IN THE MATTER OF ARBITRATION BETWEEN

ITASCA COUNTY EMPLOYEES ASSOCIATION Union	)	
And	)	**DECISION AND AWARD**
COUNTY OF ITASCA, OFFICE OF THE SHERIFF Employer	)	BMS Case 16-PA-0697

Arbitrator:	David M. Biggar
Dates of Hearing:	June 7, 8, 9, 2016
Place of Hearing:	Grand Rapids, MN
Record Closed:	July 11, 2016
Date of Award	August 11, 2016

APPEARANCES

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INTRODUCTON

The Itasca County Employees Association (Union) and the County of Itasca, Office of Sheriff (Employer or Sheriff's Office) were parties to a collective bargaining agreement effective from January 1, 2013 through December 31, 2015. (Er. Ex. 1). The Union filed a grievance on December 28, 2015, alleging that Grievant was discharged on December 23, 2015 without just cause. Under the terms of Article VII (Grievance Procedure) of the agreement, I was selected to hear this matter. The parties stipulated that the matter is properly before the arbitrator and that the arbitrator may issue a decision resolving the issue in this case.

A hearing was held in Grand Rapids, Minnesota on June 7, 8 and 9, 2016. Both parties were present and afforded a full opportunity to be heard and to call and cross-exam witnesses, all of who testified under oath. The parties filed briefs on July 11, 2016. I have read and considered the briefs and the attachments submitted by the parties.

ISSUE

The parties stipulated that the following issue is before the Arbitrator:

1. Did the Employer, the County of Itasca, Office of the Sheriff, have just cause to discharge Michael Bliss (Grievant)?

2. If not, what should the remedy be?

FACTUAL BACKGROUND

Itasca County is located in North Central Minnesota. The City of Grand Rapids is the County Seat. The County is 3300 square miles with over 46,000 residents. The Sheriff's Office is an office within the County providing law enforcement and protection services for those residents. The Office, with 73 total employees, is headed by Sheriff

Vic Williams. Williams was first elected in 2010 and re-elected in November, 2014.[1] Chief Deputy Denise Hirt is the second in command. She has seven first line supervisors who report to her, including three lieutenant/investigators, a Civil Process supervisor, a Corrections Captain, a Dispatch Coordinator and an Office Administrator. (Er. Ex. 5). The Grievant worked as lieutenant/investigator with responsibility for the road patrol deputies. The first line supervisors are represented for collective bargaining purposes by the Union.

In addition to the terms of the collective bargaining agreement, employees in the Sheriff's Office are also subject to the provisions in the Itasca County Employee Handbook. (Un. Ex. 37; Er. Ex. 46). Further, the Sheriff's Office has its own set of policies and procedures that govern employees in the department. A set of such policies was in effect at the time Williams took office. The policies were placed in a different format, a program called Lexipol, which the office subscribed to in about 2011. At some point during 2014, Sheriff Williams made the decision to discontinue using Lexipol and return to the old practice of a written set of policies applicable to Sheriff's Office employees. The switch from Lexipol to a new set of written policies and procedures was initially to take place effective July 1. (Er. Ex. 2, 3/19/14 email).

To prepare the new policies, the old written policies that had been in effect when Williams was elected (Er. Ex. 56) were revised and updated. Three supervisors, including the Grievant, were assigned to make upgrades and revisions to the old policies. Then department employees were to review the policies and execute a sign-off sheet indicating the employee had read and understood the policies, and knew they had to be

[1] All dates are in calendar year 2014 unless stated otherwise.

adhered to. The process of reviewing and updating the old policies having employees execute sign-off sheets occurred in the latter half of 2014 and early part of 2015.

Also during 2014 the Sheriff's Office had been experiencing problems with employees going to supervisors other than their own in attempts to get things they wanted, to question discipline they had been given or for other reasons. The supervisors referred to this as "supervisor shopping", the idea being that employees would try to find a different supervisor sympathetic with the employee.

Sheriff Williams was concerned about the practice of supervisor shopping. He took steps to see that the practice was discontinued. He mentioned this at a department meeting held on September 10. (Er. Ex. 3 – 4). Employees were told at this meeting to follow the chain of command with questions – to go to their own supervisor. Williams passed out an organizational chart (Er. Ex. 5) demonstrating the command structure in the department. Chief Deputy Hirt sent an e-mail to all department employees the following day. This summarized the topics at the prior day's meeting. Among other things, this September 11 email reminded employees to follow the chain of command. (Er. Ex. 6). There is no question that employees and supervisors in the department were aware of the Sheriff's concerns and his directions.

On November 24, an employee working under the supervision of Office Administrator Anna Cass was disciplined by Sheriff Williams for insubordination. Cass delivered the discipline action to her. The employee, Marcie Witkofsky, was visibly upset. Williams told Cass and Chief Deputy Hirt to keep an eye on Witkofsky as he did not "want her to deteriorate as the day went on." (Tr. 53). After Witkofsky returned from lunch she went to see Grievant. He was in the office with other

lieutenant/supervisors. The Grievant could tell that Witkofsky was upset. Since there were others present he suggested they go into interview room no. 3. Witkofsky and Grievant work together on the County's Predatory Offenders Program. Grievant believed she might be upset about a mistake she had made in connection with this program. The interview room has a window in the door to the room, and is equipped with audio and visual equipment which permits someone outside the room to monitor those in the room.

Cass was in a nearby room making photocopies when she observed Grievant and Witkofsky enter the interview room. Rebecca McDonald, a records deputy who Cass supervises, has her desk near the audio and visual controls to the interview room. Cass directed McDonald to turn on the monitoring equipment in interview number 3. McDonald was able to get the visual equipment working but could not get the audio controls to work. She and Cass could see the Grievant and Witkofsky talking. Cass summoned Hirt to come to the area near McDonald's desk. Hirt arrived. McDonald told Cass and Hirt that the audio was not working. She told them where the controls for the audio equipment were located. At this point they said they did not need the audio. Cass told McDonald to leave the room and not discuss what she had seen. Cass and Hirt watched for a couple of minutes. They observed Witkofsky show Grievant something she removed from an envelop. They watched the Grievant and Witkofsky talking and then left. The audio equipment never worked, and the video was not recorded. The only video was real time and witnessed by Cass and Hirt (and McDonald, while she was in the room).

During their conversation, Witkofsky told Grievant she wanted to discuss the discipline she had received. He told her that she was putting him a hard place because he

was a supervisor. He said there was a way she could deal with discipline, and that was to talk with her union about it. They did not specifically discuss the discipline. He did tell her that she could come to him and talk with him about any issues that she might have, but that she should know that he was a supervisor and that what he said to her would be said in that role.

Later that same day, Grievant received a call from former sheriff Pat Medure, who Grievant had worked for and who promoted Grievant to his supervisory position. Medure told Grievant that he (Medure) had been informed by someone in the Sheriff's Office that Grievant's meeting with Witofsky that day in the interview room had been recorded or monitored. Medure told him that there was a criminal statute in Minnesota dealing with listening to or intercepting conversations. He gave the Grievant this information and made no recommendations as to what Grievant could or should do with it. Instead, he said Grievant could do what he wanted with the information.

Grievant could not understand why he was being put under such surveillance. He was unfamiliar with the statute Medure had referred to. He looked it up the following day. He also talked with Witkofsky. He asked her whether she had authorized anyone to record or listen to their conversation on the prior day. She said no. He told her that the meeting they had in the interview room had been monitored or recorded by Cass and Hirt. He showed her a part of the statute he had copied. He talked with McDonald twice, who told him Cass had told her to active the recording equipment so his meeting with Witkofsky could be monitored. She told him she was unable to get the audio controls to work, and that she was instructed by Cass to leave the room and not tell anyone. (Er. Ex. 8). During his second conversation with McDonald Grievant told her a statute may have

been violated, and showed her a copy of the statute. He also told her she should not be in trouble as she was doing what she had been directed to do by Supervisor Cass.

Grievant prepared a written complaint which included a portion of the statute copied on a piece of paper as well as a summary of the facts surrounding his meeting with Witkofsky together with the information he received that it had been monitored, listened to or recorded at the direction of Cass. The Grievant took a copy of this complaint, signed and dated November 26 (Er. Ex. 8) to Elaine Hart, the manager of the County's Human Resources Office (HR Office). He took it to the HR Office rather than to the sheriff because of his feeling that the sheriff would not investigate the matter. Witofsky also filed a complaint with the HR Office concerning the fact that her conversation was recorded without her knowledge or permission. (Er. Ex. 9).

When Hart received Grievant's complaint, with the possible evidence that a criminal statute might be involved, she immediately contacted County Attorney Jack Muhar and advised him of the complaint. Muhar met with Hart, Assistant County Attorney Webb and the Grievant. Muhar decided he would advise Sheriff Williams to refer this matter to another jurisdiction for investigation because it involved a possible criminal matter. Muhar asked if Sheriff Williams was aware of what had happened regarding the interview room meeting, and of Grievant's complaint. Grievant said he was not, and Grievant asked to be allowed to tell the sheriff before Muhar contacted him. Muhar prepared an email to Sheriff Williams recommending the matter be referred to an outside agency but agreed not to send it until Grievant told the sheriff about the complaint. Grievant met with Williams that afternoon and gave him a copy of the complaint he had filed with Hart. Williams told him the monitoring was not directed at

Grievant but that Cass and Hirt were concerned about Witkofsky. Williams told Grievant that if a felony was involved, it looks like he (Williams) had committed one too because he told Cass and Hirt to keep an eye on Witkofsky. Williams told Grievant he would take care of the matter. Grievant then told Muhar he had informed the sheriff of the complaint, and Muhar sent the sheriff the e-mail with his recommendation. (Er. Ex. 10).

On that same day, Grievant e-mailed his union representative a copy of the complaint along with two typewritten notes briefly summarizing his conversations about the complaint with Hart and Williams on November 26. The information was sent as an attachment to the e-mail message. (Er. Ex. 11). On March 23, 2015, Grievant sent an e-mail to his home email address with the complaint as well as notes about other events attached which he believed showed that he was being retaliated against because he had filed the complaint. (Er. Ex. 14).

Although Sheriff Williams initially resisted bringing in an outside agency to conduct an investigation, he relented and agreed. Before doing so, he had drafted a letter (Er. Ex. 58) to Grievant dated December 2, advising him that there was no wrongdoing and the matter was closed. Although this was Sheriff Williams' preferred way of dealing with the matter, the letter was never mailed.

Ultimately, the complaints of Grievant and Witkofsky were referred by Sheriff Williams to the Lake County Sheriff's office for an investigation. Sgt. Mike Erickson of Lake County conducted the investigation by interviewing a number of witnesses. During an interview with Sgt. Erickson, Grievant stated that he was in a difficult position or situation because of Sheriff's Office policies that prevent an employee from investigating a crime the employee is somehow involved in. (Tr. 406-07). Sgt. Erickson filed his

report summarizing the findings with the Lake County Sheriff on December 15. (Er. Ex. 12).

On about February 27, 2015, the Lake County Attorney charged Cass with two felony counts in connection with the interview room incident. One of the counts was dismissed early in the litigation and the other was dismissed without prejudice in November, 2015. After being charged Cass continued to work for the sheriff's office performing her normal duties.

Grievant obtained a copy of the felony complaint filed against Cass from a site containing public documents. On about March 17 or 18, 2015, there was a meeting in the Sheriff's Office to discuss a new protocol for interviewing children. It was attended by County Human Services employees Dawn Magnusen and Sarah Polhamus who work at another location. Both know and work with Grievant regularly. As news of the charges against Cass had been in the press, the two joked with Grievant and wanted to know what was going on at the sheriff's department regarding what they had heard on the news.

Later that same day, Grievant drove the squad car assigned to him to the separate County office in Grand Rapids where Magnusen and Polhamus have their offices. During a short visit, the social workers and Grievant may have further discussed the new protocols. During their conversation, Grievant showed them a copy of the Lake County complaint alleging that Cass had engaged in unlawful conduct and they discussed it briefly.

In late March, 2015, the Lake County Attorney asked Grievant to fill out a Victim Impact statement. In the statement, Grievant said that in view of what Cass had done he

did not believe she should be allowed to return to work in Itasca County in a law enforcement position. (Er. Ex. 15).

On April 28, 2015 Grievant was issued a written reprimand for not allowing Deputy Robin Washburn (who is a notary) to review a document with his signature which he asked her to notarize. (Er. Ex. 16). Grievant filed a grievance challenging this reprimand. The grievance was scheduled to be heard at the third step of the grievance procedure before the Itasca County Grievance Committee on June 16, 2015.

In addition to the complaints filed by the Grievant and Witofsky, both on November 26, there were additional complaints filed with the Human Resources office that were related to the events of November 24 – 26. In about May, 2015, the Employer brought in an outside investigator to look into these complaints. The investigator, William Everett, met with numerous witnesses on different occasions, conducting interviews which were taped and then transcribed.[2] As a result of his interviews, Everett prepared at least five written reports which were submitted to the HR Manager Hart and Sheriff Williams. Each summarized findings regarding specific complaints. Everett's reports in the record are:

- *Er Ex. 33* (Report dated 8/11/15 on Grievant's 11/26/14 complaint against Cass over interception of oral communications)
- *Er. Ex. 35* (Report dated 8/11/15 on Grievant's 11/26/14 complaint against Hirt over interception of oral communications)
- *Er. Ex. 36* (Report dated 9/16/15 on Witkofsky's 11/26/14 complaint against Cass and Hirt over interception of oral communications)
- *Er. Ex. 37* (Report dated 9/21/15 on charge by Cass (3/25/15) and Hirt (3/30/15) that Grievant harmed their reputation by sharing information about them with two other country employees).
- *Er. Ex. 38* (Report dated 11/19/15 on Grievant's 5/7/15 complaint that he is being retaliated against and harassed by Williams, Hirt and Cass).

[2] The witnesses Everett interviewed were not shown copies of these interview transcripts.

On May 26, 2015, Grievant received a letter from Sheriff Williams notifying him that he was being placed on paid administrative leave as of that date. Williams said he was taking the action due to the turmoil going on in the office caused by multiple investigations of complaints involving the Grievant and others. The notice said the administrative leave would remain in effect pending the outcome of these "concurrent employment-related investigations". (Un. Ex. 21).

Grievant believed that the Sheriff had retaliated against him by issuing the warning and putting him on administrative leave because of the complaint he had filed on November 26. He also grieved this, and there was an understanding that he would present whatever evidence he had to support this allegation at the third step meeting about the notary reprimand on June 16, 2015.

At the third-step meeting, Grievant provided a detailed account of what he believed were incidences of retaliation against him, up to and including being placed on administrative leave. Both Sheriff Williams and Hirt attended this meeting. As a result of the comments of Grievant at this meeting, Williams and Hirt filed separate complaints against him contending that by making the open allegations of retaliation against Williams and Hirt Grievant was trying to intimidate them regarding their involvement in the felony case against Cass. They each initially filed written complaints with Sgt. Erickson of Lake County. (Un. Ex. 102 and 103.) On July 20, 2015 they filed separate complaints of tampering with a witness against Grievant with Anoka County, another outside investigative body. (Un. Ex. 106, 107).

Grievant continued on administrative leave throughout the summer and fall of 2015. On October, 22, 2015, the Anoka County Attorney's office determined that it

would not prosecute Grievant for tampering with a witness. (Un. Ex. 25). In the letter, the Anoka County Assistant Attorney questioned why Williams and Hirt were at the third step meeting where such allegations were certain to be made, and said that their presence at the meeting was more likely to intimidate Grievant than vice versa.

In late November, 2015, the Lake County Attorney decided to drop the remaining allegation against Cass without prejudice. That case remained in this status at the time of the hearing.

On December 8, 2015, Sheriff Williams notified the Itasca County Human Resources office of his intent to discharge the Grievant. (Un. Ex. 29). In a letter to the Grievant dated December 14, 2015, Williams notified Grievant of his intent to terminate his employment. (Un. Ex. 30). As grounds for the discharge Williams cited several rules and policies of the sheriff's department that Grievant had violated. All conduct is related to the events of November 24 – 26. Grievant's termination was to be effective December 21, 2015. (Un. Ex. 30, p. 2).

Grievant's attorney wrote Sheriff Williams on December 21, 2015. She asked for information and documents related to each of the allegations in the Sheriff's letter notifying Grievant of his dismissal. (Un. Ex. 31). The parties met on December 21, 2015, to provide Grievant an opportunity to address the allegations. In a letter dated December 23, 2015, Williams noted that Grievant had failed to present any new evidence at the meeting and that he was being terminated for the reasons set forth in Williams's notice of intent to terminate dated December 14, 2015. (Un. Ex. 32).

Grievant grieved his discharge on December 28, 2015. The parties waived the first two steps of the grievance procedure. (Un. Ex. 33). At the third step meeting on

January 21, 2016, the Union claimed that Grievant's discharge violated Article XI of the agreement. It also claimed that the Employer violated Minn. Stat. 43A.33 (1) and (2).[3] The Employer denied the third grievance at the third step on January 27, 2016. (Er. Ex. 53), and the matter was referred to arbitration.

RELEVANT CONTRACT LANGUAGE

ARTICLE XI. DISCIPLINE

11.1 All disciplinary action shall be for just cause. It shall be the policy of the Employer to administer disciplinary penalties without discrimination of any nature.

ARTICLE XII. GRIEVANCE PROCEDURE

12.2 Arbitrator's Authority:

A. The arbitrator shall have no right to amend, modify, nullify, ignore, add to or subtract from the terms and conditions of this Agreement. The arbitrator shall consider and decide only the specific issue(s) submitted, in writing, by the Employer and the Association and shall have no authority to make a decision on any other issue not so submitted.

B. The arbitrator shall be without power to make decisions contrary to or inconsistent with or modifying or varying in any way the application of laws, rules or regulations having the force and effect of law.

POSITION OF THE PARTIES

The Employer

There are five reasons that provide sufficient just cause to support the decision to terminate the Grievant. First, Grievant failed to comply with an office directive regarding the supervision of staff. When he interacted with Witofsky, she was a staff

[3] As this statute provides that the just cause standard will apply to public employees in discipline cases, I do not address it specifically. To do so would be redundant as the collective bargaining agreement also requires that the Employer must have just cause to issue discipline.

member who was not under his supervision. He had been told two months earlier not to do this.

Secondly, and most important, is the Grievant's investigative conflict of interest and interference with the investigation of his complaint that led to charges being filed against Cass. This is a violation of Sheriff's Office policy. The Grievant also coached a witness (McDonald) during his investigation. He told her what was involved. He told Witkofsky what happened and led her to file a complaint. He had an ulterior motive for filing the complaint. He did not like Cass and wanted her out of law enforcement, as evidenced by the Witness Impact statement Grievant filed in March, 2015. (Er. Ex. 15).

Third, Grievant breached confidentiality policy when he shared confidential investigative and personnel information with his union representative. He also sent similar material to his personal e-mail address. This violated the Minnesota Government Data Practices Act and sheriff's office policy, which basically repeat the Data Practices Act.

Fourth, Grievant failed to follow internal reporting procedures when he filed the complaint. Instead of taking the complaint he had about potential monitoring of the meeting with Witkofsky to the HR Office, he should have reported this to Sheriff Williams. Sheriff's Office policy requires that if an employee feels they have been mistreated by a coworker or had their privacy invaded they are to report this to their supervisor, of if that person is involved, to the next person up the chain. Grievant failed to follow this policy.

Finally, Grievant engaged in conduct amounting to a waste of government time and resources. He met with two employees while all were on duty to tell them what was

happening at the Sheriff's Department and to show them a copy of the public complaint document charging Cass.

The foregoing, as a whole, provides sufficient evidence of misconduct to provide just cause for the Grievant's termination. This is particularly true since the Employer here is a law enforcement agency. Because of the nature of the service they provide and the work the employees do, rules must be applied and enforced. This includes those against a conflict of interest, and rules dealing with internal reporting requirements.

The Union

Grievant has a long history in law enforcement. He is an outstanding employee, as demonstrated in his annual performance evaluations (Assn. Ex. 73 – 87, 1997 – 2014). He has many letters of appreciation and congratulations for excellent work on specific cases in his personnel file. (Assn. Ex. 43 – 71). Prior to the events of November 24 – 26 the only disciplinary action he had received during his career with the Employer was one written warning.

Grievant's discharge is improper because it was motivated by spite and not for legitimate reasons, was based on conduct unrelated to the performance of his duties, and was based on policies that were not justified, were not effective, and were not equally applied to all employees. (Post-Hearing Brief, p. 1-2).

Regarding the events of November 24 – 26, Grievant was not conducting a criminal investigation when he spoke to Witkofsky and McDonald before he filed his complaint. He filed a workplace complaint with the HR Office, the appropriate place to file such complaints. From that time forward until the date of his discharge, Grievant was subjected to retaliatory acts by the Employer. His discharge was not a result of

misconduct, but a result of Sheriff William's personal spite and animus toward Grievant because he had filled a complaint against Cass without coming to Williams first.

Grievant and Witkofsky had a working relationship in the implementation of the Predator Offender Program in which a community is notified of the presence of individuals who have been convicted of certain sex crimes. The discussion they had on November 24 dealt in part with work related matters. There is no policy or rule preventing them for meeting for this purpose. Grievant did not participate in supervisor shopping or encourage Witkofsky to do so. When Grievant became aware that Witkofsky wanted to discuss some discipline she had received from Cass, he advised her that he could not discuss this with her. He referred her to her union as the source that might help her.

Secondly, the Grievant met with Witkofsky and McDonald and asked them a couple of questions before he filed the complaint with HR Office. The complaint involved a serious allegation and he wanted to know what had happened before filing the complaint. He was not conducting a criminal investigation.

The Grievant did not violate the Data Practices Act when he sent the complaint he had filed and two notes to his union representative and to his home e-mail account. There is no evidence that the information he sent to his home e-mail account has ever been disseminated to anyone. Grievant sent a copy of the charge and some of his notes to his union representative because he feared that his complaint could lead to a situation where he would need representation. He did this after the Sheriff told him that he (Sheriff) was involved because he told Cass and Hirt to keep an eye on Witkofsky and their actions on November 24 were consistent with his directions. By sending this

information to his union representative and his home email address Grievant did not violate the DPA. (Post-Hearing Brief, p. 21-23).

When Grievant filed a complaint with the County's HR Office rather than Williams, Grievant did not violate any policy. He was not obligated to bring this to the attention of the sheriff first. Filing with the HR Office is an acceptable practice. The HR Manager and County Administrator agreed with the procedure Grievant followed.

Grievant had a short work-related conversation with two County employees at the Itasca Resource Center, another County facility, shortly after the Lake County Attorney filed a complaint against Cass. During a short conversation involving work-related matters, Grievant showed two employees a copy of the Lake County complaint as they had inquired about what was happening in a conversation earlier in the day. Although he drove his squad car to this location this was not a violation of Employer policy.

The Employer has not established that the policies it referred to in Grievant's termination letter were in place in November, 2014. There can be no violation of a policy that was not in place and no discipline may be issued for violations of such policies unless Grievant acknowledged that he understood the policy by signing a policy sign-off sheet. Only then could a violation of policy be used as the basis of discipline. As Grievant did not execute a sign-off sheet until February 7, 2015, he cannot be disciplined for a violation of policies before that date.

The Sheriff was upset that Grievant filed a complaint with the HR Office. This prevented him from keeping the matter in-house and resolving it quickly as he would have preferred. For these reasons and not for any of the alleged policy violations, Sheriff Williams terminated the Grievant. The Employer has failed to prove that policy

violations were reasons for its decision to terminate the Grievant. Accordingly, the Employer lacked just cause to discharge Grievant.

DISCUSSION AND ANALYSIS

This is a discharge case. The collective bargaining agreement covering the Grievant provides in Article XI that all discipline shall be for just cause. (Er. Ex. 1). There are no statements or guidance as to the meaning of the term "just cause" nor is there consensus among labor arbitrators as to its meaning. Should it be one definition for all discipline issues? Does "just cause" mean one thing for an employer of factory workers and another for an employer that, like the Employer here, provides law enforcement services for the public? There apparently is no right answer.

Every discipline case presents a myriad of factors and considerations that need to be weighed in the analysis. In the absence of guidelines in the collective bargaining agreement, the question of whether an employer had just cause to discipline an employee can be discerned by factors such as the nature of the conduct, the setting in which it took place, whether the rules or policies that were allegedly violated were legitimate in terms of the Employer's operations, whether the employee knew of these rules or policies, the nature of the investigation of the alleged misconduct, whether the rules or policies that were violated were applied evenly to all employees, and whether the degree of discipline issued is related to the seriousness of the misconduct. Many of these factors are taken from the list of common elements of just cause identified by arbitrator Carroll Daugherty.[4] Not all elements apply in every case. Some can be given more weight than

[4] *Grief Brothers Cooperage*, 42 LA 555, 558 (Daugherty 1964); *Enterprise Wire Co.*, 46 LA 359 (Daugherty 1966).

others because of the facts in a particular case. No matter what the factors, there should be a sense that they were applied fairly.

At first glance, this appears to be a complicated case. The record is lengthy. Seventeen witnesses testified during the course of a three-day hearing. The parties introduced well over 100 exhibits containing more than a thousand pages. As in all discharge cases, the Employer bears the burden of establishing that it had just cause to terminate the Grievant. Based on the testimony of witnesses, any credibility resolutions that may be required, the record exhibits and any relevant statutory or administrative authority, I must determine by a preponderance of the evidence whether the Employer has met its burden of proof.

The Grievant was discharged on December 23, 2015. (Er. Ex.49) That termination was justified by several alleged violations of Sheriff's Office policies. The Employer contends that in thirteen separate instances, the Grievant violated parts of five different policies. Before I focus on these alleged violations, the environment where they conduct occurred necessitates that I make certain preliminary findings to properly analyze the issue in this case.

The Sheriff's Office Policies

There was a considerable amount of evidence and testimony from both parties concerning the policies applicable to the employees in the Sheriff's Office. During a large part of 2014, the Sheriff's Office was in the process of moving from a program called Lexipol, a software program where department policies were maintained, to a new stand alone policy manual similar to the one in effect prior to the Lexipol program.

Grievant was one of the employees advocating that the Employer abandon Lexipol and return to the policy manual format. During the conversion process, several supervisory employees including Grievant were involved in reviewing and upgrading portions of the old manual. The recommended changes were to be included in the new manual. (Tr. 78-9). The new policies were originally to be effective July 1. They were not completed by that date.

The Employer contends that the new set of policies became effective on September 10. Employees were informed of this at a department-wide meeting on that date. They were told that they could access the policies on the "J" drive of the Employer's computer system. (Er. Ex.6).

Some time after September 10, the Employer requested that supervisors obtain signatures from their employees on "Policy Manual Sign-off Sheets" in which they acknowledge that they understand the new policies. The process of getting these forms signed by employees was delayed. Ultimately, the Grievant was directed to have his employees execute the sign-off sheets and return them by February 6, 2015. (Un. Ex. 9). Grievant signed his on February 7, 2015. (Un. Ex. 10).

The Union and Grievant contend that an employee may not be disciplined for violating any of these new policies unless there is evidence of the employee's signature on a sign-off sheet. (Tr. 853). Above the employee's signature on the sign-off sheet is the statement that "I understand that these policies and procedures constitute department rules and must be adhered to." (Un. ex. 10). If an employee has not acknowledged this by signing the document - the employee cannot be disciplined for policy violations.

While some arbitrators may agree with this position, I am unwilling to adhere to such a rigid principle. Each discharge case presents a unique set of facts. In this case, the Grievant admitted that he had been told the policies were effective and on the "J" drive at the meeting on September 10. He essentially admitted that he was aware of the policies, at least the ones that he was alleged to have violated as of that date. (Tr. 755, 847-56, 895).

Given those circumstances and his own admission, I find that the Grievant was aware of the policies on the "J" drive as of September 10. He knew they applied to him and that he would be expected to adhere to them. Further, he was aware that violations of those policies could be used to discipline him. He acknowledged to Sgt. Erickson during the Lake County investigation that the Sheriff's Office had a policy against investigating a crime that you were involved in. (Tr. 406-07). Under these circumstances, the Grievant was required to adhere to the policies in place in November, 2014, and thereafter. This finding does not apply to any policy adopted by the Employer after September 10 unless it can demonstrate by independent evidence that the Grievant had read and understood the new policy. For example, there was testimony that between September 10 and February 14, 2015, there were 11 new policies added and 14 modifications to 15 existing policies. (Tr. 752-53). Independent evidence of knowledge would need to be established to enforce these new or modified policies against the Grievant.

Witness Credibility

Having heard all of the evidence and witness testimony I must make findings on the credibility of witnesses. I must do so because of the context of the events in this case.

The Employer argues that it is important to look at the personal stake the witness has in the outcome. (Post-Hearing brief, p. 20). I agree that this is an important factor in assessing witness credibility. I also look at inherent probabilities and whether there is evidence to corroborate the version of one witness as opposed to the version of the other. Finally, their demeanor while testifying cannot be overlooked. When I find it necessary to resolve who is to be believed, I will explain my reasoning.

Events of November 24 – 26

Grievant was discharged for his conduct and actions that occurred as a result of events during this time period. Some of the conduct used as grounds for the termination occurred during these dates, while other conduct occurred after this period, but was part of a continuation of the events and actions flowing from this period. These events cannot be divorced from the Grievant's alleged misconduct. The testimony of those people directly involved in the events is important. Grievant's conduct must be viewed in light of what happened on November 24. The Employer's decision to discharge the Grievant, and its investigation of the alleged misconduct, must also be viewed in terms of what happened during that time period. To determine what happened it is necessary to resolve some credibility issues concerning some testimony of important witnesses. I am asked to rely on the testimony of these witnesses to determine whether there was just cause to terminate the Grievant. I must know whose testimony is credible under the circumstances.

The events of November 24 are mainly undisputed. Witkofsky received discipline before lunch and was visibly upset. Williams asked Hirt and Cass to keep an eye on her so her condition did not deteriorate. She went to see Grievant after lunch with

the intent of discussing the discipline. Cass – not Grievant – is Witkofsky's supervisor. Grievant could see that Witkofsky was upset. He believed it might be as a result of a mistake she had made in some paperwork she performs as part of their involvement in the Predatory Offenders program. (Tr. 757-61). He suggested they talk in an interview room. Cass happened to be nearby and saw them enter the room. She went to McDonald, a deputy clerk that Cass supervised whose desk was near the audio and video controls for interview room no. 3.

Here the testimony of Cass and McDonald differs. McDonald testified she was directed to engage both the audio and video function in the interview room. (Tr. 561). Cass testified she directed McDonald to turn on the video only, and not the audio. (Tr. 471, 475). McDonald was unable to get the audio equipment to work, so only the video could be observed. Cass and McDonald saw Witkofsky talking to Grievant. Cass contacted Hirt so she could come and watch as well. McDonald was told to leave and not to tell anyone what they were doing, that it was a "personnel" matter. (Tr. 248). They both watched the Grievant and Witkofsky talking and looking at the documents Witkofsky showed to the Grievant. Cass seemed quite satisfied that she could show Hirt that Grievant was talking with a deputy that Cass supervised about discipline Cass had just delivered. She indicated that she could finally prove this. She testified (at Tr. 474-75) "I just said (to Hirt) 'See, this is what they do. This is Mike interfering with the front office stuff, which he's been directed not to do. I'm not crazy.' Because any time I've made such a complaint, about Mike interfering or undermining with my staff, it's his word against mine. I had an opportunity to show her on the screen exactly what he was

doing." At no time did Cass or Hirt make any reference at all about the welfare of Witkofsky, nor did they say anything about her behavior or appearance.

Cass and Hirt immediately reported what they had observed to Sheriff Williams. The three of them concluded that Grievant had violated the department directive issued and discussed with employees at the department-wide meeting on September 10. They decided that Hirt would wait until the end of the day to see if the Grievant would "self-report" that he had met with Witkofsky. He did not do so. Since the four-day Thanksgiving holiday began the next day, no further action was taken. No one went to either Grievant or Witkofsky to question them about what they discussed during the meeting that had been observed on the video screen. It is undisputed that there was never any audio from the meeting, and the video was real-time only – it was not saved.

Thereafter, there is little dispute about relevant facts. Former Sheriff Medure heard that the meeting was monitored. He told Grievant that the meeting he had with Witkofsky may have been recorded and that a criminal statute may have been implicated. Grievant then reviewed and copied parts of a statute and prepared a complaint which included a relevant part of the statute. On November 25 - 26, Grievant talked briefly with both Witkofsky and McDonald. He asked each a few questions about what had happened to insure he did not file a false complaint. On November 26, he met with HR Manager Hart to file his complaint. Seeing that potential criminal conduct may be involved, Hart brought in the County Attorney Muhar for advice. Hart, Muhar and an assistant county attorney from the criminal division met with Grievant to discuss the situation. Muhar decided to recommend to Sheriff Williams that he find an outside agency to investigate the matter because of the potential criminal conduct. As Sheriff Williams had not been

told of the complaint, Grievant asked to be allowed to notify the Sheriff before Muhar contacted him with his recommendation. Grievant notified the sheriff of the complaint he had filed with the HR Office regarding the conduct of Cass and Hirt putting the meeting between Witkofsky and the Grievant under surveillance. Williams told the Grievant he had directed them to watch Witkofsky so that meant he too was involved in the matter. Grievant testified that he filed the complaint with the HR Office before advising Sheriff Williams because he believed that the sheriff would try to cover the matter up and put it to rest without a proper investigation.

Respondent cautions that I consider the motive of the Grievant in this proceeding. I agree. There is no dispute that the Grievant and Cass did not like one another and rarely communicated. The Employer argues that Grievant took advantage of an opportunity presented (surveillance of the meeting) in an effort to get Cass removed from her position in law enforcement and that his testimony should be viewed in that context.

But I must also look at the motives of other witnesses involved in these events as well. It is clear that both Hirt and Cass do not like the Grievant. I find that the testimony of both Cass and Hirt lacks candor with regard to the purpose of this meeting.

I do not credit Cass's denial that she directed McDonald to engage both the audio and video recording equipment in the interview room on November 24. McDonald has consistently testified that she was directed by Cass to engage both functions, but could not get the audio function to work. She told this to Everett, the outside investigator. (Er. Ex. 33, p. 4, report of Everett investigation). She testified to this under oath. When Cass asked her to leave her office on November 24, as Hirt and Cass were set to view the conversation on the screen, McDonald told them which controls were for the audio

equipment in case they wanted to try to engage it. (Tr. 475). This was an unsolicited comment, and is consistent with her testimony that she was earlier told to turn the audio on but had not been successful. I credit McDonald's testimony that she was initially told to turn on the audio function.

This calls into question the purpose that Cass had in monitoring the meeting. They testified that they were following the Sheriff's directive to keep an eye on Witkofsky. (Tr. 249-50; 470-71). It is undisputed that there was a window in the door leading to interview room no. 3. Hirt admitted that they could have observed Witkofsky through the window. (Tr. 270). If all Cass was concerned about was Witkofsky's welfare, and she did not direct that there be any audio function activated, she could have looked through the window to see whether Witkofsky had deteriorated. From her own testimony, Cass was pleased that she could finally catch the Grievant participating in supervisor shopping, contrary to directives. With this unexpected opportunity, it is only logical that she would want to hear what the parties were saying.

Whatever directions Cass gave McDonald regarding the recording equipment, the action was taken so Cass could demonstrate that Grievant was dealing with someone that she supervised. They never once talked about Witkofsky's condition or appearance or welfare, either as they watched the conversation or when they reported what they saw to Sheriff Williams. I conclude that the motive for watching the conversation had nothing to do with Witkofsky's welfare. It was for the purpose of demonstrating that the Grievant, a person they admittedly did not like, had engaged in conduct which they believed needed to be dealt with. (Tr. 464, 483). It was Cass who originally tried to take advantage of a situation (the meeting) to place Grievant's conduct in question.

I conclude that Cass' denial that she said she wanted the meeting recorded and her claim that they watched the meeting to keep an eye on Witkofsky are not credible. For these reasons, where her testimony conflicts with that of other witnesses on relevant matters, I will give it little weight.

Hirt's testimony is also important to this case. She generally agrees with the testimony of Cass concerning the events of November 24. I find that she too had a tendency to cast her testimony in a light she believes is most favorable to the Employer's position. An example was her cross-examination about the complaints that she and Sheriff Williams both filed against the Grievant on June 19 dealing with Grievant's remarks during his oral presentation at the third step grievance meeting on June 15, 2015. (Un. Ex. 102, 104). Shown the complaint she filed (Un. Ex. 102) she said she prepared this document independently without discussing it at all with Sheriff Williams before it was filed. She said, under oath, that they did not discuss what they would put in their complaints beforehand. (Tr. 319). After persistent cross-examination and comparing her complaint with that of Williams she reluctantly and gradually admitted that they had talked about the content of the complaints before they were filed. (Tr. 321-23). However, she originally flatly denied that the two had talked before filing their charges. It is clearly obvious to me from comparing William's complaint (Un. Ex. 104) with that of Hirt (Un. Ex. 102) that the two had planned what they would say in their individual complaints. Hirt denied it, then avoided answering it, then finally admitted it when she had no other option.

That testimony, plus the fact that she was evasive and argumentative while on cross examination in other areas, calls her candor into question. In addition, there is no

question that she does not like the Grievant. She testified that in her view he was a narcissistic employee who deserved to be fired. (Tr. 275). Her opinion that Grievant should be fired does not differ from that expressed by Grievant in the Victim Impact statement that Cass should not be allowed to work in law enforcement. Her testimony is clouded by her personal dislike of Grievant, and her attempt to testify in a manner most beneficial to the Employer's position. She felt it would look bad if she and the Sheriff had discussed the content of their complaints, so she simply denied it. For these reasons, where Hirt's testimony conflicts on relevant matters with the testimony of others, I do not find her to be credible.

Sheriff Williams' testimony is also crucial to this case. It appears from the testimony that Williams, Hurt and Cass are friends as well as co-workers. They work closely together. They have lunch together three or four days per week. (Tr. 263). Both Hirt and Cass were promoted to their current positions since Sheriff Williams was elected to office. Hirt became Chief Deputy in May, 2014 and Cass became the Office Administrator in the fall of 2014.

The Sheriff asked Hirt and Cass to watch Witkofsky to see that she did not deteriorate. They reported what they had observed to him on November 24, shortly after they observed Grievant and Witkofsky talking. When he discovered that Grievant had filed a complaint he began taking steps to deal with the matter internally. He resisted the county attorney's advice that he find an outside agency to investigate Grievant's complaint. (Tr.122-23, 135). He interviewed McDonald about whether there was any audio or video of the meeting that had been retained. She said there was not. (Tr. 122). She testified that she did not tell him what equipment she was directed to turn on by Cass.

(Tr. 563). She was simply not asked that question. He was prepared on December 2 to declare the matter closed because neither Cass nor Hirt had done anything improper. If he truly believed he too was involved in the November 24 incident because of the instructions he gave Hurt and Cass, as he told Grievant, he was essentially investigating a case where his own conduct might be questioned. He certainly had a personal interest or stake in the outcome.

Sheriff Williams did not want the matter to go outside the Office of the Sheriff. He reluctantly admitted this. (Tr. 125-26, 135, 711). It did and it has probably caused turmoil within the Sheriff's Department. Cass volunteered that things of this nature can find a way into the next election campaign for the office of Sheriff. (Tr. 485). Grievant's complaint called into question the conduct of the Cass, Hirt and the Sheriff. The Sheriff backed Cass and Hirt in the claim that they were observing the conversation pursuant to his directions to keep an eye on Witkofsky. But as I have found, this is not the reason that Cass wanted to watch and listen to the conversation. When Cass and Hirt reported what they had observed on November 24, he did not question the means they had used to obtain this information. He did not ask them how Witkofsky appeared or whether there was a sign that she was better or worse. The Sheriff knew that what Cass and Hirt had done had nothing to do with keeping an eye on Witkofsky. I reject his claim to the contrary. I believe this colors all of his testimony. Where it conflicts with that of other witnesses on relevant matters, I will give it little weight.

Regarding the testimony of Witkofsky it does not differ significantly with that of other witnesses. I have already concluded that I credit the testimony of McDonald who

said she was told to turn on the video and audio equipment.[5] There is no evidence that she has any stake in the outcome of this case. I credit all of the testimony of these two witnesses.

With regard to Grievant his job with the Employer, and possibly his career, is in jeopardy. Clearly, he has a large stake in the outcome of this matter. For this reason, I paid particular attention to his demeanor as he testified. He answered questions in a forthright manner, even when forced to acknowledge facts which could put his claims in a negative light. He admitted he did not like Cass. While he contends that he could not be disciplined for conduct that occurred before he executed the sign-off sheet on February 7, 2015, he admitted that he was familiar with the Sheriff's Office policies for which he was disciplined prior to that date. He did not argue or attempt to avoid answering questions. I cannot find an instance where his testimony about relevant facts conflicts with that of other witnesses.

Grievant said his motive in filing the complaint about the interview room incident was to have the matter investigated to find out what happened. He did not feel it would be investigated if he turned the matter over to Sheriff Williams. The sheriff believed the complaint was part of a personal attack by Grievant against the Sheriff's Department. (Tr. 132-33; Er. Ex. 100, letter to Lake County). There was no evidence presented of

[5] I am aware that in one of his reports, after interviewing witnesses, Everett concluded that McDonald's testimony was unreliable. (Er. Ex. 33, p. 15). He found that she could have been influenced by comments the Grievant made to her when he met with her on November 25, 2014. According to McDonald, the Grievant met with her twice on that day. The first time, he asked her what happened on November 24. She told him what occurred. He asked her if the meeting between he and Witkofsky had been recorded, whether she had been asked to turn on the audio, whether any audio or video of the meeting existed, and who watched the live video of the meeting. At this time, she told him she had been asked to record the audio by Cass. It is undisputed that the Grievant met with her a second time that day, where he showed her part of the statute and said what had happened with the recording may have been a crime. He said she did not have to worry about her role, as she had been following orders from Cass, her supervisor. Because she had already told him what had happened before he told her about the statute, I do not see how this could have possibly influenced her view of the facts, since she had already related them. For this reason and the other reasons above, I am confident that McDonald is a credible witness.

what would motivate him to do so. Grievant reacted to discovering that others in the office were trying to intercept a conversation he had with a coworker. This is not an everyday occurrence. I have to believe that Grievant's motives in filing the complaint were to have the matter looked into by someone outside the Sheriff's Office and nothing more. He could not control the outcome. I don't see any instance where he slanted his testimony in any way to control the outcome of the investigation. He may or may not have been pleased, but the only control he had was where the complaint was filed. I find him to be a credible witness.

The Discharge

On December 8, 2015, the sheriff sent a memo to the HR Office titled "Complaint and Notice of Intent to Terminate. I will refer to this as the Termination Memo. (Er. Ex. 39). It listed thirteen instances of misconduct in separate paragraphs. The specific reasons for discharge are set forth in the Notice of Intent to Terminate letter hand-delivered to the Grievant on December 14, 2015. (Er. Ex. 47). The introduction states that "The reason for the termination is as follows." Five numbered paragraphs follow, each setting forth the general directive or policy violated with the specific alleged violations. The Employer asserts that the five paragraphs incorporate the thirteen instances of misconduct. (Post-Hearing Brief, p. 16). The Employer assigns greater weight to the violations in paragraphs 2 and 3 of the Discharge Letter as they are more serious. Conduct in these two paragraphs, according to the Employer, either alone or together, provide just cause to discharge the Grievant. It contends that the violations in paragraphs 1, 4 and 5 provide a stronger basis to conclude that the discharge was supported by just cause.

I. <u>Paragraph 1</u>: ***Failure to Comply with Office Directives. The Sheriff issued a directive on September 10, 2014 that was followed up by a September 11, 2014 email from the Chief Deputy that supervisors not interact with employees who had other supervisors regarding employment matters. Your action in meeting with an employee who reported to another supervisor on or about November 24, 2015 (sic) violated this directive.***

This paragraph, as well as the allegations in the other four, all flow from the meeting between the Grievant and Witkofsky on November 24 in interview room no. 3 (the interview room incident). The alleged misconduct discussed in this paragraph of the Discharge Letter is set forth in paragraph 9 of the Termination Memo.

It is not disputed that employees in the Sheriff's Office had been instructed to follow the chain of command. That was clear from the organizational chart discussed with employees on September 10 and reference to the chain of command in the email from Hirt to department employees the next day. Grievant understood that supervisors were not to interact with employees who they did not supervise about employment issues. Witkofsky asked to see Grievant on November 24. He could see that she was upset. As someone else was present in his office area, he suggested they meet in the interview room for privacy. He did not know what they would discuss until they were alone in the interview room.

Witkofsky told him of the discipline and showed him the paperwork she had been given. Grievant advised her that he was a supervisor which put him in a hard place. He suggested she see her union representative. Witkofsky said he did not read the disciplinary papers. During her testimony she was questioned about remarks made in her complaint about the interview room incident against Cass and Hirt filed on November 26. (Er. Ex. 9). She admitted that the statements in her complaint – written two days after the incident – were true. She admitted that Grievant told her that as a supervisor "I can come

to him and discuss any issues I have, but he is a supervisor and his responses to me were given in his role as a supervisor. He said I was putting him in a bad situation." (Er. Ex. 9). Grievant does not specifically deny Witkofsky's version of what he said.

The Employer claims that as soon as Grievant discovered what Witkofsky wanted to discuss he should have referred her to Cass and ended the discussion. It claims he should have then "self-reported" what had happened to his supervisor Hirt. Hirt, however, admitted that there is no policy that would have required him to "self-report" (Tr. 270).

Grievant did not initiate the conversation with Witkofsky. Had he only said that he was not her supervisor and could not discuss this and that she should see her union representative, I would not find any violation of policy or directive. The September 10 directive was designed to prevent supervisor shopping and that response would have avoided it. Witkofsky would not have been successful at her effort to shop – Grievant's compliance with the policy would have prevented it. But when Grievant went on to tell her that she could "come to him and discuss any issues" he encouraged the very practice that the office directive was meant to curtail. The Employer has the right to enforce policies that promote organizational and administrative efficiency in the Sheriff's Office. It did so when it announced the chain of command policy. The policy has that goal. Grievant violated that policy on November 24 when he encouraged an employee of a different supervisor to come see him about any issues at any time. He was not responding to her request, but extending an invitation. By doing so, he acted in violation of the office directive issued on September 10.

I find that Grievant did not violate this directive when he later talked with both Witkofsky and McDonald before filing his complaint with the Human Resources Office (HR Office). Similarly, he did not violate this directive when he asked Deputy Robin Washburn to notarize his complaint without allowing her to see the document. He was talking to them about his own employment issues. He was not dealing with their problems or discussing issues they had with their supervisor. They are not supervisory employees. He was not supervisor shopping - the problem the office directive was aimed at. Other than Grievant's remarks to Witkofsky, I find that he did not otherwise violate the September 10 directive.

II. <u>Paragraph 2</u>: Conflict of Interest and Interference in Investigation. You indicated that you believe that you were a victim or witness to a crime that occurred on or about November 24, 2014. Rather than report the matter according to the chain of command, you determined to initiate and conduct your own investigation. In addition, the evidence supports a determination that you coached a witness in this matter. Initiating, conducting and coaching a witness in relation to an investigation in an instance in which you believe you were either as victim or witness and that involved colleagues and/or suspects violated Section 602 of the Sheriffs Office Policy Manual Section 602 (sic)(Conduct Unbecoming a Peace Officer), Principle No. 7 and Rule Nos. 7.2 and 7.3

The alleged misconduct from this paragraph of the Discharge Letter is summarized in paragraphs 1, 2, 3 and 12 of the Termination Memo. Rule 602 is entitled "Conduct Unbecoming a Peace Officer." (Er. Ex. 42.) It states in relevant part:

Principle No. 7

Itasca County Sheriff's Office employees shall not compromise their integrity of (sic) that of the Sheriff's Office or profession by taking or attempting to influence the actions when a conflict of interest exists.

Rationale

For the public to maintain its faith in the integrity and impartiality of Sheriff's Office employees, employees must avoid taking or influencing official actions where the employee's actions would or could conflict with the employee's appropriate responsibilities.

Rules:

7.1 Employees shall, unless required by law or policy, refrain from becoming involved in official matters or influencing actions of other employees in official matters impacting the employees immediate family, relatives or persons with whom the employee has or has had a significant personal relationship.

7.2 Employees shall, unless required by law or policy, refrain from acting or influencing official actions of other employees in official matters impacting persons with whom the employee has or has had a business or employment relationship.

7.3 Employees shall not use the authority of their position as a peace officer for the Sheriff's Office or information available to them due to their status as an employee of the Sheriff's Office for any purpose of personal gain including, but not limited to, initiating or furthering personal and/or intimate interactions of any kind with persons with whom the employee has had contact while on duty.

The Nature of Grievant's Investigation

The parties have focused on the nature of Grievant's actions on November 25 and 26. The Employer argues that Grievant was conducting a criminal investigation. It applies a number of policies of the Sheriff's Office to Grievant's conduct and concludes that he violated certain policies for which he is discharged. The Union calls Grievant's charge a workplace complaint, and contends that his actions were to see whether there was any basis for bringing it to the HR Office. The Union disputes that Grievant was conducting a criminal investigation.

It is necessary to determine whether Grievant was conducting a criminal investigation. Such investigations are covered by the Sheriff's Office policies that Grievant is charged with violating.

What did Grievant do on November 25 – 26? He learned that the meeting may have been recorded and that a statute was involved. This was a statute he was not familiar with. He reviewed it. He talked with a witness (McDonald) to ask her what had happened and what she was told to do by Cass and Hirt. During the second conversation he had with her did he tell her that a statute might apply. He also talked with a second witness (Witkofsky) and asked her if she had given permission to anyone to have their November 24 meeting or conversation monitored. She said she did not. Then he told her a statute may be involved. He then went to Deputy Washburn and asked her to notarize his signature on a document. He would not show her the document. It was notarized. He then took this document or complaint to the HR Office. It was later referred to Lake County for investigation. Sgt. Erickson's investigative report resulted from that investigation.

Expert witness Scott Lyons has years of experience as the Chief of Police in the City of Duluth, and as an instructor in the area of criminal justice. On cross-examination, he was given Grievant's complaint (Er. Ex. 3) and asked whether he would characterize it as a criminal investigative report. His response was that he did not know, that he had not seen it that way. (Tr. 456). Lyons was later presented with a hypothetical set of facts and asked some questions. It is important to lay his testimony out verbatim, at Tr. 458-59.

Q: (Union counsel) Okay, how about this. Let's say a deputy is working during the day and goes home for lunch and he notices that his pickup truck that was parked on the side

of his house is gone. It was parked there when he left for work in the morning and he notices the neighbors across the street working outside. Is it appropriate for him to go across the street and ask the neighbor if the neighbor knows what happened to his truck?

A: (Lyons) I suppose, yeah.

Q: What if the neighbor says that Jim down the block took it earlier today, I saw him. Is it appropriate for that deputy then to go into the house where his wife is hanging out and ask whether she gave Jimmy down the street permission to take the truck earlier in the day?

A: He's going into his own house?

Q: Yeah, and asking his wife.

A: Sure

Q: To ascertain whether Jimmy took it without her permission or not?

A: Sure

Q: Now, taking one's vehicle out of one's – from one's property without permission is against the law?

Q: Right.

A: So in that sense, the hypothetical I gave you, the deputy is at least trying to ascertain some information related to a possible criminal event, fair?

Q: Okay, I can buy that, yeah.

A: Of which he's the victim, right?

A: He and his wife, right.

I find that testimony to be very persuasive. Lyons has a vast amount of experience in the field of law enforcement. He knew what Grievant was charged with and the basis of the discharge. The Employer showed him both the Termination Memo and the Discharge Letter after he was retained. He reviewed them. He reviewed Grievant's complaint. He would not call it an investigative report.

The hypothetical questions contained facts very similar to those of the present case. Grievant's case involved a statute that he was unfamiliar with, so he looked it up. The hypothetical involved possible theft of property, which deputies deal with regularly. Lyons would not fault the deputy in the hypothetical who did almost exactly what the Grievant did on November 24 and 25 before filing his complaint. Applying the reasoning used by the Employer to conclude that Grievant violated Sheriff's Office policy, the deputy in the hypothetical questions to Lyons could have been discharged or surely severely disciplined for conflict of interest. That makes no sense.

I do not characterize what Grievant did on November 25 and 26 as a criminal investigation. He was gathering information to file a complaint with the HR Office. This information led to a criminal investigation conducted later by Sgt. Erickson of the Lake County Sheriff's office. I now address the allegations in each paragraph of the Termination Memo.

a. Paragraphs 1 and 2

The Employer concluded that Grievant was conducting a criminal investigation when he researched the statute and interviewed both Witkofsky and McDonald. As a witness and possible victim of the alleged crime, he should not have conducted the investigation of an alleged crime involving his co-workers, Hirt and Cass. The Employer argues that Grievant had a conflict of interest when he conducted this criminal investigation, in violation of Principle 7 of Policy 602.

It asserts that Grievant also violated Rule 7.2 when he talked with Witkofsky, McDonald, Muhar, Hart and Washburn (she was asked to notarize his signature on his complaint) in the conversations he had with them before he filed the complaint. It

contends his actions were an attempt to influence their actions in official matters. In doing so, according to the Employer, his conduct impacted their employment as well as that of Hirt and Cass.

The Employer further contends that Grievant's conduct violated Rule 7.3, in that he used the authority of his position and the information available to him for the personal satisfaction and gain of putting Hirt and Cass in criminal and employment jeopardy. Evidence of Grievant's goal is the Victim Impact statement. (Er. Ex. 15).

The Employer further contends that Grievant violated this same rule when he coached witnesses Witkofsky and McDonald as to what occurred in the interview room incident. He attempted to influence them in official matters which impacted his coworkers. In particular it claims that he coached McDonald and essentially told her what she needed to say to get the outcome he wanted.

The parts of Policy 602 implicated by the facts of this case serve a legitimate purpose in any law enforcement office. It was Lyons' opinion, based on the facts before him, that Grievant had a conflict of interest in initiating an investigation where the investigator and the victim were the same person. He also said it was his opinion that a conflict existed because Grievant conducted an investigation where the investigator's co-workers were involved.

I have concluded that Grievant was not engaged in a criminal investigation when he talked with Witkofsky and McDonald, and when he talked with Robin Washburn, Elaine Hart, Jack Muhar and Assistant County Attorney Webb. The Rationale for Principle No. 7 as well as Rules 7.1 and 7.2 restricts employees from being involved in "official actions." As Grievant was filing an internal complaint with the HR Office, I

find that he was not involved in official actions and that the Rules and Principles cited do not apply. Thus, Grievant did not have a conflict of interest within the meaning of Principle 7. As he did not have a conflict and was not involved in official actions, he did not violate the Principles or Rules cited in paragraphs 1 and 2.

2. Paragraph 3

The Employer charges Grievant with using the authority of his office to gain personal satisfaction of placing coworkers Hirt and Cass in employment and criminal jeopardy, in violation of Rule 7.3 of this policy. I find no merit to this charge. In reading Rule 7.3, it is clear that this deals with an employee of the Sheriff's Office who might try to use inside information for the purpose of personal gain. In my view, it is a long stretch to apply this rule to the circumstances here. Cass and Hirt started this chain of events by attempting to monitor a conversation between Witkofsky and Grievant. The goal was not to check on the condition of Witkofsky but to put Grievant in jeopardy. Instead, the matter ended up being referred to the Lake County Sheriff's office for investigation.

The evidence is insufficient to conclude that Grievant was seeking personal gain or satisfaction when he filed his complaint. If the events of November 24 created an "opportunity" for him to impose consequences on Cass and Hirt, he did not know what the outcome would be at the time he filed the complaint. Muhar might not have wanted to refer it to an outside agency to investigate. There is no evidence that Grievant urged him to do so. The Lake County Attorney may have decided not to prosecute. Grievant put his feelings down once a complaint had issued against Cass. He gave his opinion in the Impact Statement that someone engaged in such conduct should not be allowed to

work for the Employer in law enforcement. Now the Employer uses this as one of the reasons for his termination while the person whose questionable judgment in directing the monitoring has no accountability.

Filing the complaint with the HR Office, as Grievant did, was a proper procedure. He did not believe it would be investigated by the sheriff. There is not sufficient evidence to conclude that he had an improper motive or any expectation of an outcome other than he wanted the matter investigated. He could not control the outcome. I do not find that Grievant misused information available to him as an employee of the department for his personal gain, as alleged in paragraph 3 of the Discharge Letter.

3. Paragraph 12

Grievant had no conflict of interest with any coworkers because he was not conducting a criminal investigation. He did not attempt to influence their testimony. Witkofsky has nothing to say other than whether or not she gave anyone permission to listen to or record the meeting in the interview room. The Employer does not contend that she did. She provided this information to Grievant before he told her a crime might be involved.

During the first short discussion Grievant had with McDonald, he asked her what happened, who was present, and who watched the video. She said she told him what had happened. He did not show her the statute and tell her that it might apply to the situation until the following day when he talked with her a second time. (Tr. 564-65). In both cases, he asked them the relevant questions before he told them a criminal statute might be involved.

McDonald testified that her recollection of events on November 24 was not influenced in any way by anything Grievant told her. Her testimony has been consistent. I have credited it in its totality. It was not possible to influence Witkofsky, whose only involvement is whether she gave permission for the conversation to be monitored. She did not. Grievant did not "taint" these witnesses or coach them to influence their testimony. Grievant did not engage in misconduct as alleged in paragraph 12 of the Discharge Letter.

III. <u>Paragraph 3:</u> Breach of Confidential Information Requirements. You provided data on an active criminal investigation to an Itasca County employee outside the Sheriff's Office. You also forwarded private and confidential data to your home email. This conduct violated Sheriff's Office Policy Manual Section 602 (Conduct Unbecoming a Peace Officer), Principle No. 7 and Rule Nos. 7.3, Principle No. 8 and Rule No. 8.1 and Policy Manual Section 820 (Employee Speech, Expression and Social Networking), part (f). This conduct also constituted the improper release of private personnel data as defined by Minn. Stat. Sec. 13.43, and confidential and private active criminal investigative data as defined by Minn. Stat. 13.82.

The conduct discussed in paragraphs 4, 5, 6, 10 and 11 of the Termination Memo are alleged violations of the rules cited in paragraph 3 of the Discharge Letter. The Employer charges Grievant with violating Principle No. 8 of Policy 602 in that he did not observe the confidentiality of information available to him as an employee of the Sheriff's Office. Grievant is also charged with violating Rule 8.1 of Policy 602 in that he knowingly disseminated the information to his union representative and his home email in violation of legal restrictions on its release. The Employer also contends Grievant violated the Minnesota Government Data Practices Act, Minn. Stat. Sec.13.01 et seq. (DPA). It asserts that the release violated the DPA by releasing law enforcement data including criminal investigative data in violation of Minn. Stat. Sec. 13.82, subd. 7. It contends that Grievant released personnel data which included specific reasons for

alleged disciplinary action and data documenting the reason for that action, prior to the final disposition of any disciplinary action in violation of Minn. Stat. Sec. 13.43, subd. 2(5). It also charges that the release of information violated Policy 820 (f), "Employee Speech, Expression and Social Networking."

The appropriate sections of Policies 602 and 820 are set forth below.

PRINCIPLE NO. 8

Itasca County Sheriff's Office employees shall observe the confidentiality of information available to them due to the status as Sheriff's Office employees.

Rationale

Employees are entrusted with vast amounts of private and personal information or access thereto. Employees must maintain the confidentiality of such information to protect the privacy of the subjects of that information and to maintain public faith in the employee's and Sheriff's Department's commitment to preserving such confidences.

Rules:

8.1 Employees shall not knowingly violate any legal restriction for the release or dissemination of information.

8.2 Employees shall not, except in the course of official duties or as required by law, publicly disclose information likely to endanger or embarrass victims, witnesses or complainants.

8.3 Employees shall not divulge the identity of persons giving confidential information, except as required by law or Office policy.

Rule 820 (Employee Speech, Expression and Social Networking)

(f) Disclosure through whatever means of any information, photograph, video or other recording obtained or accessible as a result of employment with the office for financial gain, or data classified as not public by state or federal law or any disclosure of such materials without the express authorization of the Sheriff or designee.

There is no dispute that Grievant sent an e-mail with attachments to his union representative on November 26. (Er. Ex. 11). The attachments included his complaint and his briefs notes of his November 26 meetings with Muhar and Sheriff Williams about the complaint. This occurred after he had told Sheriff Williams he was filing the complaint and the sheriff replied that he was probably involved in the interview room incident as well. There is also no dispute that Grievant sent five pages of documents attached to an email message to his home email address on March 23, 2015. (Er. Ex. 14). This consisted of his two-page complaint, the notes he had sent to the union representative earlier and personal notes of two instances which he believed were evidence of retaliation against him by the Sheriff's Office. He sent them to his home email address to send them on to Lake County, as they had requested. (Tr. 796). This permitted him to send them from home instead of a work computer. Grievant's wife also has access to this home email account.

1. Paragraphs 4 and 5

Grievant was not conducting a criminal investigation on November 25 – 26, nor was anyone else from the Sheriff's Office. The investigation of the allegation that Cass and Hirt had done something wrong did not occur until some time in December, 2014 when Sgt. Erickson of Lake County interviewed a number of witnesses and then prepared his investigative report.

The information in Grievant's complaint, which was his claim of workplace misconduct by Cass and Hirt, was not covered by the Sheriff's Offices policies, at least not at the time that he sent the complaint to his union representative. At that time the

conduct of Cass and Hirt was not under investigation. In fact, Sheriff Williams had concluded on December 2 that there was nothing to investigate.

Principle No. 8 of Policy 602 requires employees to maintain the confidentiality of private and personal information they are entrusted to. I find that this does not apply to the information Grievant gathered to enable him to file the complaint. Further, the information in question was given to his union representative, who would be obligated to represent him in the event he became the subject of an investigation. This was clearly the direction Grievant correctly predicted the interview room incident would take as soon as Grievant told Sheriff Williams he had filed the complaint. The sheriff decided to hold him accountable because of the way Grievant handled the matter. Predicting this, Grievant told his union representative that Cass and Hirt monitored a conversation/meeting he had with Witkofsky without his permission; that a criminal statute might be involved; that he filed a complaint with the HR Office, and that he may need representation. How could the union representative defend him without some information about the initial incident that suddenly appeared to put Grievant in jeopardy?

The interview room incident did evolve into an investigation by Lake County, and charges against Cass. Grievant did not send his union representative any information that had been gathered by Sgt. Erickson. There is no claim he had any access to the contents of Sgt. Erickson's interviews of Witkofsky and McDonald. The information Grievant provided to his union representative, at the time he provided it does not fall under the provisions of Principle No. 8 and Policy 602. Under these circumstances Grievant's act of sending the information to his union representative did not violate the Employer's policies.

There is also no dispute that Grievant sent five pages of information attached to an email to his home email account on March 23, 2015. (Er. Ex. 14). Grievant's wife also had access to this email account. There is no evidence she ever saw the information, that he expected her to read it, that he discussed it with her or that it was ever disseminated to anyone.

This information was not obtained as a result of any investigation Grievant conducted in his role as an agent of the Sheriff's Office. At the time he sent the information, a complaint had been filed against Cass only. He did not obtain it from Sgt. Erickson, who conducted the criminal investigation. Most of the information involved his personal employment and evidence he believed may place his employment in jeopardy. I find that sending the information to his home email account did not violate Principle No. 8 of Policy 602. The information was not covered by the Policy. While this is not controlling, even if it arguably was information covered by the policy, he sent it to himself and not anyone else, and there is no evidence or claim that it was disseminated to anyone else or that he ever wanted anyone else to read it. Grievant did not violate Policy 602 when he sent the information to his home e-mail address.

As to Rule 8.1, it prohibits employees from knowingly violating any legal restriction for the release or dissemination of information. I address that claim in the next section of my decision.

2. Paragraph 6

The Employer charges Grievant with violating Policy 802 when he sent the information to his union representative and his home email address. This policy is

entitled "Employee Speech, Expression and Social Networking." This Policy was added to the policy manual on December 12.

Grievant did not send the information to his union representative or his home email account for financial gain, as the policy prohibits. As noted later, I do not believe it was classified by law as non-public data. It was not data gathered as a result of any formal investigation. It could not apply to the information he sent to his union representative in November, 2014. The policy was not in effect at that time.

The information sent to his home email account was never disseminated. It concerned his fear that he was being retaliated against by the Sheriff's Office because of the complaint he filed. Even if it arguably might fall under the proscriptions of Policy 820, this deals primarily with disclosing information through the use of social networking. There is no evidence the information he sent to his home email was ever disseminated through any social networking program or system. For these reasons, I find that Grievant did not violate Policy 820.

3. Paragraphs 10 and 11

The Employer contends that Grievant's actions in sending the information to his union representative and his home email address violated provisions of the Minnesota Government Data Practices Act (DPA), Minn. State Sec. 13.01 et. seq. Specifically, it argues that the information contained both personnel data and criminal investigatory data that is non-public under the DPA, and therefore in violation of the DPA. If true, this would violate Policy 820 (f) because the information Grievant disclosed to his union representative and sent to his home email address is non-public data as defined by the DPA.

Minn. Stat. Sec. 13.82, subd. 7 defines criminal investigative data:

> Investigative data collected or created by a law enforcement agency in order to prepare a case against a person, whether known or unknown, for the commission of a crime or other offense for which the agency has primary investigative responsibility are confidential and protected nonpublic while the investigation is active.

Minn. Stat. Sec. 13.43, subd. 2(5) prohibits the disclosure of personnel data which includes specific reasons for alleged disciplinary action and data documenting the reason for that action, prior to the final disposition of any disciplinary action.

The basic question here is whether the information was non-public data within the meaning of the DPA. Grievant was not conducting any criminal investigation on November 25 – 26. That was not conducted until later when Sgt. Erickson was assigned to investigate the complaint against Cass and Hirt. The protected data was that obtained by Sgt. Erickson and reviewed and analyzed by the Lake County Attorney to determine whether possible criminal conduct occurred.

Grievant sent the information to his union representative before any information was being gathered or created to prepare a case against anyone. I question whether Grievant, on November 26, was precluded from providing the information to the person who would be representing him in the event he came under investigation. The DPA does provide for the disclosure of personnel data necessary to prepare for a disciplinary hearing. Minn. Stat. Sec. 13.43, subd. 8. There is no contention that the information was disseminated to anyone but Grievant's union representative. At the time Grievant was certain he would be targeted or the subject of some scrutiny. He was correct. Grievant did ultimately face a disciplinary hearing as a result of his conduct.

The Employer contends that it makes no difference that the recipient of the information was his union representative. At the time he sent the information, Grievant was not facing discipline or investigation. Just as that may be true, it is also the case that at the time he sent the information there was no criminal investigation in progress dealing with the conduct of either Cass or Hirt in connection with the interview room incident. Grievant correctly knew that his conduct would be scrutinized by the Employer when he sent the information. Sheriff Williams had decided that Grievant would be held accountable for filing the complaint as he did. (Tr. 122-24.)

When Grievant sent the information to his home email Cass had been charged with violations of the law. According to Magnusen and Polhamus, this information had been released to the media. The data had already been gathered. Grievant did not release any information that Sgt. Erickson and Lake County had gathered to proceed against Cass. I find that in sending this information to his home on March 23, 2015 Grievant did not violate the DPA. The amount of information was insignificant, he emailed it to himself and there was no evidence that it was disseminated.

The Employer cites four cases in support of its contentions that in releasing the data to the union representative and sending it to his home email Grievant violated the DPA and Sheriff's Office policies concerning the release of confidential information. In *Hennepin County, Human Services and Public Health Dept., and AFSCME Council*., BMS Case 09-PA-0562 (Richard Anderson, June 6, 2009), there was overwhelming evidence of numerous instances where the Grievant violated client confidentiality policies by sending personal client information to his home computer to use for his personal reasons – to develop personal relationships with their relatives - and in at least

one case, so he could refer a client to one of his personal business ventures. The Grievant there was also found to have violated numerous other policies involving use of his office computer for personal business while on official duty, to receive website subscriptions, to download sexually explicit content and to contact DMV records for personal reasons. The evidence to support the termination was overwhelming. The arbitrator found that the employee had violated policy by sending confidential information to his home, but did not find specific violations of the DPA. What the employee did with the information after he sent it to his home distinguishes this case from the case before me.

Wright County and Wright County Deputies Association, BMS Case 12-PA-0752 (Stephen Befort, December 12, 2012) is also distinguishable. There a deputy was discharged for releasing inside information to her cousin about her cousin's ex-girlfriend. The information might have aided the cousin in a bitter custody battle he had with the ex-girlfriend. In addition, the deputy was not truthful with the officer investigating the allegation that she released confidential information when she denied that she had been the source of the information. The inside information was disseminated for the gain of the deputy who was then dishonest. Further, the deputy had previously been warned about releasing this type of information. There was no specific finding of a DPA violation. In the present case, unlike *Wright County*, there is no evidence that Grievant sought personal gain or was dishonest.

City of Lakeville and Law Enforcement Legal Services,, BMS Case 15-PA-0426 (Rolland Toenges, September 21, 2015) involved a case where a police officer was discharged for releasing active investigatory information about recent serious crimes to the press on at least two instances without permission. The officer was dishonest about it

when confronted. Further, the officer had been previously warned about releasing such information. Unlike the present case, there was no question but that this information jeopardized the investigation and created distrust between competing law enforcement agencies.

Finally, *City of Cold Spring and Law Enforcement Labor Services,* BMS Case 11-PA-1261 (Gil Vernon, July 26, 2012) presents facts that are most comparable to those in the present case. There, a short term police officer was assigned to the local school district as a school resource officer. A student brought a gun to school. The officer did not answer his phone immediately when called to deal with the incident. He arrived at the school principal's office after the student had been detained and the gun was confiscated. The officer was openly critical of the manner in which the student's detention was handled by the principal, and the lack of a "code red/lockdown" in the building.

The officer openly criticized the school building principal's actions to the principal of another school in the district, where he provided information concerning the criminal investigation being conducted as a result of the incident. The next day he advised the City Manager of some of the facts and was again critical of how the incident was handled by the principal of the building. He later related some of the facts to a member of the school board, who owns a local newspaper. Finally, the day after the incident, he sent an email to his wife with three witness statements attached that had been taken during the course of the investigation to that date. He told his wife in the message "hope you can read them." The arbitrator found that sending the statements to his wife with the intention that she read them violated the DPA. In part, he relied on the

discharged officer's open admission that he knew that this information was protected by the DPA and that he probably violated the law.

There is no doubt that there was a criminal investigation and that the information was covered by the DPA. The officer openly admitted that he knew this. The information was disseminated with the intent that it be read by someone outside the police department. In the present case, there was no dissemination or intent to read the information. Further Grievant was not conducting a criminal investigation.

These cases are distinguishable. I conclude that by sending the information to his union representative on November 26, Grievant did not release non-public data that was part of a criminal investigation. I reach the same conclusion with regard to the information sent to his home email address on March 23, 2015.

As to the release of personnel data, the DPA provides that "personnel data" is:

> …..data on individuals maintained because the individual is or was an employee of or an applicant for employment by, performs services on a voluntary basis for, or acts as an independent contractor with a government entity.

Minn. Stat. Sec. 13.43, subd. 1.

Here, the question is whether the information included reasons for disciplinary action, or data providing the basis for disciplinary action that is protected until the disciplinary action becomes final. Minn. Stat. Sec. 13.43, subd. 2(5). I question whether there was ever a disciplinary investigation conducted by the Sheriff's Office of either Cass or Hirt concerning the interview room incident. If there was, it was the investigation conducted by Everett, which was well after Grievant sent the information to both his union representative and his home email. Until then, there is no evidence

whatsoever that either Cass or Hirt were being investigated for any sort of disciplinary action.

The claim that Grievant's actions violated the DPA presents questions that give me pause in trying to apply the statute to the facts present here. A charge against an employee is a public document. (Minn. Stat. Sec. 13.43, subd. 2(4). Was Grievant's complaint to the HR Office a charge? Did Grievant include the substance, and therefore protected data, to his union representative? Is the info that Grievant sent to his union representative data that is being used to prepare a case against Cass or is it information that caused an investigation to be conducted by Lake County where such protected data would be gathered? Lyons was called to offer an opinion on whether Grievant's conduct violated the DPA. Having been advised of the background of the case and specific provisions of the DPA, he was uncertain whether a violation had occurred. (Tr.451-52).

For all of the above reasons, I find that Grievant did not violate the DPA or any rules in Policies 602 or 820 when it sent the information to his union representative and his home e-mail account.

IV Paragraph 4: Failure to Follow Reporting Procedure. You also failed to follow the reporting requirements for misconduct allegations required by Policy Manual Section 600 (Allegation of Misconduct). You also failed to report the allegations of harassment involving your coworkers to the Sheriff as required by the Sheriff's Office Policy Manual Section 607 (Itasca County Policy Against Violence and Harassment).

The grounds for misconduct summarized in this paragraph are set forth in paragraphs 7 and 8 of the Discharge Letter. Grievant is alleged to have violated Policy 600 (Allegation of Misconduct) and Policy 607 (Itasca County Policy Against Violence and Harassment) by failing to follow proper procedure when he filed his complaint with

the HR Office rather than with the Sheriff or an official in the Sheriff's Office. The policies implicated are as follows.

Policy No. 600 Allegation of Misconduct

Procedure for Accepting Complaints

1. A complaint alleging misconduct by personnel of the Itasca County Sheriff's Office may be made by any person at any time to any officer of the Sheriff's Office.
2. When a member of the Sheriff's Office receives information of a complaint, or a person requests that they be allowed to file a complaint, the information or the person shall be referred to the supervisor on duty. In the event a supervisor is not available, the person shall be provided a Sheriff's Office pamphlet and the process for filing a complaint.
3. If it is possible to obtain in writing the substance of the complaint, or impossible to get the complainant a Sheriff's Office pamphlet, the information obtained should be reduced to writing and forwarded to a supervisor.

Policy No. 607 Itasca County Policy Against Violence and Harassment

In regard to any form of harassment:

3. If the aggrieved person does not wish to communicate directly with the offending person or if either party does not wish to enter into mediation, the supervisor will immediately contact the department head. The aggrieved person shall be asked to provide a written report to identify person(s) involved, description and date(s) of occurrence(s), witnesses, requested remedy and other pertinent information.

If the offending person is the aggrieved person's supervisor, the aggrieved person should immediately contact the department head. If the offending person is the aggrieved person's department head, the aggrieved person shall contact the Coordinator/Human Resource Department. Any attempts by the supervisor or department head to discipline or retaliate against the aggrieved person shall be reported to the Coordinator/Human Resource Department.

V. INTERNAL INVESTIGATION

A. Except in cases of suspected criminal conduct, upon receipt of a report of harassing conduct, the department head shall undertake or authorize an internal investigation to be conducted by County officials or a designated third party. In cases of suspected criminal conduct and in coordination with the advice of the County Attorney, the department head shall undertake or authorize an internal investigation to be conducted by

> **County officials or a designated third party. If the department head is named in the complaint, the Coordinator/Human Resources Department shall undertake or authorize an internal investigation to be conducted by County officials or a designated third party.**

The language quoted above, particularly the reference to providing the complainant a copy of a Sheriff's Office pamphlet and the process for filing a complaint, suggests and I find that this Policy exists primarily for members of the public to bring complaints against members of the Sheriff's Office. Grievant's complaint was an internal complaint dealing with the workplace conduct of employees. From the testimony of HR Manager Hart (Tr. 608.) and an email from County Administrator Trish Klein (Un. Ex. 90), it is clear that these County officials do not agree that Grievant must file his complaint with the Office of the Sheriff before filing it with the HR Office. The policy, according to them, is that if an employee feels they cannot take a complaint such as that of the Grievant to the department head, it is proper to file it with the HR Office. Grievant said he wanted the matter investigated, and believed that because of the relationship between the Sheriff and Hirt and Cass, it would not have been. Both Hart and Klein agree this was proper.

Policy 600 says a complaint *may* be made to any officer in the Sheriff's Office. The Employer argues that Medure was the person bringing the complaint and that Grievant was the person in the Sheriff's Office that received the complaint. Grievant, according to the Employer, then had an obligation under this policy to bring the matter to the "supervisor on duty." He failed to do so in violation of this policy.

I do not agree. There is no evidence that Medure had any intention of filing a complaint. He was not affected in any way by the interview room incident. For this reason and because Grievant's conduct in filing his complaint with the HR Office

complied with the policy of that department, I find that Grievant's filing of the complaint did not violate Policy 600, as alleged in paragraph 7 of the Discharge Letter.

With regard to Policy 607, it is clear that the policy is to cover workplace violence and harassment. Grievant did not claim that the behavior of Cass and Hirt constituted harassment. In fact, harassment is described in Policy 607 as "Repeated, intrusive or unwanted acts, words or gestures that reasonably appear to adversely affect the workplace environment, safety, security or privacy of another regardless of the relationship between the individuals." It goes on to say that harassment occurs when "The conduct or communication of a harassing nature is *repeated*....." (Policy 607, "Definitions").

Grievant does not allege that he was being harassed. It is not clear that a one-time incident that he was unaware of at the time it happened constitutes harassment within the meaning of this policy. I find that it does not. I find that Policy 607 does not apply to the conduct that occurred in the interview room incident. Grievant did not engage in misconduct, as alleged in paragraph 8 of the Discharge Letter.

V. <u>Paragraph</u> 5: Waste of County Time and Resources as well as Official Position to Conduct Personal Business. On or about March 17 or 18, 2005, while on duty, you made a separate trip to the Health and Human Services building for the purpose of providing information related to the allegations and investigation regarding employees in the Sheriff's Department. You provided a copy of the criminal complaint against a fellow employee and discussed the situation that resulted in the charges. There was no justification for this task, it was taken for personal reasons, and it was not a de minimus personal errand. It disrupted the work time of other County employees. This conduct violated Policy Manual Sections 521 and 820.

The conduct covered by this allegation is set forth in paragraph 13 of the Discharge Letter. The title of Policy 521 is "Assignment and use of Department Vehicles." It states in relevant part:

Policy 521: Assignment and Use of Department Vehicles

III. PROCEDURES

A. Use of Vehicles

1. Department vehicles shall be used for county business only.

The meeting to discuss the new protocol for interviewing child witnesses took place on March 17 or 18, 2015. During the meeting, Magnusen and Polhamus questioned Grievant about events in the Sheriff's Department, based on reports in the media. That afternoon, Grievant drove the county vehicle assigned to him to the Health and Human Services building where Magnusen and Polhamus have their offices. There, he showed them a copy of Lake County's complaint against Cass, which he obtained from a website of public documents. The three had already met that morning for the purpose of discussing the new protocols. There is no evidence that the three of them decided to meet again later that same day and further discuss the new protocol.

I find that the only reason Grievant drove to the Health and Human Services building was to show Magnusen and Polhamus the complaint from Lake County that named Cass as someone who was charged with violations of law. They may have briefly discussed the protocol subject again, but that was not the reason for the visit. Regardless of the time and distance involved there was no official business purpose for this trip. It was made for personal reasons. Union argues that no one has ever been disciplined for a misuse of country property when they used a squad car for personal reasons. This may be true, but the Employer offered testimony that when a squad car has been used for non-duty purposes, the use has been authorized by the Employer. The Union presented no evidence to contrary. Grievant did not have permission to use the squad car for this

purpose. I conclude that by his visit to the Health and Human Services building on the day in question Grievant violated Policy 521.

CONCLUSION

I have found that Grievant did engage in some of the misconduct alleged by the Employer in connection with the interview room incident and its aftermath. Specifically, I have found that Grievant violated office policy by encouraging an employee of another supervisor to bypass the chain of command and come to him with issues and that he violated policy when he used his squad car for personal reasons. With this misconduct, the Employer has met its burden of proof that Grievant should be disciplined.

This does not end the analysis. The remaining question is whether the level of discipline imposed is appropriate under the circumstances present. Elkouri & Elkouri, *How Arbitration Works* Ch. 18-45 (7th ed., 2012). I find that it was not.

Grievant was a 24-year employee with an excellent work record. His annual performance appraisals demonstrate that he was a valued employee. (Un. Ex. 72 – 87). His most recent appraisal for the period May 22, 2013 through May 22, 2014, is one of the most impressive. (Un. Ex., 87). Further, there are numerous letters of thanks and recognition in his file for specific cases or projects that Grievant worked on. (Un. Ex. 57 – 71). He received one written warning in his 24 years of employment. He has never previously been disciplined in any way for any of the policies and directives that he is alleged to have violated.

Sheriff Williams was anxious to hold Grievant accountable for not coming to him before filing the complaint with the HR Office. His Office did not conduct its own investigation of the alleged policy violations. Instead, it gleaned through all of the

information Everett gathered and reached the conclusion that Grievant had violated the policies. Everett did not know he was investigating the specific policy violations Grievant was accused of. He may have asked different or further questions had he known so. No one else was targeted by Everett's investigation. Only Grievant alone - not Cass or Hirt - has been the subject of discipline because of the interview room incident. (Tr. 112). Unlike Grievant, Cass was never placed on administrative leave, but was allowed to work for the Sheriff's Office even after having been charged with committing a crime. The principles of fairness and equal treatment fall by the wayside when the employee who directed the monitoring with the hopes of catching the Grievant in the act of misconduct faces no accountability while Grievant's reaction has led to his discharge.

While Grievant's misconduct was not sufficient to require termination, it does require some level of discipline. There is no evidence of prior disciplinary history to any other employee for any of the policy violations that Grievant was charged with.[6] I believe encouraging Witkofsky to come to him with any issues, in direct violation of a recent directive not to do so, is the most serious misconduct. This tends to disrupt the efficient operation of the office and undermine the authority of Sheriff's Office supervisors. I conclude that it is appropriate that Grievant be suspended without pay for 30 days because of the misconduct. His suspension should run from the day of his discharge for the next 30 days. He should be reinstated to his former position and made whole from the period of the 31st day after his discharge until his reinstatement. The Sheriff, Hirt, Cass and the Grievant are professional law enforcement officers. They are

[6] There is evidence that previously an employee was discharged for investigating a crime where he was the victim. In that case, the employee arranged to interview the suspect about the theft of some of the employee's property. During the interview, the employee slugged the suspect, a teenage boy. The Employee was discharged. I think there is no question that the physical assault was the reason for the discharge, and the reason that this case is quite different than that of the Grievant.

sworn to serve and protect the residents of Itasca County. I am confident that when Grievant returns the Employer can and will continue to effectively and efficiently serve the public.

AWARD

The grievance is sustained in part. Grievant's discharge is revoked. Instead, Grievant is to serve a 30-day suspension without pay. The Employer is ordered to reinstate the Grievant to his former position and make him whole for wages and benefits lost from the 31st day after his discharge to the date of his reinstatement. Any reference to his termination is to be removed from his personnel file, which should reflect the 30-day suspension.

I will retain jurisdiction of this case for 60 days, or longer if jointly requested by the parties, in order to resolve any disputes which may arise in the implementation of this Award.

Dated this 11th day of August, 2016 at Minneapolis, Minnesota.

s/s David M. Biggar

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David M. Biggar, Arbitrator