Grievant's judgment, and the admitted excessive, and inexplicable misuse of the DVS system, and a compelling case has been made for imposing serious discipline.

**Consideration of mitigating factors – disparate treatment**

Even though the case has been made for imposing serious discipline, there remains the question of whether or not it would be unfair, discriminatory, and disparate treatment to terminate the Grievant's employment when other members of the department who misused the DVS system were not terminated.

While it is true that the treatment of the others was more lenient, there were reasons for that. The Grievant's misuse was far more extensive than the others, the circumstances were different, and the disciplinary history and off duty conduct of the Grievant also played a part. These differences in facts and circumstances are significant, and therefore it is entirely proper, fair, and non discriminatory for the Employer to impose this higher degree of discipline in this case. (*see Note 4 to Question 6 of Daugherty's Seven Tests as reproduced in Whirlpool Corp, 58 LA 421 (1972); Koven & Smith, Just Cause: The Seven Tests (BNA Books, 1992, at 303 et seq.)*)

## FINDINGS

Based on the evidence and testimony presented at the hearing, the arguments of counsel, and review of post hearing briefs, the findings are as follows:

1. The Employer had Just Cause to terminate the Grievant based primarily on the Grievant's misuse of the DVS system, but with the additive factors of the public domestic dispute and the Grievant's personal follow up investigation, the less than forthright answers during the IA investigation, and the prior trespassing incident.
2. The widespread misuse of the DVS system throughout the state which has gone virtually unpunished, and the more lenient treatment of known violators in Carver County, does not establish that there has been disparate or discriminatory treatment of the Grievant. This Employer is not bound by what happens elsewhere in the state, this Sheriff's expectations were well known in the department and understood by the Grievant, and the more harsh treatment of the Grievant, compared to the more lenient treatment of other DVS system violators, was justified.

## AWARD

Based on the record as a whole and for the reasons cited herein, the termination of the Grievant is allowed to stand and the grievance is DENIED.

Dated: November 16, 2012



James N. Abelsen, Arbitrator