

OPINION AND AWARD

OF

DAVID S. PAULL

**In the Matter of the Arbitration Between
Law Enforcement Labor Services, Inc.**

AND

**County of Mahnomen, Minnesota
(Richard D. Ohren, Grievant)**

Issued August 17, 2016
BMS Case No. 16-PA-0738

O P I N I O N

Preliminary Matters

The Arbitrator was selected by mutual agreement from a list provided by the Minnesota Bureau of Mediation Services. A hearing was conducted in the city of Mahnomen, Minnesota, on June 29, 2016. The County of Mahnomen, Minnesota (County), was represented by Kristi A. Hastings, a lawyer with offices in Fergus Falls, Minnesota. Law Enforcement Labor Services, Inc. (Union) was represented by Isaac Kaufman, a lawyer with offices in St. Paul, Minnesota.

At the hearing, the testimony of witnesses was taken under oath and the parties presented documentary evidence. No court reporter was present. After the witnesses were heard and the exhibits were presented, the parties submitted simultaneous written closing statements. The closing statements were mailed and timely received on Thursday, July 21, 2016. Thereafter, the grievance was deemed submitted and the record closed.

Issue

The parties agreed on a statement of the issue to be resolved:

Did Mahnomen County violate the collective bargaining agreement when it terminated the employment of Richard D. Ohren on December 22, 2015, and if not, what is the appropriate remedy?

No procedural issue was raised by either party.

Relevant Contractual Provisions

ARTICLE 4 EMPLOYER AUTHORITY

- 4.1 The EMPLOYER retains the full and unrestricted right to operate and manage all manpower, facilities, and equipment; to establish functions and programs, to set and amend budgets; to determine the utilization of technology; to establish and modify the organizational structure; to select, direct, and determine the number of personnel; to establish work schedules; and to perform any inherent managerial function not specifically limited by this AGREEMENT.
- 4.2 Any term and condition of employment not specifically established or modified by this AGREEMENT shall remain solely within the discretion of the EMPLOYER to modify, establish, or eliminate.

ARTICLE 12 DISCIPLINE

- 12.1 The Employer will discipline employees for just cause only. Discipline will be in one of the following forms:
- | | |
|-------------------|-----------|
| Oral reprimand | Demotion |
| Written reprimand | Discharge |
| Suspension | |
- 12.2 Suspension, demotions and discharges will be in written form.
- 12.3 Written reprimands, notices of suspension, and notices of discharge, which are to become part of an employee's personnel file, will be read and acknowledged by signature of the employee. Employees and the Union will receive a copy of such reprimands and/or notices.
- 12.4 Employees may examine their own individual personnel files at reasonable times under the direct supervision of the employer.

Pertinent Facts

The Parties

The County is a community of approximately 5,400 residents located about 250 miles north and west of the state capitol, St. Paul, Minnesota. Currently, the Mahnomen County Sheriff's Office consists of 14 full-time deputies, one part-time deputy, six Dispatcher/Jailers, an Administrative Assistant and several civilian Transport Officers. At all times pertinent to the issues raised in this dispute, Douglas A. Krier has occupied the office of Sheriff.

The County is the only similar political subdivision in the state of Minnesota to reside entirely within an Indian reservation, in this case the White Earth Indian Reservation. Approximately 16% of the population lives below the poverty line and the County has the highest poverty rate of any county in the State of Minnesota. Because of a lack of available funds, County law enforcement activities are not well funded. Witnesses from both sides of this dispute testified that, due to the high rate of poverty, the lack of County funds for the Sheriff's Department and the remoteness of the location, attracting and retaining good candidates to work for the Sheriff's Department is and has been difficult.

The Union and the County are parties to a collective bargaining agreement effective for the period beginning January 1, 2015, and ending December 31, 2017 (CBA). According to that agreement, the Union is the exclusive representative, for purposes of collective bargaining, of the following job classifications maintained by the County:

...all essential licensed employees of the Mahnomen County Sheriff's Office, Mahnomen, Minnesota, who are public employees within the meaning of *Minn. Stats. 179A.03, subd. 14*, excluding supervisory, confidential, and non-licensed essential employees. [CBA, Article 2, Section 2.1]

The Grievant

The Grievant is Richard D. Ohren, a resident of Dilworth, Minnesota. At the time of the hearing, Mr. Ohren was 43 years old. He is a career law enforcement officer, having been license by the State of Minnesota as a peace officer since 1996.

At the time of his termination, Mr. Ohren had been employed by the Mahnomen County Sheriff's Office as a patrol deputy for approximately 3 years. Mr. Ohren had previously worked as a peace officer for the cities of Glyndon and Hawley, Minnesota, and as a criminal investigator for the Clay County Welfare Fraud Unit. For about a year, Mr. Ohren served as a contract prisoner guard for the U.S. Marshalls Service.

Mr. Ohren is also a license private investigator, both in North Dakota and Minnesota. He has worked in the private sector performing law enforcement related duties such as fugitive recovery services for a bail bond agency.

There is no evidence that Mr. Ohren was the subject of any discipline by the County prior to the events which led to his termination.

Grievant Work History

For most of his term with the County, Mr. Ohren was assigned as the School Resource Officer (SRO) for Waubun High School, located in a small town just south of the county seat Mahnomen.

From the evidence, it appears that Mr. Ohren discharged his duties in a very satisfactory manner. Eric Martinez, the principal of Waubon High School, testified that in addition to very effectively responding to dangerous and potentially dangerous events at the school, Mr. Ohren introduced useful new security procedures and provided relevant training to students and staff.

In addition to his duties as an SRO, Mr. Ohren performed investigative and patrol duties on an as-needed basis. Two former County deputies, Todd Willenbring and Steve Brandby, testified that Mr. Ohren was competent and effective in performing these duties.

Mr. Ohren testified, without contradiction, that he achieved the following, working on his own time without additional compensation:

- Finding a way to supply defibrillators for County squad cars without cost to the County;
- Convincing a friend to build and donate new shooting range stands for the use of officers;
- Conducting emergency planning and training sessions on child safety and active shooter scenarios at schools and other public facilities;
- Creating a sexual assault response protocol for officers.

The Union also submitted into evidence eight letters written by members of the community attesting to his character, competence and volunteer activities.

Shortly before the occurrence of the events which resulted in his discharge, Mr. Ohren was selected to fill an open Detective Position, following a competitive selection process.

Sheriff Krier testified that, except for the events which lead to his termination, he had no reason to criticize or fault Mr. Ohren's work performance. Former Chief Deputy Burnside testified that Mr. Ohren was an asset to the Sheriff's Department and his work as an SRO was "exceptional," citing to his success in building positive relationships between students and law enforcement. Former Chief Deputy Burnside, at the time of the hearing, was serving as the Chief of Police in the Minnesota town of Lake Park.

Driving Record Disclosed During Hiring Process

As part of the County application process, Mr. Ohren completed a 54-page background investigation form. On this form, Mr. Ohren disclosed the following violations of traffic laws:

9/26/97	Speeding	Stearns County, MN	Paid fine
8/6/98	DUI	Becker County	Fine, Guilty plea
2/24/00	DUI	Moorhead	Fine, Guilty Plea
5/11/01	Speeding	North Dakota	Fine
8/31/01	Speeding	Clay County	Fine
11/28/02	Speeding	North Dakota	Fine

Mr. Ohren further disclosed that his Minnesota driver's license had been suspended due to the two DUI's and was subsequently restored. The job of patrol deputy requires a valid driver's license.

The evidence further shows that Mr. Ohren's driving record, including the fact that he committed the offense of driving while under the influence on two occasions, was common knowledge among law enforcement officers in the surrounding area.

Sheriff Krier testified that he supported the hiring of Mr. Ohren, despite the two DUI convictions. The convictions were over 10 years old, and Sheriff Krier dismissed them, opining that they occurred when Mr. Ohren was "young and dumb." Asked if he would have supported Mr. Ohren's hiring if it had been known that he had a third DUI, Sheriff Krier responded "I don't know."

2015 DUI

On November 21, 2015, at approximately 2 o'clock in the morning, Mr. Ohren was arrested for DUI by Sgt. Mark Empting of the Clay County [Minnesota] Sheriff's Office and Officer Taylor Berg of the Glyndon [Minnesota] Police Department.

Early that evening, Mr. Ohren began drinking at a Detroit Lakes [Minnesota] bar. He drank for approximately for the next six or seven hours and became intoxicated. Because the person with whom he was drinking had left the bar, Mr. Ohren found himself sitting outside early in the morning of November 21 contemplating what to do. Mr. Ohren testified that he knew he was under the influence of alcohol and considered staying where he was and sleeping in his car.

Instead, he entered his car and headed west toward his hometown of Dilworth on U.S. Highway 10. In Hawley, Minnesota, Mr. Ohren stopped at a gas station. The employees, after observing Mr. Ohren's behavior, were so concerned about his level of intoxication he displayed that they called 911.

Mr. Ohren was first stopped by Officer Berg between Hawley and Glyndon. Despite the flashing lights emanating from Officer Berg's squad car, Mr. Ohren continued to drive for approximately a mile. Thereafter, Sgt. Empting, who was following Officer Berg, arrived on the scene. Because he lacked experience with DUI enforcement, Officer Berg requested that Sgt. Empting test Mr. Ohren.

Sgt. Empting asked Mr. Ohren if he thought he had a little too much to drink. "Yeah probably," was Mr. Ohren's response. Mr. Ohren also indicated that he had had "quite a few" drinks before driving. To the question of whether he felt impaired, Mr. Ohren answered that "I would say I am over the limit, yeah probably."

Upon Mr. Ohren exiting his vehicle, Sgt. Empting noted that he was "swaying" while standing. Four field sobriety tests were administered to him by Sgt. Empting. Mr. Ohren failed them all. Mr. Ohren was then offered a PBT breath test, but he declined. Mr. Ohren was handcuffed, placed in the back of the squad car and transported to the Clay County Jail.

At the jail, Mr. Ohren was asked to take a DMT breath test. Mr. Ohren agreed. However, despite eight separate attempts, Mr. Ohren was unable to provide a sample of air in sufficient volume. In his report, Deputy Corby Nelson reported that Mr. Ohren was "instructed" on multiple occasions "to keep blowing air into the testing device." However, on each occasion, Mr. Ohren "would start with a breath and quickly fade to not blowing at all."

Sgt. Empting testified that he believed that due to his failure to provide sufficient breath for a successful test, Mr. Ohren was deliberately failing to provide an adequate sample and that his failure was tantamount of a refusal, under Minnesota state law.

Mr. Ohren testified that he did not deliberately refuse to take the breath test, but tried his best to provide an adequate sample. He was unable to do so, according to his testimony, because of a chronic cough. Mr. Ohren testified that he had an ongoing and longstanding respiratory problem which caused him to cough while he was attempting to comply with the testing procedure. Medical records placed into evidence indicate that, since at least several years before he was 32 years old, Mr. Ohren had complained of a “chronic problem of constantly having to clear his throat . . . chronic cough.”

There was testimony indicating that it was customary for the testing officer to attempt another test after a 15 minute wait in cases in which an adequate sample had not been provided due to coughing or other malady. No second test of Mr. Ohren was attempted.

When told that he would be charged with refusing the test in addition to the DUI charge, Mr. Ohren advised Sgt. Empting that he would submit to a blood test. However, Mr. Ohren’s offer to submit to a blood test was refused by Sgt. Empting. At the hearing, Sgt. Empting stated that the Clay County Attorney’s office had instructed officers not to seek blood or urine samples without a warrant due to an unsettled legal landscape.

When Deputy Nelson attempted to instruct Ohren on how to take the DMT, Mr. Ohren replied, “Yea, I know how this works.” Mr. Ohren testified that he knew, at the time, that if he failed to cooperate he would face a charge of test refusal and would have his driver’s license revoked.

After the attempts at testing, Mr. Ohren was placed in the Clay County Jail. On Monday, November 23, 2016, a complaint was filed in the 7th Judicial District Court

charging Mr. Ohren with operating a motor vehicle “under the influence of alcohol” and with refusing to “submit to a chemical test.” During the preceding weekend, Mr. Ohren and Sheriff Krier had several conversations. Mr. Ohren did not ask Sheriff Krier for any special treatment and Sheriff Krier did not offer any such assistance.

There was media coverage of Mr. Ohren’s arrest. The record contains several articles about the event, all containing references to Mahanomen County and some displaying “mug shot” pictures of Mr. Ohren. Sheriff Krier testified that the event impaired the reputation of the Department and undermined the community’s trust in their Sheriff’s Office.

On January 29, 2016, the Clay County District Court issued an order accepting Mr. Ohren’s plea of guilty to the charge of 4th Degree DUI. Pursuant to his plea, Mr. Ohren was sentenced 90 days in jail, all stayed on condition of paying a \$500.00 fine, a \$75.00 surcharge, a \$10.00 law library fee, and a Chemical Dependency Assessment fee. The order further provided that Mr. Ohren remain on unsupervised probation for two years, have no same or similar offenses during the period of the stay and abide by all the treatment recommendations made in the CD Assessment. The charge of refusal to take the breath test was dismissed in connection with the plea.

Interlock Requirement

As a result of his 2015 DUI conviction, Mr. Ohren was required by law to install an Interlock Ignition system in his automobile. The Interlock device requires the driver to provide a clean breath sample each and every time an attempt is made to start the engine. Should the device detect alcohol, the driver’s picture is taken. Mr. Ohren

testified that the device is about the size of a hand-held calculator and is not visible from outside the vehicle.

Mr. Ohren requested that the County apply to the Department of Public Safety for an exemption to drive Department squad cars. Sheriff Krier testified that he did not apply for the exemption because he did not believe it was appropriate for a County vehicle to be equipped with a device that required the operator to provide a breath sample before starting a sheriff's vehicle.

Sheriff Krier testified that without the Interlock device, Mr. Ohren could not drive any vehicle owned and operated by the County. He further testified that driving is an essential job for a patrol deputy and that the County is not big enough to permit the assignment of a deputy to a "desk job."

Disciplinary Proceedings

On Monday, November 23, 2015, Sheriff Krier sent Mr. Ohren a letter placing him on paid administrative leave because the "Clay County Sheriff's Office cited you for DUI refusal." This letter was personally delivered to Mr. Ohren by Chief Deputy Paul B. Osowski.

Notice of the scheduling of the so-called "Loudermill Hearing," the procedural device required of public employers that ensures to public employees that discipline is preceded by sufficient due process, was delivered December 2, 2015. The hearing was held on December 7, 2015.

A full transcript of the Loudermill Hearing, including a digital recording of the proceedings, was supplied by the parties in joint exhibits. The hearing was attended by

Mr. Ohren's Union lawyer, the County's lawyer, Sheriff Krier, Chief Deputy Osowski and the Mahnomen County Attorney, Darlene Rivera Spalla. Because the criminal charges arising from the DUI arrest were still pending, Mr. Ohren was advised by his lawyer not to answer any questions concerning the DUI. However, similar to his testimony at the hearing, Mr. Ohren did apologize to the County and take responsibility for his actions. Mr. Ohren further advised that he was attending Alcoholics Anonymous meetings. In testimony he repeated at the hearing, Mr. Ohren expressed his satisfaction with his job as a Mahnomen County Deputy Sheriff and stated that he was willing to accept any position on any shift in order to prove himself.

On December 11, 2015, Mr. Ohren voluntarily submitted to a chemical dependency assessment (CDA) at Simon Chemical Dependency Services in Fargo, North Dakota. The assessor diagnosed Mr. Ohren with a mild alcohol use disorder. The assessor recommended that Mr. Ohren completely abstain from the use of alcohol. There is no evidence to suggest that Mr. Ohren had consumed any alcoholic beverage since the assessment.

Around the time of the termination, Sheriff Krier received numerous letters and emails recognizing the seriousness of Mr. Ohren's mistake, but suggesting his continued employment. Sheriff Krier testified that Mr. Ohren appeared to have the support of some members of the community.

The Board of Commissioners went into closed session on both December 9 and December 15, 2015, in order to determine Mr. Ohren employment future with the Mahnomen County Sheriff's Department. The Board decided to discharge Mr. Ohren

and his employment was terminated by letter dated December 22, 2015. The Union's grievance on behalf of Mr. Ohren was filed on December 28, 2015.

North Dakota DUI

On May 11, 2001, Mr. Ohren was arrested for exceeding the speed limit and operating a motor vehicle while under the influence of alcohol in Cass County, North Dakota. He was tested at the scene. The result of the test was a blood level of .236 % alcohol. A blood sample was sent to the North Dakota State Toxicology Lab. The blood test resulted in a finding that Mr. Ohren's blood had an alcohol concentration of .31 % by weight.

On August 24, 2001, Mr. Ohren pled guilty to the charges. As a result of this conviction, Mr. Ohren's driver's license was suspended for one year. He was additionally ordered, among other things, to serve a period of 30 days while wearing an electronic home monitor and to pay a \$750.00 fine.

Although he disclosed the speeding violation, Mr. Ohren did not disclose this DUI conviction on the Background Investigation form used by the County to process his original application for employment. The questionnaire specifically asks the applicant to disclose any event which resulted in being named as a "suspect, arrested, or charged of a criminal offense as an adult." The application further contains questions seeking information on whether the applicant has even been convicted of a crime or been charged with violating the traffic laws.

Mr. Ohren admitted at the hearing that he had been convicted of the North Dakota offense and, despite disclosing two other DUI convictions, did not disclose the conviction

resulting from the North Dakota arrest. The Background Information form contains an attestation, signed by Mr. Ohren, that the data he provided was “true, complete and correct.” The form further contained an admonition providing that “omission of any information from this application may be cause for . . . dismissal if employed.”

The existence of this conviction was not listed on the criminal background information provided by the Minnesota Bureau of Criminal Apprehension, the source through which Mr. Ohren’s original application was confirmed for truth and accuracy. The Register of Actions of the North Dakota document itself contains an entry dated December 26, 2008, stating “*PURSUANT TO RULE 19 OF ADMINISTRATIVE RULES THIS RECORD WAS DESTROYED.*” [Emphasis and capitalization original]

The record was first discovered when Sgt. Empting consulted a “local records management system” containing information available only to officers of Clay County and neighboring jurisdictions. Although not generally available to the public or the BCA, Mr. Ohren’s 2001 North Dakota DUI still appeared on this system. Sgt. Empting included information concerning the 2001 North Dakota DUI in his report dated November 21, 2015. This information, however, was not immediately provided to the County.

In the spring of 2016, Mr. Ohren’s 2001 North Dakota DUI conviction was brought to the attention of Chief Deputy Osowski during a training exercise. The County eventually obtained the data regarding Mr. Ohren’s 2001 North Dakota DUI conviction by filing a Freedom of Information Act request to Cass County.

The 2001 North Dakota DUI was not known to the County or specifically the Mahnomon County Sheriff’s Office prior to the date that Mr. Ohren was terminated,

December 22, 2015. Mahnomen County Attorney Rivera-Spalla testified that she had no knowledge about the conviction until it came up during hearing preparation.

The County did not conduct any sort of independent investigation into the circumstances surrounding the 2001 DUI charge. Mr. Ohren was not given opportunity to respond to the allegations except at the arbitration hearing.

Mr. Ohren testified that he did not include the 2001 North Dakota DUI conviction for a several reasons. First, he testified that he was not actually driving the vehicle, but was rather attempting to “cover” for his intoxicated friend. Mr. Ohren stated that he had been told by his lawyer that the conviction had been removed from his record and reduced to a speeding violation after his friend wrote the court a letter disclosing that he, and not Mr. Ohren, was actually driving. Mr. Ohren verified this himself by checking on his own criminal background. Like Chief Deputy Osowski, Mr. Ohren no found no record of the event on any source available to him.

The arrest report relating to the 2001 North Dakota DUI was written on May 11, 2001, by Cass County Deputy Sheriff Jesse Jahner and was placed in evidence. Deputy Jahner was not called as a witness. However, his report states in pertinent part as follows:

On 5/11/0, at approximately 0150 hours, I, Deputy Jesse Jahner, was working a patrol shift for the Cass County Sheriff's Department. At this particular time I was in the area of I-29 around mile marker 67. I noticed a vehicle approaching my patrol vehicle and this vehicle appeared to be traveling at a high rate of speed. The vehicle was clocked on radar and was traveling at a rate of 71 mph. It should be noted that the speed limit in this particular area is 55 mph. I initiated a traffic stop on this vehicle, which was bearing Minnesota License Plate DXZ100 by activating my top lights, and the vehicle came to rest in the north bound lane between mile marker 67 and mile marker 68.

I approached the vehicle on the driver's side and noticed two occupants in the vehicle. I made contact with the driver who was identified as Richard Douglas Ohren.

Mr. Ohren testified that his friend, who he did not name, asked his lawyer if he could write a letter to the court explaining that the driver on that evening was not Mr. Ohren, but was in fact his friend. Mr. Ohren testified that he provided his defense lawyer with this letter and was told that this matter would be dismissed against him.

According to Mr. Ohren's testimony, he spoke with Detective Reimer regarding the 2001 North Dakota DUI conviction during the background disclosure process. He testified that he specifically asked Detective Reimer whether or not he should disclose the North Dakota charge on his background form, given that it no longer appeared to be of record. Mr. Ohren testified that Detective Reimer, who regularly performs background check duties for the Department, advised him it was not necessary to list the conviction. In her testimony, Detective Reimer stated that she was unable to recall the conversation referred to by Mr. Ohren.

County Sheriff's Policy Manual

The County maintains an Employee Policy Manual that was entered into evidence. The Manual requires that employees maintain a respectful workplace and prohibit "withholding information from . . . others." The Sheriff and his deputies are additionally obligated to observe a County policy entitled "Conduct Unbecoming a Peace Officer," which provides in pertinent part as follows:

SCOPE: This policy applies to all Employees of this agency engaged in official duties, whether within or outside of the territorial jurisdiction of this agency. Unless otherwise noted, this policy also applies to off duty

conduct as well. Conduct not mentioned under a specific rule, but which violates a general principle is prohibited.

PRINCIPLE ONE. Peace officers shall conduct themselves, whether on or off duty, in accordance with the Constitution of the United States, the Minnesota Constitution, and all applicable laws, ordinance and rules enacted or established pursuant to legal authority.

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 in which the officer is present, except where permitted in the performance of duty under proper authority.

PRINCIPLE TWO. Peace officers shall refrain from any conduct in an official capacity that detracts from the public's faith in the integrity of the criminal justice system.

RATIONAL. Community cooperation with the police is a product of its trust that Deputies will act honestly and with impartiality.

PRINCIPLE FOUR. Peace officer shall not, whether on or off duty, exhibit any conduct which discredits themselves or their department or otherwise impairs their ability or that of other Deputies of the department to provide law enforcement services to the community.

RATIONALE. A peace officer's ability to perform his or her duties is dependent upon the respect and confidence communities have for the officer and law enforcement officers in general. Peace officers must conduct themselves in a manner consistent with the integrity and trustworthiness expected of them by the public

LAW ENFORCEMENT CODE OF ETHICS

I WILL keep my private life unsullied as an example to all; maintain courageous calm in the face of danger, scorn, or ridicule; develop self-restraint; and be constantly mindful of the welfare of others. Honest in thought and deed in both my personal and official life, I will be exemplary in obeying the laws of the land and the regulations of my department.

I WILL never act officiously or permit personal feelings, prejudices, animosities or friendships to influence my decision. With no compromise for crime and with relentless prosecution of criminals, I will enforce the law courteously and appropriately without fear or favor, malice or ill will, never employing unnecessary force or violence and never accepting gratuities.

I RECOGNIZE the badge of my office as a symbol of public faith, and I accept it as a public trust to be held so long as I am true to the ethics of the police service. I will constantly strive to achieve these objectives and ideals, dedicating myself before God to my chose profession . . . law enforcement.

At the hearing, Mr. Ohren acknowledged that he was familiar with these policies.

Positions of the Parties

The County

The County declares that it has the burden of proof to establish just cause. To satisfy this burden, the County cites to a recent arbitration award holding that the standard of just cause requires sufficient proof to establish that the grievant engaged in the behavior charged and that “discipline issued was reasonable in light of the circumstances.” The County asserts that it has met this burden by proving by a preponderance of the evidence that Mr. Ohren knowingly drove drunk in 2015 and “purposely refused to comply with DMT testing.” Additionally, the County takes the position that just cause exists because Mr. Ohren misrepresented his criminal background by failing to disclose his 2001 DUI during a criminal background check.

As to remedy, the County argues that termination was appropriate “in light of the circumstances.” While maintaining that “egregious” conduct is not required to establish just cause, the County asserts that Mr. Ohren’s conduct was egregious in this case, with specific reference to not only the DUI conviction but his refusal to complete the pertinent test. Mr. Ohren will not be able to legally drive a county vehicle until November of 2017, the County argues, and the “2015 DUI was Ohren’s fourth conviction, establishing a pattern of disregard for the very laws he has sworn to uphold.”

The County additionally contends that Mr. Ohren’s record will damage his credibility in future court cases. “The four DUI’s will have to be disclosed to every defendant in every impaired driving case that Ohren may be testifying in, the County

argues. The testimony of the Mahanomen County Attorney is referenced in support of the allegation that such disclosures will have a negative impact on the County's ability to secure convictions in such cases. The County further takes the position that Mr. Ohren's credibility will be further damaged because his "lies" during the investigation of the most recent DUI would also have to be disclosed.

Conceding the evidence showing that Mr. Ohren "was a quality officer . . . The reality is that Ohren's good work has been overshadowed by his misconduct and tendency to be dishonest . . . Ohren made the choices he did and now he must be responsible to for the damage it has caused to his career."

The County contends that the evidence relating to Mr. Ohren 2001 North Dakota DUI can be considered although the "information about Ohren's dishonesty about his criminal background was not discovered until after the 2015 termination." Recognizing the general rule that a discharge "must stand or fall upon the reason given at the time of the discharge," the County contends that its use of the information is grounded on several "exceptions," as summarized below:

- The evidence of Mr. Ohren's prior undisclosed DUI is further evidence of his pre-disciplinary misconduct.
- The evidence constituted a second identical instance of the activity that resulted in the discipline.
- The evidence constituted false statement on an employment application.

Now that it has this knowledge, the County suggests, "it would be an inappropriate remedy to allow reinstatement of an officer that has lied and been

untruthful, making him Brady-Giglio impaired . . . [the County had] every right to expect honesty and truthful answers on an employment application . . . the questions . . . could not be written more plainly or simply.”

Anticipating the Union’s argument that Mr. Ohren did not refuse to complete the test, the County points out that even after 3 minutes, he was unable to provide a sufficient breath sample due to a coughing spell. Mr. Ohren’s coughing stopped after the test was given, the County asserts, and referring to the testimony of Sgt. Empting, the County contends the coughing spell was contrived.

The County argues that Mr. Ohren is unemployable as a deputy sheriff because he cannot drive any vehicle without an Interlock Ignition system until November 27, 2017. Sheriff’s deputies and investigators are required to maintain a “valid driver’s license,” the County points out. Conceding that the County could apply for exemption that would allow Mr. Ohren to drive a squad car, there is “no guarantee that it will be approved.”

The *Loudermill* hearing accorded to Mr. Ohren after notice of his termination is the source of additional evidence regarding his dishonesty according to the County. They refer to the fact that Mr. Ohren refused to answer questions concerning his 2015 DUI, on advice of his lawyer. Although he testified he received over 200 letters of support, the County notes that a number far short of 200 was produced at the hearing. The County reasserts its position that Mr. Ohren was dishonest when he testified that his 2015 DUI was his third, when it was in fact his fourth. The County contends that Mr. Ohren misstated his status regarding an “out-patient” treatment program, a statement he retracted at the hearing.

Anticipating the Union’s argument that the County Board forced the termination decision on this Sheriff, the County contends that the evidence does not support this point. Although Sheriff Krier admitted that initially did not want to terminate Mr. Ohren’s employment, he made it clear, according to the County, that he not only made the decision but stood by it.

The County cites to four BMS cases upholding the proposition that discharges can be based on off-duty conduct. The County also argues that the “swift and negative” publicity regarding Mr. Ohren’s arrest “tarnished the reputation of the department.” The County distinguishes the cases cited to by the Union and discusses what believes to be the detriment of having to rely on a witness with Mr. Ohren’s criminal history.

The County concludes by noting that Mr. Ohren made the choices that led to his termination and he “must be responsible for the damage it has caused to his career.”

The Union

The Union begins its statement of position by declaring that the termination was “both substantively and procedurally unfair . . . fail[ing] to comport with the principles of progressive discipline.”

Focusing on the 2015 DUI incident, the Union argues that Mr. Ohren did not refuse to cooperate with the breath test. The police report affirms that Mr. Ohren was “coughing continuously” at the time of the test and that he tried repeated times to provide what was necessary. To the charge that the cough was faked, the Union refers to Mr. Ohren’s “well-documented and longstanding chronic coughing condition.” Sgt. Emptying, the Union asserts, had “no knowledge of Mr. Ohren’s medical history.”

In further support of its position, the Union refers to Mr. Ohren's offer to submit to a blood test and the failure of the County to attempt another breath test after a few minutes. "As an experienced law enforcement officer," the Union contends, "Mr. Ohren would be expected to know that if he did not cooperate with the test, he would be facing not only a DUI charge, but a test refusal charge as well . . . the allegation is implausible and not supported by any evidence other than Sgt. Empting's bald assertion."

The Union next addresses the County's position that Mr. Ohren cannot be reinstated because he does not possess a valid driver's license. Mr. Ohren has successfully applied to drive pursuant to the state interlock laws, the Union suggests, and could drive a county automobile if the County would apply according to state law. The County, the Union submits, "has presented no reason why it would be unable or unwilling to apply for the employment exemption . . . the interlock restriction . . . will be lifted in November, 2016, just a few months from now."

The Union takes the position that the DUI, a fact to which Mr. Ohren has openly admitted, does not by itself justify the termination. In support of this premise, the Union argues that "the just cause standard requires that this violation be weighed against Mr. Ohren's entire record of service to the County." In this regard, the Union refers to the hearing testimony indicating that "Mr. Ohren was an excellent officer. *T. Krier; T. Osowski; T. Burnside.*" (Emphasis original)

The Union also points to evidence indicating Mr. Ohren's "dedication to police work and his outstanding service to the County . . . devoted much of his own time to improving the operations of the department and the safety of schools and other public spaces, without additional compensation." The Union calls for consideration of the

“numerous letters, emails and phone calls that Sheriff Krier received in support of Mr. Ohren,” including similar evidence provided by officers Willenbring, Brandby and Mr. Martinez. Prior to the 2015 event, the Union submits, Mr. Ohren had never been charged with any policy violations and had “never received any discipline whatsoever.” Not surprisingly, in the days following the DUI incident, both Sheriff Krier and Chief Deputy Oswoski told Mr. Ohren that that they did not want him to lose his job.”

The Union argues that progressive discipline was not applied, and Mr. Ohren has not had the chance to benefit from correcting disciplinary measures. Mr. Ohren should have been accorded progressive discipline, the Union suggests, despite the prior DUI events. These convictions took place more than 11 year ago, the Union declares. Mr. Ohren disclosed the incidents occurring in 1998 and 2000 and notes that he has voluntarily undergone chemical dependency assessment, has expressed the intent to abstain from alcohol and is willing “to submit to random testing to ensure his abstention.” A case is cited in support of the proposition that progressive discipline applied in other case in which the deputy had been convicted for DUI twice in the 15 months.

The Union anticipates that the County will argue that Mr. Ohren’s case should be dealt with in a manner similar to that of Mr. Hinsler, who was terminated for drinking. Two facts distinguish the *Hinsler* matter from the instant case, according to the Union – the fact that Mr. Hinsler was a probationary employee and that his drinking occurred on duty.

The Union further asserts that Mr. Ohren’s termination cannot be justified through use of the *Brady/Giglio* doctrine. The Union argues that Mr. Ohren’s 2001 North Dakota DUI conviction was not known to the County until after the termination. It cites a

treatise in support of the rule and suggests that the evidence cannot be used since Mr. Ohren had no notice of the allegation during the termination process. Citing a treatise, the Union argues that Mr. Ohren was not given the opportunity to respond to this allegation at any time prior to the arbitration hearing.”

Assuming the after-acquired evidence is considered on its merits, the Union cites a case ruling that the charge of “lying” must be proved by “clear and convincing evidence.” The Union notes that, according to Mr. Ohren’s, testimony, he did not disclose the 2001 North Dakota arrest because (1) he was not driving, (2) was trying to cover for his friend and (3) he was advised by his lawyer that the charge had been removed from his record.

Turning to the evidence, the Union asserts that Mr. Ohren’s belief was confirmed by the background check performed by Chief Deputy Osowski, which revealed no record of the matter. An experienced law enforcement officer, the Union contends that Mr. Ohren was well aware of the consequences of “deliberately” withholding the information. There is no reason for Mr. Ohren to attempt such a cover up under these circumstances. The Union notes that Mr. Ohren disclosed the speeding ticket issued at the same time as the DUI and was accurate and truthful concerning all of the other violations. Mr. Ohren has no history of making untruthful statements, the Union declares.

Mr. Ohren testified that he asked Detective Reimer whether he should disclose the North Dakota incident, and advised his it was not necessary. The Union submits that although Detective Reimer was unable to recall the conversation, she could not deny that it had taken place.

The Union takes the position that the application of *Brady/Giglio* by governmental employers to justify the discharge of law enforcement officers has been expanding and is an “alarming” trend. Not all misstatements constitute “lying,” the Union suggests. For *Brady/Giglio* to apply, the Union argues, there must be a finding that the officer was “knowingly and deliberately untruthful,” citing authority. Thus, the Union concludes, even if Mr. Ohren was untruthful, such a fact is not sufficient to justify the discharge.

The Union believes that the grievance should be sustained and that Mr. Ohren should be reinstated to his prior position.

Discussion

Applicable Rules

The CBA, at Article 12, contains the accords made by the parties relating to discipline. In accordance with these provisions, disciplinary action can be taken only for “just cause.” The provision contains a list of five possible penalties, including reprimands (oral and written), suspensions, demotions and discharges.

The agreement requiring that all discipline be based on “just cause” implies the parties’ commitment to abide by a prescribed method of regulating employee conduct which recognize and encompass certain elements of substantive and procedural principles. The definition of the term “just cause” has been stated in a variety of ways. In this case, the County has suggested that the term imposes upon it the task of showing that the grievant engaged in the behavior charged and that the “discipline issued was reasonable in light of the circumstances.”

Many arbitration awards have embraced the several well-established criteria set forth in *Enterprise Wire Co. and Enterprise Independent Union*, 46 LA 359 (Daugherty, 1966), as further analyzed in Koven & Smith, *Just Cause: The Seven Tests* (2nd Ed. 1992). These defined criteria include (1) forewarning or foreknowledge of possible consequences of misconduct, (2) a rule reasonably related to proper business goals and reasonable employee expectations, (3/4) a reasonable effort to discover whether misconduct occurred and if so, a fair and objective investigation of alleged conduct, (5) discipline is based on a sufficient level of evidence, (6) that rules and penalties be applied

in an even-handed manner and (7) the penalty is consistent with the offense and the employees past work history.

At the end of the day, whether one utilizes the more general definition suggested by the County or one of the more detailed descriptions, all encompass several universal themes – adequate proof of misconduct, a fair procedure and a reasonable penalty.

Here, the County takes the position that Mr. Ohren's DUI, the limits on his driving privileges and the evidence it offers in support of the contention that he failed to cooperate in the completion of the breath test is more than sufficient to justify his termination. The County further believes that Mr. Ohren is unfit for employment due to evidence suggesting that he was untruthful in the hiring process. In this regard, the County argues that his failure to be truthful regarding the 2001 North Dakota DUI must be disclosed in future court cases, as set forth in the *Brady/Giglio* line of U.S. Supreme Court cases. Any effort to rehabilitate him as a witness in future cases, according to the County, would be problematic and pose an unnecessary risk.

In contrast, the Union takes the position that the discharge of Mr. Ohren was at once “substantively and procedurally unfair . . . fail[ing] to comport with the principles of progressive discipline.” The Union takes the position that the DUI is, in of itself, insufficient to constitute just cause. The Union counters by pointing to evidence in support of its contentions that Mr. Ohren did not refuse to cooperate with the breath test, was not deliberately untruthful in the hiring process and has earned an excellent rating as an employee. The Union further argues that Mr. Ohren is fully qualified to discharge his duties and there is no reason to invoke the dictates of the *Brady/Giglio* disclosure cases.

2015 DUI

Mr. Ohren does not deny that, while off-duty in the early morning of November 21, 2015, he operated his vehicle on the public roadways while under the influence of alcohol. Assuming the lack of any mitigating factors, this conduct is certainly sufficient to justify the penalty of discharge. *See, e.g., City of Fairborn and Fairborn New City Lodge No. 48, FOP*, 119 LA 754 (Cohen, 2003); *Cass County Sheriff's Department and Teamsters Local 346, BMS Case No. 02-PA-40* (Bognanno, 2002). Here, the Union does offer certain evidence in mitigation which must be evaluated.

Neither party argues that the off-duty nature of Mr. Ohren's conduct is a reason to contest the discipline imposed here. Mr. Ohren's actions not only violated a state law with which he has intimate familiarity, but completely violated several important principles of conduct as set forth in the Employee Manual. These rules specifically admonish Sheriff's deputies to at all times comply with the law and refrain from behavior which "detracts from the public's faith in the integrity of the criminal justice system" or "discredits themselves or their department."

The applicable rule is that off-duty conduct can be used to justify discipline when there is a connection between the misconduct and the ability of the employer to perform its duties. Examples include behavior that harms the employer's reputation or impairs the ability of the offending employee to perform the work assigned. *See, Stearns County and LELS, BMS Case No.11-PA-0432* (Befort, 2011). Mr. Ohren's behavior clearly falls within the coverage of this rule.

The Union's first contention is that the discharge is inappropriate due to the County's failure to apply progressive discipline. The discipline cannot be challenged on

this basis in the context of the evidence presented. Even when a collective bargaining agreement contains specific provisions calling for progressive discipline, the concept does not apply to behavior which specifically violates the law. *Burger Iron Company*, 92 LA 1100 (Dworkin, 1989). Systems of progressive discipline do not require an employer to take incremental action without regard to the seriousness of the offense. *See, Logan-Hocking School District*, 122 LA 550 (Sellman, 2006); *City of Fort Worth*, 129 LA 446 (Moore, 2011).

Breath Test

The Union concedes the fact that Mr. Ohren failed to supply sufficient breath to properly activate the breath test, which eventually failed to produce a reliable result. The County takes the position that Mr. Ohren did this deliberately by shamming a coughing spell. In support of this contention, the County offers the testimony of Sgt. Empting, who believed that, based on Mr. Ohren's conduct, he purposefully and deliberately avoided the test.

In support of its argument that Mr. Ohren did not deliberately try to subvert the test, the Union placed into evidence medical records indicating that Mr. Ohren has had a well-documented and longstanding chronic coughing condition dating back many years. Mr. Ohren testified that this chronic condition is aggravated when he is nervous, as he undoubtedly was during the events which lead to the DUI charge.

Based on this record, there is insufficient evidence to conclude that Mr. Ohren deliberately undermined the breath test. The testimony of Sgt. Empting, while certainly credible and worthy of consideration, was based mostly on subjective factors. Sgt.

Empting could not have known about the medical records supporting Mr. Ohren's chronic condition, since he had no access to these records at the time. Comparing the two items of evidence, Sgt. Empting's testimony and the records of Mr. Ohren's longstanding condition, the medical records are the more persuasive.

There is an additional factor that supports the conclusion that Mr. Ohren did not deliberately subvert the test. The evidence is uncontested that Mr. Ohren, having failed to perform the actions necessary to successfully complete the breath test, voluntarily offered to give a blood sample instead. The County did not act on Mr. Ohren's offer because the Clay County Attorney had previously instructed officers to avoid such tests without a warrant. At the time, aspects of state law surrounding the issue were unsettled.

But in this case, Mr. Ohren had given his consent to the drawing of his blood, a situation which would seemingly not require a warrant nor fall within the ambit of the instructions given by the Clay County Attorney. In any event, it would be difficult to conclude that Mr. Ohren was deliberately trying to avoid the breath test, when the evidence shows that he voluntarily proposed to participate in a more than adequate substitute. It is equally difficult to attribute to Mr. Ohren the intent to purposely avoid the breath test, since he was an experienced law enforcement officer who knew that, unless he cooperated with the test, he would face the additional charge.

It is noted that the refusal charge was eventually dropped by the Clay County Deputy Attorney prosecuting the case.

Failure to Disclose

Aside from the 2015 DUI, the County's most significant contention is that Mr. Ohren disingenuously failed to disclose his 2001 North Dakota DUI during the hiring process and that, under the *Brady/Giglio* doctrine, the County is obligated to disclose Mr. Ohren's alleged dishonesty in every future criminal case in which he serves as a witness.

Assuming Mr. Ohren's failure to disclose falls under the *Brady/Giglio* guidelines, the County's concerns would be well-founded. The *Brady* and *Giglio* line of federal cases hold that in any criminal case, prosecutors must disclose to the defense any all pertinent evidence which is exculpatory or favorable to the defendant. Information which might be used to impeach the credibility of government witnesses, including law enforcement officers, is included. The rationale for the disclosure, according to these U.S. Supreme Court cases, is that information indicating that a government witness who has made false statements in the past might be favorable to the defense because such an event might convince a trier of fact that the witness is testifying falsely in the criminal case at bar. *See, Brady v. Maryland*, 373 U.S. 83 (1963) and *Giglio v. United States*, 405 U.S. 150 (1972).

Obviously, such a disclosure could theoretically be of great advantage to the defendant. The County asks why it should be asked to take such a chance, given that it was Mr. Ohren who engaged in this additional misconduct and placed it in this position. To the County, Mr. Ohren's allegedly dishonest failure to disclose the 2001 North Dakota DUI further suggests that the issue gives rise to several other examples of Mr. Ohren's failure to tell the truth, including his denial that he was actually driving the car.

But before this particular issue can be resolved on its merits, there is a question of evidence to be settled. The parties agree, and the record is clear, that that the evidence relating to the 2001 North Dakota DUI charged was unknown to the County until well after Mr. Ohren was terminated. The rule that generally applies to such evidence is well established:

Any reason the employer intends to rely on for a discharge must be either stated in writing or communicated to the employee . . . Surprise and lack of notice generally prejudices the union and the employee in investigating the charges and preparing a defense . . . The employer must provide employees facing discipline information about the charges they face. *See, Elkouri & Elkouri, How Arbitration Works (5th Edition) p. 454 et.seq.*

Both parties candidly admit this rule and its applicability to this case. However, the County suggests the existence of exceptions in situations where the evidence might be relevant to a “second identical instance” of misconduct or an alleged false statement on an employment application. The County cites in support *Bill Kay Chevrolet*, 107 LA 302 (Wolff, 1996). There is also some precedential support for the concept that such evidence may be considered for the purpose of arriving at an appropriate remedy. *See, e.g. Group Cable of Chicago*, 93 LA 789 (Fischbach, 1989)

The Union is understandingly concerned about its ability to properly respond to evidence that was not considered in the initial decision to terminate Mr. Ohren. However, despite the fact that the Union had no chance to respond until the hearing, this is a question which cannot be ignored. For Mr. Ohren, the failure to resolve this question would certainly affect his future employment opportunities. The County, because of its obligations under *Brady* and *Giglio*, needs a definitive examination of these allegations. Because the allegation of

dishonesty is of the kind that must be reported pursuant to *Brady/Giglio*, it is appropriate to hold the County to the “clear and convincing” standard of proof on this issue. *City of Oakdale and LELS, Inc.* BMS Case No. 09-PA-0836 (Orman).

While the County certainly presented credible *prima facie* evidence to support its allegations, the nature of proof the County offered did not reach the “clear and convincing” standard. Mr. Ohren testified that he initially did not disclose this conviction because it was his understanding that, after the court reviewed his friend’s letter admitting that he and not Mr. Ohren was the driver, that all trace of the case would be destroyed.

There is evidence to support Mr. Ohren’s statements. The BCA had no record of the arrest and no evidence of the conviction was revealed by the County’s background review. The record of the North Dakota conviction notes on its face that the entries were at some point “destroyed” pursuant to some unspecified North Dakota administrative procedure. The entry would in fact never have been found, but for Sgt. Empting’s comprehensive effort to access an inter-agency list not available to the general public, on which the record still appeared.

Mr. Ohren, who did disclose the “speeding ticket” aspect of the conviction on the County background form, went so far as to ask Detective Reimer if he should disclose the 2001 North Dakota conviction, given the fact that the entry was not part of the BCA records. According to Mr. Ohren’s testimony, Detective Reimer told him that he could ignore it. Detective Reimer testified, but could not remember whether or not she had made such a statement to Detective Ohren.

The County additionally alleges that Mr. Ohren was disingenuous when he testified that he was not driving the car on the evening in 2001 that he was arrested in North Dakota for DUI. Again, the County presented credible *prima facie* evidence to establish their contention. The report by the arresting officer, Cass County Deputy Sheriff Jesse Jahner, clearly states that he “made contact with the driver who was identified as Richard Douglas Ohren.”

Deputy Sheriff Jahner was not produced as a witness in the hearing. There was no evidence relating to his availability – whether he was still employed as a law enforcement officer by Cass County or whether he had moved on. This is hardly surprising since, at the time of the hearing, the report was approximately 15 years old. Significantly, and regardless of the reason he was not produced, the Union was deprived of the opportunity to cross examine Deputy Jahner due to his absence from the hearing.

Had Deputy Jahner been present for cross-examination, the Union might have asked him questions that could have supported Mr. Ohren’s testimony. The answers to such questions would certainly have raised the evidentiary value of Deputy Jahner’s observations, as contained in his report.

This report was the only evidence offered to support the proposition that Mr. Ohren had lied about who was driving during the 2001 North Dakota stop. It states, without elaboration, that Mr. Ohren was the driver. But Mr. Ohren’s testimony has now placed this factual statement in issue. The report was not introduced to corroborate the testimony of another witness who attended the hearing and was subject to cross examination, but was offered standing alone.

Given this circumstance, the weight and usefulness of the report is limited. *See, Milgram Food Stores, Inc.*, 68-2 ARB Section 9622 (Murphy, 1968). In view of the contrary evidence provided by Mr. Ohren, full weight cannot be accorded to the report. *White Motor Co.*, 28 LA 823 (Lazarus, 1957). Standing alone and without it being tested under cross-examination, the report cannot be considered evidence that reach the level of “clear and convincing.”

The evidence is therefore insufficient to prove that Mr. Ohren deliberately failed to disclose the 2001 North Dakota DUI and lied about it at the hearing. Consequently, the County would not be under any obligation to disclose the events in any future criminal case in which Mr. Ohren may be called as a witness.

Appropriate Remedy

The general factors considered in evaluating the penalty for misconduct include the (1) nature of the conduct, (2) the length of service, (3) work performance and (4) disciplinary history. *See, Ramsey County Sheriff's Department*, 100 LA 208 (Gallagher, 1992) and *Fry's Food Store of Arizona*, 99 LA 1161 (Hogler, 1992).

There is little doubt that Mr. Ohren's decision to operate his vehicle while he was under the influence of alcohol was a very poor one, constituting the basis for a very serious offense. This event had a great impact on the County and its citizens. When news of the arrest became known, media reports consistently referred to a “Mahnomen County Deputy” and included a rather unflattering mug shot of Mr. Ohren in prison attire. Sheriff Krier credibly testified that Mr. Ohren's actions impaired the ability of his office to perform their duties and, to

some degree, undermined the trust of citizens in his office. On this basis alone, these events would certainly constitute reason to justify the County's action.

However, in this case, a decision on the proper remedy is considerably complicated by Mr. Ohren's work performance. In his short three year tenure with the County, Mr. Ohren has not only incurred no prior discipline, he produced a work record of enviable quality. Mr. Ohren was deemed an "exceptional" officer by Chief Deputy Burnside, an asset to the Department, reliable and effective. Other witnesses provided similar testimony, including Deputies Willenbring and Brandby and Principal Martinez. Even Sheriff Krier conceded at the hearing that Mr. Ohren was a quality officer.

Mr. Ohren's extra-curricular contributions are similarly impressive, including his working to obtain the defibrillators and the shooting range, as well as his efforts on emergency planning and training. Additionally, Mr. Ohren's showing of public support and the County's difficulties in attracting and retaining competent and reliable law enforcement officers are factors that require at least some consideration.

Most appropriately, Mr. Ohren has apologized to the County and taken responsibility for his actions. He testified that he joined Alcoholics Anonymous and attended meetings. He stated his willingness to accept any conditions that will give him a second chance to prove himself.

This case presents a challenging dilemma. Mr. Ohren, on the one hand, has committed one the most severe offenses a law enforcement officer can commit – one that begins to unravel whatever level of trust has accrued between

the County Sheriff's Department and the people they are sworn to serve. On the other hand, Mr. Ohren was, by all accounts, a most competent officer who gave his all to his job. Most important, he has taken responsibility for his actions and appears willing to accept any conditions leading to his reinstatement.

After carefully balancing all of these factors, it appears that this is an appropriate case for conditional reinstatement, often referred to as "Last Chance" reinstatement. See, generally, *City of Sandusky*, 73 LA 1237 (O'Keefe, 1979).

Mr. Ohren should be reinstated without back pay but retaining his seniority, if he will promise to refrain from using alcohol or drugs. For a period of two years from the date of this award, Mr. Ohren must further agree to waive any recourse he may have to the grievance process, if during that two year period of time, Mr. Ohren is apprehended for misconduct involving the illegal use of drugs or alcohol. To ensure Mr. Ohren's continued compliance, he should continue to attend AA meetings and Sheriff Krier or his designee should have the authority to test Mr. Ohren for alcohol or illegal drug use on a random basis.

Finally, the County should make an immediate and "good-faith" effort to apply for an interlock on Mr. Ohren's squad car. Although there is no evidence that it would attempt to do so, the application should be made without the County attempting to influence in any way whether or not the request is granted.

Conclusion

Having carefully considered the testimony and exhibits received into evidence, as well as the written arguments of the parties, it is the opinion of the Arbitrator that Mr. Ohren's termination was not for just cause and that he should be conditionally reinstated as provided for in this award.

For the foregoing reasons, the grievance is *SUSTAINED*.

A W A R D

1. **IT IS THE OPINION** of the Arbitrator that the discharge of Richard D. Ohren was not for just cause and that he should be immediately reinstated to the same or similar position retaining seniority but without back pay on the following conditions:

- a. That the County, if the position to which Mr. Ohren is reinstated requires him to operate a County vehicle, apply immediately and in good faith for an interlock device to be installed on the vehicle assigned to Mr. Ohren pursuant to *Minn. R. 7503.1775*;
- b. That Mr. Ohren promise and agree to refrain from the illegal use of drugs or alcohol;
- c. That for a two year period beginning with the date of his reinstatement, Mr. Ohren agree to waive any recourse he may have by means of the grievance procedure to challenge any action taken by the County on account of his illegal use of drugs or alcohol;
- d. That Mr. Ohren continue to attend AA meetings and agree that Sheriff Krier, or his designee, have the right to randomly test him for the illegal use of drugs or alcohol at all times.

2. **IT IS THE AWARD AND THE ORDER** of the Arbitrator that the grievance is *SUSTAINED*.

August 21, 2016
St. Paul, Minnesota

David S. Paull, Arbitrator