

**IN RE ARBITRATION BETWEEN:**

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**MOWER COUNTY, MINNESOTA**

**and**

**LAW ENFORCEMENT LABOR SERVICES**

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**DECISION AND AWARD OF ARBITRATOR**

**BMS CASE #11-PA-0560**

**JEFFREY W. JACOBS**

**ARBITRATOR**

**July 18, 2011**

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Mower County,

and

LELS.

DECISION AND AWARD OF ARBITRATOR  
BMS Case # 11-PA-0560  
Jeffrey Karlen grievance matter

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**APPEARANCES:**

**FOR THE EMPLOYER:**

Ann Goering, Attorney for the County  
Sheriff Terese Amazi  
Ruth Larson, Clerk Dispatcher  
Breia Leif, Clerk Dispatcher  
Jennifer Simpson, Human Resources Director  
Jeffrey Ellis, Night Shift Patrol Sergeant  
Mark May, Chief Deputy  
Craig Oscarson, County Coordinator

**FOR THE UNION:**

Brooke Bass, Attorney for the Union  
Jeffrey Karlen, grievant  
Dr. Michael Keller  
Deputy Tom Mensink

**PRELIMINARY STATEMENT**

A hearing in the above matter was held on June 2 and 3, 2011 at the Mower County Government Center in Austin, MN. The County was allowed to take and submit a post-hearing deposition of its medical expert. The parties filed Post-Hearing Briefs dated July 1, 2011 at which point the record was closed.

Due to the sensitive nature of the medical records relative to the grievant's treatment the arbitrator issued a protective order and ordered that the records were to be reviewed only by counsel for the parties, the grievant and the arbitrator but that no one else would have access to or be shown those records. Further, that the County's medical expert, Dr. Marston, would be allowed to review copies of the medical records of Dr. Keller but would be subject to the same protective order and subject to any further regulations under HIPAA to protect confidentiality. The protective order was extended to employees in the offices of counsel for the Union and the County to allow them to handle the records as necessary for the preparation of the matter and to assure confidentiality of the records.

The parties stipulated that there were no procedural arbitrability issues and that the matter was properly before the arbitrator.

## **CONTRACTUAL JURISDICTION**

The parties are signatories to a collective bargaining agreement covering the period from January 1, 2010 to December 31, 2010. Article III provides for submission of disputes to binding arbitration. The arbitrator was selected from a list provided by the State of Minnesota Bureau of Mediation Services.

### **ISSUE PRESENTED**

Was the termination of the grievant for just cause in accordance with Article 15.1 of the collective bargaining agreement? If not what is the appropriate remedy?

### **PARTIES' POSITIONS**

#### **COUNTY'S POSITION**

The County took the position that the grievant was discharged for just cause. In support of this position, the County made the following contentions:

1. The grievant as a law enforcement officer is expected to be honest and forthright in all his dealing with the public and certainly with the County. His integrity must be above reproach and as any law enforcement officer knows, the need to be absolutely truthful in word and deed is of paramount importance. Without it, the public may be placed at risk and any prosecution in which the grievant might be involved in could be compromised if an officer is found to be untruthful in submitting necessary documents to the County. This includes, of course, time records from which his salary is calculated.

2. The grievant is a deputy sheriff and understands the policy with regard to honesty and conduct unbecoming a law enforcement officer. He received and signed for a copy of the County's policies in this regard and knew well what the consequences were of violating the County's and the public trust placed in him.

3. The grievant was certainly aware of the policy against submitting false time sheets, against sleeping on the job and for conduct which would bring him and the department into disrepute. He acknowledged receipt of these policies and that he understood them. The County further argued that these policies are hardly a surprise and that one does not really need a policy against sleeping on the job but the County had one anyway and the grievant was well aware of it.

4. The County introduced testimony from several witnesses who indicated that they discovered that the grievant was leaving work early but not submitting his time accurately thereby resulting in his being paid for the time he was not working. Instead he should have been submitting requests for PTO, which he had in his bank, but failed to do so. The County further argued, discussed more below, that the grievant's explanation that he was filling them out "cookie cutter" style, i.e. filling them out in advance, does not hold up to scrutiny. He filled out activity logs after he would have left work that accurately noted the mileage on the vehicles he was driving yet falsely indicated that he was working when he was not. Overall, the County was able to discover approximately 30 hours or more of time that was incorrectly paid due to the false and fraudulent time records the grievant submitted.

5. Further, the grievant admitted that these were not accurate and provided no excuse or explanation for that until much later when he asserted that he had Post Traumatic Stress Disorder, PTSD, stemming from an incident with his wife, also discussed more below, from November 2008, almost two years prior to the submission of the false time records.

6. The County asserted too that this pattern of submitting false time records was not a "once or twice occurrence" but was a regular practice indicating that the grievant was engaging in a pattern of fraudulent conduct in order to preserve his PTO account and not have it depleted. County witnesses alleged that this practice had been going back several years and that the grievant had been warned about this several times yet his paperwork was consistently inaccurate.

7. The County further asserted that the grievant was in fact deliberately attempting to avoid using PTO so he could “cash out bigger” by accumulating enough PTO time to get some hours cashed out at the end of the year. The County allows deputies to “cash out” up to 25 hours in their PTO accounts, or certain parts of it, as long as they have more than 150 hours of PTO in their bank. At the end of 2009 the grievant did not have that amount of PTO remaining thus providing some motive for his conduct in 2010 to preserve it. The County asserted in the strongest possible terms that this was not an innocent mistake or the result of some mental illness or PTSD condition but was rather a deliberate attempt to defraud the County.

8. The County asserted that this pattern of behavior was bad enough but that during the investigation, almost as if the grievant was trying to make himself appear the victim of something, he admitted that he frequently fell asleep on duty for as much as 20 minutes at a time. He was of course being paid for this time and was also of course supposed to be out protecting the public yet he would deliberately set his cell phone to wake him up after a 20 minute cat nap. The County raised serious questions about trust based on his allegation and further asserted that this too was not the result of PTSD, see Dr. Marston’s testimony. The County noted as significant that he made this admission only after a *Garrity* warning and in what appeared to be a vain attempt to bolster the bogus claim of PTSD.

9. The County further asserted that the grievant could have contacted his supervisors if he was not feeling well or was too tired to continue working and ask for time off. He did not. Instead he engaged in a pattern of deliberate behavior to sleep on duty. This again was not a once or twice occurrence but was almost nightly and sometimes more than once per shift. It is not known how many hours he may have slept on duty but the County asserted that this too was simply “theft of time” and a serious breach of the public trust. The County asserted that the Sheriff cannot trust him any longer.

10. Further, Sgt. Jeff Ellis, who challenged Sheriff Amazi for the Sheriff position during the last election, and who was well acquainted with the grievant and counted him as a friend, admitted that he too would have been compelled to terminate the grievant for this pattern of behavior.

11. Second, significantly the grievant did not inform anyone that he had any problems sleeping, staying awake on duty, or performing the duties of his position until *after* the discrepancies in his time reporting was discovered by the County. The County asserted that the whole PTSD claim is nothing more than a ruse to make the grievant look sympathetic and to provide a much too little, much too late excuse for his bad behavior.

12. Third, the County noted that there was nothing in the grievant's behavior since November 2008 that would indicate that he was having difficulty at work. He took on extra duties, became the FTO, and seemed to do well with all other aspects of his job. He never indicated that he was suffering from the effects of PTSD even though he was given information about EAP when the incident in November 2008 happened. He never availed himself of that.

13. Further, even though much of his other paperwork was accurate for some odd reason his time sheets and activity logs, which were directly tied to his PTO bank, were not filled out. The County asserted that the PTSD would not have caused him to be so "selective" about which documents were accurate and which were not.

14. The County also countered the claim that "someone should have made sure the grievant got help" as asserted by the Union, and argued that since the November 2008 incident did not occur at work there was little the Sheriff could do to order the grievant to get help. His performance was satisfactory and by all outward appearances there was nothing in his performance that warranted such intervention. Thus there was no "failure" by the County because it did not order or direct the grievant to get help nor was there any obligation the County had to watch over him given his performance following November 2008.

15. Moreover, the grievant's paystubs showed the amount of PTO he had remaining, See Affidavit of Mr. Oscarson, and the grievant would have known how much PTO he had left. Certainly if he saw that his bank went up even though he certainly would have known that he took considerable time off during these pay periods, he would have known that something was wrong. Instead he ignored these facts, or chose to hide them and hope that nobody noticed that he was taking considerable time off yet not using PTO for that time. Either way, the result according to the County is the same: the grievant was intentionally defrauding the County and this was not a mere mistake or the result of PTSD but was instead deliberate fraud and cannot be tolerated.

16. With regard to the allegation that the grievant had PTSD stemming from a November 2008 incident and that the PTSD condition somehow caused a lapse in judgment that caused the grievant to "forget" to fill out his time sheets correctly the County raised several arguments. Further, the County and its doctor questioned whether the grievant even has true PTSD. The County pointed to Dr. Marston's testimony and noted that he does not Exhibit the classic symptoms of PTSD despite what happened to him in November 2008.

17. Further, Dr. Marston testified that there is nothing in the nature of PTSD that would prevent someone from mentioning sleep disturbance to a medical doctor or, if sleeping was problematic, from making an appointment to address the issue. *Martson Deposition p. 16-17.*

18. Finally, the County asserted that the grievant did not even tell his treating doctor all of the relevant information about his situation, i.e. that he was facing criminal proceedings, and that this omission is a very serious problem undercutting the foundation for Dr. Keller's opinions. Further, even Dr. Keller did not make a firm connection between PTSD and the grievant's behavior – he never clearly indicated that the PTSD would cause him to do what he did. This even assuming he has PTSD, a fact that the County disputed, there was no evidence that the PTSD would have somehow caused him to forget to fill out his time sheets, or to fill out one part of the activity logs correctly yet fill out other parts of the same form at the same time inaccurately.

19. The County countered the claim that the investigation was unfair and asserted that it was both fair and thorough. The County first noted that it had no obligation under any measure of just cause to “investigate” the claim of PTSD. This was not brought up until the Loudermill hearing and even then when asked if he had anything to add to the facts the grievant said he did not. The County did not terminate the grievant for PTSD but rather for falsely submitting time cards that enabled him to save PTO he was not entitled to and for sleeping on the job multiple times. An employer has no obligation to investigate possible defenses that are not the basis of the decision to terminate. It had the obligation to investigate and find out about the time cards, which it did and the Union raised no plausible defense to these facts. In fact the grievant admitted several times that he filled them out incorrectly and that he was “not careful” or words to that effect.

20. The County further noted that even though Olmstead County decided not to prosecute the grievant on these facts because there was insufficient evidence of intent, this does not control the result here. First, the decision not to go forward with a criminal case is based on very different criteria from a just cause standard in labor relations. Further, the Olmstead investigator may not have been shown all of the evidence that was presented here; some of which may well have changed their decision. The County alleged that it is apparent that the Olmstead detective did not consider the additional hours of time taken off by the grievant as evidenced by the chat logs, since the Olmstead County report did not reflect this information, although it was sent to them.

21. The County further countered the claim that there was disparate treatment here and asserted that the cases cited by the Union are very different for a variety of reasons. In one case a dispatcher was disciplined but not discharged for inappropriate use of her computer and for inappropriately using sick time. She was not a licensed peace officer and the County alleged that the grievant here can and must be held to a higher standard. Further, the employee’s conduct did not rise to the level of seriousness or frequency. Further she was not determined to be sleeping on the job for 20 minutes at a time multiple times and on almost every shift for months on end.

22. Another deputy was disciplined but not terminated for an off duty DUI arrest. The County acknowledged that such conduct was serious but further noted that it did not occur on duty and did not involve the sort of overt fraud involved here. The grievant's conduct was far more serious and involved a much greater breach of the public trust.

23. Yet another dispatcher was disciplined for failing to get adequate information from 911 callers. The County distinguished this as a case of negligence or carelessness, but asserted that it did not involve deliberate fraud or deceitful behavior and did not involve sleeping on duty. The County argued that in none of the cases cited by the Union was there the same sort of behavior and that termination was appropriate here given the nature and extent of the fraudulent behavior here.

The essence of the County's case is that the Sheriff can no longer trust the grievant to perform his duties to the standards of the Mower County Sheriff's department and cannot trust that he will be engaged in those duties while out in the field. Obviously Mower County is a largely rural area where deputies are on their own for long stretches of time. They must have the full confidence of the public and the Sheriff and the other deputies and employee's of the department. To reinstate a deputy who freely admitted engaging in this sort of behavior would be a serious breach of that. The County asserted that every traffic ticket he writes now could be subject to challenge in court. Every time the grievant claims to be patrolling small towns and doing building checks, the truthfulness of his actions may also be challenged. A history of falsification of records would completely undermine any testimony he might give.

The City seeks an award upholding the discharge and denying the grievance.

## **UNION'S POSITION**

The Union took the position that there was insufficient cause for his termination and that the grievant should be reinstated with all pay and contractual benefits reinstated. In support of this position the Union made the following contentions:

1. The Union asserted that the grievant is a well respected and good deputy who has been with the County since 2001. He has received good to excellent reviews for all his years with the County and has not received even a single instance of discipline until his termination in December 2010 herein. The Union asserted that this is somewhat significant since this Sheriff has disciplined a great many employees in the department for all sorts of alleged violations of policy.

2. The Union further noted that aside from his almost total lack of discipline the grievant has a fine record, has taken on extra duties and excels at his job. The Union pointed to his evaluations as well as testimony from several of his co-workers who noted his excellent work as a deputy over time. The Union noted that from almost the very beginning of his career at Mower County until November 2008; his evaluations reflect excellent law enforcement work. His 2003 evaluation was nearly all 4 out of 5's and showed an excellent record. His 2005 evaluation showed improvement and contained statements such as "good to excellent" and "doing a fine job." This evaluation again showed 4 out of 5's in performance. In 2006 he again received 4 out of 5's and showed initiative with only minor areas of constructive criticism. There was nothing in any of his performance reviews or his actions either at work or off duty that remotely suggests that the grievant is a liar or would purposefully engage in fraudulent behavior and nothing to suggest that he was anything other than completely honest and trustworthy in his personal and professional life. The Union asserted that something clearly changed in late 2008 and that was the incident in November of that year.

3. The November 2008 incident involved a domestic dispute in which the grievant's wife became enraged, somehow got the grievant's service revolver and threatened to shot him with it. In fact, the Union asserted, if the couple's son had not been in the room it is likely that the grievant would be dead since his wife was so out of control that night. She was charged with a felony for this, and other actions that night. Sheriff Amazi was actually there that night and wanted to see how the grievant was doing but offered no solid help nor did she direct him to see a psychologist or other mental health professional after such a traumatic event.

4. Clearly, the Union asserted, someone should have offered this or should have known that the grievant would be severely traumatized by this and that his drop in performance over the next year should have been a “red flag” to the department to make sure he got help.

5. The Union also noted, discussed more below, that since November 2008, when the fateful incident with the grievant’s wife occurred, he has seemed more distant and noted that his law enforcement numbers have fallen off. Even his 2009 evaluation showed a significant drop off in performance. By that time the form had changed and showed the grievant receiving 2’s out of 3’s on all categories and indicating that he simply “meets standards.” The Union noted that the grievant was by that time taking vacation due to his divorce and dealing with his life. This evaluation is signed by both Sgt. Ellis who had signed off on the prior evaluations but also by Sheriff Amazi herself. This shows that she knew that the grievant was having performance problems since the 2008 incident.

6. The Union asserted that this case is thus not about a deputy who engaged in purposeful behavior to steal time but rather one who was struggling with PTSD and was not even aware of its effects until months, even years later and who has finally beaten that affliction and can now return to active duty. Here the grievant was subjected to an event that caused him to fear for his life – he stared down the barrel of his own, loaded gun, with his young son by his side pleading his mother “not to shoot Daddy.” His wife continued to assault the grievant even though he attempted to retreat. His wife was later charged with felony assault.

7. The Union alleged in the strongest terms that one can scarcely imagine a more frightening or shocking experience than that. One can scarcely imagine simply picking up that same gun and cheerfully trotting off to work the next day as if nothing happened yet that is what the County expects of the grievant and treats him as if nothing happened that day. The Union asserted that the terrible events of that evening in 2008 coupled with the clear diminution in work performance clearly demonstrates a connection between the PTSD and the very actions that led to his discharge – yet the County did nothing to help the grievant seek treatment.

8. As if the 2008 incident was not enough, there was the subsequent divorce, with the wife getting custody of the couple's children and moving approximately 6 miles away, and then the death of the grievant's father, with whom he was very close. All of this was well known to the Sheriff and others in the department yet they insist that he should have carried on as though nothing stressful had happened in his life.

9. The Union introduced testimony and evidence from two treating physicians who have treated the grievant separately and have no incentive to create a diagnosis of PTSD unless it is really there. Both doctors opined based on their expertise and experience that the grievant suffers from the effect of PTSD as a direct result of the November 2008 incident. The Union also discounted the opinions of Dr. Marston since he is in reality not independent at all but is rather on the County's payroll and is frankly paid to say what they want him to say.

10. The Union asserted too that the effects of this are always not immediately apparent, especially to law enforcement officers, who tend to believe they can handle things without any sort of professional help. It was not until things got very bad in mid-2010 that the grievant even recognized fully how the 2008 incident affected his ability to remember things, his sleep patterns and his attention to details (such as filling out PTO forms or activity logs etc). These events finally triggered the grievant to get professional help even though he knew something was wrong with him since late 2008.

11. The Union asserted that the grievant's treating doctors opined that he became more forgetful and depressed over time since the 2008 incident coupled with all these other events and that the grievant Exhibited a typical pattern of PTSD – i.e. a willingness to accept treatment but reluctance to accept that he truly had PTSD. Most people simply do not want to accept that they have a mental illness and the grievant was no exception.

12. The Union relied heavily on the opinions of Dr. Keller who is a licensed specialist in the diagnosis and treatment of PTSD especially in law enforcement officers. The Union asserted that his expertise as a psychologist and former law enforcement officer puts him in a unique position to deal with issues like the grievant has and that his opinions should be accepted over the County's "hired gun" doctor. He opined that the grievant clearly has PTSD and that this may well have caused the behaviors that led to his discharge. He further took extra time to learn about the grievant, his home and work situations in order to get a better picture and in order to form the basis of his diagnosis.

13. The Union asserted that under well-established arbitral precedent an employer must meet all of the so-called "7 tests of discipline" as first listed by Arbitrator Daugherty more than 45 years ago. Here the County failed to meet several of these tests according to the Union and that the grievant must therefore be reinstated.

14. The Union asserted that the County failed to conduct a thorough and fair investigation. The basis of this was that the County knew in advance of the decision to terminate that the grievant was diagnosed with PTSD yet they failed to look further even though the Union presented the County with a letter from the grievant's treating doctors at the Loudermill hearing; which was supposedly before the decision to discharge him was made. At that meeting County officials said they would look further" into this but apparently never did and even expressed some surprise at the hearing that he was using that diagnosis as a defense. The County knew about the PTSD yet did nothing.

15. The Union further asserted that the County has ordered other officers who Exhibited bizarre behavior to "get medical clearance" before returning to work. Only 20 months prior to the grievant's discharge the County required another deputy to get a fitness of duty exam. The County has its doctor on a retainer of sorts and could have done this quickly and cheaply yet it decided to ignore the clear evidence of PTSD and the resultant behavior changes it carries with it.

16. The Union asserted that here is little question that the grievant has PTSD and compared his stated symptoms over the course of many months since 2008 with the DSM-IV section 309.81 diagnosis for that affliction. He has sleeplessness, fatigue, forgetfulness, difficulty concentrating, flashbacks to the events that caused the PTSD, recurring nightmares about it and a sense of estrangement and separation from others. Even those in the department who testified for the County acknowledged that they saw changes in Deputy the grievant's behavior since 2008 and that he seemed more distant and sometimes distraught but could not put their fingers on why. Now of course the answer is known and everything finally makes sense yet the County refuses to accept that PTSD was the underlying cause of this uncharacteristic behavior and claims that the grievant should have somehow been able to diagnose and fix himself even though he was unaware he even had PTSD until the Olmstead County investigator suggested he get help and after these allegations came down on him.

17. The Union asserted that PTSD is real and a well accepted diagnosis and comes directly from events that cause a sense of helplessness or fear for ones life; which is exactly what happened to the grievant. It is not limited to combat veterans but can and frequently does arise in other contexts. The Union cited a case from Vermont which it asserted was strikingly similar to this one where the PTSD caused almost identical behavior in a peace officer there. There was a diagnosis of PTSD before the termination action, a refusal of the employer to acknowledge or investigate the PTSD and a doctor who disputed the diagnosis who never even examined the officer – just as here. The Union asserted that the same sort of analysis should apply here and the grievant should be reinstated.

18. The Union also asserted that there is disparate treatment at play here and cited several examples of other employees in the Sheriff's office including a 9-11 dispatcher, who are also considered essential employees under the law, who effectively stole time yet were not terminated for their actions. One such employee, a dispatcher, was given only a 3-day suspension for inappropriate computer use. She was also disciplined again for the use of the computer and for spending inordinate amounts of time (nearly two hours per day) on non-work related matters while on duty.

19. In another case, a detention deputy was arrested for a DUI and given a suspension but was not terminated. Clearly this sort of behavior is both criminal and inconsistent with the obligations of a licensed peace officer. Yet that serious misconduct was treated less severely than the minor transgression committed by the grievant – i.e. failure to fill out forms resulting in some 30 hours of time being inappropriately paid as straight time rather than being used as PTO. (The Union noted too that the grievant has plenty of PTO time and could easily pay this back and square things with the County from a financial standpoint). The Union also noted that this same deputy was disciplined 8 times for various offenses and was directly involved in intentional deception. She falsely documented that she gave medication to an inmate when she apparently did not.

20. Yet another employee was disciplined seven times and finally discharged, for repeatedly failing to get correct information from callers to the dispatch center. Her discharge was only after multiple warnings and other discipline for essentially the same offense yet the County seeks to terminate this deputy for the first instance of misconduct. He was never given an opportunity to correct his behavior even though his doctors all feel that he is in full remission now from the PTSD, after extensive treatment for it, and that the chances of any relapse are quite minimal.

21. The Union also noted that the matter was turned over to Olmstead County to investigate possible criminal charges and further asserted most strenuously that Olmstead declined to even prosecute the matter because there was no evidence of intent to defraud, which is of course an essential element in a fraud case. At best, this is a simple case of forgetfulness resulting from the “cookie cutter” style in which the grievant frequently filled out his time cards. He had been doing it that way for years and simply neglected to go back and claim PTO later. The Union asserted that without any evidence of intentional conduct the County’s case simply falls apart – and here there is none.

22. Finally, the Union reiterated the grievant's honest and forthright behavior here – he came forward with the sleeping information; he was both contrite and forthcoming I the investigation – he hid nothing, he always told dispatch when he was leaving so there can be no allegation that he attempted to surreptitiously leave without notifying anyone he was going. He simply failed to fill out paperwork properly – there is no allegation whatsoever that his on duty performance was anything but exemplary and there is no allegation that he failed to perform his duties

23. The essence of the Union's case is that the grievant deserves a chance to make good since he has now appropriately dealt with his PTSD and can now return to active duty with virtually no chance of a recurrence of the actions that led to this matter.

The Union seeks an award reinstating the grievant to his position with the County with full back pay and benefits reinstated and for the expungement of his record of all discipline herein.

## **MEMORANDUM**

### **BACKGROUND FACTS**

The Grievant was hired as a deputy sheriff by Mower County on February 21, 2001 and continued his employment until his termination on December 13, 2010. His work record was generally quite good and there were no disciplinary issues with his employment up until the time of his termination. As noted above, his evaluations were also generally good and he received high marks on all of these up to and including the last one he had at the end of 2009.

There was some evidence to suggest that his numbers were down after 2008 but not so much as to be significant on this record. In addition, the grievant has received over a dozen commendations and positive letters in his career with the County. The evidence did not show any instances prior to his termination that demonstrated any dishonesty or propensity to fabricate facts or to lie about things. He was regarded as generally trustworthy.

While the details do not need to be discussed in detail in this Award, it was clear that the grievant's marriage was in serious trouble by the end of 2008. On November 3, 2008 his wife, now ex-wife, became very angry with the grievant and a heated argument ensued. The wife began hitting him and throwing objects at him and eventually locked him out of the house. He found his way back only to be confronted by the wife, now completely out of control, with his service pistol and Taser. She was pointing the gun at him and threatening to shoot him. This all happened while the couple's young son was in the room pleading with his mother not to shoot the grievant. While it may never be known for sure, there was some evidence that the wife may well have shot the grievant had the son not been there standing next to him during this melee.

Eventually the grievant was able to coax the gun away from his wife and tried to take the son and leave but she continued the assault, hitting him and kicking and denting his car. She was arrested and charged with felony assault as the result of these actions. Sheriff's deputies responded to this call as well as Sherriff Amazi at that time. She testified credibly that following the arrest, she provided the grievant with information regarding the County's employee assistance program for both himself and his son. The County's employee assistance policy is also set out in the Mower County Personnel Policy Manual, which is available in the Sheriff's office and online. See employer Exhibit 25. There was no evidence that he ever contacted EAP however despite going through a divorce and the loss of his father also in late 2009.

Neither was there sufficient evidence that he sought treatment or mentioned to his doctors the symptoms he later indicated he had as a result of this event until much later, actually after the investigation into the allegations that led to his discharge occurred.

As will be discussed more below, the grievant's work performance did not apparently suffer in any outward way during 2009. His evaluation did not reflect any significant problems and, as the County witnesses noted, the grievant took on additional responsibilities, including becoming a Field Training Officer (FTO)<sup>1</sup> and taking the initiative for getting digital cameras. The 2009 evaluation reflects that "[the grievant] has taken control of the FTO program and providing a good environment for new hires to learn." employer Exhibit 29. Further Sgt. Ellis, a person who worked with the grievant frequently and who was familiar with his work and with him personally as a co-worker, testified that the grievant's job performance did not change appreciably or noticeably for the worse in the two year period following the 2008 incident.

Deputy Mensink, who also identified himself as a friend and co-workers also testified that he saw no change in the grievant's job performance in the two year period following the 2008 incident. He further testified that they went on calls together and worked on the same shift regularly. He noticed no changes with job performance other than the number of traffic citations.

The evidence showed that the grievant has had problems with paperwork in the past. Chief Deputy May testified that he had a long-standing problem with the grievant failing to turn in his daily activity logs in a timely manner. He indicated that he has spoken to the grievant many times over the years about this but that it remained a continual problem. He issued a memo to all deputies about late activity logs and despite the memo, the grievant still failed to turn in all of the logs. As of the time he was suspended in September 2010, the Sheriff's office was missing numerous dates from the grievant.

The incident that began the investigation that eventually led to the grievant's discharge occurred in late August/early September of 2010 when Ruth Larson, who is responsible for time records, payroll and warrants, found something wrong with one of the grievant's time cards.

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<sup>1</sup> It should be noted that holding a position as an FTO demonstrates a willingness to take on additional responsibilities as well as a demonstrated ability to train other officers in various law enforcement aspects. As will be discussed more in the section dealing with how and how much PTSD might have affected the officer, this fact added additional support for the County's claims that the PTSD, if it existed here, did not adversely affect the grievant's ability to form reasoned judgments or to recall certain matters regarding paperwork or other needed documentation.

She also indicated that there had been problems with his time cards for some time and that she frequently had to confront him about it to get these matters fixed. Ms. Larson testified that she arrives at work at 6:00 a.m. and that the grievant's shift is scheduled to end at 7:00 a.m. so she assumed he would be there to answer her questions.

When she asked where he was she was informed by another employee that the grievant had left and frequently left early. This surprised Ms. Larson because few if any of his time cards reflected that.

This fact triggered an investigation into the time records that ultimately showed that there were serious discrepancies between what the grievant's time records showed and the actual time he spent at work. It was clear that he left early on many occasions without taking PTO time off and that he was paid inappropriately for at least 34 hours at straight time when these should have been paid for as PTO hours. The Sheriff called in investigators from Olmstead County to investigate possible criminal charges as there was an allegation of theft of time from the County.

There was some dispute about this but the evidence showed that at nearly the same time the grievant learned that there was an investigation about to commence over his time records he suddenly began submitting PTO requests with the correct hours listed on them.<sup>2</sup>

Olmstead County declined to prosecute and noted that there was insufficient evidence of intent to establish that a crime had been committed. During the course of that investigation Mower County continued its internal investigation and looked at the chat logs, activity logs, time sheets and PTO requests for the grievant to see if they matched up. This showed that there were numerous additional hours, beyond the original 34 hours found by Ruth Larson, that were unaccounted for by PTO.

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<sup>2</sup> It should be noted that in most instances the grievant was notifying a shift supervisor or other deputy that he was leaving early. This case is not so much about whether he was entitled to leave or whether he was simply walking off the job without telling anyone but rather is very much about whether his time records were appropriately completed and whether there was any excuse for the discrepancies based on PTSD. There is also very much an issue raised by the County as to the his motivations for incorrectly submitting time records based on the claim that he wanted to preserve PTO hours so he could cash them out and to save them to use to see his children who were by this time living in St. Charles, Minnesota.

The grievant admitted that his time sheets showed discrepancies and that he was quite lax in submitting correct time sheets and that his PTO account should have been charged for many more hours than it was. He denied any intent to defraud the County but acknowledged that there were discrepancies. Under *Garrity*, he admitted to taking time off without taking PTO and to sleeping on the job on a routine basis. The grievant stated, under an order to be truthful, that “I took a lot of time off” and that he took off early “a few times a week.” See Employer Exhibit 15, p. 2. the grievant estimated that he was taking off an average of six hours per week. *Id.* at page 8. However, for the entire year, his PTO requests for partial days, which is what is at issue in this case, amounted to 14 hours. See, Employer Exhibits 10 & 14. The evidence this showed that the amount of time taken as paid time was considerably more than the 34 hours originally found.

Finally, during the investigation under a *Garrity* warning the grievant admitted sleeping on the job for approximately 20 minutes at a time. He further acknowledged at the hearing that he would intentionally set his cell phone to wake him up and would simply sleep until the alarm went off. He was not able to give an exact number of times he did this but the evidence showed that he slept on duty several times per week and that he did this occasionally more than once per night.

Faced with this the Sheriff determined that termination was appropriate and discharged the grievant on December 13, 2010. Sheriff Amazi testified that she has lost trust in the grievant and cannot trust that he will fill out necessary forms and paperwork appropriately. She further indicated that she is concerned that his dishonesty in filling out these forms might compromise future prosecutions and that she simply cannot in good conscience place a road deputy back out on the road after he acknowledged sleeping on duty while in a squad car for 20 minutes a night several times per week and that she did not feel the public would tolerate that.

It is against this backdrop that the case against the grievant proceeds.

## **TIME LOGS - PTO ISSUE**

The evidence clearly showed that the time logs were not filled out correctly and that due to the inaccuracies in the way these were completed the grievant was paid inappropriately for at least 34 hours, but likely far more given the number of times he left work early. The grievant claimed that he must have forgotten to fill these out and that he filled out his time cards in a cookie cutter fashion – i.e. that he filled them out in advance. He claimed that he did this because Ms. Larson and others had admonished him in the past about not getting these turned in on time so he filled them out prior to his shifts so he would have an easier time getting these in.

The evidence as a whole did not support the claim that he simply forgot to go back and correct the time records to reflect that he had left early. One could excuse or explain a few of these given that the grievant worked a night shift and that he was tired or distracted by other matters. If there had been only a few it is likely the matter would not have gotten this far; it is certainly likely that he would not be terminated under a just cause standard.

Here though several things conspired to undercut the grievant's claim. First, there was the sheer number of incorrect records. The evidence showed that he left early "frequently" although an exact number was never clearly determined on this record. The evidence further showed that only in a few instances was he going back and correcting the time cards to reflect when he left early. Certainly as noted above, he was telling people he was leaving early but simple absentmindedness would not explain the failure to complete time records time after time.

Second and most significantly, there were the activity logs. The evidence on this issue was damaging indeed to the Union's and the grievant's claim that he "must have forgotten to go back and correct the records." The evidence showed clearly that his activity logs could not be completed in "cookie cutter" fashion. While some of them were turned in late and some were missing, those that were turned in had information which could not have resulted from simple absentmindedness.

Each activity log shows starting times and ending times as well as starting and ending *mileage* or *total mileage* on the vehicle used that night. The activity logs each show what he claimed to have been doing on his shift each night. The grievant acknowledged that he could not and did not complete activity logs in advance.

Further on more than one occasion the logs had the mileage written down, which could only have been done after the shift ended and likely immediately after the shift ended but which showed him working until 7:00 a.m. when other clear evidence showed that he had left. For example, dispatch memos and time records show that he left work at 5 a.m. on April 27, 2011. He did not submit a PTO memo to make sure he got PTO deducted rather than being paid. See, Employer Exhibit 22. The activity log he completed for that date shows a beginning and ending mileage in his vehicle, which as noted above, could not be determined in advance. He then listed his activities for the night and claimed to have patrolled a certain area, which was specifically written down on the log, from midnight until 0700. He claims on his activity log to have gone off duty at 7:00 a.m. This was clearly false and showed that he filled this out clearly knowing that he was not working until 0700 but that he left at 0500.

As another example, on both August 24 and 25, the dispatch logs and time records reflect that the grievant left at 6:00 a.m. without taking PTO to cover his absences. See Employer Exhibit 7. His activity logs for both of these dates show him leaving work at 0700, as well as the patrol activity he claims to have engaged in during the night. See also activity logs and time sheets etc. for August 10, 2010. There were multiple examples of this kind of error and it was clear that a disturbing pattern exists throughout the activity logs.

Significantly too the grievant admitted that his activity logs contained false information. He admitted that he put the false information into the activity reports after the fact. He testified that the mileage information was correct and that therefore he would have had to have filled out “some of” the information on the day he performed the work.

While there was apparently insufficient evidence to find intent under a criminal standard this is to such a standard. Whether there was or was not any intent to defraud this type of evidence demonstrates at the very least a lack of care in filling out these forms. This is especially troubling where, as here, the errors and discrepancies resulted in a direct financial gain to the officer making the error. As every law enforcement officer knows, their jobs require the highest degree of both honesty and accuracy and that even a minor misstatement in a report can be grounds to jeopardize an investigation or a prosecution.<sup>3</sup>

Thus, as a factual matter, there was no question that the grievant filled out his time reports in such a way as to result in a direct financial benefit to him. To his credit he acknowledged that and was both forthcoming in that regard with Olmstead County and with the internal investigators. That alone however does not excuse it, especially where there was a fairly large amount of time involved.

The third piece of evidence that undercut his claim was the assertion that he simply did not know what his PTO balance was and that he was not aware that he was not being charged for the times he left early. This claim was simply not supported by the weight of the evidence here.

The evidence showed that the paystub had that information on it and that over time his PTO balance went *up* rather than *down*. Some of this could possibly be excused by simply inattentiveness. Clearly, not everybody checks their paystubs every other week and may well simply trust that the HR people are calculating things accurately. Here though there was sufficient evidence to show that the grievant should have been aware that the balance should not have been going up to raise suspicion about his motives and knowledge of that balance. That information is clearly on the paystubs. See Oscarson Affidavit.

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<sup>3</sup> While there was no evidence that the grievant was inaccurate in writing up reports about his job duties this was something of a double edged sword here. It is certainly a good thing that the grievant was able to complete necessary reports about traffic stops or other police matters, his ability to do so without apparent error seriously undercut the claim that his PTSD impaired his ability to fill out such forms or to remember details of things later on. There was nothing to suggest that he had a problem filling out a report about anything else; only his time records were so affected by the PTSD. There was no explanation by anyone as to why this would be the case. As in all things, one should never overlook the obvious.

It strains credibility a bit to assume that the grievant had forgotten all of the time he was taking off or that he had absolutely no idea how many hours he was taking off; especially in light of the other evidence in this matter, i.e. that he was able to complete all the other forms required of him with apparent accuracy and was able to take on additional responsibilities without difficulty and that his overall job performance remained about where it had been even prior to the events of 2008.

Fourth, there was the assertion by the County that the grievant was simply motivated by monetary gain. Here though the evidence was not as squarely in favor of the County as other assertions it made. The grievant did “cash out” PTO balances in the past and he was not able to do that in 2009 because his balance fell below 150 hours. Clearly too he indicated on his evaluation that he wanted to “cash out bigger!” (Emphasis in original), which might tend to show that he had some motivation to fudge his time off and try to preserve PTO. The County asserted that he had a motive to save those hours in order to spend time with his children and to save time for his upcoming wedding and honeymoon. There was no direct evidence of a clear intent to steal PTO from the County based on these allegations. However, having said that, it was clear that the time was saved and that the grievant did realize a direct financial benefit – whether he intended to steal time on this record is not strictly relevant – what is relevant is that he certainly had the information to know that his PTO hours were greater than they should have been.

### **SLEEPING ON THE JOB**

There was clear evidence that the grievant was sleeping on the job and that he did so quite frequently and deliberately. Frankly, for a sworn law enforcement officer to acknowledge that he was sleeping on the job in a marked car while supposedly out on patrol was akin to a torpedo hitting the ship of his case right under the smokestack.

There will be some discussion of PTSD below but on this record there was clear evidence that he did this without apparent regard for the safety of the public and of the public perception this would create. No one from the public ever reported seeing him asleep and fortunately there were no incidents where he was late responding to a call because of that. This was simple serendipity.

The grievant made vague allusions that other deputies sleep on the job but there was no evidence of that and the grievant was only said he had “heard” of others but nothing more than that. On that sparse record there is insufficient evidence to make out a credible disparate treatment claim.

Further, the grievant was well aware of his obligations to remain alert while on duty<sup>4</sup> and could have taken time off or get appropriate medical treatment for a sleep disorder, if indeed he even had one. He did neither and apparently thought it was acceptable to do this. Moreover, the evidence here showed that the grievant was quite deliberate about this conduct; setting his cell phone to wake him up after 20 minutes. It was not as if he suddenly had an attack of narcolepsy that caused him to fall into unconsciousness. Certainly the grievant may have been tired, although he did have the same shift every day, which again caused some angst over why he was having his problem.<sup>5</sup>

Obviously any employee who is caught sleeping on the job has some explaining to do. Sleeping on the job is generally regarded as a very serious, probably terminable offense unless there is a very good reason or explanation for it – such as a medical emergency – although at that point it might not be considered “sleeping” but rather “falling unconscious due to a medical condition.”

The Union cited *Great Western Recycling Indus.*, FMCS CASE # 101001-60281-3, (Jacobs, 2011), where this arbitrator reinstated without back pay an employee who was found asleep on the job. Several things distinguished that case from this one.

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<sup>4</sup> There is actually a County policy against sleeping on the job but one hardly needs a formal policy for that.

<sup>5</sup> One could envision a situation where someone’s schedule changes thus causing a disturbance in sleep patterns that an officer might dose off but here that was not the case. The grievant had the same shift night after night and there was no evidence that the shift caused him to be tired. We will discuss the PTSD later but on this record there was insufficient persuasive evidence to blame this activity on PTSD alone. It was clear that the grievant was likely distracted by other outside matters, such as the divorce, the distance in going back and forth to his children etc.

First, the employee in *Great Western* was not a law enforcement officer. For better or worse these employees are held to a somewhat higher standard. The employee there operated a conveyor belt at a recycling facility and apparently either dozed off or passed out while other employees were literally within a few feet of him and they noticed it right away.

Second, there was evidence that he did this only once – not multiple times out in the field were presumably no one was watching him late at night. Third, and most importantly, the employee in *Great Western* might well have faced termination but for the employer's action in only suspending another employee who had fallen asleep at the controls of a large crane only months before the incident in question.

The almost inescapable conclusion is that this totality of evidence results in such a loss of confidence in this deputy by the Sheriff and the department that termination is appropriate unless PTSD provides an excuse for this.

### **DISPARATE TREATMENT**

The Union claimed that the grievant has been treated differently from other similarly situated employees who have not been discharged but rather who have been disciplined and allowed a second chance within the department. Joint Exhibit 3, showing all discipline within the County Sheriff's department over the past several years was reviewed. The Union cited three specific examples it claimed showed that the County has allowed other employees to return to work even after very serious misconduct and inappropriate up of time.

The County argued that those cases are distinguishable and asserted that either the cases did not involve similar fraudulent behavior or it involved employees in a far different category than a licensed peace officer. These will be discussed below.<sup>6</sup>

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<sup>6</sup> The parties submitted an extensive joint Exhibit 3 setting forth all recent discipline and this was reviewed. Most of the discipline involved very dissimilar offenses and only the ones analyzed below were strictly relevant here.

In one case a dispatcher was disciplined but not discharged for inappropriate use of her computer and for inappropriately using sick time. She was not a licensed peace officer however and here was some merit to the County's allegation that the grievant here must be held to a higher standard. Further, the employee's conduct did not rise to the level of seriousness or frequency as here and did not involve what appeared to be highly suspicious submission of forms to gain a direct financial benefit. Further, and significantly, that dispatch employee was not sleeping on the job for 20 minutes at a time multiple times and on almost every shift for months on end.

In a second case a licensed deputy was disciplined but not terminated for an off duty DUI. The County acknowledged that such conduct was serious but asserted that it did not occur on duty and did not involve the sort of overt fraud involved here. The grievant's conduct was far more serious and involved a much greater breach of the public trust. The distinguishing factor was the on duty nature of the conduct. While a DUI for any peace officer is very serious misconduct given the nature of their work and may even be related to the disease of alcoholism, such activity cannot be equated to the conduct here. There was clear evidence of an attempt to benefit financially as well as multiple times sleeping on duty. That fact alone differentiates those two cases.

Finally, there was an employee who was given multiple chances to correct her behavior before finally being terminated. The obvious distinction here is that her actions appeared to be caused by sheer negligence or inattentiveness rather than intentional conduct in filling out an activity log that resulted in incorrect pay. There was further no evidence in that case of sleeping on the job. On balance there was insufficient evidence of disparate treatment on this record to warrant a reduction in the penalty or to provide a basis for the claim that there was no just cause for discipline.

## **PTSD**

The Union's main, and perhaps sole argument, is that the grievant suffered from latent PTSD due to the traumatic events of November 2008. There is little question that facing down the barrel of a gun at close range, one's own gun, in the presence of your small child who is pleading for the assailant not to shoot you is perhaps one of the most frightening scenarios imaginable. There is little question that this event would be enough to trigger PTSD in many people.

Clearly too, PTSD can remain undiagnosed and untreated for a long time. Both Dr. Keller's and Dr. Marston's testimony was reviewed in some detail. The Union claimed that all of these actions can be explained by a diagnosis of PTSD and that he would not have done this if he had not had it.

For purposes of this discussion it was assumed that the grievant actually has PTSD; although both doctors acknowledged that the basis for the diagnosis is in many cases based on subjective self-reported symptoms. There is obviously a large amount of faith placed in the accuracy of the symptoms reported by a person who claims to have the illness but for now the assumption is that he has it.<sup>7</sup>

There is also a great need to be completely open with one's doctor about health history and the situation in which a patient finds him or herself in order for there to be an adequate foundation for the diagnosis. There was some evidence that Dr. Keller may not have had all of the relevant facts. The County pointed out that he did not have all of the grievant's medical records from Mayo Clinic or the records that show that he has had difficulty concentrating all his life. See Union Exhibit 5.

There was also evidence that Dr. Keller did not know that the grievant was under criminal investigation for the false time cards and PTO records. This too would have made some difference. There was evidence that Dr. Keller was not given all of the relevant information about the grievant by the grievant but the main issue here is that he was unable to make a clear connection between the diagnosis of PTSD and the conduct that led to the discharge.

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<sup>7</sup> Frankly if the grievant did not have PTSD, the discussion would be over. The decision would be straightforward and result in termination. On this record, the claim that A. the grievant has PTSD, and B. that PTSD and only the PTSD caused him to take these actions is about the only cogent argument the Union could make on the grievant's behalf.

Dr. Marston took issue with Dr. Keller's diagnosis and asserted that there were many items missing here and that the grievant was not being honest with his doctor perhaps in an effort to get the doctor to come up with a PTSD diagnosis as a defense to this case. All these issues though go to the question of whether the grievant has PTSD. The question here is whether here was a direct causal link between PTSD and the actions the grievant took. On this record, there was not.

Dr. Keller was vague at best about whether here was such a link and was not able to say that the PTSD was even a substantial contributing factor to the lapse in judgment in deciding to sleep on the job, fill out time cards incorrectly and then fail to fill out activity logs correctly even though they were filled out late. Without this the defense simply falls short of providing enough evidence on this record to overturn what was clear misconduct.

The Union cited what it claimed was an almost identical case to *Appeal of Thomas Revene*, 27 V.L.R.B. 282, 292 (2004), *affirmed*, Docket No. 03-2 (2006). There the Vermont Labor Relations Board, VLRB, there was immediate change in the behavior of the deputy, see slip op at page 292, 295. It was apparent almost immediately that the event, which also involved a gun being pointed at the deputy, had an immediate and noticeable effect on this officer which changed his demeanor and behavior immediately and for a long period of time into the future. This was noticed by department personnel as well. By that same evening the grievant began to have symptoms of PTSD and by the next day he was directed to see a psychologist who eventually diagnosed him with it. Within days the normally outgoing and strong willed officer cried when talking to friends about the incident and it was clear that his performance was beginning to suffer. See VLRB slip op at page 297.

Also, there was a vast difference between the cases. The allegations leading to the discipline in the VLRB case stemmed from the very incident and the alleged failure to recall details of that event as set forth in an affidavit filled out by the deputy. The allegation was that the trooper had misled other officers about what the dispatcher told him and failed to tell them that the assailant who was in the house they were to enter in response to a call about a person out of control had a weapon.

The allegation in that case was that the trooper intentionally falsified reports to make it appear that the dispatcher had failed in her duties to report the gun and that he tried to cover his mistake up by filing false reports and making false statements to investigators about the incident later on.

The Commissioner eventually overturned the discharge largely because the investigators knew well in advance of the investigation that the grievant was suffering from PTSD, had been diagnosed with it and that it was greatly affecting his memory of the events in question.<sup>8</sup>

The evidence there showed that his memory was clouded by the traumatic events of that day and that he did not intentionally fail to report things – he simply had them blanked out by the PTSD and the trauma of having a loaded gun pointing at him. There was also an affirmative finding that there was no malingering of the PTSD, even though it is possible since it is based largely on self-reported subjective symptoms. See VLRB slip op at page 330-331. The VLRB found that dispatch had told the trooper the perpetrator had a gun but that this did not translate into a conclusion of intentional lying because the trooper did not recall it later. There was insufficient evidence to conclude he had intentionally lied because the trauma caused a lapse in his memory. VLRB slip op at page 334.

The Commission also found significant that there was no history of malingering nor of any prior truthful behavior and found that the trooper's behavior was so altered after the event that it was reasonable to conclude that PTSD had significantly affected his memory of the event. There was also evidence that well prior to any investigation the employer was aware of the problem and of the diagnosis yet failed to order an IME even though one could have been ordered. The Employer essentially concluded on its own that such an exam could be tainted because of the subjective nature of PTSD and was effectively making a medical/psychological conclusion without adequate basis for that.

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<sup>8</sup> Note too, there is a vast difference in these cases in that in the VLRB case the trooper's memory of the *event in question*, i.e. the event that actually led to the PTSD, was clouded due to the trauma. Here the claim is that the grievant's memory was affected to the point where he was unable to properly recall whether he left early from shifts that occurred almost two years later. On this record there was insufficient evidence that the PTSD, whether it is in remission or not, would have caused this type of lapse in memory, See testimony of Dr. Keller, or that it would have caused the grievant's memory to be so selective as to recall what the mileage was on an activity log yet fail to cause a failure to recall that he had left early even though he falsely reported that he had stayed on for the entire shift.

No such evidence was present here. While the letter with the diagnosis of PTSD was presented at the *Loudermill* hearing, there was also the statement by the grievant that he had nothing to add. Further, the events are distinguishable. Here there was some evidence to suggest that the grievant may have known that there was an investigation underway that suddenly caused him to seek treatment for this and to suddenly start submitting the paperwork properly, even though there had been problems with such paperwork for years.

Further, on this record even Dr. Keller was unable to provide sufficient evidence that the PTSD caused this sort of lapse in judgment or in selective memory. He was also unable to securely connect the PTSD, even if one assumes that the grievant had it, to this behavior. He was asked several times about this but was unable or unwilling to say clearly that the PTSD caused the grievant to do this.

Clearly PTSD is real and many officers suffer from it, as was amply demonstrated by the VLRB case and others like it in this and other States. It is a clear occupation hazard faced by any law enforcement officer and those in other public safety positions. However PTSD is not and cannot be a catch all excuse for bad behavior and cannot be relied upon on all cases to excuse any and all misconduct, especially where there is a delay of such a long time and where the diagnosis appears to be in response to the allegations of misconduct themselves.

Here it is clear that the grievant may well have recovered from the effects of PTSD and that he can be a good and effective officer in another department, but it was also amply clear that he cannot be effective here. The Sheriff testified credibly that she has lost trust in him and that other officers have as well. This is not to say that a one time mistake such as this must haunt a person forever but that the effects of such action within a department can so undercut the necessary trust that a law enforcement department must have in the integrity and attention to detail in its officers that they can no longer be effective. Accordingly, based on the record as a whole and on these unique facts the discharge must be allowed to stand and grievance denied.

**AWARD**

The grievance is DENIED.

Dated: July 18, 2010

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Jeffrey W. Jacobs, Arbitrator