IN THE MATTER OF ARBITRATION BETWEEN

LAW ENFORCEMENT LABOR SERVICES, INC. ) OPINION AND AWARD
) BMS # 07-PA-0044
) Grievance re: Discharge

AND

WRIGHT COUNTY

ARBITRATOR: Charlotte Neigh

HEARING: December 6 and 7, 2007

POSTHEARING BRIEFS RECEIVED: January 7, 2008

AWARD: February 6, 2008

REPRESENTATIVES

For the Union: For the Employer:

327 York Avenue Frank Madden & Associates
St. Paul, Minnesota 55130-4090 505 N. Highway 169 - #295
Plymouth, Minnesota 55441-6444

JURISDICTION AND PROCEDURE

Pursuant to the parties’ Labor Agreement and the procedures of the Minnesota Bureau of Mediation Services, Charlotte Neigh was appointed to arbitrate this matter. A hearing was held in Buffalo, Minnesota, at which time both parties had a full opportunity to offer evidence. By agreement of the parties, posthearing briefs were postmarked by January 4th, and the record was closed upon their receipt.

ISSUES

1. Whether the Employer had just cause to discharge the Grievant.

2. If not, what is the appropriate remedy?
PERTINENT AUTHORITY

LABOR AGREEMENT

"ARTICLE X - DISCIPLINE"

The Employer will discipline Employees for just cause only. Discipline will be in one or more of the following forms:

- oral reprimand
- written reprimand
- suspension
- demotion or
d. discharge.

CODE OF ETHICS

G100.01 Purpose
This order describes the qualities of character and conduct expected of all licensed deputies of the Wright County Sheriff’s Office.

G100.02 Policy
It is the policy of this agency to require its deputies to maintain minimally acceptable standards of conduct and behavior to keep the public faith and respect in this agency at an optimum level to ensure the public’s support. For without the public’s support, a law enforcement agency cannot effectively serve the public.

G100.03 The Canons of Police Ethics
All licensed personnel shall abide by the Law Enforcement Code of Ethics:

I will keep my private life unsullied as an example to all; . . . develop self-restraint; and be constantly mindful of the welfare of others. . . . I will be exemplary in obeying the law of the land and the regulations of my department.

CONDUCT UNBECOMING A PEACE OFFICER

G101.03 Conduct
Rule 1.4 Peace Officers, whether on or off duty, shall not knowingly commit any criminal offense under any laws of the United States or any state or local jurisdiction . . .

Principle Two
Peace Officers shall refrain from any conduct in a social capacity that detracts from the public’s faith in the integrity of the criminal justice system.

Principle Four
Peace officers shall not, whether on or off duty, exhibit any conduct which discredits themselves or this office or otherwise impairs their ability or that of other officers or this agency to provide services to the community.

RULES OF CONDUCT

G110.03 Conduct
Any breach of the peace, neglect of duty, misconduct or any conduct on the part of any member of the department which violates existing community moral standards, either within or without Wright County, which tends to undermine the good order, the efficiency, or discipline of the department, or which reflects discredit upon the department or any member thereof, or which is prejudicial to the efficiency and discipline of the department, even though these offenses may not be specifically enumerated or laid down, shall be considered conduct unbecoming a member of the Wright County Sheriff’s Office, and subject to disciplinary action by the Sheriff.
BACKGROUND AND UNDISPUTED FACTS

The Grievant was hired as a Deputy Sheriff on 2/16/05 and his probationary period ended on 2/16/06. On 2/17/06 the Sheriff’s Office was notified by the St. Cloud Police Department that a criminal investigation involving the Grievant was underway, and the Grievant was placed on paid administrative leave. The Grievant and his housemate, a law enforcement officer in another jurisdiction, were ultimately charged with two gross misdemeanor counts of furnishing alcohol to persons under the age of 21 and a misdemeanor count of procuring another to expose private parts. In July 2007 the Grievant was acquitted on all counts; his housemate was convicted on all counts.

After the Saint Cloud P.D. completed the criminal investigation, the Employer began an internal affairs employment investigation, which concluded that the Grievant had violated the policies set forth above. The Sheriff’s command staff reviewed the investigation report and unanimously agreed that the Grievant’s employment should be terminated.

By letter dated 6/28/06 the Employer notified the Grievant of intent to terminate his employment for misconduct constituting disregard of his oath and violation of Sheriff’s Office directives, based on: allowing two juvenile females to consume alcohol in his presence on 2/12/06; having his exposed genitals photographed with a camera phone in the presence of two juvenile females and an adult female; and one of the juvenile females being encouraged to expose her body parts, and actually exposing her breasts and bare buttocks.

The Grievant did not attend the meeting that was scheduled to provide an opportunity for him to present information why his employment should not be terminated. By letter dated 7/5/06 the Sheriff notified the Grievant that his employment was terminated effective on that date. The Union filed a grievance, claiming that the termination was without just cause. The parties were unable to resolve this matter and it proceeded to arbitration.

SUMMARY OF THE PARTIES’ ARGUMENTS

THE EMPLOYER ARGUES THAT:

• The evidence has established good and sufficient basis for the Grievant’s discharge.

• The conduct for which the Grievant was discharged was proven through the testimony of the three females who were involved in the events of 2/12/06, by the statements that they gave previously to the St. Cloud P.D. and the internal affairs investigator, and by their testimony in the criminal trial. The Grievant’s exposure of his genitals was also established by his housemate’s statement to the St. Cloud P.D. The County has submitted undisputed proof that the Grievant engaged in the conduct for which he was discharged.

• The guilty verdict for the Grievant’s housemate substantiates the events of 2/12/06, and the Grievant admittedly was present during these events. The Grievant admitted that he never: told his housemate to stop his behavior; told his housemate not to furnish alcohol to the juvenile females; or told the girls not to drink it.
Employer Arguments (continued)

- The inconsistencies in the statements of the three females are to be expected as a matter of human nature when multiple statements are made over a long period of time.

- The fact that the Grievant was found not guilty is not dispositive of the issue of whether the Employer had just cause to terminate his employment. He was not terminated for furnishing alcohol to the minors, but for allowing them to consume alcohol in his presence. He was not terminated for procuring them to expose private parts, but because it was encouraged and did happen in his presence.

- The Union’s effort to blame the underage victim and the adult female should not be accepted; their conduct is not the subject of this grievance arbitration. Nor did the Union prove that the adult female was out to get the housemate or that there was a conspiracy to get the two juveniles to make untrue allegations. This theory was rejected by both the internal affairs investigator and the jury at the criminal trial. The allegation regarding the housemate’s asking one of the girls to expose her breasts is corroborated by the cell phone recording made at the time.

- Law enforcement officers are held to a higher standard of conduct than other public employees, as reflected in their oath of office and Code of Ethics. They are expected to conduct themselves in an exemplary manner. The Grievant knew what was expected of him but he violated these standards through his actions and inactions on 2/12/06. The Grievant’s conduct brought discredit to himself and the Office and violated the public trust that is crucial to law enforcement. The absence of any witnesses in support of the Grievant indicates that he does not have the trust and confidence of his fellow officers.

- One of the juvenile females testified that it was “cool” to be drinking with law enforcement officers. These two impressionable and vulnerable minors were likely “at risk” and there can be serious consequences from minors using alcohol. It is especially important for law enforcement officers to establish a positive role model for underage people, rather than sending the wrong message about law enforcement. The Grievant expressed no concern about the impression he left on these juveniles.

- There are no factors to mitigate the discharge penalty. The Grievant’s on-duty performance does not negate the serious off-duty misconduct. The Grievant was still in his probationary period when the event occurred and he acknowledged this is when a deputy tries to demonstrate his best performance and conduct. Engaging in such serious misconduct during his probationary period raised grave questions regarding his judgment, and his short length of employment was considered in determining the level of discipline.

- Reinstating the Grievant would send a message to young people and county residents, as well as other members of the Sheriff’s Office, that would undermine the high standing and integrity of law enforcement officers. The totality of his conduct justified terminating his employment.
THE UNION ARGUES THAT:

- The Grievant had good performance evaluations for being self motivated, requiring little supervision, being ahead of his peers in development as a deputy, and displaying an excellent work ethic and positive attitude to the public.

- The three females involved in the events of 2/12/06 tell seemingly different stories about what happened and change the story each time they tell it. The Grievant consistently denied providing alcohol to minors and denied encouraging the females to flash or moon either himself or his housemate. He remembers the events of the evening but admits to being a little foggy on conversations, due to his level of intoxication.

- The Grievant provided a voluntary statement to the St. Cloud P.D. and independently completed a chemical dependency assessment. He was acquitted of the criminal charges by a jury.

- The Employer has the burden of proving the Grievant’s guilt of wrongdoing. The standard should be beyond a reasonable doubt, or at least clear and convincing evidence because: the allegations involve moral turpitude or stigmatizing behavior; and his employment was terminated. Although the clear and convincing standard is not precise, its effect is to cause the trier of fact to pause and take a hard look at the evidence in a dispassionate way.

- The stories of the three women are inconsistent and their credibility needs to be carefully reviewed. Initially they identified the housemate as the perpetrator and the Grievant as a witness.

- The adult female who was present was in charge of the two girls during their four-day visit to the house but she assumed no responsibility for their activities and did not try to intervene in their behavior on 2/12/06. Even the note she forged in the name of one of the girls identified the housemate as the perpetrator and mentioned the Grievant only as being involved in waking the females up and telling them to get up and drink. It was not until the criminal trial that the adult female stated that: both of the defendants were saying “It’s underage consumption night”; the Grievant handed the girls drinks; and the Grievant asked one of the girls to expose herself.

- The juvenile females are no more credible or reliable. Both were familiar with alcohol, flashing and mooning. One of them admitted she didn’t remember a lot about that night due to her alcohol consumption. Their testimony does not rise to the level of offering credible evidence to sustain the Grievant’s discharge.

- The Grievant’s actions were misguided and could even be considered poor judgment but one event does not measure the man or reflect on the potential he already exhibited. He is worthy of redemption. He should be reinstated to his position as a deputy sheriff.
ANALYSIS AND DISCUSSION

Credibility

The Union argues that the females who were involved in the events of 2/12/06 are not to be believed and that the Grievant did not say or do some of the things alleged. There is reason to doubt some parts of the adult female’s account: some of the discrepancies can be attributed to normal forgetfulness over time about details; and some to her anger and desire to see the housemate held accountable. The account of one of the juvenile females was incorrect in some details relating to times and days when things occurred, but there is no reason to believe that she did not attempt to tell the truth about the events of that night. The fact that she was reluctant to be involved in the proceedings because she did not want the men to lose their jobs adds to her credibility. The other juvenile was candid and straightforward in answering questions, including unabashedly admitting her own intoxication and vomiting that night. The fact that the girls had prior experience with alcohol, and perhaps with flashing or mooning, is not relevant either to their credibility or to the Grievant’s culpability. It is concluded that the testimony of the three female witnesses was generally credible.

The basic accounts of all three females agree that: the two men came into their sleeping area in the middle of the night and woke them up; one or both insisted that they get up and come upstairs to drink with them; both men were present for a couple of hours drinking rum that had been provided by the housemate; one or both were pouring alcoholic drinks for the girls; one or both were encouraging the girls to bare their buttocks and breasts, which one of the girls did; and at no time did the Grievant try to put a stop to these activities.

The Grievant denies that some of these things happened, or claims that he did not do them, was not aware of them, or does not remember them. This was his posture from his first statement to the St. Cloud P.D. when it executed the search warrant on 2/17/06, through his statement to the internal affairs investigator, his trial testimony, and the arbitration hearing. He and his housemate had some forewarning that there might be trouble about the events of 2/12/06 because the adult female left a note on 2/15/06 complaining about “two drunk cops” barging in when she was sleeping. The housemate notified the Grievant about this note and characterized it as “threatening”. The housemate also had a telephone conversation with the adult female on 2/16/06, which confirmed that she was upset about his behavior that night.

Nevertheless, both men apparently were taken by surprise on the evening of 2/17/06 when a group of St. Cloud police officers arrived to search the house and question them separately. At the first opportunity the Grievant volunteered to the interrogating officer that he had been drinking that evening and was drunk. In response to questions, he repeatedly said that he didn’t really remember a whole lot about what happened after he and his housemate returned home from the bar. However, as the internal affairs investigator noted during a subsequent interview, the Grievant’s memory was conveniently selective: he was able to recall details that were not incriminating but none of the particulars that were incriminating. His responses were guarded and he appeared to be trying to find out how much the interrogator already knew. The Grievant’s ultimate explanation for why the men went into the females’ sleeping area was not given until later, after the two men had an opportunity to coordinate their stories.
Analysis and Discussion - Credibility (continued)

The housemate’s demand that one of the juveniles show her “boobs” is corroborated by a recording. The Grievant’s claim that he had no idea why one of the juveniles was vomiting is not believable. The Grievant admittedly was present and awake throughout these events; his denial of any knowledge of them is not believable. The credibility analysis favors the females’ version of events over the Grievant’s.

Burden of Proof

The Union correctly points out that the Employer has the burden of proving the Grievant’s wrongdoing. The Union further argues that the standard for this burden should be either “beyond a reasonable doubt” or “clear and convincing”. The Union acknowledges that there is no uniformity among arbitrators regarding which standard applies, and also that it is difficult to give a precise definition of the standards. Regardless of how the standard is labeled, in all cases the trier of fact should take a hard look at the evidence in a dispassionate way. Such an analysis leads to the conclusion that the Employer has proven the Grievant’s misconduct.

Just Cause

The Grievant admittedly exposed his genitals for the purpose of a cell phone photograph or photographs at some time or times during the evening and/or the early hours of the morning. Whether he did this while the females were present is not clear, and none of the females claims to have actually seen his genitals. Although it is likely that he did so, it is not necessary to reach a conclusion on that count because the other bases for discharging the Grievant are sufficient.

The Employer conducted a thorough and fair investigation and determined that the Grievant had: allowed two juvenile females to consume alcohol in his presence; and failed to intervene when they or one of them was encouraged to, and did, expose breasts and buttocks. The Employer reasonably concluded that the Grievant’s conduct violated the policies, principles and rules of the Sheriff’s Office, as well as his oath to serve with fidelity, integrity and judgment. The Sheriff consulted his command staff about the level of disciplinary action, and gave the Grievant an opportunity to present information regarding why he should retain his position. The Sheriff considered the Grievant’s short time on the job and reasonably concluded that a probationary law enforcement officer who would exhibit such poor judgment was not likely to measure up to the expected standards over time. The Sheriff also reasonably considered the effect on his Office’s public image and other employees if such misconduct did not result in discharge. It is concluded that the Employer had just cause to terminate the Grievant’s employment.

AWARD

The grievance is denied.

February 6, 2008

Charlotte Neigh, Arbitrator