
In Re the Arbitration Between:

BMS File No. 13-PA-0118

Clay County Sheriffs Department,
(Moorhead, Minnesota)

Employer,

**GRIEVANCE ARBITRATION
OPINION AND AWARD**

and

Law Enforcement Labor Services, Inc.
(St. Paul, MN),

Union.

(Grievance of [REDACTED])

Pursuant to **Article 6** of the collective bargaining agreement effective January 1, 2012 through December 31, 2014, the parties have brought the above captioned matter to arbitration.

The parties selected James A. Lundberg to serve as their neutral arbitrator from a list of arbitrators provided by the Minnesota Bureau of Mediation Services.

A grievance was filed on July 26, 2012.

The parties agree that they have no procedural issues and the matter is properly before the arbitrator for a final and binding determination.

An arbitration hearing was conducted on January 15, 2013 and January 16, 2013 in the City of Moorhead, Minnesota.

Final briefs were submitted by e-mail transmission on February 20, 2013 and the record was closed.

APPEARANCES:

FOR THE EMPLOYER

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FOR THE UNION

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Law Enforcement Labor Services
327 York Avenue
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ISSUE:

Whether the Employer had just cause to terminate the employment of Officer ██████████? If not, what is the proper remedy?

RELEVANT CONTRACT PROVISIONS:

ARTICLE 7. SENIORITY

7.6 Discipline

7.6.1 Employees will be disciplined for just cause only.

7.6.2 Discipline will be in one or more of the following forms; although not necessarily in the order shown;

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

FACTUAL BACKGROUND:

The grievant was employed by the Clay County Sheriffs Department as a Deputy for a period of roughly (11) years. He was hired in 2001. He had two and one half years of experience in law enforcement, when he joined the Clay County Sheriffs Department. Deputy ██████████ began working as a K-9 officer in 2007. Deputy ██████████ had no significant history of discipline until his discharge on July 25, 2012. His only disciplinary incident involved a missed court date in 2006 for which he was reprimanded. Officer ██████████'s most recent performance reviews indicate that he was

considered an above average performer. The grievant had no history of engaging in any dishonest conduct while a Clay County Deputy Sheriff.

On June 21, 2012 a voice message was left for Clay County Sheriffs Lieutenant Steve Todd by Edén Prairie, Minnesota Police Department Lieutenant Morrow. The phone call was returned and Lt. Todd had a conversation with Lt. Morrow. Lt. Morrow followed up the conversation with an e-mail. Lt. Morrow was unhappy with an incident that occurred at the Residence Inn in Eden Prairie during the late hours of June 9, 2012 and the early hours of June 10 2012. The grievant, Deputy ██████ was staying with his wife at the Residence Inn at the time and attended a K-9 training session on June 10, 2012.

Lt. Todd was informed that Deputy ██████ and Deputies from Wabasha County were in a group that was being loud and refused to leave the pool area of the hotel, when asked by the manager. A call was made to the Eden Prairie Police and Officer Schmidt answered the call. According to the investigation notes of Lt. Todd and the e-mail from Lt. Morrow, Deputy ██████ refused to leave the pool area. Deputy ██████ only left, after being given several commands. The investigation report indicates that Deputy ██████ was very intoxicated and argued with Officer Schmidt. It was reported that one of the K-9 officers was making his dog bark and a siren from one of the police cars had been activated.

Lt. Morrow was acting on hearsay information provided by Eden Prairie Officer Irmiter. Officer Irmiter was not called as a witness in this arbitration and the source or sources of Officer Irmiter's information is/are unknown.

In fact, most of the information that was given to Lt. Todd by Lt. Morrow, as obtained from Officer Irmiter, was either inaccurate or completely wrong based upon the direct testimony of witnesses who were present at the time of the incident in the early hours of June 10, 2012 at the Residence Inn in Eden Prairie, Minnesota. However, Lt. Todd assumed that Lt. Morrow was providing him with an accurate picture of what happened prior to the K-9 trials on June 10, 2012 and he initiated an "Internal Complaint".

Lt. Todd initiated an Internal Investigation into Deputy ██████ conduct by calling Deputy ██████ at 5:30 PM on June 21, 2012. Deputy ██████ was on vacation at the time he took the phone call. He was attending a fishing tournament in Devils Lake, North Dakota. In a telephone conversation Lt. Todd informed Deputy ██████ that allegations of misconduct had been made against him regarding the early hours of June 10, 2012 at the Residence Inn in Eden Prairie, Minnesota. Lt. Todd testified that he told Deputy ██████ not to discuss the matter with anyone except his Union Representative and his Attorney. Lt. Todd also testified that he ordered Deputy ██████ to see him when he returned from vacation.

At the time that Deputy ██████ received the phone call from Lt. Todd, ██████ was in the registration line at the fishing tournament. The area where he was standing was congested and noisy. Since Deputy ██████ was on vacation, in the process of registering for a fishing tournament and was receiving oral notification by cell phone with considerable background noise and movement, it is reasonable to conclude that he was not completely focused on the conversation. It is quite likely that Deputy ██████ did not fully understand all of the information that Lt. Todd

conveyed to him on June 21, 2012. Deputy ██████ did not ask any questions at the time.

After receiving the phone call from Lt. Todd, Deputy ██████ did make some comments about the complaint to two members of the Clay County Sheriff's Department. He spoke with Deputies Steffes and Bredman. He also spoke with Jason Lorentson, who was one of the two Wabasha County Deputies at the K-9 trials. Deputy ██████ also had some conversations with Officer Vogel, a K-9 Officer with the Moorhead Police Department and his ████████████████████ of the Moorhead Police Department. There is no evidence that Deputy ██████ ever violated the written non-disclosure order served upon him by Lt. Todd on June 30, 2012. There is also no evidence that any conversation Deputy ██████ had with anyone interfered with or in anyway corrupted the investigation.

While Lt. Todd testified that he gave Deputy ██████ an oral order to speak to no one except his Union steward or attorney and to see him when he returned to Moorhead, the Clay County Internal Investigation procedures provide for delivery of written notice. Written notice is delivered to an employee to avoid confusion and to make certain that the employee knows and understands what the Employer requires of him. In this case, valid written notice was given to Deputy ██████ pursuant to the Clay County Internal Investigation procedure on June 30, 2012 at 3:45 P.M. Delivery of the notice was the responsibility of the serving officer, in this case Lt. Todd. Lt. Todd's alleged order that Deputy ██████ was to see him when he returned to Moorhead was both vague and unverifiable. Deputy ██████ could not

reasonably have been expected to know whether he was to seek out Lt. Todd, when Todd was off duty or approach Lt. Todd the first time their paths crossed at work.

On June 30, 2012 at 3:45 PM, Lt. Todd went to Deputy ██████ home and hand delivered the Sheriff's Office Internal Complaint Notification to Deputy ██████. Deputy ██████ acknowledged receipt and signed the document which says:

The Sheriff's Office has received a complaint against you as described in the enclosed complaint form. Upon receipt of this notice, read the complaint.

You may, if you choose, send a written response to Lt. Todd, describing your part of the incident, including what you observed and heard and the names of any officers present, witnesses and /or complainants.

You should know that any response you submit can be used as the basis for disciplinary action or criminal proceedings. You are free to consult an attorney or your Union representative before submitting a response.

If you choose not to respond, no disciplinary action will be taken against you for that choice.

Thank you for your cooperation. You are ordered not to discuss, disclose, show or otherwise inform this matter with any of your fellow officers or employees of the department, other than your Union representative, until it is resolved.

The written order clearly prohibits Deputy ██████ from discussing the incident on June 10, 2012 with "fellow officers or employees of the department". Lt. Todd claims that he modified the order by telling Deputy ██████ that he could speak to no person other than his Union representative and/or attorney. Since the written order delivered to Deputy ██████ is clear and unambiguous and was delivered as part of the formal Internal Investigation Procedure of Clay County, the arbitrator finds that the written order is the order given to Deputy ██████ on June 30, 2012. Written Orders are given to avoid misunderstanding and to give an employee clear

behavioral guidance. If Lt. Todd intended to expand the scope of the June 30, 2012 order he should have given Deputy [REDACTED] a different written order.

Lt. Todd investigated the June 10 2012 incident by meeting with the Eden Prairie Police, Officer Schmidt and Officer Brown, and with personnel from the Residence Inn, including Mr. Harvey, who was the night manger of the hotel. Lt. Todd also interviewed Ryan Mangen from the Olmstead County Sheriff's department, who was with the group of loud Deputies at the Residence Inn on June 10, 2012. Deputy [REDACTED] was interviewed and later Lt. Chris Carey from the Moorhead Police Department was interviewed. Lt. Todd never interviewed Jason Bade from Wabasha County but did have a telephone conference with Jason Lorentson from Wabasha County. Both Deputy Bade and Deputy Lorentson were present at the Residence Inn in Eden Prairie, Minnesota on June 10, 2012.

The individuals who were present at the June 10, 2012 incident gave testimony at the arbitration hearing. Jason Bade, a Wabasha County Deputy, admitted that it was his squad car's siren that sounded that morning, it was his dog that was barking that evening and he was the Deputy who stayed to talk to Officer Schmidt, after the other Deputies went to their rooms. Based upon Deputy Bade's admissions against his own interest and confirmation of his testimony by the other individuals who were involved in the June 10, 2012 incident, it is clear that the complaint made by Lt. Morrow to the Clay County Sheriffs Department was driven primarily by inaccurate information.

During the arbitration hearing, Mr. Harvey, the Residence Inn night manager, testified that Deputy [REDACTED] was the individual whose squad car siren was operated,

whose dog was barking and who stayed back to talk with Officer Schmidt. In essence, Mr. Harvey, was convinced that Deputy ██████ was the disruptive member of the group and the person causing most of the trouble on June 10, 2012.

Since the incident occurred between midnight and about 2:00 A.M. on June 10, 2012, visibility was poor. Also, the area where the group of Deputies were meeting initially and the area where they moved to upon Mr. Harvey's request, were in shadows. Mr. Harvey testified that he is blind in one eye and has some degree of correction in his other eye. Given the admissions made by Deputy Bade, which are against his own interest and corroborated by multiple witnesses and the diametrically opposite testimony of Mr. Harvey, who was dealing with poor lighting and a visual handicap, it is impossible to find that Deputy ██████ engaged in particularly egregious behavior on June 10, 2012.

There is no evidence that Deputy ██████ spoke with Officer Schmidt during the incident. According to Deputy ██████ he left the area when Officer Schmidt asked the Deputies to go to their rooms. Deputy ██████ testimony was corroborated. Deputy ██████ did not stay back and argue with Officer Schmidt on June 10, 2012.

All of the Deputies and their wives admitted that they had been drinking alcohol prior to the incident on June 10, 2012. However, there is no evidence that any of the participants in the incident were unable to recall what happened due to high levels of intoxication. That they may have been over the legal limit for the operation of a motor vehicle does not lead to the conclusion that they would be unable to recall whether Deputy ██████ left the scene when asked or whether Deputy Bade was the person whose siren sounded and whose dog was barking.

Lt. Todd's failure to interview all of the witnesses to the June 10, 2012 incident and to give inordinately heavy weight to the hearsay statements of Lt. Morrow and Officer Irmiter (the K-9 Officer who reported to Lt. Morrow) of the Eden Prairie Police Department resulted in a biased and factually inaccurate investigative report.

When interviewed following a Tennesen/Garrity warning, Deputy ██████ recalled that he had spoken to Deputy Steffes about the June 10, 2012 incident. During the course of the investigation, Deputy Steffes found several text messages on his phone from Deputy ██████. The text messages were sent shortly after Lt. Todd ordered Deputy ██████ not to talk to anyone about the incident, except his Union representative or attorney. Deputy ██████ inaccurately testified in his interview that he talked to Deputy Steffes but not that he sent text messages to Deputy Steffes. In fact, he vigorously denied sending test message Grievant testified at arbitration that he still had no recollection of the text messages. However, he did explain and support with data from his phone service that he sent and received approximately 16,000 text messages over a period of 8 months. Grievant's failure to recall a series of text messages sent on June 21, 2012 was deemed a lie by the Employer. However, Deputy ██████ was asked to respond to questions about specific text messages on a specific day, when he sent and received an average of 67 messages each day. Deputy ██████ testimony that he did not and does not recall sending the text messages is credible in light of the number of text messages he routinely receives and transmits each day.

By written notice dated July 10, 2012 grievant was notified that the Internal Investigation of his conduct resulted in charges of misconduct against him in four areas. The July 10, 2012 document was formal notice of both the allegations being made against the grievant and that his *Loudermill* Hearing would be conducted on July 18, 2012 at 9:00 A.M.

The *Loudermill* Hearing Notice makes the following allegations of misconduct by the grievant:

Lying while under Garrity/Tennessee Warning – Violation of Policy 340.3.5

(m)

- Dishonest statements concerning text messages sent to Deputy Steffes on June 21, in reference to the Internal Investigation. Several text messages were collected from Deputy Steffes's phone from June 21, that were sent by you in reference to the Internal Investigation.
- Dishonest statements concerning alcohol or intoxication as an excuse for your behavior during your conversation with Eden Prairie Police Lt. Morrow on June 10. Lt. Morrow was interviewed twice, and in both interviews he stated you apologized to him, giving alcohol or intoxication as a reason for your behavior, not the group's behavior.
- Dishonest statements in reference to your interaction with Eden Prairie Police Officer Schmidt during the call for service at the Residence Inn on June 9. Both Eden Prairie Police Officer Schmidt and Olmstead County Canine Deputy Mangen state that you verbally interacted with Officer Schmidt. Your interaction was defined by Olmstead Deputy Mangen as rude. Eden Prairie

Officer Schmidt defined your interaction as that you had a problem with leaving.

Conduct Unbecoming an Officer – Violation of Policy 340.3 (n)

- In the late hours of June 9 and early hours of June 10, you disregarded at least 4 notifications by hotel staff and guest that you were being loud. The lack of cooperation to hotel staff resulted in a police call for service.
- You were reported to have been intoxicated at the Residence Inn by hotel staff and your own admission.
- You were reported to have smelled of alcohol by Eden Prairie Officer Irmiter on June 10, while speaking to him about the call for service at the Residence Inn earlier that morning.

Failure to Notify Department Administration of Activities Resulting in Official Contact by Another Law Enforcement Agency – Violation of Policy 340.3.2 (k)

(l)

- Failure to contact your Administration, even after both Wabasha County Canine Deputies informed you that they contacted their Administration concerning the Eden Prairie police call at the Residence Inn.

Insubordination – Violation of Policy 340.3.2 (d) and 340.3.5 (e)

- Failure to contact Lt. Todd to pick up Internal Investigation complaint upon your return from vacation. Lt. Todd spoke to you via telephone when you were at Devil's Lake and you acknowledged that you were aware that there was an Internal Investigation pending. You failed to contact Lt. Todd when

you returned on Thursday, June 28 and when you worked on Friday, June 29 as directed.

- Failure to follow the Non-Disclosure order. Lt. Todd ordered you via telephone on June 21 about the Internal Investigation and not to discuss the investigation with anyone. You acknowledged the phone call with Lt. Todd and were aware of the investigation. On June 21, approximately 3 hours after receiving the call from Lt. Todd, you texted Deputy Steffes, indicating you were involved in an Internal Investigation stemming from the incident in Eden Prairie.

The *Loudermill* hearing was conducted on July 20, 2012 shortly after 1:00 P.M. By written notice dated July 25, 2012 the grievant's employment was terminated. Since the termination letter made no reference to specific reasons why grievant was terminated, the specific allegations that grievant was given an opportunity to respond to in the *Loudermill* hearing are the reasons why the Employer terminated grievant [REDACTED].

A grievance was filed on July 26, 2012 by the Union at Step 3 in accordance with **Article 6** and **Article 7** of the collective bargaining agreement. The parties were unable to resolve the grievance and the above matter was brought to arbitration for a final and binding determination.

SUMMARY OF EMPLOYER'S ARGUMENT:

The Employer proved that grievant broke work rules of which he was knowledgeable and which were reasonable. The grievant violated **Work Policy 340.3.5 (m)** when he lied under the Garrity/Tennessee warning. Not only did he

receive the Garrity/Tennessee warning, which requires his honest response to questions, but **Policy 340.3.5 (m)** prohibits "Work related dishonesty, failure to disclose, being untruthful..." The grievant was trained over the department work rules and received the Garrity/Tennessee warning but lied when told investigators he did not send text messages to Deputy Steffes on June 21, 2012. He also was dishonest when he said he apologized to Lt. Morrow for the group's behavior and when he denied acknowledging that alcohol was a factor in his conduct on June 10, 2012. He was also dishonest by not acknowledging that he did interact with Eden Prairie Officer Schmidt, that he was "rude" during the interaction and he had a problem leaving the scene of the incident.

The grievant also disregarded at least 4 notices by hotel staff that he was being too loud. The loud behavior that resulted in a call to the Eden Prairie Police, was conduct unbecoming an officer. The fact that he was believed to be intoxicated by hotel staff and by his own admission was also unbecoming conduct. Finally, Officer Irmiter of the Eden Prairie Police reported that grievant smelled of alcohol when they met on June 10, 2012. **Rule 340.3 (n)** prohibits a Deputy from engaging in "Any on- or off-duty conduct that any employee knows or reasonably should know is unbecoming a member of the office or that is contrary to good order, efficiency or morale, disgraceful or that tends to reflect unfavorably upon the office or its members." The grievant was intoxicated at his hotel, ignored the requests to be quiet made by the hotel night manager and smelled of alcohol when he met with Officer Irmiter. His conduct reflected unfavorably on the office of Deputy Sheriff, was disgraceful and contrary to good order.

Work Rules 340.3.2 (k) and (l) require the following:

(k) Failure of any employee to promptly and fully report activities on his/her part or the part of any other employee where such activities may result in criminal prosecution or discipline.

(l) Failure of any employee to promptly and fully report activities that have resulted in official contact by any other law enforcement agency.

The grievant failed to report the contact he had with the Eden Prairie Police Department. It was not until Lt. Morrow contacted the Clay County Sheriff's office that Deputy ██████ contact with the Eden Prairie Police became known. Deputy ██████ simply failed to report the contact and his failure violated **Work Rule 340.3.2 (k)(l)**.

Work Rules 340.3 (c) (d) and 340.3.5 (e) require Deputies to follow orders, prohibit willful disobedience to a lawful order and deliberate failure to follow orders. The grievant was given a direct order not to talk to anyone about the Internal Investigation but within approximately three hours of being given the order he sent text messages to Deputy Steffes that indicated he was involved in an Internal Investigation. The grievant also failed to follow an order to contact Lt. Todd, when he returned from vacation. Grievant's failure to follow orders was insubordination.

The Employer argues that the evidence of grievant's misconduct is sufficient and was obtained during a thorough investigation. Grievant engaged in the misconduct alleged and his misconduct violated reasonable work rules.

The grievant's rule violations were so egregious that discharge was the only reasonable disciplinary option available. Honesty is an essential characteristic of a

Deputy Sheriff. A Deputy Sheriff must be honest when giving testimony in court, when giving a factual basis for issuance of a warrant and when reporting the details of a stop or an arrest. If a Deputy does not have an honest character, he cannot perform the essential functions of his job. In this case, the dishonesty took place after grievant was given a Garrity/Tennessee warning. Grievant knew that he could be disciplined or discharged, if he lied under the Garrity /Tennessee warning. Failing to follow an order is an act of insubordination. Grievant knew that he could be disciplined and possibly discharged for failing to follow an order. Grievant also knew that he was required to report any official contact with another Police Department. He had official contact with the Eden Prairie Police Department but failed to report the contact. Finally, grievant's conduct on June 10, 2012 may not have been so egregious that discharge was the only appropriate disciplinary act. Taking the failure to report and conduct unbecoming an officer together with the egregious acts of dishonesty and insubordination, the Employer had just cause to discharge the grievant.

The grievance should be denied.

SUMMARY OF UNION'S POSITION:

Because of the stigmatizing nature of the allegations made against Deputy ██████ the standard of proof in this case should be the "clear and convincing" standard of evidence. The Employer should not be allowed to discharge an employee for such stigmatizing reasons as dishonest conduct, in this case lying under Garrity/Tennessee, insubordination and conduct unbecoming an officer without meeting the high standard of proof of "clear and convincing" evidence.

The Employer did not prove by clear and convincing evidence that the grievant lied under the Garrity/Tennessee warning. The grievant testified that he did not recall sending text messages to Deputy Steffes. He did recall and report his contact with Deputy Steffes. There is absolutely no reason that would motivate Deputy ██████ to admit talking to Deputy Steffes but conceal the fact that he sent Deputy Steffes a short series of text messages. The significant question put to Deputy ██████ was whether he communicated with anyone about the Internal Investigation and with whom he communicated about the Internal Investigation. Deputy ██████ admitted that he communicated with Deputy Steffes about the Internal Investigation. His failure to recall the handful of short text messages sent to Deputy Steffes is easily explained by the fact that Deputy ██████ sends and receives an average of 2,000 text messages per month or 67 per day. Deputy ██████ had no reason to deceive his Employer over the method of communication he employed, when he communicated with Deputy Steffes about the Internal Investigation. The grievant's high frequency of text messaging explains why he failed to recall communicating about the internal investigation with Deputy Steffes by text message on June 21, 2012.

There are some minor discrepancies in how Deputy ██████ and Lt. Morrow recall the specifics of their conversation on June 10, 2012. Deputy ██████ did not recall mentioning alcohol as a factor in his and his groups conduct on the morning of June 10, 2012, while Lt. Morrow recalled "some mention of alcohol". Deputy ██████ recalled that he apologized for the group and at hearing Lt. Morrow did not have a specific recollection of the conversation. The fact that both men had slightly

different recollections of what was said in the conversation does not mean that Deputy ██████ lied. The Employer did not establish by clear and convincing evidence Deputy ██████ lied about his conversation with Lt. Morrow.

Deputy ██████ was also found by the Employer to have lied about his interaction with Deputy Schmidt. In fact, Deputy ██████ did not speak with Deputy Schmidt. There is no evidence that Deputy Schmidt and Deputy ██████ conversed at all on June 20, 2012.

The Employer did not establish that Deputy ██████ engaged in conduct unbecoming an officer. There is no evidence that Deputy ██████ was more intoxicated than others in the group. He did make a comment to the hotel night manager about the fact that a lot more dogs and police would be staying at the hotel the next day and there would probably be a lot more noise. He also admitted that he told the hotel night manager that he should call the police, if he thought it was appropriate. The grievant's comments were not loud, disrespectful or threatening. The fact that the grievant expressed an opinion does not mean that he engaged in conduct unbecoming an officer.

There is no evidence that Deputy ██████ conduct was the cause of at least four notifications by the hotel staff and guests that he was being too loud nor is there evidence that grievant's conduct caused the hotel night manager to call the police. In fact, the disruptive conduct on June 10, 2012 cited by the hotel night manager and brought to the attention of the Eden Prairie Police was the conduct of Jason Bade of Wabasha County, not the grievant.

The evidence presented at hearing demonstrated that the grievant did not argue with Officer Schmidt on June 10, 2012. The evidence also demonstrates that Deputy [REDACTED] and the group cooperatively moved from one table to a location suggested by the hotel night manager, when their conversation was too loud for the guests in nearby units and Deputy [REDACTED] left the second table when Officer Schmidt asked the group to return to their rooms.

The Union contends that the mere fact that Deputy [REDACTED] may have smelled of "burned alcohol" on June 10, 2012, when he spoke with Officer Irmiter is not a basis for finding that grievant engaged in conduct unbecoming an officer. The grievant did consume alcohol the night before, when he was off duty. The fact he consumed alcohol on the night of June 9-10, 2012 and had bad (burned alcohol) breath in the morning does not reflect poorly on the Clay County Sheriffs Department.

Deputy [REDACTED] testified that he was not aware of the policy requiring him to report an "official contact" with another law enforcement agency. Furthermore, it is not clear from the policy statement what constitutes an official contact. The grievant did not, as alleged, talk with Officer Schmidt on June 10, 2012. Additionally, no citations were issued. Neither Officer Schmidt nor Officer Brown, the officers who went to the scene, wrote incident reports. In the absence of any interaction, any citation, any written report, the Union contends that no "official contact" took place and grievant was not required to make a report to his supervisors.

The Employer failed to prove the alleged acts of insubordination by Deputy [REDACTED]. First, the notice given to Deputy [REDACTED] was in a phone call, while Deputy

██████ was on vacation and in line getting registered for a fishing contest. The policy of the Clay County Sheriffs Department is to give personal written notice of an Internal Investigation, as evidenced by the written notice form ultimately used by Lt. Todd on June 25, 2012. Lt. Carey of the Moorhead Police Department testified that use of written notice to initiate an Internal Investigation is "best practice." The reason for written notice is at least in part because written orders are less likely to be misconstrued or not understood. Also, the employee can reference the written order to make sure he/she is complying with the order. Lt. Todd admitted that his modification of the written order prohibiting grievant from talking to anyone in the Sheriffs Department, other than his Union representative or attorney, about the Internal Investigation was likely to be confusing. In this case, neither order given by Lt. Todd over the telephone was clear. Lt. Todd did not make it clear that grievant needed to see him immediately when he returned from vacation. Lt. Todd did not make it clear that grievant must find him, regardless of what hours he was on duty and regardless of whether the Lieutenant's shift and the Deputy's shift coincided. The order Lt. Todd gave Deputy ████████ to see him when he returned was vague. Similarly, the order not to talk to anyone was confusing. In order to discipline an individual for insubordination, the Employer must establish that the employee was given a clear order and failed to follow the order or refused the order. In this case, the grievant did not understand the order.

The Union contends the Employer failed to prove by clear and convincing evidence that the grievant engaged in the misconduct alleged by the Employer. Hence, the Employer did not have just cause to discharge the grievant.

If it is found that the grievant did engage in misconduct on June 9 and June 10, 2012, the degree of discipline imposed on the grievant is far too severe.

The Union asks that the grievance be upheld and that the grievant be reinstated with full back pay and benefits, including all senior benefits.

OPINION:

The validity of the Clay County work rules applied to the grievant, are generally undisputed in this arbitration. However, the concept of an "official contact" under **Work Rule 340.3.2 (k) (1)** is claimed by the Union to be poorly defined. The argument does not go to the reasonableness of the work rules, only to the question of whether the rule is clearly stated. In his case, it is unclear whether the grievant had official contact with the Eden Prairie Police Department, which he should have reported.

Forewarning is necessary to establish just cause for discipline. In this case, Deputy ██████ was not well informed of the expectation of the Employer that he report an incident where the Deputy was part of group that had contact with another law enforcement agency. **Work Rule 340.3.2 (k)** does not appear to address conduct engaged in by Deputy ██████ to the extent that he engaged in no criminal activities. If, for example, the grievant had failed to report a traffic citation, the applicability of the rule would not be in question. In this situation, it is unclear whether Deputy ██████ conduct could reasonably have resulted in discipline. Assuming that Deputy ██████ was required to read and understand the County Work Rules but failed to recall the reporting rules at **340.3.2**, he is still responsible for following the rule. Since the rule cited lack clarity when applied to the situation that

arose on June 10, 2012, an appropriate remedy would be clarifying the rule through counseling. Lt. Morrow, who in his report to Clay County said he did not believe that the situation called for discipline, seemed to be asking Clay County to counsel the Deputy. Lt. Morrow has many years of experience in law enforcement and his suggestion is well taken. The Employer did not have just cause to discharge the grievant for violating **Work 340.3.2 (k) (I)**, because the work rule is too vague to provide an employee forewarning. Additionally, discharge is too severe a penalty for a first time violation of the rule. The Employer did not have just cause to discipline the grievant for violation of **Work Rule 340.3.2 (k) (I)**

Lt. Todd believed that he had given the grievant two direct orders. However, Lt. Todd should have been very precise in directing the grievant to immediately contact him upon his return to Moorhead to receive documents relating to the Internal Investigation. There is nothing in the testimony of either Lt. Todd or Deputy ██████ that suggests that Deputy ██████ was trying to avoid receipt of the Internal Investigation documents. There was nothing in Lt. Todd's testimony that informed Deputy ██████ that service of the internal affairs documents was urgent or could not wait until a shift overlap occurred. Also, the Employer failed to establish that any of the investigation suffered in any way from a two-day delay in serving the documents on Deputy ██████. The arbitrator finds no insubordination in the alleged failure of Deputy ██████ to follow an order to see Lt. Todd when he returned to Moorhead, as the order given by phone was not clear.

The oral order given over the phone to Deputy ██████ to not discuss the Internal Investigation was different than the order given in writing on June 25, 2012

and did not follow the County's Internal Investigation protocol. A non-contact order, like the one given by Lt. Todd needs to be clearly stated and should be delivered in writing to assure that the employee knows and understands the scope of the order. In this case, Lt. Todd's oral order was received by Deputy ██████, while he was in the registration line at a fishing contest. The conditions under which the order was received by Deputy ██████ were difficult and likely to result in error and confusion. Furthermore, the scope of the oral order far exceeds the order that was issued in writing. The evidence is insufficient in this situation to establish that Deputy ██████ knew and understood the scope of the order not to discuss the Internal Investigation given to him by Lt. Todd. Hence, the Employer failed to establish that the grievant was insubordinate and did not have just cause to discipline the grievant for insubordination.

The grievant testified after being given a Garrity/Tennessee warning. It was his recollection that he had not sent text messages to Deputy Steffes. Grievant did not recall saying that alcohol was a factor in his June 10, 2012 conduct, when he talked with Lt. Morrow, and he recalled apologizing for the groups' conduct not his individual conduct in his conversation with Lt. Morrow. The statements made by Deputy ██████ about text messages were inaccurate but there is no reason to believe that Deputy ██████ was lying to the investigators. He disclosed the fact that he had discussed the Internal Investigation with Deputy Steffes. Given that Deputy ██████ claimed and verified that he sends and receives roughly 2,000 text messages per month, his claim that he did not recall sending text messages to Steffes on June 21, 2012 is credible. The evidence of dishonesty regarding the text messages is

insufficient. The evidence supporting the claim that grievant lied about whether he apologized to Lt. Morrow for himself or the group and whether he mentioned alcohol as a factor in the conduct on June 10, 2012 is also insufficient. Lt. Morrow and Deputy ██████ had slightly different recollections of the content of their conversation, which was a short one. It would be most unusual for both men to have recalled the conversation verbatim. Not only did the Employer fail to establish by sufficient evidence that Deputy ██████ lied to investigators while under Garrity/Tennessee but the Employer failed to establish any reason why the grievant should be disciplined based on the statements. Whether grievant communicated by phone or text message to Deputy Steffes is not important. Similarly, whether he apologized for himself or a group and mentioned alcohol are not significant facts. The evidence that Deputy ██████ failed to recall sending some text messages does not mean he lied. Based on the testimony given at hearing it is not clear whether Deputy ██████ or Lt. Morrow more accurately recalled their conversation. There is insufficient evidence to establish that Deputy ██████ made dishonest statements to the investigators. The Employer did not have just cause to discipline the grievant for dishonesty.

The Employer did establish by sufficient evidence that the grievant engaged in conduct unbecoming a Deputy Sheriff. There is evidence that grievant was part of a group which was inappropriately loud at the Residence Inn in Eden Prairie, Minnesota on late night and early morning of June 9 and June 10, 2012. All of the members of the group had been drinking. However, the specifically egregious conduct reported was operation of a squad car siren, causing a dog to bark and

arguing with a Eden Prairie Police Officer. The evidence submitted at hearing included admissions by Deputy Jason Bade of Wabasha County that he was the Deputy whose siren was sounded, he was the Deputy whose dog was barking and he was the Deputy who stayed back to talk to Officer Schmidt of Eden Prairie. Officer Schmidt did not testify that any Deputy in the group argued with him.

In fact, the night manager at the Residence Inn testified that the group cooperated with him when he asked them to move from a table between a couple of buildings to a table that was more distant from units occupied by customers. The night manager also mistakenly identified Deputy ██████ as the individual who engaged in the more egregious behavior that late night and early morning.

Information about Deputy ██████ conduct on the night of June 9, 2012 and early morning of June 10, 2012 passed from Officer Irmiter of Eden Prairie to Lt. Morrow of Eden Prairie, was inaccurate. Officer Irmiter and Lt. Morrow were of the mistaken belief that Deputy ██████ had argued with Officer Schmidt, had been running his siren and had caused his dog to bark in the early hours of the morning. Given the degree of inaccuracy in the reporting done by Officer Irmiter, very little weight can be given to his report that Deputy ██████ smelled of "burned alcohol" in a morning meeting with him on June 10, 2012. Showing up to a meeting with a host officer after an uncomfortable incident has taken place with really bad breath is tacky but does not rise to the level of conduct unbecoming a Deputy. The Employer did not have just cause to discipline grievant for conduct unbecoming a Deputy Sheriff.

The Employer in this case did not meet either the preponderance of credible evidence standard or the clear and convincing evidence standard necessary to establish that the grievant engaged in misconduct for which there was just cause to discharge him from the Clay County Sheriffs Department. While it is not the normal practice of this arbitrator to comment beyond whether the just cause for discharge standard was met, the arbitrator offers the following:

- The Clay County Sheriffs Department is operated by people who are very proud and they take their profession very seriously.
- The high standards of the department are admirable.
- While there is insufficient evidence in this case upon which discipline can be imposed, Deputy ██████ appears to be in need of some guidance at this point in his career.
- Deputy ██████ overall performance as a Deputy Sheriff has been very good but he inexplicably allowed himself to be drawn into an situation at the Residence Inn in Eden Prairie that is at odds with his overall performance.
- As Deputy ██████ is reinstated into the Clay County Sheriff's Department, it may be wise for him to touch base with a mentor in the Department from time to time and/or review this experience with an Employee Assistance Counselor.

AWARD:

- 1. The Employer did not have just cause to discharge the grievant.***
- 2. The grievance is hereby upheld and the Employer is directed to reinstate the grievant with full back pay and all benefits.***

3. *The arbitrator will retain jurisdiction over the remedy for a period of 90 days from the date of the award to assist the parties with any issue that may arise.*

Dated: March 16, 2013

James A. Lundberg, Arbitrator