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AXON (2003), ARBITRATOR AXON REDUCED DISCIPLINE OF LANE COUNTY DEPUTY SHERIFF

In this case the Deputy had a chargeable traffic accident as well as a number of prior driving accidents. However, he had no prior discipline for his accidents. The Sheriff's Office suspended him for two days without pay.

The Association put on evidence showing there had been 70 accidents in the last 10 years and no Deputy had been suspended without pay.

Arbitrator Axon relied on the 10-year history of no employee being suspended without pay to reduce the discipline to a written reprimand. He found that the grievant had not been issued formal discipline for any of his prior accidents.
Editorial Comment: Duh

AXON (2006), ARBITRATOR AXON SUSTAINS GRIEVANCE CHALLENGING INSUBORDINATION (Washington)

Arbitrator Gary Axon sustained the grievance filed by IAFF Local 452 challenging the demotion of a Fire Captain. The Captain was demoted for insubordination following a series of disciplinary actions in 2004. The discipline included 2 letters of reprimand and 2 suspensions. In sum, he was disciplined repeatedly for failing to maintain required certifications needed to work as a paramedic. Ultimately, he was demoted for failing to complete a required paramedic class and for failing to complete a "punishment project" assigned as a result of an earlier failure to maintain paramedic certifications.

Initially, the City described the reason for the demotion as being inattention to detail. However, after Local 452 grieved the demotion, the Fire Chief changed the reason for demotion to insubordination. Arbitrator Axon observed that generally insubordination means "the refusal by an employee to work and obey an order given by employee's superior." He cited the fundamental principle of labor relations that employees "must work now, grieve later." Arbitrator Axon added that commonly arbitrators require evidence of six tests in order to find insubordination:

1. The employee's refusal to work must be knowingly willful and deliberate (negligence and insufficient),
2. The order must be explicit and clearly given,
3. The order must be reasonable and work related,
4. The order must have been given by someone with appropriate authority,
5. The employee must be made aware of the consequences of failure to perform or follow the directive, and
6. If possible the employee must be given time to correct his alleged insubordinate behavior.

Arbitrator Axon concluded that the Captain's behavior was not willful. He noted that a July 2004 disciplinary letter set forth a specific deadline for completion and training needed to complete the punishment project and that the Captain met that deadline. The Arbitrator credited the Captain's testimony that he intended to complete the required assignments, but did not do so because of a combination of events (he was on leave for an extended period in late 2004, there were problems with the Department's e-mail delivery, and he had stress related memory problems). In sum, the evidence demonstrated a performance problem concerning Captain's attention, not willful and deliberate insubordination.

The Arbitrator also concluded that the City failed to give explicit and clear directives. Deadlines were changed and orders were less than clear.

In conclusion, the Arbitrator described the charge of insubordination as "the fatal flaw" in the City's case. He ordered that the Captain be reinstated to his position with an appropriate award of back pay, seniority and benefits as requested by Local 452.

"B"

BOEDECKER (2006), ARBITRATOR KATRINA BOEDECKER RULED TERMINATION REDUCED TO SIX MONTHS SUSPENSION—LACK OF PROGRESSIVE DISCIPLINE KEY

The State of Oregon Department of Corrections terminated Grievant, a Department of Corrections Food Service Coordinator, because of repeated incidents in which she kicked 13 or 14 inmates over a six-month period.

Two inmates testified that they were repeatedly kicked by Grievant and that some of the kicks resulted in bruising. Grievant testified that initially she thought there was nothing wrong with kicking an inmate crew member, but when she overheard inmates warning each other that she was going to kick them, she realized her behavior was inappropriate. After six months of this conduct, Grievant wrote a memo to her supervisor confessing inappropriate behavior. After self-reporting her conduct, she never kicked an inmate again. The Department of Corrections investigated her conduct and terminated her employment.

The Collective Bargaining Agreement included the usual just cause requirement for discipline and specifically required: "The principles of progressive discipline shall be used when appropriate." AFSCME Local 2376 argued that the DOC violated the progressive discipline requirement.

Arbitrator Katrina Boedecker explained that progressive discipline is based on the premise that both employers and employees benefit when an employee can be rehabilitated and retained. Trained employees are a valuable resource, making it

economically prudent to attempt rehabilitation. AFSCME argued that progressive discipline would have worked with Grievant since her evaluations showed that she was a skilled and valuable employee. Moreover, after she self-reported her conduct, she stopped any further kicking. The Arbitrator concluded that while Grievant's conduct merited discipline, the DOC had not established that the conduct was so serious to abandon the concept of progressive discipline.

AFSCME argued that the kicking was horseplay. Testimony from inmates showed that when the kicking first started, they thought it was a joke. However, when an inmate showed bruising it was no longer funny. Grievant offered to get the inmate medical attention when she realized that he was bruised. The Arbitrator concluded that the record did not establish that Grievant intentionally meant to hurt the inmates.

The Arbitrator gave substantial weight to the fact that Grievant was honest, admitted her wrong doing, and expressed remorse. Moreover, she rehabilitated herself by stopping kicking. Finally, she modeled good behavior when she "constantly told the crew members to tell the truth during the investigation."

The Arbitrator reduced the termination to a suspension. The suspension without pay would be for a period equal to the time that she behaved inappropriately, that is, six months.

Finally, the Arbitrator declared that the Department of Corrections had a well-founded interest in treating inmates with dignity. Therefore, as a condition of re-instatement, the Grievant was ordered to write a letter of apology to each of the inmates she kicked, with a copy to the Department of Corrections.

Editorial Comment: It appears that Arbitrator Katrina Boedecker's decision was heavily influenced by Grievant's self-reporting of her actions and her instructions to inmates on her crew to tell the truth during the investigation.

BRAND (2003), ARBITRATOR NORMAN BRAND SUSTAINS DISCIPLINE OF A STATE CORRECTION OFFICER

This case arose out of an issue of a series of incidents where the employer charged the grievant with sexual harassment. This included telling an employee that he wanted to take a nap with her, making physical contact with her at the work place, and discussing that if he didn't ask twice, it would not yet be sexual harassment. He was also charged with being untruthful during the internal investigation but interestingly was not terminated for doing so.

In analyzing the numerous instances of alleged misconduct, the Arbitrator found that the Department proved inappropriate conduct by the comments on the complaining party's physical looks and characteristics. While he decided that they did not rise to the level of a hostile work environment, they did violate Department policies for a respectful

work place. On the other hand, in some of the other instances, the Arbitrator did not find the complaining party credible, and found that some comments made did not violate the Department policy.

In the end, the Arbitrator decided that there was just cause to discipline the grievant based upon Department policies. Interestingly, the arbitration decision does not give any indication of the level of discipline that was imposed upon the grievant.

BROWN (2004), ARBITRATOR NANCY BROWN SUSTAINS A THIRTY-DAY SUSPENSION WITHOUT PAY OF A MARION COUNTY CORRECTIONS OFFICER

In a set of facts that might be described as "only in Marion County," an Association officer was serving in an acting in capacity Sergeant's position in the Marion County correctional facility one evening. Another Corrections Officer called in sick. The acting in capacity supervisor decided to authorize a "home visit" on the Corrections Officer to see if she was abusing sick leave. When the Corrections Officer called in sick, the frustrated acting in capacity supervisor was heard to exclaim, "She probably has a damaged uterus." The acting in capacity supervisor had had an intimate relationship with this Corrections Officer in the past.

Previously there had been an announcement that the employees who are out of sick leave, or are very low on sick leave, could expect to see home visits occur for their "own welfare."

However, as stated later in the investigation, the acting in capacity supervisor ordered the home visit with the express intent of proving that the County's home visit policy was nonsensical and did not work.

The home visit was conducted. The Corrections Officer who conducted the home visit entered the residence of the sick Corrections Officer's boy friend to verify that the Corrections Officer was indeed in bed with a migraine headache. Meanwhile, a firestorm erupted at the correctional facility. The acting in capacity supervisor was confronted by irate co-workers over his ordering the home visit. During briefing for the shift change, without using names, the acting in capacity supervisor gave an outline of what had occurred. In the ensuing debate, the identity of the Corrections Officer for whom the home visit had been conducted, became well known.

The County gave a letter of due process to the acting in capacity supervisor, charging him with violating the privacy of the sick Corrections Officer by discussing her case at shift briefing and for making an inappropriate comment concerning her damaged body part. The County imposed a thirty-day suspension without pay.

The Association grieved the severity of the discipline. It elicited testimony that while the officer was not disciplined for conducting the home visit, that that factor did influence the County's decision to impose a thirty-day suspension without pay. The

Lieutenant in charge of the correctional facility testified that he believed 15 to 30 days was justified but admitted his recommendation was grounded on the fact that the home visit should not have been conducted. The Human Resources employee who conducted the investigation had recommended a 15-day suspension without pay. However, the Jail Commander ordered that recommendation to be "removed" from the report. That occurred but the County was forced to produce the original report at the arbitration hearing.

The County argued that the home visit could be considered and also argued that based on the grievant's past disciplinary record, which included reprimands for inappropriate comments, that the 30-day suspension was appropriate.

Arbitrator Brown sustained the level of discipline based on the seriousness of the two events. She did rule that the County could only impose discipline for those charges listed in the due process letter. However, that became a hollow victory. She stated:

> "I concur with the County's argument that I, as Arbitrator, should not substitute my judgment for that of management unless I find the penalty arbitrary, discriminatory, or unreasonable under the circumstances. I do not find that management abused its discretion when they imposed a 30-day suspension as penalty for misconduct."

She found that a prior reprimand, a comment in the evaluation warning the deputy to conduct himself in a professional manner with his co-workers, and the events in this case justified the 30-day suspension without pay. Arbitrator Brown did not discuss the other recommendations of the Lieutenant or the HR investigator.

Editorial comment: *Given the County's confession that the 30-day suspension was imposed for the circumstances surrounding the home visit, it is hard to understand why the Arbitrator did not take that into account. Using Arbitrator Brown in a discipline case where a reduction of penalty is sought is something that should not occur in the future.*

BROWN (2003), ARBITRATOR NANCY BROWN REVERSES FIVE-DAY SUSPENSION WITHOUT PAY IN A CITY OF SALEM CASE

The incident that led to discipline occurred when the grievant was entering a residence in order to make a search for illegal drugs. When he was restraining the defendant in order to stop him from swallowing the evidence, the officer did not holster his gun, and it hit the defendant's head. The subsequent internal investigation commenced over the red mark on the defendant's head and injuries to his ribs. Matters got worse when the Corporal was heard complaining that the injuries should not have been reported to Department supervisors and stated that it should have remained within the Special Team. When interviewed about the incident, he was evasive.

The City disciplined the Corporal by demoting him and suspending him for five days without pay. The Union only grieved the suspension, as it appeared to be for the intentional use of force, i.e. striking the defendant with the Corporal's weapon.

The first issue that was raised, whether the demotion was for untruthfulness, and the omission of pertinent information, i.e. a code of silence, versus for excessive force, as it was the Union's argument that the way the disciplinary document was written, the suspension without pay was solely for the charge for excessive force.

The City argued that the demotion and the suspension without pay was for everything. However, the Arbitrator "split the baby," deciding that the suspension without pay was for both, the intentional use of force and a lack of truthfulness surrounding that usage.

The Union argued that the suspension should be reversed because the only witness to the event, other than the Corporal, was a Detective who testified that he did not believe the blow was intentional.

Arbitrator Brown indicated she was not using the seven tests of just cause, but narrowed them to four tests. She used these tests:

1. Did the City prove the event that the grievant was charged of committing?

2. If so, was he on notice that his conduct would result in discipline and was the rule reasonably related to what the City should expect?

3. Did the City conduct a fair and complete investigation, and

4. Was the level of discipline related to the circumstances? (To some that would seem like five tests.)

In the end, the Arbitrator found the City did not meet its burden of proof and that the medical records and photographs did not tell whether the blow was intentionally delivered or not. She found the Detective, who was backing up the grievant in the search, to be a credible witness. She also decided that the grievant did not contradict himself with regards to the use of force. Therefore, the suspension without pay was reversed.

BROWN (2003), ARBITRATOR NANCY BROWN SUSTAINS DISCIPLINE IMPOSED UPON OFF DUTY CORRECTIONS OFFICER WHO IS ARRESTED FOR DRIVING UNDER THE INFLUENCE OF INTOXICANTS

An off duty Corrections Officer was arrested for driving under the influence of intoxicants early one morning. He indicated that he had just left a bar in Salem, where he

had only had one drink. He had been with a supervisor of another department who verified that statement.

However, the Officer, who was a trained DRE, concluded otherwise. The Officer testified that the employee did not do well on the field sobriety tests and was attempting to get "a professional courtesy" by conspicuously displaying his old BPST I.D. card. The department suspended the Corrections Officer for 30 days without pay.

Arbitrator Brown found the arresting Officer to be "well trained in administering the field sobriety tests." Arbitrator Brown also faulted the Corrections Officer for not requesting to put his glasses back on when he knew he wasn't doing well on the tests and discounted his claim that his performance was because of his poor vision.

The Arbitrator also discounted the testimony of a number of co-workers who testified that when the grievant came into the jail, that he did not appear to be under the influence of intoxicants. She believed that the observations as a result of the field sobriety tests were more persuasive.

Lastly, the Arbitrator found it more likely than not that the grievant had displayed his police I.D. in an attempt to get immunity. Therefore, she sustained the grievance.

Editorial comment: The arresting Officer is to be congratulated for his professionalism and his demeanor. He convinced an Arbitrator that his conclusions were correct as opposed to the grievant, a supervisor from another department who was with the grievant just prior to his arrest, a sergeant at the Jail, and three co-workers.

"C"

CALHOUN (2003), ARBITRATOR JACK CALHOUN SUSTAINS A THREE DAY SUSPENSION WITHOUT PAY OF AN ALBANY OFFICER

The suspension came as a result of the grievant's actions in responding to a call of a minor in possession of alcohol. The Department disciplined the officer for inappropriate use of force in investigating the MIP complaint and failing to properly investigate the allegations. The employer also stated that the officer entered the citizen's house without legal authority.

The Union argued that the employer did not conduct a fair investigation, and that warrant less entry into the citizen's home was justified under State law.

The Arbitrator decided the investigation was fundamentally fair even though there were other witnesses that could have been interviewed. He pointed out that the officer was given a predisciplinary hearing and had a chance to bring forward other evidence, if it had been relevant. The Arbitrator also agreed that the entry into an individual's home did violate Oregon law and State statutes. The officer did not have reason to forcefully enter the home of the individual in question. Therefore, he sustained the discipline.

CALHOUN (2001), ARBITRATOR JACK CALHOUN SUSTAINS TERMINATION OF MULTNOMAH COUNTY EMPLOYEE FOR FALSIFYING AN EMPLOYMENT APPLICATION

The grievant in this case had first been an employee of the Department of Community Corrections. It had been discovered that she had attempted to access the State of Oregon Department of Corrections electronic records concerning her son who was an inmate at Snake River. The County ended up terminating her for such conduct. During the course of the investigation she gave multiple conflicting statements about what occurred regarding the access of charges. Later the grievant applied for and was employed by the County Health Department. When making the application she was asked to explain on the questionnaire why she left all of her previous employers. She gave no reason why she left Community Corrections.

Later, the County Health Department heard about what had occurred at Community Corrections and asked the grievant about it. She claimed she resigned because she was asked to do so.

The Arbitrator found her to be not credible, that her statements had changed over time, and sustained her termination. The union was represented by AFSCME Council 75 and the employer was represented by a Multnomah County labor relations specialist.

CAVANAUGH (2008) ARBITRATOR MICHAEL CAVANAUGH REINSTATES FIRED MARION COUNTY DEPUTY

Marion County fired a Corrections Deputy after an incident in the Marion County Work Center in which the deputy handcuffed an inmate to bunks when the inmate refused to comply with her orders to get into his bunk during the inmate count. When the grievant and another deputy left the room, another inmate pantsed the handcuffed inmate. When the inmates burst out into loud laughter, the deputies returned and released the handcuffed inmate (after grievant took his picture). Although the inmate did not complain at the time, he subsequently filed a claim against the County. The County paid him $60,000.

The Marion County Law Enforcement Association grieved the deputy's discharge. The MCLEA argued that the incident mostly horseplay between the deputies and the inmates (although the inmate's refusal to comply with inmate policy required some response from the deputies). Grievant admitted that her actions were unprofessional and that she failed to assure the inmates safety. She denied using excessive force or abusing the inmate.

Arbitrator Michael Cavanaugh sustained the MCLEA's grievance and reinstated grievant subject to a 30 day suspension without pay. He reasoned that since grievant admitted violation of *some* of the policies cited by the County, the real issue was whether termination was warranted. He found discharge was not supported by just cause. He noted the deputy's consistent, exceeds expectations work record over many years. He completely rejected the County's contention that the deputy intended to abuse the inmate

or intimidate him—the joking just got out of hand according to the arbitrator. Nonetheless, the deputy's admittedly unprofessional actions warranted a 30 day suspension.

Editorial Comment: The arbitrator's rejection of the County's attempt to paint a picture of inmate abuse and bullying was solidly supported by the testimony at the hearing. Grievant acted inappropriately, but this was horseplay. The County undermined its case by attempting to contrive an illusion of progressive discipline by first suspending grievant for an incident that happened after the handcuffing incident.

After first informing the Association and grievant that she would be returned to work as ordered by Arbitrator Cavanaugh, Marion County changed course and has decided to appeal the arbitrator's award. A hearing before the ERB was held September 17 in Salem. We will let you know when the ERB rejects the County's appeal.

"D"

DORSEY (2001), ARBITRATOR WILLIAM DORSEY SUSTAINS TERMINATION OF CORRECTION OFFICER FROM EOCI FOR EXCESSIVE FORCE AND DISHONESTY

This case resulted from a fight between a number of corrections officers and some inmates. The issue was whether or not an officer gave two facial blows to an inmate.

The union called as an expert, Howard Webb of Hitsman Training System (formerly an employee of DPSST) who claimed that the Corrections Officer had been "red zoning" and was not aware, initially, that he hit the inmate the way he was supposed to during the course of a fight.

However, the Arbitrator decided that the repudiation of the memo where the Correction Officer admitted that he hit the inmate two blows in the face destroyed all of his credibility and that excessive force was clearly present, thereby having just cause for termination. The Union was represented by Kevin Keaney, an attorney in Portland, Oregon, and the State was represented by Steven Krohn, an Assistant Attorney General.

DORSEY (2000), ARBITRATOR WILLIMA DORSEY REINSTATED GOLD HILL POLICE CHIEF

Although this case has virtually no precedential value for future decisions, it is interesting from an anecdotal standpoint. The collective bargaining agreement between the Teamsters and the City of Gold Hill listed the Police Chief as a bargaining unit member. (There are no paid officers.) It also provided for due process in discipline and grievance arbitration.

The City Council received complaints by a number of individuals against the Police Chief. The Council conducted an "investigation," concluded that the witnesses

were credible, and promptly terminated the Chief. The Council announced that the Chief should not have been in the collective bargaining agreement, and that it would not provide due process or discovery to the Chief.

After the Oregon Court of Appeals upheld an ERB order that the City had to proceed to grievance arbitration, the parties finally appeared before Arbitrator Dorsey. Arbitrator Dorsey found that the due process provisions of the contract were violated. In addition, he found that the complainants who did not testify at the arbitration, and one of whom refused to appear in spite of being served with a subpoena, were not worthy of being relied upon because of their refusal to testify and counter the Chief's testimony. Moreover he noticed that a Department of Justice investigation found that the complaining witnesses were not credible and contradicted each other in numerous respects.

Because of that, the City of Gold Hill ended up owing the Police Chief almost two years of back pay and other benefits.

DOWNING (2002), ARBITRATOR MARK DOWNING REINSTATES A TERMINATED DEPARTMENT OF CORRECTIONS OFFICE SPECIALIST

In a case that graphically illustrated the importance of a competent investigation, an employer's termination of an Office Specialist for disclosing confidential information was overturned.

Arbitrator Downing's reason for doing so was that while the charging letter which led to the employee's termination claimed that she had repeatedly used her position to provide inappropriate personal histories, which were not public records, when the summary of investigating DOC employees' report was compared with actual transcripts of the interviews, the Arbitrator found that charge after charge was not sustained when one carefully read the statements. For that reason the Arbitrator fully reinstated the employee.

Editorial Comment: The Special Investigation Unit of the Department of Corrections has, at least for the last decade tape recorded its interviews of witnesses and not transcribed them. Instead it has relied on its investigators to write a "summary" of their interviews. The head of unit claimed that was because the unit did not have adequate clerical resources to transcribe the tapes. One can only wonder at the cost of one competent clerical employee versus one incompetent investigator.

DUFFY (2005), ARBITRATOR DUFFY REINSTATES MOLALLA DETECTIVE

On December 30, 2004 the Molalla Police Department terminated the employment of Detective Ronald Lister. Lister came under investigation when concerns arose about the accuracy of statements he made in search warrant affidavits. In particular, the Department became concerned that the grievant did not accurately describe the searches used in control drug buys and falsely stated that the informant was searched before and

after the buy. In addition, there were concerns that affidavits described in controlled buys inaccurately as to the date of the buys. Four affidavits were deemed to be inaccurate. The Clackamas County District Attorney's office presented information concerning the four affidavits to a Grand Jury. Although the Grand Jury declined to issue an indictment, the Chief Deputy District Attorney informed the Molalla Police Chief that the mistake in the grievant's affidavits were not excusable or acceptable. He declared that the Clackamas County District Attorney's office had concluded that grievant could no longer appear as a witness in cases prosecuted by the office.

The Clackamas County Peace Officers Association grieved Detective Lister's termination. Arbitrator Joseph Duffy rejected the grievant's testimony that he had never presented anything to a judge in a search warrant that was not accurate. He found that the four affidavits that dealt with the focus of the case included inaccurate information. He rejected the Union's argument that the grievant had nothing to gain by intentionally falsifying the search warrant affidavits, as the grievant might want to increase his felony arrest numbers. However, the Arbitrator concluded that the most likely explanation for the inaccuracies were lack of concern for the details required in a drug warrant.

Nonetheless, Arbitrator Duffy found that the inaccuracies in the affidavits did not support termination. He observed that three of the four affidavits were written years before the grievant became a detective. When the grievant wrote the three affidavits, he had received no training and had no experience as a detective.

The Arbitrator emphasized that this was not a case where an officer planted or manufactured evidence nor did the evidence offered wrongfully convict an individual of a crime. The Arbitrator rejected the employer's argument that reinstatement was not possible because the prosecutor had indicated that the grievant would not be used as a witness. The Arbitrator concluded that the evidence in this case did not establish that the grievant was incapable of rendering credible testimony in court and rejected the employer's argument. He disagreed with the District Attorney office's assessment and found that evidence introduced at the hearing showed that probable cause most likely could have been found in each of the cases even after the exclusion of the inaccurate information. In summary, he observed:

> "Although these actions constitute careless, substandard police work, they fall within the type of work performance issues that training and progressive discipline are designed to address."

He found that the grievant's actions at best were careless, neglectful or inattentive rather than knowing or intentional.

Discharge was not warranted, however it was cause for discipline since the grievant violated a work rule barring officers from taking any action which will impair the efficiency and reputation of the Department. Although the grievant lacked training and supervision he had been a police officer for many years and knew the importance of the

accuracy when submitting information to a court. Therefore, the termination was reduced to a 15 day suspension without pay.

"E"

EKBERG (2001), ARBITRATOR DENNIS EKBERG SETS ASIDE DISCIPLINE OF A MULTNOMAH COUNTY SHERIFF'S DEPUTY

This arbitration arose out of allegations that a Deputy made comments concerning another Deputy in the Detention Center which management decided were discourteous and resulted in a five-day suspension without pay.

The allegations were that the Deputy in question encountered another Deputy and stated to others something to the effect that you "better spray your chair seat down." It was overheard by two other Deputies, one of whom thought it was referring to the first Deputy, and after discussion with each other, decided that the attack was of a personal nature and reported it. The incident occurred in April and the internal affairs interview of the other Deputy who was alleged to have made the statement occurred in September.

The Association grieved the discipline, arguing that first, there was never an intent to communicate derogatory comments to another co-worker, but it was simply a comment about a bathroom urinal which was plugged up, and secondly, that the discipline came too late and was not investigated in a competent manner and, third, the discipline that occurred on other co-workers for making slurs based on sexual practice, swearing, religious comments, or sexual orientation, had resulted in the past in letters of reprimand.

The Arbitrator found that the comments were ambiguous, that it was hard to recreate exactly what was said and what was meant, and held it against the Sheriff's office that the investigation had occurred so late after the event. The Arbitrator disregarded an alleged prior counseling which was used to aggravate the discipline because the Deputy had no knowledge of that counseling. In addition, the Sheriff utilized training to prove that the event was inappropriate and yet the training and the rules that the Sheriff relied upon were enacted and took place after the incident in question.

The Arbitrator's conclusion was that the most egregious violation by the County was the lack of timely notice of the event and the delay in investigation of it, which he held against the County in totally throwing out the discipline that had been imposed.

The Association was represented by Hank Kaplan. Multnomah County Counsel's Office represented the County.

EKBERG (2000), ARBITRATOR DANIEL ELKBURG REVERSES DISCHARGE OF A DEPUTY FOR SMOKING MARIJUANA

This case which involved Washington County and Washington County Peace Officers' Association was issued in October 1999. The case arose because a deputy who was assigned to the transportation division in corrections had to have a commercial bus license. To have a commercial bus license, an employee must be subject to random drug testing pursuant to federal legislation. This obviously superseded the collective bargaining agreement between the parties which provided for drug testing only on a basis of reasonable suspicion.

The Department of Transportation gave a drug test and determined that the deputy had smoked marijuana and in fact, later testimony revealed that the deputy had smoked it almost daily from December of 1988 through January of 1999. The deputy was terminated for untruthfulness and for the use of drugs.

The arbitrator reversed the termination on the basis that ODOT regulations required that an employee who drug tested positively be offered rehabilitation as an option. The arbitrator noted that ODOT regulations superseded the contract, which required testing based on a reasonable suspicion, so the arbitrator ordered the employee reinstated but did not order any back pay as part of the award.

Editorial Comment: *This arbitrator is not an attorney, and interestingly, was a management labor relations employee before becoming an arbitrator. This case is somewhat unusual, as most arbitrators would have sustained the termination on the facts of this case. It is also interesting in that the arbitrator gave no explanation as to why he gave no back pay award; something that one sees fairly frequently in the private sector but not in the public sector after a lengthy suspension.*

"G"

GABA (2000), ARBITRATOR GABA RULES THAT A STATE POLICE TELECOMMUNICATOR WAS TERMINATED FOR JUST CAUSE

In an arbitration between Oregon State Police Officers Association and the State of Oregon, Department of State Police, Arbitrator Gaba ruled that a telecommunicator was properly terminated for just cause.

This case centered whether on an employee who failed to complete 12 months of probationary time as a Telecommunicator II and had requested a voluntary demotion to Telecommunicator I, as well as to completing a new 12 months of probationary time in that classification. In this particular case, the Arbitrator found that the language was imprecise and that there was no legislative history between the parties to resolve the issue. He indicated that he would construe the language against the drafter but he couldn't tell from the record who drafted the language.

Next, he examined the past practice of the parties. He found virtually none had occurred.

Therefore, the Arbitrator concluded he could not tell from the evidence in the case which position was correct. In making that finding, he concluded that the Association failed in its burden of proof.

GANGLE (2004), ARBITRATOR SANDRA GANGLE SUSTAINS A GRIEVANCE AGAINST LANE COUNTY FOR REMOVING A DEPUTY FROM A REASSIGNMENT LIST FOR TRANSFER FROM CORRECTIONS TO PATROL

Normally, issues of assignment work are permissive subjects of bargaining. However, the County had agreed in Article 15 of the contract and in a reassignment MOU to utilize a transfer list.

However, the County raised a defense to the grievance that assignment is an exclusive management right, and that the Arbitrator would have to find that the Deputy's removal from the transfer list was a disciplinary action in order to be able to rule on the grievance. In this particular case, the grievant had competed for a transfer from corrections to patrol, and was told in early September of 2003 that he was next to fill a vacancy.

However, the grievant made a decision in November to get a vasectomy. The doctor informed him he needed to be off work for two days, and he submitted a request for two days off, which was denied by his supervisor. The grievant went ahead with the surgery and informed the Department he was calling in sick because his doctor required him to take two days off to recuperate. When he returned to work, his scheduled reassignment had been withdrawn, and the Association filed a grievance.

The Arbitrator concluded that the County's assignment procedure had been negotiated between the parties and that Article 2, Section 2.2 of the Management Rights Clause requires the County to apply its rules uniformly and equitably.

The Arbitrator also found that the grievant had been placed on the transfer list and had been informed that he was going to be given the new assignment.

Because there was testimony that the Personnel Director had stated that the grievant could have been disciplined for insubordination since his time off request had been denied before he called in sick, the Arbitrator decided that taking the grievant off of the list was disciplinary in nature.

Based on the fact that the Sergeant told the grievant that he could use sick leave even though the request for emergency leave had been denied, the Arbitrator concluded the County did not have just cause to take disciplinary action against the grievant, and she

ordered that he be reinstated to his position, to transfer from corrections to patrol, and that all references to any discipline be removed from his files.

GANGLE (2000), ARBITRATOR SANDRA SMITH GANGLE DETERMINES THERE WAS JUST CAUSE FOR THE TERMINATION OF A COMMUNICATION SYSTEMS ANALYST

This was a grievance arbitration between Oregon State Police Officers Association and the State of Oregon. The State of Oregon terminated a Communications Systems Analyst who had been working for the Department since 1995. This employee provided technical support for the radio communications system for the State Police. As part of that work, the grievant had a State-owned laptop which he used in programming radios. In the spring of 1998, a detective discovered pornographic material on the laptop which had been accessed from the Internet for personal use.

At that particular time, the grievant promised in writing never to make any unauthorized use of the material or State-owned equipment again. He also promised to notify the Lieutenant in charge of him if it was ever so used again. He was issued a letter of reprimanded and warned that if it occurred again, he would be subject to more severe disciplinary action.

Approximately one year later, a co-worker observed the grievant using the computer for personal access to the Internet regarding non-work related items. The Department terminated him for doing so.

The Association's main defense was that the letter of discharge was too severe as this use of the computer for personal reasons was not as bad as the previous use. The Arbitrator rejected that defense and, moreover, found that the grievant was not credible with regard to his claim that he thought that the issue was of pornography, as opposed to unauthorized use of the computer. Therefore, the grievance was denied.

GAUNT (2003), ARBITRATOR JANET GAUNT SUSTAINS DISCIPLINE OF TWO MARION COUNTY DEPUTIES FOR "BEING ABSENT WITHOUT LEAVE"

This case was an unpleasant surprise from an Arbitrator with a respected reputation.

The saga began well over two years ago when Marion County announced that it would be interpreting a section of its contract dealing with being absent without leave and would utilize that to discipline employees who are out of paid time on the books because of their use of sick leave. At that time, the County indicated there was nothing to negotiate over as it was only enforcing a section of the contract and not implementing a new disciplinary policy. The Association took it at its word and approximately a year ago, successfully defended the first discipline imposed upon a deputy who was out of

sick leave. Part of the reason the Association was successful was much of the deputy's time had been utilized caring for a sick child and was protected by FMLA.

That deputy along with another deputy was disciplined again for being out of paid time. The Association grieved both of those disciplines in a consolidated case, arguing that the legitimate use of sick time should not be the basis for discipline.

The Arbitrator began by rejecting the County's interpretation of the contract on being absent without leave as justifying discipline. She agreed with the Association's contention that discipline had to be imposed for just cause.

Evidence was received in the case that one of the deputies was trying to work when she was so sick that she was found curled up on the floor in a fetal position and had to be taken to the hospital. Marion County supervisors contradicted themselves over how and when they would discipline employees. That was not too surprising considering that the County has never put this rule into writing. Nevertheless, the Arbitrator found that the County's policy for sick leave was generous, that the County had additional expenses when employees called in sick at the last minute, and the County was justified in imposing low levels of discipline on employees who used up all of their paid leave. She suggested that the County should put the rule in writing so that its own supervisors would understand it.

Editorial Comments: This case again illustrates the risk of litigation. Arbitrators don't have to follow other Arbitrator's decisions. Also, an Arbitrator who seems to have an excellent reputation can make a decision that is surprising. The only way to deal with this matter is to negotiate over it when the contract comes up for renewal in a year. I hope that this issue will be vigorously pursued by the Association at the time.

GREER (2005), ARBITRATOR GREER FINDS SCHOOL EMPLOYEE NOT INCAPACITATED AND ORDERS HER REINSTATEMENT

This arbitration involved the termination of a Jefferson County School District employee for insubordination and incapacitation. The contract requires just cause for termination. It also included language specifically excluding terminations due to an employee's inability to perform assigned work due to incapacitation. The grievant filed a workers comp claim. The comp claim was closed on the grounds that her disability was due to an underlying condition and not due to, or worsened by, work activity. The doctor concluded that the employee might not be able to do her regular work because of the preexisting condition. The District then tried to get her to return to work with a medical release from her doctor. She didn't do so. She was terminated for insubordination and not returning to work or providing the requested medical documentation and because she was incapacitated.

The employer abandoned the insubordination charge in its closing argument. It said that the only reason the grievant was terminated was because she was incapacitated from performing her custodial functions.

Arbitrator William Greer found that it was reasonable for the District to order the grievant to have a fitness for duty examination because she was out of work for more than six months, had exhausted her leave and had been granted unpaid leave, the District's workers comp carrier considered the grievant to be medically stationary, and the physician had recorded that she might not be able to return to work because of her medical condition.

Arbitrator Greer concluded that the doctor's concern that the grievant might have an inability to perform her assigned work due to incapacitation did not amount to proof that the grievant wasn't able to do her job. Therefore, the employer failed to carry its burden of proof. Arbitrator Greer ordered the employer to reinstate the grievant without back pay since she was on unpaid leave status when terminated.

"H"

HARRIS (2002), ARBITRATOR CATHERINE HARRIS RULES THAT MARION COUNTY IMPROPERLY DISCIPLINED AN EMPLOYEE BECAUSE OF ITS "NO FAULT" SICK LEAVE POLICY

For a number of years the Marion County Sheriff has had a perception that some employees, mainly those working inside the Correctional Facility, were abusing their sick leave by using too much sick leave. In fact, during negotiations over past contracts those employees were referred to as the "dirty dozen."

Recently, Marion County's labor relation's manager decided since the contract provided that employees who were absent without authorization could be subject to discipline, then any employee who ran out of sick leave would be subject to discipline because the employee would be absent without authorization. Marion County thought that it could implement such a policy by refusing all requests to use vacation, holiday, or comp time when an employee calls in sick and is out sick time.

Marion County's attempt to implement this policy immediately ran into trouble. A newly hired employee received a reprimand, which Marion County later retracted, after it discovered the employee had gone into the negative numbers on her sick leave balance she had to take time off almost immediately after she was hired as one of her grandparents had the gall to up and die causing her to attend the funeral. Next, her son obviously used poor judgment as he was a passenger in an automobile involved in an accident, in which the driver of the car in which her son was in was not at fault, and this caused her to take more sick time off for her son. That discipline was rescinded. However, one employee who had used blocks of sick time caring for a sick son was disciplined because he was out of sick leave.

One problem with Marion County's discipline is that Oregon Family Leave Act (OFLA) allows for protected leave on an intermittent basis for a sick child. This is different from

the Federal Family Medical Leave Act (FMLA), which only allows such time off for a serious illness.

Marion County attempted to begin utilizing FMLA forms, but obviously had not trained its supervisors in the Correctional Facility, as they had no idea that intermittent sick leave for a child was protected leave. Moreover, Marion County never bothered to have a written policy indicating what it did with tracking FMLA or OFLA time for purposes of compliance with its new policy.

Given these factors, the Arbitrator made short work of Marion County's discipline and indicated that it could not withstand scrutiny. She pointed that in order for Marion County to have any sort of a policy that it could not count all protected leave against its "no fault" policy.

The Association had argued that any "no fault" disciplinary policy for being out of sick leave was a per se violation of the requirement that discipline had to be for just cause. However, the Arbitrator declined to reach that issue, since she disposed of the case on its specific facts.

Editorial Comment: The case went into the "make me a hero" category. The County's desire to curb what it believes is sick leave abuse caused it to lose all common sense. However, on the bright side, the Undersheriff lost a bet for dinner for four out of the litigation. I expect to hold him to that.

HEIN (2002), ARBITRATOR ALLEN HEIN SUSTAINS DISCIPLINE OF CLACKAMAS COUNTY NURSE

The nurse worked in the public health division of the County and was responsible for charting the results of examinations of patients. This case arose because the nurse made a mistake and did not properly chart the result of an examination of the patient. The County looked at the nurse's conduct, issued a written reprimand, and put her on a work plan. The union grieved the written reprimand, because the basis for the reprimand was for "falsifying" a record. The union argued that falsification required an intent to deceive someone, and mere negligence did not rise to that level.

The Arbitrator dismissed that contention finding that the nurse did engage in misconduct, which was at least to the level of negligence, and that making a misleading chart entry could be sufficient enough to meet the definition of false.

Editorial Comment: It is the action not the words that sometimes make the difference. Why this went to arbitration over a written reprimand, one can only wonder.

HENDERSON (2006), ARBITRATOR JOE HENDERSON UPHOLDS 1 DAY SUSPENSION OF VANCOUVER POLICE OFFICER (Washington)

The Vancouver Police Department suspended grievant for one day without pay as for violation of the Department's pursuit policy. The officer initiated a pursuit after the

driver of a parked van sped away, ignoring the officer's commands. A short pursuit ended when another officer pitted the van. After the pursuit was concluded and both officers were approaching the van on foot, the driver suddenly attempted to flee. One officer fell to the ground. The other officer, fearing that his fellow officer would be run over and killed or seriously injured shot and killed the driver.

The Department found no violations of its use of force policy, but found that both officers violated its pursuit policy. Grievant was found to have violated the policy by improperly initiating the pursuit and improperly failing to terminate the pursuit.

The Vancouver Police Officers Guild grieved the one day suspension. The Guild argued that the grievant was an excellent officer with no prior discipline. Grievant made a good faith decision to initiate the pursuit in the heat of the moment. The Guild argued that this was the first time any officer had been suspended for his first violation of the pursuit policy. The Guild offered evidence of 12 prior sustained violations that resulted in supervisory counseling or at most a written reprimand. The Guild asserted that the suspension of grievant constituted disparate treatment and was not supported by just cause.

Arbitrator Henderson denied the grievance. He concluded that this pursuit was unique and that the one day suspension was "not arbitrary, capricious or discriminatory."

Editorial comment: The arbitrator's analysis was extremely brief. While it cannot be disputed that the prior pursuits were not identical to grievant's pursuit, the prior incidents included aggravating factors including refusal to comply with a supervisor's order to discontinue the pursuit. They clearly were sufficiently serious to support the Guild's disparate treatment argument. The arbitrator's use of an "arbitrary, capricious or discriminatory" standard for discipline ignores the just cause standard included in the contract. If the Guild wanted to use such a low standard for discipline it could easily have convinced the City to adopt an arbitrary and capricious standard in the contract in lieu of just cause. John says I'm a sore loser.

"K"

KELLAR (2005), ARBITRATOR SHERMAN KELLAR REVERSES A TERMINATION OF A 31 YEAR CORRECTIONS SERGEANT, BUT ORDERS A TWO MONTH SUSPENSION WITHOUT PAY

This case arose regarding an employee who had an unblemished record up until his last two years of employment. At that time, among other things that got him in trouble, was an issue of his sexual harassment of a subordinate. The employer found that the sergeant had made a comment about bending the worker over a pool table and doing her. That the sergeant inquired of a corporal if he was having relationships with the officer. One time he asked her to turn around in a break room so he could urinate on the toilet, and in

another incident he was alleged to have engaged in misconduct with an inmate during a cell search.

The Arbitrator sustained two of the four allegations. He found that the break room was in a recreation yard building which was used by employees to go to the bathroom and smoke in, and he found nothing inappropriate about asking her to turn around so the sergeant could urinate. He also found there was an atmosphere in the penitentiary with a great deal of shop talk, which included foul language, sexual innuendos, gossip and rumors, and it happens almost on daily basis. For these reasons, while he called the grievant a "dinosaur" and recognized his conduct was unacceptable, Arbitrator Kellar found the termination to be too severe, although he included in his award a warning to the grievant that if he did a similar act in the future, he would be terminated.

Editorial Comment: Let's hear it for 31 years of employment at an out of control workplace!

KELLAR (2003), ARBITRATOR SHERMAN KELLAR SUSTAINS TERMINATION OF DESCHUTES COUNTY DEPUTY

This case arose because a newly elected Sheriff in Deschutes County attempted to change the actions of a previous regime, which included lackadaisical attitudes toward discipline, and the disappearance of FTO files.

Specifically, between April and November of 2002 a Sergeant counseled the grievant on numerous occasions to abide by Department policies. In November 2002, the grievant was given a written reprimand for failure to obey a direct order, failure to supply backup, violation of dress code, and being late for briefing.

In February the grievant received a written reprimand and was suspended for a day without pay for again failing to provide backup to the Sergeant who was dispatched to a domestic dispute.

The incident that led to termination was when the grievant left his patrol area in LaPine and went home to Bend to have dinner, did not warn the other Deputy in LaPine that there would be no backup, and later claimed that he had told dispatch that he was in Bend and not LaPine.

The Arbitrator started his analysis by stating that he has maintained for years that police officers should be held to higher standard of performance than are required in other working environments. The Arbitrator noted that when the new Sheriff was elected, he gave everyone a rule: "If you lie, cheat, or steal then you're fired. It's automatic," and then he continued with rule number 1: "Nothing compromises Officer safety."

The Arbitrator also found that the grievant resisted strongly the change in the culture of the Sheriff's office and working towards a team system of backing up others.

The Arbitrator noted there were back to back cases where the grievant failed to provide backup, and that the ink was "barely dry" on the first discipline when the grievant again failed to provide backup.

The Arbitrator found that the grievant was dishonest and his explanation that he had told dispatch that he was in the Bend area, and the Association's attempt to cast the exchanges and misunderstanding as disingenuous arguments. Therefore, the Arbitrator concluded the County had established by clear and convincing evidence that it had just cause to discharge the grievance and the discharge was sustained.

KELLAR (2002), ARBITRATOR SHERMAN KELLAR REDUCES A TERMINATION TO A 33 WORKING DAY SUSPENSION WITHOUT PAY

The case arose out of two grievances filed by the Milwaukie Police Employees' Association for the suspension and then subsequent discharge of a police officer.

The officer involved in this case was a seven-year veteran with the City and for two years in the later part of the 1990s he was DARE officer working with youth groups. He had received a significant number of accommodations and his evaluations were exceeds expectations in many categories.

The problems apparently commenced in January of 2000 when the DARE program suffered a lack of funding and the officer was reassigned to regular patrol duties. In June of 2000, he received a letter of reprimand relating to damaged City property, received counseling in July 2000, for comments made on duty and in uniform regarding management policies and procedures in the police department. Initially in January of 2001, he was ordered suspended without pay for 12 working days and placed on the work improvement plan. That was modified by the City Manager in March for a reduced suspension, but with the work plan. The grievance over that suspension was withdrawn.

In April of 2001, the officer missed a court date and received a verbal warning. He subsequently missed court dates in May and July. For doing so the City suspended him 40 hours without pay. He was also transferred to a 5-day workweek schedule that mirrored that of his supervisor. That suspension was one of the two grievances that proceeded to arbitration.

In December, the officer twice missed court dates. At that time the City terminated him.

The Association's defense was that the officer had been ill and requested FMLA accommodation and that his sickness was why he missed the December court dates.

Arbitrator Kellar found that the Department's general orders made it clear that court cannot be missed except for the most extenuating circumstances, and there was no defense for the officer missing court appearances when he was on a work plan in May and July of 2002. The Arbitrator stated that he believed that the City was more than

generous for what occurred during the work plan, as apparently one of the actions of insubordination was spitting on a picture of the Chief. The Arbitrator commented in a footnote that in many jurisdictions that alone would have justified termination. The Arbitrator strongly criticized the officer for missing court dates and sustained the suspension without pay.

Turning to the December court dates, which led to his termination, the Arbitrator found there was no excuse for missing the December 5th court date. In addition, the Arbitrator noted that the Association's attempt to do what he called "interject" a defense of FMLA leave was questionable because it didn't surface until after the first IA interviews. However, the Arbitrator found that with regards to December 12th, the officer had been calling in sick due to flu and sinus complications from the 5th through the 12th. He found that the City's supervisors knew that the officer was sick for at least a week by the 11th and was on heavy medication. The Arbitrator found it to be troubling that when the officer called in the 12th that the Sergeants who were aware of his court appearance did not discuss that with him. The Arbitrator concluded that the failure was a mitigating circumstance especially when the supervisors knew the officer was very ill and heavily medicated at the time. Therefore, he set aside the termination because of that last event, reduced it to a suspension without pay and recommended that the grievant be left on the work plan for six months following the date of his reinstatement.

KELLAR, (2001), ARBITRATOR SHERMAN KELLAR DENIES IN A GRIEVANCE BY AOCE THAT AN EMPLOYEE WAS NOT PROPERLY COMPENSATED FOR TIME THE EMPLOYEE WAS NOT PERMITTED TO WORK HER BID SHIFT

An AOCE represented nurse had significant health problems and was restricted by virtue of an order from her doctor from climbing stairs, which limited her availability to work in the penitentiary and to respond to "man down calls" in various parts of the penitentiary, which could only be reached by climbing stairs.

Management concluded that it had too many nurses on restricted duty and reassigned those nurses involuntarily to different shifts, based on their seniority and their physical restrictions.

Based on her bid shift, the grievant had been working day shift and was offered a chance to work swing shift. The grievant was sent home and the employer eventually brought her back to work. She ended up missing 224 hours of work. Because of her health conditions, the grievant had been missing work in the past. The employer agreed to reimburse her for 66% of her time that she missed, based on her overall attendance record for 1999.

The Association grieved the reinstatement, arguing the grievant was entitled to additional compensation beside that which she had already been paid. At the arbitration, the employer first argued that the grievant shouldn't have been compensated at all

because she should have worked now on a different shift and grieved later. The employer secondly argued that utilizing her attendance record for the last year was appropriate.

Testimony during the hearing established that the grievant was offered two other shifts and refused to accept them. The arbitrator noted there was lots of case law to support the proposition of work now, grieve later. He decided that the critical issue was whether the employer's determination of back pay was reasonable or was it arbitrary and capricious, and he cited other decisions to support the utilization of a past record of attendance in making a back pay award. Lastly, the arbitrator expressed a concern about taking the word of the grievant as to how much she would have been sick during this time, as it was not subject to objective verification.

The arbitrator declared the Association was the loser and yet ordered the employer to pay for 40% of the arbitration decision.

Editorial comment: A critical factor during this case was that the grievant totally lost her temper during a meeting with management over her shift assignment. This loss of temper hurt her as to credibility for the amount of time that she would have been sick. However, the employer's fault in causing the grievance to even take place was the reason the employer got stuck with part of the award.

KELLAR (2000) AOCE PREVAILS IN OVERTURNING DISCIPLINARY TRANSFERS

Arbitrator Sherman Kellar reversed the disciplinary transfers of two AOCE bargaining unit members. In each case, the employer declined to issue formal discipline against two correction officers but "exercising its management right to assign" reassigned the employees because the employer was critical of their performance at work. Arbitrator Kellar declared if the employer was going to use the assignment as a pretext for discipline, then the employer would have to provide just cause rights to the employees, and because none were so provided, he reversed the disciplinary assignments and ordered the employer to allow the employees to return to their previous assignments.

In another section of this case, Arbitrator Kellar also declared that one of the employees who was reassigned had individually established a past practice of not only bidding the employee's shift or days off, but bidding whether or not the employee gets to work on holidays. The arbitrator ordered the State of Oregon to honor that past practice.

Editorial Comment: *This decision was somewhat surprising in that there is a split of arbitrable authority as to whether a transfer under these circumstances would constitute discipline or not. Even more surprising, was the arbitrator's decision allowing one correction officer to establish a past practice where the bid could include whether or not the correction officer worked on holidays as well as just bidding the shift and days off, which is all that the contract required. The State was as upset with this award as*

AOCE was with the interest arbitration award. Again, this is another illustration of what happens when litigation occurs.

KELLAR (2000), ARBITRATOR SHERMAN KELLAR REVERSES THE TERMINATION OF A KLAMATH COUNTY DEPUTY SHERIFF BUT IMPOSES A 60-WORKING DAY SUSPENSION WITHOUT PAY

This case started when a work plan was negotiated between the Association and the Sheriff's Office regarding the grievant. An evaluation subsequent to that in February of 1998 gave the grievant "C's" and an occasional "A" in his performance.

The employer ultimately discharged the grievant, whom it believed was insubordinate, for issues surrounding a damaged holster and claimed that he clearly violated his work plan by not having his work up to Department standards.

The Arbitrator noted this issue started initially on whether this work plan was in essence a last chance agreement. He found that it was not. He found no severe discipline or imminent discharge of the grievant before the plan was implemented, which is normally required in last chance agreements. Therefore, he found that the County breached its obligation to the grievant when it terminated him. In addition, the Arbitrator found that the issue of insubordination for the holster was overblown as the grievant continued to wear the holster for up to six months during the dispute. The Arbitrator concluded that the grievant's performance surrounding the damaged holster and his wearing a nylon one in violation of Department policy was egregious enough that a 60-day suspension was in order to ensure that the grievant knew that he had to follow Department policies in the future.

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LANG (2001), ARBITRATOR WILLIAM LANG REDUCES A 20 HOUR SUSPENSION WITHOUT PAY TO A VERBAL WARNING

This was an arbitration between the Polk County Deputy Sheriff's Association and Polk County. The problems began when a Corrections Deputy turned in an internal incident report which contained misspellings. The Sergeant asked a Deputy to re-do his report. The Deputy became furious and began swearing, telling the Sergeant he wasn't a "fucking English major." The Deputy apologized to the Sergeant and then got mad again. The Sergeant then started an internal investigation into the conduct, and the Deputy admitted that he had gotten angry but didn't think things should have gone as far as they had. At that point, the Sergeant recommended a suspension without pay for 20 hours, but offered to suspend imposing the discipline if the Deputy were to abide by the Department's policies for two years. On the advice of counsel, the Deputy refused to do so.

In looking at the Department, the Arbitrator found that the Department policy had a two-step discipline process. The first step was for what was called "first step options" which were for infractions of a minor nature, and secondly, "second step" actions which were more serious. The Deputy had been charged with insubordination, failure to comply with a lawful order, and unwillingness to perform an assigned task. The Arbitrator found, based on the record, that the Deputy did not want to correct the report, and therefore, he was insubordinate in not making changes to the report.

The Arbitrator next found that the charge of unwillingness to perform duties was redundant to the insubordination, and so he wouldn't utilize it to enhance any punishment.

The next issue was a charge of use of profanity. The Arbitrator found that the way this rule was written, was to avoid the use of profanity and insulting and contemptuous behavior, that both need to be found in order to have a violation of the rule. The Arbitrator found that the profanity was not used to belittle or attack the specific Sergeant in question, so the Arbitrator found there was not a violation of the rule.

The Association also charged that the Sergeant who conducted the investigation was a witness and participant to the incident and therefore, should not have conducted the internal investigation. The Arbitrator agreed with this and found that the Sergeant who was part of the interaction with this Deputy should not have conducted the internal affairs investigation. The Arbitrator concluded that the flawed investigation "results in punishment that was too severe under the circumstances." Given all of the above, the Arbitrator reduced the two-day suspension to a verbal reprimand.

Editorial comment: Many Arbitrators would not criticize an investigation in and of itself based on the wrong person doing it and would simply look at the results. For the charge of insubordination to be reduced to a verbal reprimand, in essence reflects the Arbitrators underlying belief that this was a small incidence that got blown up to be much more than was needed. However, many other Arbitrators might have reached a different result.

LEVAK (2006), OREGON TROOPER WAS DISCHARGED FOR JUST CAUSE

Grievant, a Trooper with 17 years' experience, had a long disciplinary history, including alcohol related incidents both on and off duty. Some of the incidents involved conflicts with his neighbors. His Association negotiated reduced penalties more than once. Grievant entered substance abuse programs more than once.

Grievant was fired after a confrontation with his neighbors. According to his neighbors, grievant angrily cursed them and flipped them off. City police called to the scene interviewed the neighbors and grievant's family members. All confirmed that grievant had cursed at his neighbors and repeatedly gestured at them. Grievant denied any such actions: "Well it never happened."

The Oregon Department of State Police fired grievant for off duty misconduct and untruthfulness.

The arbitrator concluded that grievant provoked and created the confrontation with his neighbors. The arbitrator found that grievant's denial of the use of profanity and obscene gestures in the confrontation was not credible. He instead accepted the description of the incident as given by the neighbors and the responding officers. He found the officers' account of grievant's responses to their questions established that grievant "clearly intended" to deceive the officers when he denied his role in the confrontation.

The arbitrator concluded that a public safety employer clearly has the right to conclude that either harassing and threatening actions toward members of the public *or* untruthfulness will justify a lengthy suspension or summary dismissal. In this case, given that the record established both and given the grievant's disciplinary record, termination was supported by just cause. The arbitrator gave no weight to the grievant's entry into yet another treatment program given his repeated failure to follow through with such programs in the past.

Editorial Comment: Arbitrator Tom Levak's denial of this grievance is not surprising. Not only did he find that the grievant was untruthful regarding the incident that led to his termination, he expressly rejected his testimony on another issue as "disingenuous."
A law enforcement officer's career ends when he lies. Off duty misconduct, especially abusive conduct directed at the public, will support termination. Any time an officer is found to have a substance abuse problem, extended follow-up is essential to assure that the officer does not relapse, and stop following his treatment recommendations.

LEVAK (2004), ARBITRATOR THOMAS LEVAK "REINSTATES" THE NON DISCIPLINARY DISABILITY TERMINATION OF A SALEM FIREFIGHTER

In this case, the contract gave the right to employees out on long term disability not to be terminated for two years from the date of disability unless its been mutually agreed on otherwise. Here the issue was when did the time begin to run on the two-year limitation.

The City argued that the first day the employee took time off on LTD should start the clock even if the employee only utilized a few days of coverage and then a year later went out indefinitely.

However, the Arbitrator found that it was clear and unambiguous contract language that required that an employee be out on long-term disability receiving benefits for two years before the employee could be terminated. Therefore, the Arbitrator ordered the "reinstatement of the employee and all contractual protections to which he was entitled" even though the employee was still out on LTD.

LEVAK (2004), ARBITRATOR THOMAS LEVAK SUSTAINS TERMINATION OF PAROLE AND PROBATION OFFICER FOR "INAPPROPRIATE CONDUCT WITH SUBORDINATE"

The grievant had sexual relations with a co-employee, a Human Resources Assistant over a three-week period of time while on duty. FOPPO challenged the severity of the discipline. The HRAs' are temporary employees who are interested in a career in law enforcement. Parole Officers assign them work on a self regulated flex schedule.

The Arbitrator had no trouble sustaining the termination. He noted that such activity with a subordinate will per se impair the officer's ability to perform his job. There was plenty of evidence in this case, that it did so. The Arbitrator also reviewed cases on a nationwide basis where such conduct resulted in sustained termination.

Editorial Comment: Remember what the third little pig said: "work and play don't mix."

LEVAK (2004), ARBITRATOR THOMAS LEVAK REINSTATES A HILLSBORO POLICE OFFICER WHO IS TERMINATED FOR FALSIFYING HIS EMPLOYMENT APPLICATION

Ultimately, the City discharged the grievant for allegedly failing to disclose in his background interviews that he had committed two acts of domestic violence against his wife, and had been arrested or detained by the military police for that conduct.

This came to light when the ex-wife, who was involved in a custody dispute, faxed documents to the department showing allegations of spousal abuse while he was in the Marines. During one interview, the ex-wife indicated that he had been detained twice by military police and placed in a holding cell due to domestic violence. She also provided the department with documents relating to the custody dispute where the grievant had claimed that the incident had not involved physical violence.

The subsequent investigation included a statement from a Sergeant in the Marines who claimed that the grievant had been arrested for domestic violence, and the claim that he had never been arrested was a "technicality" because only a commanding officer had the authority to make an arrest.

During the IA interview, the grievant indicated that he thought during his background interview that questions about contact with police was about traffic matters, and he didn't believe that contact with military police was really police contact.

Also, during the course of the grievance procedure, the attorney for the City interviewed the ex-wife who then told him she had exaggerated the marital incidences because of her ongoing custody dispute. However, the Chief ignored all of the above and decided he could terminate the grievant solely because of his answers during the

background interview as the grievant hadn't brought up the MP's contacting him because he didn't feel it was relevant. The Chief decided that failure constituted a conscious decision to conceal the information.

However, the Arbitrator concluded, based upon witnesses called by the Association, that the grievant had never been arrested or booked by the military police. Testimony revealed that the MP's taking a Marine out of the residence to transport him was a cooling off tactic and such action did not constitute an arrest. They also indicated that handcuffing a person did not constitute an arrest.

The Arbitrator concluded that the City failed to provide clear and convincing evidence that the grievant was discharged for just cause. The Arbitrator also concluded that prior allegations of dishonesty against the grievant that were not sustained were really what the department was considering when it decided to discharge the grievant. The Arbitrator "finds that the department and the City committed a very serious due process violation by basing its decision to terminate the grievant, in a large part, upon matters rendered stale and finally foreclosed from further consideration by the City's own bargains with the Association." The Arbitrator decided the failure of the City to even consider the fact that the grievant had considered the contacts with the MP's were not relevant showed that the City was out to get the grievant. The grievant was reinstated with full back and benefits.

LEVAK (2002), ARBITRATOR THOMAS LEVAK OVERTURNS A SUSPENSION WITHOUT PAY OF A WASHINGTON COUNTY CORRECTION OFFICER

This case arose because a person, who was taken into custody after he was found guilty in a trial, attempted to commit suicide with small knife that was attached to his key ring.

After the Sheriff's Department reviewed the incident, it suspended without pay the deputy who conducted a pat down search of the individual after she took him into custody. The department ordered a three-day suspension without pay, but actually only imposed one of those days.

The Sheriff's policy "on its face" would have required the deputy to conduct a detailed "rub search" after she took the defendant into custody. However, the facts in the case showed that the corrections deputies had not been trained to do so for out-of-custody persons who were taken into custody in the courthouse. The Arbitrator found that the great weight of the evidence proved that such persons, when taken into custody, had been able to retain personal items, because deputies did not want to be accused of misappropriating the items. The items were not taken until the intake area of the jail. Corrections deputies had not been taught to exam every key in a key ring. In this key ring was a small knife, which the defendant used to cut himself. Numerous officers testified that the most they would do to inspect key rings was to look for handcuff keys and would leave keys on a person unless they found a large weapon.

In addition, the Arbitrator found "creditable persuasive" evidence established that both road deputies and correction deputies have occasionally failed to find items during searches including small knives, and other such items, and that no deputy had ever been disciplined in the past for failing to find an item during a search.

In this particular case, the supervisor testified that he would have merely imposed a reprimand but the fact that an injury occurred as a result of the negligence, he "stepped it up a notch" and that justified the suspension.

In overturning the decision, the Arbitrator ruled that the employer had failed to provide the grievant with notice that what she did violated policy.

> In turning to the investigation the employer undertook, the Arbitrator stated:
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> "Most arbitrators maintain that an employer must conduct a careful impartial, disinterested, objective, and unbiased investigation, and while arbitrators disagree somewhat regarding the specific requirements of fair investigation, and regarding the extent that there were defects in the investigation should effect the outcomes of the case. Normally, most arbitrators will either set aside or reduce imposed discipline when it becomes clear that a fair investigation was not conducted. …the person assigned to serve as complainant, investigator, and adjudicator, was a witness to the critical events. All things considered, it is virtually impossible to find the grievant's case was fairly investigated. …added to the mix is the fact that the investigation was proceeded by de facto directive from (another) that discipline should be imposed and also proceeded by discussion with other superior officers, discussions that mostly certainly adversely affected any impartiality and objectivity …"

Editorial Comment: It appears from the last few years' worth of disciplines, some of which have been highly controversial, the Washington County Sheriff's Office just doesn't get it. Policies are no substitute for actual practices and cannot be used to sustain discipline when the common practice in an employer's operation differs from the policy. Policy and practice differences result in disasters. Discipline will not be sustained, and in civil rights litigation, it is doubtful that the department can be successfully defended.

LEHLEITNER (2002), ARBITRATOR LEHLEITNER REDUCES DISCIPLINE IMPOSED ON THREE CORRECTION OFFICERS

The relevant facts in an arbitration between AFSCME and the State of Oregon, Department of Corrections were that an inmate was being escorted by three officers to be moved from one housing area to another because the inmate had been disruptive. The officers indicated that the inmate began to tense up his muscles when saying "this was

bullshit," and the officers believed they had a threat from the inmate to assault them, so they took the inmate to the wall and took him down to the ground. The department terminated the officer who handled the incident and severely disciplined the other two on the grounds that the officers' actions were due solely to verbal comments of the inmate, which did not justify use of force escalation. However, the Arbitrator concluded that the evidence fell short of "clearly and convincingly" showing that the officers' action in taking down the inmate was solely in response to the inmate's verbal misconduct.

The Arbitrator indicated that he believed that the action of aggressively taking the inmate to the wall and then with only a momentary pause taking him down to the floor, face down was not excessive. He accepted testimony of other witnesses that even if the inmate had tensed his arms, the proper response would have been solely to take him against the wall and attempt to gain control of the situation, and only if he continued to resist would taking him to the floor be appropriate. However, the Arbitrator noted that one has to make split second decisions on the use of force and noted the officer knew that the movement was being video taped and believed that this showed that the officer had not acted out in anger. Therefore, the Arbitrator concluded that the take down to the floor did not constitute excessive force.

The final aspect of the incident was the fact that when the inmate was taken to the floor the officer pulled the inmate's hair back telling him to be quiet and reminding him to obey staff orders. The Arbitrator agreed that hair holds are appropriate for pain compliance holds, but pointed out that it was not being used for that situation, so the hair hold was deemed to be excessive force.

The Arbitrator did not sustain an allegation of untruthfulness because the officer did not mention the hair hold. The Arbitrator found that employees did the best they could in writing reports and should not be expected to conclude whether or not their conduct was excessive. He indicated that was a function of management.

In the end, the Arbitrator reinstated the officer who performed the take down and found that a one month, one step reduction in pay was all that could be justified for the excessive force of pulling back the inmate's hair. The Arbitrator lowered the discipline of another officer for not writing an accurate report, but did find it troubling that the officer neglected to mention the hair hold. Therefore, he sustained a written reprimand to him. All charges were dismissed for the camera operator.

Editorial Comment: The Arbitrator's acknowledgment that use of force decisions have to be made in a split second is a useful statement that can be utilized in other use of force cases.

LEVAK (2006), OREGON TROOPER WAS DISCHARGED FOR JUST CAUSE

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with his neighbors. His Association negotiated reduced penalties more than once. Grievant entered substance abuse programs more than once.

Grievant was fired after a confrontation with his neighbors. According to his neighbors, grievant angrily cursed them and flipped them off. City police called to the scene interviewed the neighbors and grievant's family members. All confirmed that grievant had cursed at his neighbors and repeatedly gestured at them. Grievant denied any such actions: "Well it never happened."

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Editorial Comment: Remember what the third little pig said: "work and play don't mix."

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MILLER (2004), ARBITRATOR RONALD MILLER REINSTATES A TERMINATED POLICE SERGEANT BUT FINDS THAT A DISCIPLINARY SUSPENSION WITHOUT PAY IS IN ORDER BETWEEN THE TIME OF THE SERGEANT'S DISCHARGE AND THE SERGEANT'S REINSTATEMENT

This was an arbitration between La Grande Police Association and the City of La Grande. The grievant was hired as a police officer in 1987 and had been serving as a sergeant when he was terminated on May 20, 2003 for "gross misconduct." (The arbitration decision mandated reinstatement by January 26, 2004.)

The case occurred when the Sergeant was engaged in a foot chase of an intoxicated and shoeless individual. That person was arrested by another officer who handcuffed him and was holding him up. The officer testified he didn't release his hands-on control of the suspect until the Sergeant physically took the subject to the ground.

The Sergeant's testimony contradicted that officer, and he claimed that the Officer let the subject go and he took him to the ground to re-establish physical control, and to prevent the subject from fleeing.

However, others who showed up testified that both the Sergeant and the officer were initially holding the subject up against the railing. Thus the Arbitrator found that there was credible evidence that the officer maintained physical control of the subject until he was taken to the ground by the Sergeant. Additional testimony was that when the Sergeant grabbed the subject, he shook him and said, "don't run from me." There was an allegation that the Sergeant also struck the subject in the head, but the Arbitrator found conflicting witness statements on this and did not find the proof of instance was sustained.

The next issue was the use of capstun on the suspect. The Sergeant claimed that the suspect was attempting to kick him and he capstunned him. However, other officers' testimony contradicted that, and the Arbitrator found that the subject was under the officer's physical control and did not attempt to kick the Sergeant.

Needless to say, the City claimed that its termination of the Sergeant was justified because he engaged in excessive force. Even though the Arbitrator found the Sergeant had used excessive force by grabbing the suspect's head and shaking it two or three times, he concluded that because of the other allegations of excessive force were not proven, the discharge could not be sustained. Therefore, the Sergeant was reinstated but without back pay. However, the reinstatement did not have to be effective until January 26, 2004.

Editorial comment: It will be interesting whether the City chooses to reinstate the Sergeant citing ORS 243.706, which provides that an arbitrator cannot reduce discipline for egregious use of physical force. Given court rulings today, the chances of success of that challenge is not good.

MILLER (2004), ARBITRATOR RONALD MILLER REINSTATES A TERMINATED POLICE SERGEANT BUT FINDS THAT A DISCIPLINARY SUSPENSION WITHOUT PAY IS IN ORDER BETWEEN THE TIME OF THE SERGEANT'S DISCHARGE AND THE SERGEANT'S REINSTATEMENT

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NELSON'S (2007) LUELLA DECISION REGARDING DISHCARGE VIOLATED COMMON STANDARDS IN HIS PROFESSION
(LIES, PRISON, AND NEW CAREER OPPORTUNITIES)

An Oregon mental health specialist was fired from his position at an all-female facility when a love letter and love poem were found in his office along with scented lotions, CDs (quiet music) and incense. The lights in the office were partially covered with blue file folders. The grievant explained that he did not report the inmate's love letter (or her expressions of love made during counseling sessions) because his supervisor worked at another facility and was difficult to contact. He explained that the scented lotions were a

"comforting agent" for the inmates (later he explained that the scented lotions were for his own personal use as he practiced aromatherapy). The author of the love letter and another inmate described inappropriate, sexual conversations with grievant.

The State offered evidence concerning 53 other employees investigated for "offender-employee relationships." 4 were fired, one was suspended with pay pending pre-dismissal process, one had been offered resignation in lieu of termination (apparently pending at the time of this arbitration), and 17 resigned during the investigation. For these cases, the charges ranged from romantic or sexual relationships to personal relationships to granting favors. 30 other employees received lesser discipline (reduced pay, written reprimands or counseling).

The arbitrator found that the State offered clear and convincing evidence that the grievant's discharge was supported by just cause. Grievant's failure to report the inmate's written and oral statements of affection to anyone was the most serious offense. Contrary to grievant's assertion that his supervisor was difficult to reach, communication was routinely accomplished through e-mail. Voice mail was also mentioned as an obvious, readily available method of communication. The arbitrator found that failure to report this inmate's conduct "violated common standards in his profession." She noted that compliance with these standards in correctional institutions where inmates have few emotional outlets and staff exercise substantial control. Finally, and significantly, the arbitrator found that the grievant was "less than forthright or outright deceptive" during his interviews.

***Editorial Comment**: Arbitrator Luella Nelson's opinion discusses the evidence in detail and analyzes the grievant's attempts to minimize or explain that evidence. Arbitrator Nelson recognized the standards of grievant's profession, the security needs of the prison, and the need for the State's limited resources to be used in the most effective manner possible. Bottom line: Failing to report an inmate's repeated, improper conduct and then making untruthful statements flush a 30 year career down the drain.*

"P"

PERNAL (2003), ARBITRATOR PERNAL, JR., SUSTAINS A WRITTEN REPRIMAND PROVIDING THAT THE CITY OF PORTLAND MODIFY THE CONTENTS OF THE REPRIMAND

This case also arose out of the response of a Police Officer to an injury accident with possible fighting. On the way to the accident the Officer entered an intersection against a traffic light with her siren and lights on, but was involved in an accident with another vehicle in the middle of the intersection.

The Officer's prior record was that she had been an Officer for two years, was still on probation at the time of the accident, and had a command counseling for a preventable accident when she hit a support pole in a sally port. However, by the time of

the arbitration, the grievant had successfully completed probation. Although all witnesses agreed that it was a close case, the finding of some of the panel was that the Officer was at fault to some degree.

The Arbitrator concluded that while the Officer was not negligent under the employer's standards, the collision was preventable and therefore, in violation of policy. The Arbitrator held that the letter of reprimand seemed to state that the grievant's action was negligent, which he found not to be the case. Therefore, the Arbitrator ruled that the employer had to modify its letter of reprimand to state that the grievant was not negligent, but the accident was preventable.

Editorial comment: This was a California Arbitrator. Maybe this is how they do business in California, but this writer has never seen an Arbitrator order that the language in a written reprimand be modified in order for discipline to be sustained. Usually in the language in a disciplinary document rises or falls on its own merits.

PESONEN (2005), ARBITRATOR DAVID PESONEN SUSTAINS THE TERMINATION OF A CORRECTIONAL EMPLOYEE FOR ABUSE OF SICK LEAVE

A Correctional Officer applied to use sick leave to take his wife to a medical appointment. It was later found that he had participated in a multiple day poker tournament at a casino.

The officer first asserted that he was going to drive his wife to a doctor's appointment and at the last minute a neighbor offered to drive his wife, so then he went to the casino. However, when first confronted with this information by the employer, he became belligerent and claimed harassment and threatened to sue them.

In addition, the office manager of the clinic where the wife was going had a record that the wife had failed to keep the appointment at the clinic and that when the officer went to pick up her records, he threatened them because he did not believe that her failure to show up for the appointment should be reflected on the clinic's records.

In this case, the Arbitrator pointed out that the union had the ability to call witnesses to try to bolster the officer's statement, including his wife and the neighbor who allegedly drove the wife at last minute to the doctor's appointment. The Arbitrator found that the Department did not have to disprove every issue of the officer's story, but simply to find just cause for dismissal.

The Arbitrator further found that a later admission of fault by the officer and an apology was insufficient, because the officer did not come forward initially except to deny material facts, attempt to suppress evidence and to threaten the employer.

As to past cases of discipline sick leave abuse, the Arbitrator found that they were not comparable, because there was no proof that there was an attempt to deceive the employer with regards to what occurred. Therefore, he sustained the termination.

Editorial Comment: Lying and belligerence will not help matters when one is faced with an issue of bad performance.

"R"

RUNKEL (2006), ARBITRATOR FINDS JUST CAUSE FOR ONE WEEK'S SUSPENSION OF ASHLAND OFFICER

Grievant is an Ashland Police Officer and FTO. Grievant was suspended for one week when the City determined that he had: (1) slugged a recruit in the chest while in public view while in training, (2) removed patrol vehicle keys and threw them into a field, forcing the recruit to retrieve them, and (3) using his lights and siren in a patrol vehicle to stop an officer for no legal reason while she was off duty. The Ashland Police Association grieved the suspension, arguing that it was not supported by just cause. The Association argued that the discipline was unduly harsh because it had taken a no-confidence vote in the Police Chief and the Grievant had voted in support of the no-confidence vote. However, the Arbitrator found that the Chief was unaware of how the Grievant voted. The Arbitrator also rejected the Association's argument that a Chief's unprecedented revision of the investigative report tainted the investigation and discipline. The Arbitrator rejected the Association's arguments concerning each of the three offenses.

One night while the Grievant was training a recruit, the recruit used both hands to put her notebook away behind her back. Grievant was concerned that this would put her in an unsafe position. He ordered her to take out her notebook and put it away. When she again placed both hands behind her back, the Grievant pushed her in the chest using the flat of his hand, throwing her off balance. He repeated this training effort. The Arbitrator found that this incident which occurred in the parking lot of a Block Buster Video store in public view, was unprofessional conduct. He stated that although the Grievant's actions could be a legitimate training tool, it was improper to do this in public view.

The second incident occurred when Grievant and an FTO were having a heated discussion of highly personal matters. Grievant instructed the recruit to stop the car, pulled out the car keys and threw them into a field. He ordered the recruit to go find them. The Police Association argued that Grievant was concerned that the recruit was "tunneling" her thoughts and that throwing the keys was his way of breaking her concentration. The Arbitrator found that Grievant was "in a heightened emotional state", the recruit had a history of tunneling, and that the Grievant threw the keys to stop the tunneling. However, because there was no indication that the Grievant had attempted any other method of stopping the recruit's tunneling before resorting to the extreme act of key

throwing, he was acting out of emotion, perhaps anger. The Arbitrator found that this unnecessarily put the recruit in a demeaning situation. The Arbitrator rejected the Association's argument that the recruit did not complain to anyone about this incident and concluded that the lack of a complaint had not reduced the seriousness of the incident. The Arbitrator declared "the appropriateness of one officer's conduct, is not measured by whether another officer complains." The recruit was on probation and having problems with her training. The Arbitrator declared that the recruit had no reason to invite trouble by making a complaint about the conduct of her FTO.

Finally, the Arbitrator found that when the Grievant used his lights and siren to stop the recruit while she was off duty driving her private vehicle for the purpose of "checking how she was doing," this was not a lawful stop. He rejected the Association's argument that the City had no policy on this conduct, reasoning that no policy was needed since the conduct was not lawful. The Arbitrator rejected the argument that other officers had done the same thing and that it had even happened to the Grievant. He concluded that the fact that other officers had engaged in similar conduct, does not make the conduct proper and did not change the seriousness of the conduct.

Finally, the Arbitrator rejected the Association's arguments that the one-week suspension was excessive. Grievant had a record that included a one-day suspension imposed as a result of a discussion in which he criticized a supervisor's conduct and poked his supervisor in the chest during that discussion.

Editorial Comment: Arbitrator Ross Runkel's award reflects that where an officer has a record of suspensions for similar conduct, engages in multiple incidents of misconduct, and is a position of being an FTO during two of those incidents, it will be difficult to successfully grieve imposition of discipline.

RUNKEL (2002), ARBITRATOR RUNKEL SUSTAINS THE TERMINATION OF MILWAUKIE POLICE OFFICER

This case began with an Internal Affairs investigation as a result of the nonappearance of an officer who had been subpoenaed to appear at trial.

In this department case, officers personally received copies of subpoenas, plus the department used a computerized system where officers could access their calendars and determine if they had to appear in court. Right before the missed court appearance, the grievant was unable to access his schedule, but he had been served with a copy of a subpoena. The grievant acknowledged that he intended to look to find the subpoena to see who the defendant was and when he had to testify and simply forgot to do so. The argument on his behalf was that termination was too strong a penalty.

The Arbitrator noted that the grievant had been employed since 1997. In June 1998, he was given a verbal warning for missing training. In October of 1998, he was given a verbal warning for missing a DMV hearing. In April 1999, on his performance

evaluation, he was warned about tardiness. In November of 1999, he received a written reprimand for failure to appear in Municipal Court. In April of 2000, he received a suspension without pay for one day, for failure to appear at a DMV hearing in February. In August in 2000, he was suspended without pay for 40 hours for failure to appear in Circuit Court. His October 2000 performance evaluation rated him as needs improvement from missing court dates, and he did not receive a merit increase at that time.

The grievant tried to re-litigate the appropriateness of the previous disciplines, and the Arbitrator ruled that it was not appropriate to reopen a hearing to allow prior disciplinary decisions to be re-litigated. The Arbitrator stated that the failure to proceed to arbitration on those disciplines waived the right to contest their validity at a later time.

The grievant offered for mitigation that he suffered from PTSD. The Arbitrator noted that two psychologists testified that the grievant had PTSD, which would cause him to have avoidance of stressful activities. However, the Arbitrator pointed out that the City did not know or have reason to know that he had PTSD when the grievant was discharged, as he had never brought it to the City's attention. The grievant had informed the Chief that he had stress and had been depressed. However, the Arbitrator found it relevant that no one mentioned PTSD at that time. The Arbitrator decided that the evidence did not show that the grievant was disabled as defined by the ADA, because he could still participate in major life activities. The Arbitrator concluded that even if the PTSD was the cause of missing trainings and court appearances, that would not constitute a substantial impairment of the ability to work. The Arbitrator also made much of the fact that the City made its discharge decision without knowledge that the grievant had PTSD. Reading between the lines, it was clear that the Arbitrator was not impressed with a new defense brought up after the termination decision took place.

As to the evenhandedness of discipline, the Arbitrator looked at ways various officers had received varying levels of discipline for missing court hearings. In one particular case, for Officer "C," there was a suspension of three days without pay, a reduction in pay, the removal from a special team, placed on 18 months probation, lost seniority rights, and "C" was put on a plan of assistance. The grievant argued that he should have been given a plan of assistance as well. The employer's response was that they were attempting to retain Officer "C" and the grievant did not show the need for any kind of training, or that a plan of assistance would even have helped him. There was another case of an officer who ended up going through a progressive discipline for missing court all the way to termination. The Arbitrator found that situation was similar to the grievant's.

The Arbitrator concluded that he did not believe that he had the ability to mitigate the termination. The PTSD was brought to the City's attention during the steps of the grievance process, but the Arbitrator stated that it was too late because it was a review of a termination decision. He concluded that the disorder did not seriously impair the grievant's ability to rationally perform the duties of a police officer.

Editorial Comment: It is hard to read from the award whether or not the Arbitrator felt that PTSD was made up after the fact, or was real. Other arbitrators might have ruled differently in that bringing up the appropriate diagnosis after the termination, as sufficient to give the City an opportunity to change its mind. It was clear that Arbitrator Runkel would not do so.

"S"

SCHURKE (2005), ARBITRATOR SCHURKE SUSTAINS TERMINATION OF A DPSST EMPLOYEE

In this case, a newly divorced DPSST instructor was charged with multiple counts of misconduct for misusing his position by attempting to have romantic liaisons with students going through DPSST.

The Arbitrator found that the employee had violated department policy by socializing with female students at a local watering hole, and therefore the employer had just cause to summarily dismiss the grievant. In addition, he found there had been sexual harassment by complementing a female student at the watering hole and that under a zero tolerance policy summarily dismissing the employee was also justified.

Editorial Comment: Remember what the third little pig said: work and play don't mix.

SCHURKE (2003), ARBITRATOR MARVIN SHURKE SUSTAINS WRITTEN REPRIMAND TO LANE COUNTY DEPUTY

This case arose out of what has locally been known as the "Great Christmas Caper," or Union Christmas party December 2001. The disciplined grievant was the President of the Association.

As a result of rumors circulating that the grievant and his brother had been inebriated and/or engaged in unprofessional conduct following a party, the Sheriff's office commenced an internal investigation.

The Union's contention, among others, was that the County would be interfering with Association business if they investigated allegations of off duty misconduct at a Union function.

The County issued a reprimand for the President's calling an Association member who had complained about conduct at the parties, telling him that the County had no authority to investigate the Association's party, and threatening to report him so he could be disciplined for malicious gossip if he continued with the complaint.

The Arbitrator quickly rejected those defenses noting that the labor organization and a Union official could face an unfair labor practice under both the NLRA and Oregon

statutes if one is using the power of Union office for a personal advantage. He also criticized the President for attempting to represent himself and others during the investigation into the Christmas party.

The Arbitrator indicated that specific Department policies were not necessary, but general ones were sufficient as the conduct in question certainly violated the "anybody should know" standard. The Arbitrator did find that two of charges were not sustained against the grievant, and that the written warning should be rewritten to remove those from his personnel file. The Arbitrator strongly criticized the Union for suggesting the County could not investigate allegations of misconduct, pointing out that allegations of a cover up or failure to investigate misconduct, are worse than an incident itself.

SCHURKE (2001), ARBITRATOR SCHURKE SUSTAINS A PORTLAND POLICE ASSOCIATION GRIEVANCE OVER AN EMPLOYEE SUSPENSION WITHOUT PAY FOR OVER TWO YEARS

In this case, a police officer was accused of committing the crime of theft. The officer was first administratively assigned to the Personnel Division and later suspended without pay. After that, the officer was indicted in a highly publicized case, and was acquitted in a court trial with the judge making highly critical comments of the police department.

In this arbitration, over the officer's being suspended without pay by the City during the pendency of the criminal case for over two years, Arbitrator Schurke reinstated the officer and in his decision was highly critical of a deputy police chief and the captain in charge of the personnel division. The City's defense in this case appeared to be that the officer had "consented" to the suspension without pay. Arbitrator Schurke analyzed the credibility of witnesses and found the Portland Police Captain and the Deputy Chief not to be credible. He also noted that the City's attorney all but abandoned supporting their credibility in the post-hearing brief.

The Portland Police Association was represented by David Snyder, attorney at law.

Editorial Comment = WOW!

SKRATEK (2005), ARBITRATOR SILVIA STRATEK SUSTAINS A TERMINATION OF CITY OF REEDSPORT DISPATCHER FOR MISAPPROPRIATION OF FUNDS

This case started when the dispatcher received $40 from a citizen for a dog impound fee and did not receipt the $40 in the appropriate log. The employer was later unable to find the money. The dispatcher claimed she put it in the petty cash box. However, that money could not have been accounted for. The City conducted an extensive review,

looked at sixteen different times where money went missing on the dispatcher's shift, or was not logged in appropriately. Therefore, the City terminated the dispatcher.

An initial issue was over the timeliness of the grievance with the Union claiming that it thought there was an understanding that it had a time extension to analyze the matter. The Arbitrator found that without some kind of claim of misunderstanding she would have dismissed the grievance as being untimely.

The Arbitrator also concluded there was enough circumstantial evidence that money had been missing when the grievant was working that she sustain the termination for misappropriation of money.

SKRATEK (2004), ARBITRATOR SYLVIA SKRATEK REVERSES TERMINATION OF FAIRVIEW TRAINING CENTER EMPLOYEE AND REDUCES IT TO A THREE DAY SUSPENSION

In this case an eight year employee whose job required monitoring "clients" who were a threat to themselves and each other, and required close monitoring, had turned on a television to get an update on the war of Iraq, sat on a sofa, propped up his feet and went to sleep.

Management observed this and terminated him. However, the employee went to see a nurse practitioner who removed him from work for three days due to a viral respiratory infection, and the employee testified that his going to sleep had been brought on by taking over the counter medication to treat that infection.

The Union challenged discipline as not progressive and too severe because the employer had never terminated anyone for sleeping before this event and the employer had changed its policy "to no tolerance" without providing notice to employees or the Union. The Arbitrator noted that these work rules of the employer, which indicated sleeping on duty was not permitted, does not contain the phrase even "could result in the immediate initiation of pre-dismissal proceedings." The Arbitrator also found that if the grievant had intended to fall asleep he would have chosen a place that was not so visible. The Arbitrator found the grievant's testimony credible, including the fact that his allergies made it difficult for him to sleep at night, that he certainly didn't intend to fall asleep. The Arbitrator reversed the termination and looked at the grievant's record which had no acts of misconduct, so she reduced it to a three day suspension without pay, and without any explanation that what it was based on, such as past discipline between the parties.

SKRATEK (2002), ARBITRATOR SYLVIA SKRATEK UPHOLDS A 30-DAY SUSPENSION OF A CORRECTION OFFICER FOR DISOBEYING A DIRECT ORDER

A correction officer was accused of fondling the private parts of an inmate. He was reassigned other duties during the pendency of the investigation, and was given an order to have no inmate contact. A month later, he was observed in a room speaking to an inmate. The correction officer claimed that he was not told why to have no contact, didn't know what was going on, and felt that he had a reasonable obligation to help the inmate receive a new I.D. card. However, the department suspended him without pay for 30 days for violating the direct order. The discipline was later reduced to a 1-step pay reduction for 6 months.

The issue was whether there was just cause for this level of discipline. At the arbitration, the union claimed that the underlying allegation was found to have no substance and, in essence, argued that the employer's actions, therefore, were inappropriate. The officer testified that he thought he could only have minimal contact with the inmates and not no contact whatsoever.

In sustaining the discipline, the Arbitrator noted that the correction officer did not deny that he "may have touched the inmate" in what could be considered an inappropriate way. The superintendent testified that there should be no physical contact with an inmate absent an emergency without backup, i.e., other witnesses being present. The Arbitrator also rejected the fact that the correction officer somehow didn't understand that the order was given to him not to have contact with inmates. She concluded that "common sense dictates that (the CO) should have had no private contact without first checking with a supervisor."

In looking at the severity of the punishment imposed, she adopted the judgment of many other Arbitrators that unless it can be shown that the employer acted unfairly, given the circumstances of the case, the level of discipline should not be modified. She found that the two instances combined were aggravating, and that the employer had a legitimate business interest in ensuring that important work rules on how inmates were dealt with were maintained.

Editorial Comment: Duh.

SKRATEK (2001), ARBITRATOR SYLVIA SKRATEK SUSTAINS TERMINATION OF DPSST EMPLOYEE

The grievant had been hired in 1995 as a Program Technician Fire Training Program Manager for DPSST. His job was to deliver and present fire training programs to small rural and volunteer fire departments in his area.

In 1997 he received a written reprimand for failure to follow state traffic laws and state policies when using state vehicles and for being untruthful about the incident with agency managers. In December of 1997, he had a second written reprimand for failure to follow written policy direction, and inability to perform a job without constant supervision. In the summer of 1998, he was given a performance improvement plan report to correct deficiencies, and in October of 1998, he received a one-day suspension for failure to follow direction in a work improvement plan and warned that any future violations would result in discipline up until termination. In addition, in April 1, 1999, he received a salary reduction for two months.

In November of 1999, a variety of charges were brought against the grievant including failure to attend meetings, failure to complete training, leaving doors in his office unlocked, poor quality of work, and failure to maintain a pager in working condition. The grievant was terminated. The employer argued that the grievant's conduct was intentional, that he would make wild accusations against the supervisors, blame them for all the problems, and not take any responsibility. The union's defense was that there was a misunderstanding on failure to do requested training on the other issues.

The arbitrator concluded that most of the charges were sustained. She decided that they were, by themselves, not enough to warrant termination, but based on the five-year employment history, she agreed that discharge was appropriate.

SNOW (2003), ARBITRATOR CARLTON SNOW REINSTATES TERMINATED COQUILLE POLICE OFFICER

This case arose because the employer terminated a police officer on the grounds that he could not perform the essential duties of his position when the District Attorney refused to permit him to testify in any case.

This occurred as a result of an incident the officer was involved with the wife of the District Attorney. The officer followed the vehicle driven by the wife of the District Attorney into a parking lot because she failed to yield when he turned on the lights of his patrol car. She asserted that during their conversation, he grabbed hold of her arm, and the District Attorney filed a complaint on behalf of his spouse.

In a separate internal investigation concerning that incident, there was an allegation that the grievant had made inconsistent statements during the IA and received a suspension for the incident.

When the District Attorney found out about the alleged inconsistent statements, he explained that because of them the grievant was not credible and the DA stated that he had an ethical duty to disclose that as exculpatory evidence. Therefore, he was not going to utilize the grievant in criminal cases. As a result, the grievant was terminated.

The initial issue in the case was the failure of the City to give due process to the grievant. Professor Snow concluded that due process should not be "under-valued". A notice given for the grievant's termination conflicted with the parties' Collective Bargaining Agreement, which gave a seven-day notice and a chance to respond. Professor Snow found that, particularly in a termination case, the due process was important.

The employer argued that because it gave notice after the termination, the violation should be called "de minimis" because the Association did not suffer any harm. That was rejected.

The Arbitrator rejected the Union's defense of double jeopardy because the District Attorney's action was a new incident, subsequent to the previous discipline.

However, Arbitrator Snow adopted the Union's position that the disclosure of the discipline and the details of the internal investigation to the District Attorney constituted a violation of the employer's policy on confidentiality.

In analyzing all the facts of the case, the Arbitrator also concluded the grievant was not dishonest. The grievant had given an explanation for his allegedly inconsistent statements, namely that he was extremely agitated about this event, and probably did touch the District Attorney's wife in the arm, but didn't remember doing so thereafter. The Arbitrator concluded that just because statements are not consistent, it does not automatically follow that they are dishonest. The Arbitrator required the employer to prove an intent to mislead or defraud it, did not make such a finding. He noted that the grievant made no effort to cover up any inconsistencies. He found that police management had actually misled the District Attorney as to the nature of the statements. In addition, the Arbitrator found it highly relevant that the Chief had been making statements that the grievant had been with the department for too long, and was asking other officers to come up with reasons to find misconduct on behalf of the grievant. In addition, the department used a Board of Review, and there was testimony that the Chief had been asking the Board of Review to make sure that the grievant was terminated.

Another issue was that the department's policies attempted to define just cause by utilizing only the term "cause" and watering down the normal concepts of just cause. The Arbitrator declined to decide whether this was relevant because he concluded even using a lesser standard, the employer failed to carry its burden of proof.

The Arbitrator sustained the grievance and gave the parties 60 day to attempt to fashion an appropriate remedy. They were unable to do so, and they went back to the Arbitrator for round two, which was the appropriate remedy. One issue was the Association's argument that the employer should pay to the grievant the cash value of the insurance premiums that it would have paid but for the wrongful termination. The Arbitrator rejected that argument. The Arbitrator declared that what expenses the grievant actually had incurred would be the make whole remedy.

The Association's desire to delete all reference of dishonesty from the grievant's personnel file was granted.

Lastly, the Association wanted a directive that the grievant would not be subject to discrimination or harassment upon return to work. The Arbitrator rejected that, pointing out that there are adequate laws already in place that protect the grievant.

Editorial comment: This case is one more example of how not to conduct an investigation and how not to impose discipline.

SNOW (2001), ARBITRATOR SNOW RULES THAT THE STATE OF OREGON, DEPARTMENT OF CORRECTIONS, DID NOT VIOLATE THE CONTRACT BY DISCIPLINING ONE EMPLOYEE, REMOVING ANOTHER FROM PROMOTIONAL TRIAL SERVICE, AND REASSIGNING THEM

Both of the grievants were in the Drug Investigation unit of the Department of Corrections. One of them began working in the unit in 1996 with excellent reviews. The other one was a 10-year veteran and promoted to Corrections Sergeant in 1997 and in April of 1999, moved into the Drug Investigation unit. He was on trial service there for six months before being officially promoted to the position of investigator.

The employer alleged that the Corporal in the Drug Investigation unit had used excessive force, attempted to conceal it, failed to give truthful statements, and therefore, was demoted to Correction Officer with a reduction in pay. The employer also concluded that the Sergeant witnessed the conduct and proceeded to conceal facts from his supervisor, therefore, he was also demoted to Corporal with a reduction in base pay.

The arbitrator found that the use of force against the inmate was unjustified and found that the officers' testimony at the arbitration contradicted the officers' written statements and witness statements from prior interviews. Therefore the Arbitrator sustained the discipline that was imposed.

Editorial Comment: One is amazed that termination was not imposed in these cases.

STITLER (2004), ARBITRATOR DAVID STITELER RULES THAT THE CITY OF ASHLAND HAD JUST CAUSE TO DISCIPLINE A POLICE OFFICER

This incident arose when a number of officers were arresting suspects due to a bar fight, and the grievant believed that a Sergeant created a risk for officer safety by his actions. They had a brief, heated, conversation where the grievant gestured his hands and poked the Sergeant in the chest. The next the morning, the grievant talked to the Lieutenant and apologized for his unprofessional conduct in confronting and poking the Sergeant. The department ended up initially suspending the grievant for three days without pay, later reducing it, on appeal, to one day without pay. The Arbitrator concluded that the grievant's own statements, and his apology, showed that he was

culpable and, in fact, had lost his temper and poked the Sergeant in the chest. The Arbitrator also ruled that he could not find the discipline too severe.

"T"

TORNQUIST (2001), ARBITRATOR LEROY TORNQUIST REINSTATES THE WASHINGTON COUNTY CORRECTIONS OFFICER WHO WAS TERMINATED FOR ALLOWING A CONVICTED RAPIST TO ESCAPE.

In a case that received quite a bit of publicity at the time, in February of 2000, a corrections officer was transporting back to the jail, a prisoner who had just pled guilty to a number of rapes. The prisoner escaped, and the deputy was unable to catch the prisoner and also was unable to call for help right away because he had not carried his two-way radio with him. The Sheriff terminated the grievant.

The arbitrator concluded that a great deal of the County's justification for the termination of the grievant was because he did not require the prisoner to use a leg brace rather than handcuffs when he went to court. However, the arbitrator found that numerous other deputies did not use leg braces, and the County's investigation was not fair and objective because it did not interview other Court security officers concerning the use of leg braces.

In this case, the correction officer had been employed for 16 years. However, he had had numerous disciplinary instances, including a 30-day suspension in 1986, and another un-paid suspension.

Due to the County's culpability in the matter, to a degree, by not having better security in place, the arbitrator concluded that termination was too severe but concluded that substantially more than a 2-month suspension without pay should be imposed. He retained jurisdiction for 60 days in case the County and the Association could not resolve the appropriate penalty.

"W"

WHALEN (2008) ARBITRATOR KATHRYN WHALEN UPHOLDS TERMINATION OF JEFFERSON COUNTY DEPUTY FOR PERFORMANCE FAILINGS

Jefferson County fired grievant for multiple offenses including failure to write 2 citations per shift, failure to timely and properly complete reports, and insubordination. Grievant had received a letter of reprimand and a 3 day suspension in less than 2 years of employment. In November 2007 she received a critical performance evaluation along with the 3 day suspension. When she failed to increase her productivity on patrol, she was fired.

The record established that grievant did not write 2 citations per shift and did not complete reports as required by policy. The critical questions were whether this conduct constituted insubordination and whether it established just cause for termination.

Arbitrator Kathryn Whalen rejected the Association's arguments that grievant's workload with other tasks prevented her from writing 2 citations per shift and that overall, her productivity as documented by the Sheriff's productivity statistics was comparable to her peers. The Arbitrator also rejected the Association's argument that grievant was fired in retaliation for filing a sexual harassment complaint against her sergeant. The arbitrator agreed with the Association that grievant was not insubordinate.

On cross-examination grievant testified that she had maintained a professional relationship with the Sergeant she had accused of sexual harassment. She had no explanation when confronted with transcripts of text messages she sent to the Sergeant which the arbitrator described as "in no uncertain terms, contain crude jokes and sexually-suggestive content." The Arbitrator concluded that grievant was not a credible witness and gave her testimony no weight unless it was corroborated by independent evidence.

Given (1) grievant's disciplinary history in a relatively short period of employment, (2) two critical evaluations in that period, (3) continued performance problems in the areas of traffic citations and report writing and (4) the arbitrator's finding that grievant had no credibility, Arbitrator Whalen concluded that discharge was appropriate.

Editorial Comment: The Arbitrator's decision reaffirms the importance of a grievant's work history and credibility in determining whether specific misconduct will be found to constitute just cause.

WHITE (2005), ARBITRATOR BURTON WHITE SUSTAINS DISCIPLINE FOR MISUSE OF COMPUTER RESOURCES, BUT REDUCES PENALTY

This was an arbitration over a non law enforcement employee at Lane County who had spent a lot of time using the computers for personal business. In this case, Arbitrator Burton White found that there was just cause for the discipline, but based on the grievant's record and the other disciplines, reduced a ten day suspension without pay to a three day suspension without pay.

One of the lessons from this case is the County tried to rely on its Administrative Procedure's Manual which outlines polices that are unacceptable and shows a range for discipline for such a violation. Had the County been able to rely on this policy Arbitrator White probably would have sustained the discipline that was imposed. However, the County never proved that the employee in this case had ever been aware of the Administrative Procedure's Manual existence, or been trained on it. Partly for this reason, while the Arbitrator found that the Department Manual put the grievant on notice that his actions were inappropriate, he lowered the level of discipline on this event.

Editorial Comment: Employers have to remember that they need to prove that their policies have not only been out there for employees to see, but that employers have actually spent the time to train employees on them. Employees need to remember that whatever happens on the computer is a public record and an erase, delete button or clear history button will not erase the evidence of where they have been or what they shouldn't have been seeing.

WILKINSON (2003), ARBITRATOR JANE WILKINSON REINSTATES A TERMINATED JOSEPHINE COUNTY DEPUTY SHERIFF

In a case that is a classic on how not to handle an internal investigation, Jane Wilkinson reinstated a terminated Josephine County Deputy Sheriff, because the complaining witness against him was deemed not to be credible.

This case arose when two Deputies arrested an out of control-intoxicated female for telephonic harassment. She resisted them and was taken to the floor in her residence with a hair hold. She alleged that one of the Deputies slammed her head into the rear of the patrol car after the arrest.

The Sheriff assigned a Lieutenant to conduct the internal investigation who had spent most of his career as a civil deputy. In arbitration he had to admit that he had less than 5 years experience as a Deputy Sheriff, and that was a long time ago. He had never attended a class on how to actually conduct an internal investigation, and had never even worked as a detective.

The Lieutenant did recognize that if the allegations were true, that the conduct would be criminal. He referred the case to the Oregon State Police for a criminal investigation. He was informed shortly thereafter that the complaining party had passed a polygraph. However, the exam was a "short form" exam that is used to save time. The person examined writes out a statement, and is then asked if it is true. To this writer's knowledge, it is not a nationally recognized technique.

The Lieutenant went out to the house of the complaining party to interview her. She lied to him in the initial interview about the telephonic harassment. She refused to answer his questions about the nature of the telephonic phone call.

The Lieutenant proceeded to interview the children who had been at the house during the arrest when they came home from school. He interviewed them in the presence of the complainant. Only after hearing their statements did she admit she had lied to him. None of those interviews were tape-recorded. The complainant was not taken to a Doctor for a medical exam, and she was not asked to participate in a video taped reenactment. All of the potential witnesses, including Sheriff's Department employees were not interviewed.

Later, she admitted to the State Police investigator that she had lied to the Deputies who arrested her regarding the telephonic harassment. However, claimed to both the Lieutenant and the State Police investigator, that she was never told by the Deputies that she was under arrest. The OSP investigation was not much better than the Sheriff's. Whether that was due to the investigator's opinion of the case is hard to say. However, OSP did not arrest the deputy, nor recommend prosecution, but merely turned over their reports to the District Attorney.

In spite of all of that, the Department went ahead and issued a letter of pre-termination.

Meanwhile, the Deputy, who was charged with the misconduct had hired Claudia Browne, an excellent defense attorney, (who is a back up for me to respond to officer involved shootings and has been trained in how to do so). Claudia Browne hired an investigator that re-interviewed the children. One of those children claimed that he saw the Deputy slam the complaining party's head onto the car. That child was not the complaining party's biological child, but the son of her live-in boyfriend, whom the Deputies had arrested well over 20 times. The child claimed that the Deputy slammed the complaining party's head onto the trunk of the car with the second Deputy present and watching it, and had placed the deputies on the wrong side of the police car. The second Deputy was inside the house when the head slamming was alleged to have occurred.

Lastly, Claudia Browne obtained the services of the local emergency room physician who opined that the injuries to the face of complaining party could not have been caused by her head hitting the trunk of the police car as she had alleged.

Perhaps as a result of the Association's response to the notice of termination, which listed the mistakes in the investigation, the Sheriff decided not to terminate the Deputy. He stated that the charges were simply not sustained. He returned the Deputy to duty. He also asked that the Lieutenant conduct a follow up investigation.

The Lieutenant went to the doctor and allegedly got him to change his statement. The Lieutenant also presented this information through the State Police to the District Attorney's office. While the District Attorney's office initially had decided not to present the case to the Grand Jury, the DA changed his mind and indicated that he was going to proceed to the Grand Jury.

The Sheriff then terminated the Deputy. At different times he claimed that it was because of the new medical evidence, or because the complaining party had passed a polygraph, something of which the Sheriff was well aware of when he initially decided to return the Deputy to duty and not sustain the charges. The Association was given no chance to make another presentation on behalf of the Deputy before the unexpected termination occurred.

The Association proceeded to arbitration. The complaining party testified at arbitration that her statements about this event had always been consistent and truthful. She denied lying to the Lieutenant, to the OSP investigator, denied telling anything untruthful to the Deputies, and denied admitting that she had ever lied. Her attorney had sent in a tort claim notice alleging that she suffered short term memory loss, but she denied telling him that. On cross-examination, the Lieutenant had to admit that the complainant lied at least 5 times on the witness stand. Some of those lies included the claim she had only two drinks, and yet hours later she had a .09% BA. The terminated Deputy was a DRE expert and testified without contradiction that her blood alcohol was at least a .15% at the time of her arrest.

At arbitration the County attempted to offer the polygraph exam results into evidence. However, the County did not even call the Oregon State Police polygrapher. Due to the County's failure to even attempt to lay foundation for the polygraph, Arbitrator Wilkinson excluded it from evidence.

The Association presented testimony from the Association President, Wayne Dykes, who got the complaining party to reenact how her head hit the trunk of the car. Photos of this were taken, and through the work of Claudia Brown, the Association had available expert medical testimony which caused the County to stipulate, without the necessity of calling an expert, that the injuries sustained by the complaining party to her face (a cut on the inside of her lip and a black eye) could not have been caused by her hitting the trunk in the manner that the photographs depicted. However, the complaining party testified at arbitration that she believed she had only been doing a reenactment to show where she hit the trunk of the car, and not how she hit the trunk of the car, something the Arbitrator found not to be credible.

Arbitrator Wilkinson wrote a lengthy opinion discussing how arbitrators attempt to determine credibility of witnesses. She concluded that based on the record in this case, that the complaining party was not credible and reinstated the Deputy with full back pay and benefits.

Three of the elements of just cause concern the adequacy of the employer's investigation. Arbitrator Wilkinson decided not to comment on the adequacy of the employer's investigation, because the Association had stipulated that this was an all or nothing case. Either, the Deputy committed the conduct, or he did not.

Editorial comment: In thinking back over this case, I realized that over the last 15 years, three of the most bizarre discipline cases I have ever been involved in (yes, this one is included), all involved an employer's relying on a polygraph exam. In this case, instead of utilizing the old fashioned method of gauging a person's credibility, which is examining what they said to whom and how honest they were, the County did a rush to judgment and went forward trying to terminate this Deputy even though the Lieutenant had to admit that the complaining party had lied on five different occasions during the arbitration. I counted seven lies besides the false allegation in this case. Yet, the Deputy had never lied to the Lieutenant. How under these circumstances the Josephine County

Sheriff could justify accepting a word of such a witness over the Deputy is beyond this writer's comprehension. The only "rational" explanation is that the Sheriff panicked and reversed himself when he thought that the Deputy was going to be indicted, which didn't happen. The Grand Jury also didn't believe the complainant.

In his press statement after the award, the Sheriff complained that the Arbitrator didn't consider the evidence that he did, namely the polygraph. Given such "candor," it is easy to understand why the County chose not to call the Sheriff to testify in the case.

At DPSST in a class that Sheriff Daniel attended on how to supervise internal investigations two points were made (among others):

1. *Assign a highly competent investigator, and*

2. *Never rely on a polygraph for whom is telling the truth.*

Other DPSST instructors teach press relations. I'm sure that being honest with the news media is taught there. The Sheriff needs to go back to school.

WILKINSON (2002), ARBITRATOR WILKINSON CONCLUDES THAT OSHU IMPROPERLY ADOPTED A "NO FAULT" DISCIPLINE POLICY FOR "UNEXCUSED ABSENCES"

This case came before the Arbitrator over a grievance concerning a policy adopted by OSHU, which was a so-called, "no fault" discipline policy. The policy was initially adopted by just one section of OSHU, and the testimony the Arbitrator credited was that the union informed the employer if discipline occurred from the use of that policy grievances would be pursued. The union finally grieved the adoption of other "like" polices, because in its view they were proliferating around OSHU.

Arbitrator Wilkinson ruled that "no fault" policies,

> "…that is policies that simply count instances of tardiness, and absence, and impose consequences, based on the numbers can run afoul of the principles of just cause, progressive discipline, employee leave rights, and statutory leave, and disability rights."

She found that most arbitrators will allow reasonable "no fault" attendance control policies,

> "as long as those policies are 1) consistent with just cause standards, including progressive discipline, and 2) take into account the employee's circumstances including his or her record before imposing serious consequences to the employee."

The Arbitrator also stated that even if she had upheld the employer's policy, "its application remains subject to challenge in disciplinary proceeding brought under Article

10 (Just Cause of the Agreement)." The Arbitrator found that if there is a legitimate use of contractual sick leave rights, it should not result in discipline. The Arbitrator concluded:

> "If the employer intends to apply the policy to employees making legitimate use of their accrued sick leave, it must not only build in a special degree of flexibility for those employees, but it must also rewrite language on other approved leave to make it clear the type of leave that is accepted under the policy and the type leave that is not."

Editorial Comment: This grievance was somewhat unusual that it was over the adoption of the policy, and not over specific instances of discipline. As such, the Arbitrator spent a lot of time making detailed comments on a complicated policy that she found deficient in numerous areas. This case could have arisen from a discipline decision with the same result.

WILLIAMS (2007) ARBITRATOR TIMOTHY WILLIAMS RULED JOSEPHINE COUNTY DEPUTY REINSTATED – ARBITRATOR REJECTS INSUBORDINATION AND DISHONESTY CHARGES

The Josephine County Sheriffs' Association successfully challenged the termination of a long term corrections deputy. In a decision issued December 8, 2007, Arbitrator Timothy D. W. Williams ruled that there was no just cause for the deputy's termination. The Arbitrator reduced the termination to a five day suspension without pay and ordered the deputy reinstated with full back pay and benefits. The County based the termination on the following four charges.

Insubordination: The County fired the deputy because it found that he violated an order when he moved an inmate from one cell block to another. The deputy explained that he believed the move was authorized because the inmate held an approved kyte stating that the move had been approved by the jail's classification committee. The deputy was unaware that subsequent to the approval of the inmate's request to move, a sergeant had posted two restrictions on the move on a computer system which deputies were to review each day. The County concluded that by moving an inmate when the computer notices explicitly denied authorization for the move, he was insubordinate.

The Arbitrator declared that the "definitive aspect" of subordination is the element of defiance, that is, employee's actions must pose a direct challenge to management's authority to disobedience. However, a failure to comply does not constitute insubordination if the employee did not intentionally defy an order. An employee's mistaken or negligent action contrary to an employer's order maybe a serious infraction, but it is not insubordination.

The Arbitrator accepted the grievant's testimony that he had not read the computer postings restricting the movement of the inmate and acted without any knowledge of their

existence. The Arbitrator concluded that "an employee cannot refuse to carry out an order that he or she has not received." However, despite finding the grievant was not insubordinate, the Arbitrator concluded that he was negligent in not checking the computer postings for a nine day period. The Arbitrator imposed a five day suspension without pay.

Neglect of Duty: The County fired the grievant because he failed to report a medical kyte which included allegations that an inmate would be stabbed. The grievant testified that he brought the situation to his relief's attention and thought that his relief would handle the situation. The County did not call the grievant's relief deputy as a witness.

The Arbitrator concluded that the evidence indicated that at a minimum the grievant notified the relief deputy that there was a potential problem, however the grievant's statements to his relief deputy was more dismissive in content than alarming. The Arbitrator indicated that he might have come to a different conclusion had the employer called the relief deputy as a witness.

The Arbitrator concluded that the grievant should have notified his supervisor of this situation, but that although some discipline was warranted, his failure to do so was not as egregious as the County contended. The fact that the County waited a significant period of time before investigating the situation and never initiated a search for a stabbing weapon undermined the County's contention that this was an extremely serious situation. The Arbitrator noted that one of grievant's supervisors made a statement during an investigative interview in which she appeared to agree with the grievant's assessment that the report of the threat came from an inmate who was entirely lacking in credibility.

Dishonesty: Shortly after the incident in which an inmate reported that another inmate would be stabbed, the grievant was called into his lieutenant's office and asked if he could identify the written kyte in which the stabbing was reported. The grievant did so. He was then asked what he did with this kyte. He stated that he gave it to his relief, "Deputy Fox". The employer's staffing records and Deputy Fox both stated that the grievant had been relieved by another deputy. The employer fired grievant charging that his failure to accurately identify his relief was a lie. The Arbitrator rejected this charge declaring that:

> "The critical component of a lie is the intention to deceive and having a clear motive for the dishonesty is the best evidence that a factually incorrect statement can be labeled a lie."

According the Arbitrator evidence of the intent to deceive may be found where the lie contributes to the accused advantage in someway. The grievant's naming of Deputy Fox as his relief did not benefit him in any way and there was no motive for the grievant to lie about the identity of his relief. Therefore, the Arbitrator concluded that the grievant's testimony that he was mistaken rather than intentionally deceitful would be accepted.

Pattern of Policy Violations: Finally, the Arbitrator rejected the County's contention that the grievant had engaged in a pattern of policy violations beginning January 2007. The Arbitrator noted that most of the incidents described by the employer's witnesses occurred prior to January. The Arbitrator noted that grievant received a positive performance evaluation in March.

Finally, the Arbitrator concluded that the County violated the party's Collective Bargaining Agreement by failing to impose progressive discipline. The grievant had a clean record with the exception of a January 2007 note of counseling. The Arbitrator concluded that this note was not discipline. The Arbitrator awarded that the grievant be reinstated and made whole for lost wages and benefits.

Editorial Comment: Arbitrator Tim Williams' decision clearly lays out the elements of insubordination. Many employers have an unreasonably broad definition of insubordination. Arbitral case law requires that insubordination include

(1) A direct and clear order from a supervisor to do, or not to do, a thing;

(2) A direct and unequivocal refusal to perform as directed; and

(3) A statement of consequences to the employee if the employee fails to perform as directed.

The employee's actions must be knowing, willful and deliberate – negligence does not amount to insubordination. In addition, Arbitrator Williams' decision includes a clear and careful analysis of alleged dishonest statements. Simply being mistaken about a fact does not make that statement a lie.

WILLIAMS (2000), ARBITRATOR TIMOTHY WILLIAMS LOWERS DISCIPLINE IN A CASE INVOLVING WASHINGTON COUNTY AND WASHINGTON COUNTY POLICE OFFICERS' ASSOCIATION

In a decision issued in September of 1999, Arbitrator Williams reduced a 30-day suspension without pay to a 5-day suspension without pay.

In this case, a deputy sheriff who was hired in 1994 immediately showed some problems getting reports written on time. The deputy was also involved in a critical incident, a shooting, for which there had been no treatment or training given by the County and then became involved in a series of progressive discipline incidents. First, a courtesy violation toward a sergeant in 1997. Secondly, eating in a strip club and radioing in a false location in 1998, and third, discipline for not writing a report in a domestic violence case in 1999. The deputy was also given a written reprimand in May, 1999 for not having reports in on time, and became involved in August of 1998, in an off-duty intoxication incident with two friends at a club in Portland, where law enforcement officers had to intervene. Meanwhile, the deputy was examined by Dr. Corey, a Portland psychologist, who concluded that the deputy was not fit for duty.

The County proceeded to suspend the deputy for 30-days without pay, 20 of which it imposed, and 10 the County held in abeyance.

The Association grieved the discipline arguing that the level of discipline was far too high. The arbitrator agreed based on Washington County's past practices and reduced the discipline to five days suspension without pay. The decision is somewhat unusual in that the arbitrator did not discuss the effect of Dr. Corey's opinion on the unfitness of the deputy for duty when discussing the discipline. All that can be read from the four corners of the decision is that Arbitrator Williams based it on the relative rareness for Washington County to disciplinary suspend a deputy for such a long period of time.