

**THE MATTER OF ARBITRATION BETWEEN**

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**WRIGHT COUNTY,** )  
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 ) **Employer,** ) **LAUER DISCHARGE**  
 ) **GRIEVANCE**  
**and** )  
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 )  
 ) **WRIGHT COUNTY DEPUTIES**  
 ) **ASSOCIATION,** )  
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 )  
 ) **Union.** ) **BMS CASE NO: 12-PA-0752**  
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Arbitrator: Stephen F. Befort  
Hearing Dates: June 27 & September 7, 2012  
Post-hearing briefs received: November 15, 2012  
Date of Decision: December 7, 2012

**APPEARANCES**

For the Union: Robert J. Fowler  
For the Employer: Susan Hansen

**INTRODUCTION**

The Wright County Deputies Association (Union), as exclusive representative, brings this grievance claiming that Wright County (Employer) violated the parties' collective bargaining agreement by discharging Deputy Melissa Lauer without just cause. The Employer maintains that it had just cause to terminate the grievant for sharing private law enforcement information with her cousin in furtherance of personal, non-law enforcement objectives. The grievance

proceeded to an arbitration hearing at which the parties were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

## **ISSUES**

Did the Employer have just cause to terminate the grievant? If not, what is the appropriate remedy?

## **RELEVANT CONTRACT LANGUAGE**

### **ARTICLE VII - EMPLOYEE RIGHTS - GRIEVANCE PROCEDURE**

#### **7.5 ARBITRATOR'S AUTHORITY**

- A. The Arbitrator shall have no right to amend, modify, nullify, ignore, add to, or subtract from the terms and conditions of this Agreement. The Arbitrator shall consider and decide only the specific issue(s) submitted in writing by the Employer and the Union and shall have no authority to make a decision on any other issue not so submitted.
  
- B. The Arbitrator shall be without power to make decisions contrary to, or inconsistent with, or modifying or varying in any way with the application of laws, rules or regulations having the force and effect of law. The arbitrator's decision shall be submitted in writing within thirty (30) days following the close of the hearing or the submission of briefs by the parties, whichever is later, unless the parties agree to an extension. The decision shall be binding on both the Employer and the Union and shall be based solely on the Arbitrator's interpretation or application of the express terms of this contract and to the facts of the grievance presented.

### **ARTICLE X - DISCIPLINE**

- 10.1 The Employer will discipline employees for just cause only. Discipline will be in one or more of the following forms:
  - a. verbal warning,
  - b. written warning,
  - c. suspension,
  - d. demotion, or
  - e. discharge.

## **FACTUAL BACKGROUND**

Melissa Lauer has worked as a deputy in the Wright County Sheriff's Office since 2003. The Wright County Deputies Association is the exclusive representative of the Wright County deputies and has negotiated a collective bargaining agreement establishing terms and condition of employment. Wright County terminated Deputy Lauer's employment by a letter dated December 13, 2011.

This grievance arises out of a long-running dispute between Nick Schimming and Angie Schimming. Nick and Angie had once been romantically involved. Although the couple never married, they did participate in a commitment ceremony, and Angie assumed Nick's last name. They also parented a child. The relationship eventually deteriorated, and a nasty custody battle ensued.

Melissa Lauer is Nick Schimming's first cousin, and she sided with him in the custody battle. So, too, did Deputy Lauer's two roommates: Wright County Dispatcher Patty Heitland and Wright County Deputy Krystal Kramer.

In February 2011, Angie Schimming filed a citizen's complaint with the Wright County Sheriff's Office alleging that Deputy Lauer had disclosed private public safety information about Ms. Schimming and her new boyfriend to Nick Schimming. Lieutenant Todd Hoffman conducted an investigation and concluded that he could not determine whether or not Deputy Lauer provided the information in question to Nick Schimming. Nonetheless, Captain Dan Anselment, on May 27, 2011, counseled Deputy Lauer that private law enforcement information must not be disclosed to family or friends and warned her that a future improper release of such information could result in serious discipline up to and including discharge.

On June 9, 2011, Angie Schimming lodged another complaint with the Wright County Sheriff's Office again alleging that Deputy Lauer had disclosed private law enforcement information to Nick Schimming. Lt. Hoffman, who had received the complaint over the phone, met with Ms. Schimming at a travel plaza in Clearwater, Minnesota to discuss the allegation. At this meeting, Ms. Schimming played an ipod recording of a message from Deputy Lauer to Mr. Schimming. Because of the poor audio quality of the ipod recording, Ms. Schimming then played a copy of the message captured on her telephone, and Lt. Hoffman assisted in recording that voicemail message. The audio recording left little doubt that it was taken from a voicemail message left on someone's voicemail system.

The voicemail message, as transcribed, stated as follows:

Hey it's me.

I was just calling you from um old Patty's phone cuz I just wanted to let you know that I just got a phone call from a deputy because um it, the hospital, New River in Monti called and said that Angie is being released and that she has a warrant.

But we ran her and she doesn't have a warrant so I told them to call State Patrol to see if they want her or what the deal is because apparently this girl at the hospital was told to call when she was getting released because they wanted her so and I don't know what happened with it I'll find out later.

But, just wanted you to let you know that hopefully maybe she'll be in jail but she's getting released in an hour, soon here, so.

But if you want to give me a call back um you can actually just call me on my regular phone if you want, I just don't want to call you but I'm not working anyways so, they won't have access to my phone records when I'm not working so.

But I will let you know what's happening later on.

Talk to you later. Bye.

The voicemail message related to Angie Schimming's impending release on June 6, 2011 from New River Hospital in Monticello, Minnesota following a car accident; an event that was

closely monitored by Lauer, Heitland, and Kramer. Earlier on June 6, hospital staff informed Wright County dispatch that Ms. Schimming was about to be released from the hospital and inquired about the existence of a warrant for her arrest. Ms. Heitland was on duty at the time, and she called the Minnesota State Patrol to advise them that Ms. Schimming was about to be released and asked them if they intended to arrest her upon release. Meanwhile, Deputy Kramer ran a check on Ms. Schimming through the Department of Motor Vehicle record system. Shortly after these events, Deputy Kramer placed two calls to Deputy Lauer's personal telephone, and Deputy Lauer left the voicemail message on Nick Schimming's telephone.

Wright County Sheriff Joe Hagerty assigned Lt. Hoffman to conduct an internal affairs investigation into this new series of events. During the course of the investigation, Lt. Hoffman interviewed various parties including Deputy Lauer. During his interview of Deputy Lauer conducted on October 2, 2011, Lt. Hoffman asked whether Deputy Lauer had shared any law enforcement information with Nick Schimming relating to Angie Schimming's release from the hospital on June 6, 2011. Deputy Lauer answered in the negative. Lt. Hoffman then played the recording of the voicemail message and repeated the question. Deputy Lauer acknowledged that she apparently had left such a message, but she claimed that she had no independent recollection of such an event.

During the investigation, Lt. Hoffman also inquired of Angie Schimming concerning how she happened to have access to the voicemail message left on Nick Schimming's telephone. At the time, the two were not living together, and they were embroiled in a contentious custody dispute. Ms. Schimming replied that the Schimmings had shared passwords in the past, so that she was able to use one of those passwords to retrieve the voicemail message. Lt. Hoffman did not interview Nick Schimming concerning the voicemail access issue as part of the investigation.

Lt. Hoffman's investigation concluded that Deputy Lauer had violated departmental policies by improperly releasing law enforcement information to Nick Schimming and by attempting to conceal her actions from the Sheriff's Office. Lt. Hoffman's report also found that Deputy Lauer provided false testimony during the internal affairs investigation. The Employer terminated Deputy Lauer's employment effective December 3, 2011.

At the arbitration hearing, Nick Schimming testified that he never gave Angie Schimming permission to access his voicemail messages. Mr. Schimming testified that after he and Angie separated, he purchased a new cell phone and entered a new password that he did not share with Angie. He also testified that he received a message from his cell phone provider sometime in June 2011 stating that someone calling from Angie Schimming's cell phone number had unsuccessfully tried to access his voicemail and then attempted to change his password by using Nick Schimming's social security number.

### **POSITIONS OF THE PARTIES**

#### **Employer:**

The Employer contends that it had just cause to discharge the grievant. The Employer initially argues that it has adequately proven that Deputy Lauer engaged in misconduct by divulging law enforcement information concerning an ongoing criminal investigation to Nick Schimming for non-law enforcement purposes. The Employer points out that this action occurred just ten days after Captain Anselment had warned Deputy Lauer with respect to an earlier incident that a future disclosure of law enforcement data to family or friends could result in discipline up to and including termination. In terms of proof, the Employer maintains that the voicemail recording obtained by Angie Schimming is admissible because it was not obtained by or at the direction of the Wright County Sheriff's Office. As an additional basis for a finding of

misconduct, the Employer argues that Deputy Lauer was untruthful during the internal affairs investigation when she denied contacting Nick Schimming with law enforcement information relating to Angie Schimming. The Employer finally asserts that discharge is an appropriate remedy given the serious nature of the misconduct at issue.

**Union:**

The Union maintains that Wright County did not have just cause to terminate Deputy Lauer's employment. The Union contends that the message left by Deputy Lauer on Nick Schimming's voicemail was obtained illegally and is therefore not admissible in this arbitration proceeding. According to the Union, once that voicemail and the "poisonous fruits" connected with that message are properly disregarded, the Employer lacks sufficient evidence to establish that Deputy Lauer engaged in misconduct. In addition, the Union argues that Deputy Lauer did not deliberately make any false statements during the investigation that could provide an independent basis for discipline. Finally, and in any event, the Union claims that the penalty of discharge cannot be sustained on progressive discipline grounds since the prior charges against Deputy Lauer alleging an improper dissemination of law enforcement information were never sustained.

**DISCUSSION AND OPINION**

In accordance with the terms of the parties' collective bargaining agreement, the City bears the burden of establishing that it had just cause to support its disciplinary decision. This inquiry typically involves two distinct steps. The first step concerns whether the City has submitted sufficient proof that the employee actually engaged in the alleged misconduct or other behavior warranting discipline. If that proof is established, the remaining question is whether the

level of discipline imposed is appropriate in light of all of the relevant circumstances. Elkouri & Elkouri, HOW ARBITRATION WORKS 948 (6<sup>th</sup> ed. 2003). Each of these steps is discussed below.

### **The Alleged Misconduct**

The Employer alleges two grounds for its discharge decision. The Employee first alleges that Deputy Lauer inappropriately divulged law enforcement information to a relative. The Employer additionally alleges that Deputy Lauer was untruthful in the answers she provided during the investigatory interview.

#### **1. Release of Law Enforcement Information**

The Employer maintains that Deputy Lauer shared private law enforcement information with a relative for personal reasons. Such conduct, if established, would violate a promulgated Employer policy. In addition, Captain Anselment underscored the importance of this policy by counseling Deputy Lauer only ten days prior to the incident in question that any future violation of this policy could result in discipline up to and including discharge.

Whether or not this basis for misconduct is established depends upon the admissibility of the voicemail message procured by Angie Schimming. If admissible, this message clearly depicts Deputy Lauer sharing law enforcement information with her cousin Nick Schimming that relates to his ongoing battle with his ex-girlfriend. But if this voicemail and its “poisonous fruits” are not admissible, as the Union contends, the Employer likely could not establish the occurrence of the alleged misconduct.

It is well-established that evidence obtained through an unreasonable governmental search violates the Fourth Amendment to the U.S. Constitution and is not admissible in a criminal proceeding. Mapp v. Ohio, 367 U.S. 643, 655 (1961). In general, a search occurs when the government intrudes upon an area in which an individual has a reasonable expectation of

privacy. Skinner v. Railway Executives Ass'n, 489 U.S. 602 (1989). The evidentiary ban also extends to the "fruits of the poisonous tree;" that is, evidence that would not have been discovered but for an illegal search. Wong Sun v. United States, 371 U.S. 471 (1983). The Minnesota Court of Appeals has ruled that this exclusionary rule also applies to labor arbitration proceedings that involve the possible loss of an individual's job. Minnesota State Patrol Troopers Ass'n. v. State, 437 N.W.2d 670 (Minn. Ct. App. 1989).

The Fourth Amendment, however, acts only as a restraint on governmental action. Thus, a search undertaken by a private individual is subject to Fourth Amendment scrutiny only where the individual acts "as an instrument or agent of the state when conducting the search." State v. Boswell, 460 N.W. 2d 614 (Minn. 1990) (quoting Skinner v. Railway Executives Ass'n, 489 U.S. 602 (1989)). As the Ninth Circuit Court of Appeals has explained, a crucial factor is determining whether a private individual is acting as a governmental instrument or agent is "whether the government knew of and acquiesced in the search." United States v. Walther, 652 F.2d 788, 792 (9th Cir. 1981).

Applying these principles to the instant matter leads to the conclusion that the voicemail message is admissible. As a starting point in the analysis, Nick Schimming had a reasonable expectation of privacy in the contents of his voicemail inbox, and the weight of the evidence supports a finding that Angie Schimming intruded upon that zone of expected privacy by hacking into Mr. Schimming's voicemail without his permission. While this action constitutes a "search," the intrusion was undertaken by a private person - Angie Schimming - rather than by a governmental entity. Moreover, the Wright County Sheriff's Office did not request Angie Schimming to undertake this search nor did it know of and acquiesce in that search. While there is some evidence that Lt. Hoffman may have aided Ms. Schimming in copying a higher-quality

version of the voicemail recording, this action was "antecedent" to the search itself. *See State v. Boswell*, 460 N.W. 2d 614 (Minn. 1990) (finding that "antecedent contact between law enforcement and a private party is inadequate to trigger the application of the exclusionary remedy under the Fourth Amendment").

As admitted into evidence, the voicemail recording clearly establishes that Deputy Lauer shared law enforcement information relating to Angie Schimming with Lauer's cousin, Nick Schimming. Deputy Lauer knew that this conduct violated County policy since Captain Anselment had counseled her against such behavior just ten days earlier. Deputy Lauer also demonstrated awareness that this conduct was inappropriate by advising her cousin to call her back "on my regular phone" so that "they won't have access to my phone records." The Employer, accordingly, has adequately established this misconduct alleged as a basis for discipline.

## **2. False Statements Made During the Investigatory Interview**

The Employer also alleges, as a second basis for discipline, that Deputy Lauer lied during her investigatory interview with Lt. Hoffman. During that interview, Lt. Hoffman asked Deputy Lauer whether she had divulged law enforcement information to Nick Schimming relating to Angie Schimming's release from New River Hospital on June 6, 2011. Deputy Lauer initially denied releasing such information, but after Lt. Hoffman played the voicemail recording, Deputy Lauer acknowledged that she had shared some law enforcement information with her cousin.

At the hearing, Deputy Lauer testified that she simply forgot about having left the June 6 voicemail message for Nick Schimming when initially questioned. The Union points out that the investigatory interview occurred almost four months after the event and that it was not unreasonable that she would have forgotten leaving that message during the intervening months.

I do not find Deputy Lauer's explanation to be credible. The impending release of Angie Schimming from the hospital was an emotionally charged event for Deputy Lauer and her two roommates. They worked as a team to gather law enforcement information concerning Angie Schimming with the objective of facilitating her arrest and incarceration. In addition, Deputy Lauer took affirmative steps to keep her supervisors unaware of the voicemail message she left with Nick Schimming. Given the details that she described concerning other events, it is difficult to believe that she completely forgot about leaving this message. Accordingly, I find that the Employer also has established the factual basis for this allegation.

### **The Appropriate Remedy**

The Union argues that discharge is too extreme of a remedy in any event since there is no pattern of progressive discipline to support this ultimate sanction. In this regard, the Union points out that the earlier February 2011 allegation lodged against Deputy Lauer was not substantiated during the first internal affairs investigation.

While the Union's assertion is accurate, that earlier investigation resulted in a sufficient concern that inappropriate behavior had occurred to cause Captain Anselment to caution Deputy Lauer that any future sharing of law enforcement information with family or friends could result in discipline up to and including discharge. Deputy's Lauer's intentional disregard of this admonition just ten days later constitutes a question is whether the level of discipline imposed is appropriate in light of all of the relevant circumstances. serious breach of law enforcement protocol. It raises the very legitimate concern that Deputy Lauer's personal and family allegiances trump her allegiance to the public and to the Sheriff's Office as a peace officer. Law enforcement officers are held to a high standard of conduct because they serve as society's thin blue line of security and safety. As Sheriff Hagerty aptly summarized, Deputy Lauer's conduct

falls short of this norm in that it undermines the integrity of the Wright County Sheriff's Office and violates the public trust in fair and unbiased law enforcement. Under these circumstances, the Employer's discharge decision constitutes an appropriate remedy.

**AWARD**

The grievance is denied.

December 7, 2012

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Stephen F. Befort  
Arbitrator