
In Re the Arbitration Between:

Chelan County, Washington,
Sheriff's Department,

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Employer,

**GRIEVANCE ARBITRATION
OPINION AND AWARD**

and

Chelan County Deputy Sheriff's
Association,

Union.

- Pursuant to **Article 9** of the collective bargaining agreement effective January 1, 2013 through December 31, 2016, the parties brought the above captioned matter to arbitration.
- Mike Harris submitted a grievance following his termination on March 31, 2015. The grievance was denied at Step 2 on June 22, 2015. The Step 3 request for arbitration was made on June 16, 2015.
- The parties selected James A. Lundberg as their neutral arbitrator from a Washington PERC list of arbitrators.
- The arbitration hearing was conducted on February 22, 2016, February 23, 2016 and February 24, 2016.
- The parties agreed that they had no procedural issues and the matter was properly before the arbitrator for a final and binding determination.
- Closing briefs were submitted by e-mail transmission on March 31, 2016 and the record was closed.

APPEARANCES:

FOR THE EMPLOYER

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FOR THE UNION

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ISSUE:

Whether, Chelan County, the Employer, had just cause to discharge the grievant, Mike Harris?

If not, what is the proper remedy?

RELEVANT CONTRACT PROVISIONS:

ARTICLE 2- MANAGEMENT

2.1 Subject to the express terms and conditions of the Agreement, all of management's inherent rights, powers, authority and functions shall remain vested exclusively in the County. It is expressly recognized that such rights, power, authority and functions include, but are not limited to, the full and exclusive entrepreneurial control, management and operation of the Sheriff's Officer Affairs; the determination of the scope of its' activities, the business to be transacted, the work to be performed and the methods pertaining thereto; the equipment to be utilized, the process and procedures; the right to maintain order, efficiency and effectiveness, and standards of performance; the right to fix standards of quality and quantity of work, the right to control the scheduling of all work; the right to determine the number of employees and the direction of the working forces; the

right to hire, select, train, assign, promote, and transfer its' employees and the right to discipline, demote and discharge employees for just cause.

2.2 All management rights, powers, authority and functions, whether heretofore or hereafter exercised, shall remain vested exclusively in the County, except insofar as expressly and specifically surrendered or limited by the express provision of this Agreement. In matters not covered expressly and specifically by language within this Agreement, the County shall have the clear right to make decisions as the need arises. This shall include, but not be limited to, the right of the County to make rules and regulations in order to maintain operating efficiency. All rights not specifically abridged or limited by the Agreement are reserved exclusively to the Employer, regardless of whether or not such rights have previously been exercised by the Employer.

ARTICLE 5- HOURS OF WORK AND OVERTIME

5.2 Overtime. The Sheriff may assign work to be performed in excess of the employee's regularly scheduled work shift. All work performed in excess of the employee's regularly scheduled hours of work shall be compensated for at one and one-half times the employee's regular straight time hourly rate. Reimbursement for uniform, clothing, equipment, meals, travel and any other fringe benefits shall not be included in the determination of the employee's regular straight time rate of pay. All paid leaves count as time worked for purposes of this section.

5.5 Travel Time. Field deputies are not required to reside in the area of their assignment but instead are allowed to reside anywhere they choose. However, field deputies who choose to reside outside the area of their assignment must be within

the assigned area at the beginning of their work, and time spent traveling to and from the area of assignment shall not be considered work time. Calls taken while the field deputy is traveling to the assigned area prior to the start of the work shift do not qualify as call outs pursuant to Paragraph 5.4. In such circumstances, the deputy will be paid for the actual time spent on the call (15 minute time units will be used), and such time is eligible to be considered when calculating overtime pay or compensatory time. Reasonable time spent traveling to and from the area of assignment shall be considered work time if the field deputy is involuntarily transferred to an area of assignment, which excludes the deputy's residence.

5.7 Schedule Modifications. The Sheriff may modify scheduled days off or on duty in exceptional situations, which are defined as an unforeseen occurrence, civil disorder, natural disaster, a life threatening situation, holiday weekend or scheduled festival, or other bona fide emergencies. County-wide shift bids shall be conducted annually. When called to duty without prior notice, the employee shall have a reasonable time to clean up and get into a uniform. All shifts scheduled with less than 72 hours notice shall be compensated at the overtime rate. The overtime for a schedule change made with less than 72 hours notice applies only to the changed hours, not the entire shift (unless the entire shift is a change). An employee assigned to a shift that is canceled with less than 72 hours notice shall be paid straight time for all hours originally scheduled; provided the pay requirement may be waived by mutual agreement between the employee and Employer.

5.10 Employees may not work more than sixteen (16) hours within a twenty – four (24) hour period, except for temporary assignments necessitated by emergencies,

and they shall be guaranteed a minimum of eight (8) hours between shifts. For purposes of this section, mandatory court time is considered part of an employee's daily shift. If court time overlaps with an employee's regularly scheduled work shift, the employee shall finish out their regular work schedule upon completion of court duties. If court time is outside the employee's regularly scheduled work shift, the employee will be guaranteed a minimum of eight (8) hours off from the end of their court assignment until commencing their regularly scheduled shift.

FACTUAL BACKGROUND:

Grievant's history with the Sheriff's Department before the investigation that led to his discharge.

The grievant, Mike Harris was employed by the Chelan County Sheriff's Department for nineteen years. Over the years he served the County as a Patrol Deputy, Corporal, Sergeant, Patrol Chief. At the time of his discharge Mr. Harris was a Sergeant.

Mr. Harris' employment history includes positive reviews by his supervisors. The Performance Review Forms use a three-part scale for evaluating skills wherein an (E) stands for exceeds job requirements consistently, (S) stands for consistently up to standards and (I) stands for requires improvement and close monitoring. From the beginning of his career through the last review in grievant's personnel file, no score of (I) was recorded on any evaluation. Only scores of (E) and (S) were recorded.

The personnel file contains twenty-one (21) letters of commendation and appreciation from people with whom he worked. The letters span his nineteen (19) year career.

In addition to his regular duties, Mr. Harris was a Marine Patrol Instructor, Traffic Task Force Coordinator, SWAT team member, Assistant SWAT Team Leader, SWAT Team Leader and SWAT Commander.

No evidence of discipline prior to grievant's discharge was submitted at hearing. The grievant voluntarily demoted from Patrol Chief to Sergeant in February of 2014, during a preliminary inquiry into whether he misrepresented his intended use of drug samples from the evidence room for a seminar. The underlying question was whether the drugs were going to be used for a publically funded seminar or for a seminar Mr. Harris put on through his private company. It was the opinion of the investigating Chief, that Mr. Harris had been deceptive. No internal investigation was conducted and there are no findings from an investigation of the incident.

However, a letter was written to the County Prosecutor by the Undersheriff. In the letter the Undersheriff says "Through a series of meetings and questioning over the next few weeks, it was determined that Chief Harris had been deceptive...and ultimately lied about his intent to use the drugs...." According to the Undersheriff's letter, Chief Harris "admitted to the deception on Thursday February 13, 2014..."

The County Prosecutor's *Brady* letter informs other counsel that Mr. Harris "was found during an internal investigation¹ to have lied to a superior on or around February 13, 2014."

¹ An internal investigation was never conducted by the Sheriff's department.

The County Prosecutor appeared at this hearing to explain how his office makes a *Brady* determination. The County Prosecutor does not conduct an independent investigation. In this case the County Prosecutor relied on the representations made by the Undersheriff, when he made the *Brady* determination.

Since the Sheriff's office did not conduct an Internal Investigation in February of 2014, there exists a very limited record of the dispute. For example, notes about what was said written by the Undersheriff comprise the record, rather than a verbatim record of questions asked and answered. Importantly, the February 2014 preliminary inquiry is not the central issue before this arbitrator. On the other hand, the conclusions drawn by the Undersheriff and investigating Chief were relied upon by the Sheriff's department when the decision to discharge the grievant was made.

In determining what weight to give the prior determination that grievant Harris lied or intended to deceive other Sheriff department administrators in February 2014, the arbitrator reviewed notes that were submitted into evidence. It is not clear from the reports submitted at hearing, whether Mr. Harris actually used drugs from the evidence room for a class he was teaching through his private company.

A portion of the narrative note² made by the Undersheriff dated February 10, 2014 says:

... I told him, "Mike you can see how I could have taken this as being a little deceptive, so that is why I am just wanting to make sure I am clear about what happened and your request for the drugs." He stated he understood how I could

² Not a verbatim transcription.

take it that way, but didn't understand why I was asking him again since he "had explained it already." I then asked him if he had ever used or intended to use the drugs he had in his possession for DRE classes for his personal business, not relating to anything sanctioned by the Sheriff's Office? His answer was "No" ... *but I need to add, in my professional opinion, he was lying. The reason being, in over 22 years of Law Enforcement training and experience, I have interviewed hundreds of people for various incidents, whether they were victims or suspects, so I feel I have a pretty healthy ability to determine when someone is lying based on their body language and facial expressions if I am able to spend enough time with them. Chief Harris closed his eyes slowly as he said, "No." This was an indication to me he was lying with the answer he gave. I then re-asked the question a different way, just reversing the order and again, looking for clarification and confirmation of his intent. Again, when the question was asked if he had used the drugs he had in his possession or ever intended to use the drugs in his possession for his personal business, he again answered, "No," and again slowly closed his eyes when answering. To me, this was a strong indication and confirmation he was lying but again, it is solely my professional opinion.*

Another narrative note made by the Undersheriff on Thursday February 12, 2014 gives additional insight into the preliminary inquiry.

Chief Mathews contacted me first thing in the morning when I arrived in the office to tell me that he was going to speak with Chief Harris about the email and that he also thought the email and his answers were deceptive and the need for him to "Come clean" about it with me. He said if Chief Harris refused, he would have to write up a document describing his email and

telephone conversation. He indicated he would be back up to my office when he had completed his talk with Chief Harris. About 30-45 minutes later, they both came into my office and Chief Mathews began by talking about communication and the need for all of us to be sure to make it as open as possible. Chief Harris wasn't saying anything and Chief Mathews had to "direct" Chief Harris, by that I mean he had to "prompt" Chief Harris as to what he thought Chief Harris should be telling me which he wasn't volunteering...."

The just cause standard requires that a decision to discharge be based upon a fair, even handed, thorough and reliable investigation. The arbitrator is giving no weight to the February 2014 preliminary inquiry that was relied upon by the Sheriff in making the decision to discharge the grievant. The notes from the preliminary investigation demonstrate that Chief Mathews and the Undersheriff proceeded against Mr. Harris with the firm belief that he was lying but lacked concrete evidence.

The incident that led to the internal affairs investigation of grievant Harris.

On the night of October 18, 2014 and early morning of October 19, 2014 Sergeant Harris was working a voluntary overtime assignment at the Oktoberfest in Leavenworth, WA. When he accepted the voluntary overtime assignment at Leavenworth, he anticipated that he would have eight hours between that overtime assignment and an overtime assignment of Public Utility District No. 2 in Grant County the next day. Sergeant Harris' voluntary overtime schedule originally provided him with eight hours off between assignments. The grievant completed the

Leavenworth assignment at approximately 3:00 AM on October 19, 2014. He planned to travel with Sheriff's Detective Josh Mathena to the Grant County assignment at 8:00 AM on October 19, 2014. Sergeant Harris intended to sign in to his shift at 11:00 AM. The Grant County assignment involved traveling to the Wanapum Dam on the Columbia River from his home in Wenatchee for marine patrol on the river.

Celebration of Oktoberfest at Leavenworth continued in the early hours of the morning and Sergeant Long, who was responsible for scheduling overtime, needed to extend the assignments of some deputies and officers. Either in a conversation with: Sergeant Long "at the Festhalle, or at the entrance to the Festhalle"³, in front of the Starbucks Building⁴, or by the side of the road⁵ (somewhere) Sergeant Harris informed Sergeant Long that he needed to be off at 3:00 AM, because he was assigned to Grant County marine patrol the next day. From the various statements it is clear that Sergeant Long knew Sergeant Harris was going to be signing in at 11:00 AM. It is also clear from the various statements that the witnesses: Sergeant Long, Sergeant Harris, Sergeant Zimmerman and Corporal Haynes have primarily vague, as compared to specific, recollections of the conversations that took place.

The vague recollections of witnesses are not surprising given the fact that the Oktoberfest celebration was loud, crowded, involved a lot of drinking by participants, and extended into the early morning hours. Moreover, the recollections

³ Sergeant Long's December 1, 2014 statement.

⁴ Sergeant Zimmerman's December 5, 2014 statement, Corporal Haynes December 5, 2014 statement

⁵ Sergeant Harris' statement taken December 1, 2014.

of Sergeant Harris were not sought until November 21, 2014 and the recollections of Sergeant Long were not sought until December 1, 2014. Sergeant Zimmerman and Corporal Haynes were not interviewed until December 5, 2014.

On October 19, 2014 Detective Mathena drove to Sergeant Harris' home in Wenatchee, WA at approximately 8:00 AM and they rode together to the Wanapum Dam assignment. Detective Mathena signed in around 7:36 AM but Sergeant Harris did not sign in, until approximately 11:00 AM. Sergeant Harris and Detective Mathena worked on the water for their shift and returned to Wenatchee. On their return they stopped a speeding vehicle, traveling roughly 100 to 120 miles per hour. The driver was given a warning, as Detective Mathena did not have a pad of tickets with him.

The internal affairs investigation.

An internal investigation of Sergeant Harris was initiated. However, the record of investigation does not clearly identify the source of a complaint against Sergeant Harris. Chief Helvey states in his January 9, 2015 report to Undersheriff Wisemore that "On November 3, 2014 *it came to my attention* Sergeant Harris signed in service at 1100 hours on October 19, 2014 but was actually in service prior to 0800 hours. On October 18, 2014 Sergeant Harris worked overtime in Leavenworth for Oktoberfest. Sergeant Harris signed In Service at 1533 hours and Out of Service on October 19, 2014 at 0256 hours." According to Undersheriff Wisemore "On November 4, 2014, I ordered Chief of Patrol, David Helvey to perform an Internal Investigation reference potential misconduct and/or negligent performance of duties by Chelan County Sheriff Sergeant Mike Harris. *Information*

was provided to me of potential violations of the Chelan County Sheriff's Office Policy and Procedure Manual as a result of a scheduled marine overtime shift he worked on October 19, 2014." According to Chief Helvey and Undersheriff Wisemore, Chief Matthew was the source of the complaint in that he had observed different start times on the time records for Sergeant Harris and Detective Mathena. According to Chief Matthew, Detective Mathena was the source of the complaint. In his testimony Matthew said "*I believe* Detective Mathena made – this was a long time ago – a comment about Sergeant Harris either falling asleep or being sleepy, or something on the way home." Detective Mathena had *no recollection* of the conversation with Chief Matthew.

There is a discrepancy in hours reported by the two officers but the discrepancy does not indicate that Sergeant Harris was attempting to be paid for hours not worked! The grievant claimed far fewer hours than he worked. According to management, grievant should have been "In Service" when he got in the car. Hence, he was violating the eight (8) hour off guarantee found at **Article 5, Section 5.10** in the collective bargaining agreement.

There is no evidence that any employee of the Sheriff's department has ever been disciplined for accepting an assignment that violated the contractually agreed upon guarantee found at **Article 5, Section 5.10** of the collective bargaining agreement that guarantees employees eight hours between shifts. Despite the minor nature of the apparent infraction and the fact that prior instances or similar perceived violations had never resulted in discipline, an Interval Investigation was initiated.

The notice of internal investigation given to Sergeant Harris before he was interviewed said the following:

On November 4, 2014 (Chief Dave Helvey) was ordered by Undersheriff Wisemore to perform an internal investigation reference potential misconduct and/or negligent performance of duties to include:

Potential Violations of the Chelan County Sheriff's Office Policy and Procedure and Procedure Manual including but not limited to violations of Policies 1.04.00 Values, 7.01.00 Canons and Standards of Ethics, 7.06.00 Inducement to Commit Illegal Acts or Violations, 7.07.00 Truthfulness, 7.17.00 Teamwork and Cooperation. 15.04.00 Falsification, Destruction of Records, and 24.02.00 Radio Communications Procedures.

The investigation began with a series of interviews by Chief Helvey. The first individual interviewed was Sergeant Harris.

When Sergeant Harris was interviewed he expressed the belief that Sergeant Long had approved his plan to ride with Mathena to the Grant County site and sign into service at 11:00 AM. He also recalled either Sergeant Zimmerman or Corporal Haynes saying something about the eight hours of time off guarantee in the contract. In the November 21, 2014 interview, Sergeant Harris was asked about what happened and he gave a rather long narrative response, which included the following statement "... And he said okay, he said just, he, I said I'm gonna be riding with Josh, I won't be in service, I'll just be in service when I get to the boat that way, because I'm the operator so I have to be in service for that, and he goes that's fine, just make sure you have eight hours, and it was either Andy or Monika said well that

doesn't pertain to us, that's Admin. Saying they can't, they can't make us work with eight hours..."

On December 1, 2014 Chief Helvey interviewed Sergeant Long, who was asked the following questions and gave the following answers:

Chief Helvey asked: ... Did Sergeant Harris have any conversations with you about actually beginning his day on the nineteenth at eight a.m. but not signing into service until eleven a.m.

Sergeant Long answered: Um, I think he did say uh, what would be the case or the situation if he was in the car but not in service and I think I just told him that he needed to be out of service for eight hours. ...

Chief Helvey asked: Okay. Um, so I just wanted to make sure that I'm clear. Um. You didn't tell Sergeant Harris that it would be alright for him to be in the car with um, Detective Mathena at eight a.m., but not sign in service until eleven a.m.?

Sergeant Long answered: I don't recall him saying who he was going to be in service with, and I don't recall him saying anything about being in the car, or driving to Vantage um, I recall him asking something like you realize I'm gonna have to get to Vantage, or drive to Vantage and I think I told him that well, you just have to be out of service for eight hours. Be not in service for eight hours. You can't be in service for less than eight hours.

Chief Helvey asked: Okay. Um. Was Sergeant Zimmerman and Corporal Haynes a part of this conversation? That you had with Sergeant Harris?

Sergeant Long answered: I don't recall so. No, um the conversation I recall having with Harris was one time at the Festhalle, or at the entrance to the Festhalle, and then a second time we had a phone conversation and, I think I called Mike, it was pretty chaotic um, and I, you know, wasn't really paying attention to who was going home and what time they were leaving. ...

Chief Helvey interviewed Detective Mathena, Sergeant Zimmerman (Andy) and Corporal Haynes (Monika) and found some discrepancies between Sergeant Harris' statement and their recollections. Detective Mathena recalled being on the water at about 9:30 AM in the morning, while Sergeant Harris recalled being on the water one to one and half hours later. Sergeant Harris believed that either Corporal Haynes or Sergeant Zimmerman had made the comment "well that doesn't pertain to us they can't make us work with eight hours..." Neither Corporal Haynes nor Sergeant Zimmerman recalled making any statement about the eight-hour rule.

After the interviews were completed Chief Helvey submitted findings of his investigation to Undersheriff Wisemore, wherein he concluded that Sergeant Harris had violated five of the department policies cited in the Notice of Internal Investigation.

By written notice dated January 16, 2015 Undersheriff Wisemore notified Sergeant Harris of the following:

In this case, it has been determined the allegation of violations of Chelan County Policy and Procedures 7.07.00 – Truthfulness, 7.17.00 – Teamwork and Cooperation, 15.04.00 – Falsification, Destruction of Records, 24.02.00 – Radio Communications Procedures and 1.04.00 – Values, and Mission

Statement and Core Values is proven and sustained. The contemplated discipline is termination.

A pre determination (*Loudermill*) hearing was conducted on February 15, 2015. Following the hearing, Detective Mathena was re-interviewed by Chief Mathews.

On March 24, 2015 a second *Loudermill* hearing was conducted.

Undersheriff Wisemore prepared a document giving "Administrative Insight", wherein he found that each of the policy violations previously cited were violated by Sergeant Harris and gave notice of his immediate termination. The document is dated March 31, 2015.

The discharge was grieved and the parties were unable to resolve the dispute at Step 2 of the grievance process. Consequently, the grievance was brought to arbitration for a final and binding determination.

SUMMARY OF EMPLOYER'S POSITION:

The Employer argues that the grievant was "found to have been untruthful". Consequently, they cannot continue to employ him in the Sheriff's department. In its' closing brief the County asserts:

The investigation initially involved Mr. Harris' misreporting of his duty time. The termination decision, however, **was not the result** of the discrepancy in the timekeeping, nor was it the result of his failing to sign into service or his failure to abide by the eight hour off between shifts requirement of the Collective Bargaining Agreement ("CBA"). The termination was made as the result of Mr. Harris' multiple and repeated

misrepresentations or outright false statements made during the course of the internal investigation.

The Employer begins with the proposition that statements made by an officer in an internal investigation are the same as sworn testimony. "We fail to see how the presence or absence of an oath is material to the due process inquiry."

***LaChance v. Erickson*, 522 U.S. 262 (1998).**

Dishonesty has been found to be the appropriate basis for discharge of a law enforcement officer. The position is grounded on public policy expressed in **RCW 43.101.021**. The arbitrator in ***City of Mountlake Terrace*, 134 LA 1736, 1748** asserted that "...a police department must have confidence that its law enforcement officers are honest and forthright..." Similarly, the need for confidence in the integrity of the law enforcement officers is addressed in ***Haney v. City Los Angeles*, 109 Cal. App. 4th 1, 12 (2003).**

The internal investigation initially dealt with minor timekeeping violations. Chief Helvey initiated the investigation after reviewing time cards that showed Sergeant Harris beginning his shift at 11:00 AM on October 19, 2014. However, the Chelan County Marine Patrol Records indicate that Sergeant Harris and Detective Mathena worked from 8:00 AM to 5:30 PM. In the investigation Chief Helvey discovered that Sergeant Harris was on the boat on river duty approximately one and one half hours before he signed into service. The grievant failed to sign into service when he was on unpaid status and when he was on duty on the river in violation of the Sheriff's Office Communications section on procedures **24.02.00**, which says:

Field Units are to keep RiverCom advised of their status and availability during the entire time they are on duty. This includes advising RiverCom of your "in service" and "out of service" status.

The internal investigation confirmed initial suspicions that Sergeant Harris violated policies, despite the fact that Sergeant Harris received no additional compensation. The rule infraction was not what led to the discharge. Instead, it was Sergeant Harris' false statements during the internal investigation.

Sergeant Harris said that he received authorization from Sergeant Long to delay signing into service until he had eight hours between shifts. He also falsely represented that Sergeant Long was aware of what he was doing and that he thought it was okay. In his second *Loudermill* hearing, Sergeant Harris said "so I think there's a lot being put on that I'm lying about this when from the start I didn't, I didn't hide this with anybody. ***I got Bruce's permission.***" The Employer argues that grievant's statement was false.

Grievant also claimed that he received approval from either Sergeant Zimmerman or Corporal Haynes to be on duty and not sign into service. Both Sergeant Zimmerman and Corporal Haynes deny ever having discussed that with Sergeant Harris or having heard anyone else discussing that with Sergeant Harris.

The most egregious false statements made by the grievant were the specific representations he made about their time on the water. Mr. Harris said that "even Josh Mathena says he thinks it was 10:40, 10:45." However, at arbitration the following questions were asked of Sergeant Harris and the following answers were given:

Q... and do you recall if you said something to [Detective Mathena] about the time that you got on the water?

A. Yes. Because, I mean, we had never talked about it before. And said, Yeah, I thought it was about 10:30, 10:40, 10:45," something like that; I don't remember the exact – but I –

B. Q. What did he say?

A. It was kind of like a "Hmm?" It was basically that.

Mr. Harris' misrepresentation is the same type of misrepresentation as Mr. Harris made when claiming that Sergeant Long, Sergeant Zimmer and Corporal Haynes all knew about his plan to not sign in to service until he had eight hours off between shifts. Even if he made statements that were not heard, he clearly represented in the internal investigation that others were aware of his plan and those representations were false.

Sergeant Harris was the only qualified boat operator and it is clear that he operated the boat from the time it was launched. Detective Mathena repeatedly testified that they launched at 9:30. Sergeant Harris did not sign into service until 11:00 AM, when he had eight hours between shifts. Sergeant Harris' repeated representation that he was not on the water, until 10:40 AM is false.

Even at the arbitration hearing Sergeant Harris misrepresented facts. When asked about his voluntary demotion he focused his response on the fact that he made approximately \$40,000 more that year by transferring from Chief's salary to Sergeant, because he was able to earn overtime. While he did not testify that he

demoted to make more money, he obviously wanted the arbitrator to believe that was his motivation.

The Undersheriff did not have an ulterior motive for discharging Sergeant Harris. There is no evidence that anyone in the Sheriff's Office administration had any ill will toward the grievant. In fact, the Undersheriff found it difficult to arrive at the discharge decision, because he had a personal friendship with the grievant.

Termination is appropriate for an Officer found guilty of being untruthful for the second time. Not only did the Employer establish that the grievant made false statements in this internal investigation but he had previously admitted to having been deceptive in requesting the use of drugs from the evidence room for a private business class he was teaching. Since the credibility of a law enforcement officer is essential, proof that the law enforcement officer was untruthful is sufficient basis for job termination. Hence, the grievance should be denied and the discharge upheld.

SUMMARY OF UNION'S POSITION:

The County did not show by sufficient evidence that the grievant engaged in the alleged misconduct. It is the Union's position that the standard of clear and convincing evidence should be applied by the arbitrator or a more stringent standard should be applied. When serious allegations are made involving moral turpitude a substantial number of arbitrators have subscribed to the view that beyond a reasonable doubt is the appropriate standard of proof. **Hill and Sinicropi, *Evidence in Arbitration*, 32-36 (1987, 2d Ed.); *Fairweathers Practice and Procedure in Labor Arbitration*, 200-04 (1991 3d Ed. (Schoonhoven Editor).**

The grievant never said that Sergeant Long “approved” his plan, rather he explained how he presented his plan to Sergeant Long, who did not disapprove. Sergeant Long repeatedly told him in one way or another to comply with the eight (8) hour rule. At no time did Sergeant Harris say he received explicit permission from Sergeant Long to be in the car without signing in. Harris consistently said he told Sergeant Long about his plan to check in at 11:00 AM and Sergeant Long did not object, which Harris took as tacit approval. The Union cites the testimony of Sergeant Long where he admits that he knew Harris would have to drive to the boat and, therefore, would have to start his shift before eight hours lapsed, if he was going to be on marine detail at 11:00 AM. There is insufficient evidence to establish that Sergeant Harris lied about obtaining approval for his plan to sign in at 11:00 AM for marine detail.

The County did not prove that Harris’ recollection of what Corporal Haynes and Sergeant Zimmerman said on October 19, 2014 about management being responsible for the eight (8) hour rule was a lie. Both Haynes and Zimmerman had been vocal in their belief that it was management’s responsibility to enforce the eight-hour guarantee, not the employee’s responsibility. Both Haynes and Zimmerman recalled Harris’ assertion that he could not work beyond 3:00 AM because he had to be on the boat at 11:00 AM. The Union suggests that the animosity that Haynes and Zimmerman had toward Harris had much to do with their being unable to recall the conversation. The Union produced a witness who testified that Haynes and Zimmerman often went back and forth at coffee making derogatory remarks about Sergeant Harris calling him an “**idiot”. There is

insufficient evidence to establish that Harris lied about the comments made by Haynes and Zimmerman.

The evidence does not support a finding that Sergeant Harris lied about being on the water at approximately 10:40 AM. The Employer relies upon the testimony of Detective Mathena, who said he and Harris got on the water at around 9:30 AM. However, when asked, Detective Mathena admitted that he did not look at his watch to determine the time of day. The Employer concluded that the grievant lied based exclusively upon the conflicting recollection of two people and they relied exclusively upon the recollection of the individual who had not looked at his watch.

The Union demonstrated that Sergeant Harris' estimate of the time he believed he was on the water was accurate through the testimony of Doug Corulli, who had performed the same marine patrol with Sergeant Harris. He noted:

- the time it takes to get into and out of the parking area, where the jet boat to be used for the marine patrol was stored,
- the time it takes to drive from the storage area to the launch site,
- the time it takes to warm up the jet boat and
- the needed to unload the boat.

Based upon Mr. Corulli's experience, he offered the opinion that the sign in on the water was actually made at the place where the boat was stored not at the boat launch. Additionally, there is no rule or policy that required the team to be on the water at a certain time.

Despite Corulli's concise explanation of how long it takes to get on the water at the Wanapum Dam launch, the Employer did not make an independent

investigation into how long it actually does take to get on the water. Instead, the Employer relied exclusively upon the recollection of Detective Mathena, who did not look at his watch when he determined what time Harris and Mathena got on the water.

The Sheriff is the ultimate decision maker in this case. Nevertheless, the Sheriff testified that he did not review all of the transcripts. When asked if he recalled what transcripts he reviewed, the Sheriff said “No. I’d have to look through—what I mean is I reviewed the write-up, the entirety of that. And then looking through the transcripts, I read most of those. But to say I read the entire one hundred – every single page to the end, I would say no.” The Union contends that a 19-year veteran of the Sheriff’s department deserved a thorough review not a partial review of the facts.

The Union points out that Chief Mathews testified that the complaint involving Sergeant Harris came from Josh Mathena. Chief Mathews recalled “ I think Detective Mathena was informing me of the traffic stop. And based on that traffic stop, the conversation went to working the boat shift and being tired. And I believe Detective Mathena made – this was a long time ago – made a comment about Sergeant Harris either falling asleep or being sleepy, or something on the way home.” In his testimony Detective Mathena had no recollection of the conversation testified to by Chief Mathews. The Union contends that Chief Mathews testimony was untruthful.

There is no evidence that the Employer has a clear sign in policy nor has it strictly enforced the sign in policy it alleges grievant violated. When Chief Mathews

interviewed Detective Mathena, he learned that Mathena had signed-in late he laughed and admitted that it was amusing. Mathews also said in the interview with Mathena "well, obviously, this investigation is hardly about Sergeant Harris actually being on duty prior to the time he signed in service." No one but the grievant has ever been disciplined for violating sign in rules. The Employer has not applied and enforced its' rules evenhandedly.

Just cause normally involves progressive discipline. In this case the Employer imposed the ultimate penalty of discharge on a 19-year veteran with no prior history of discipline. Progressive discipline or some form of corrective action was not considered.

The February 2014 investigation into whether the grievant was untruthful, was not a formal internal investigation and included no safeguards. The grievant had no *Garrity* Warning, no *Weingarten* rights and no *Loudermill* hearing and there was never a full investigation. The Employer's rules regarding internal investigations say "Complaints involving serious allegations, ..., shall always receive a full internal investigation, monitored at the highest level of the office." If the February 2014 issue involved a serious allegation, it would have received a full internal investigation.

There is no evidence that the grievant did anything that violated the **7.17.00** rule regarding teamwork and cooperation. Josh Mathena testified that he did not think that Harris was trying to dupe him into some kind of misconduct by signing in later. Moreover, Sergeant Harris advised the scheduling Sergeant of his plan to comply with the 8-hour rule.

The Union also argues that using the issuance of a *Brady* letter in this case as a factor in imposing discipline is inappropriate. The use of a *Brady* letter is entirely outside the scope of discipline under a collective bargaining agreement and the prosecuting attorney has discretion in determining whether sustained or unsustained allegations led to a *Brady* designation. Even speculative and potential impeachment evidence must be disclosed. The *Brady* designation should have been a factor in the Employer's decision.

Finally, there is no evidence that the Employer took the grievant's remarkable career of 19-years into consideration, when it imposed discipline. While the grievant's personnel file is full of many strong reviews from supervisors and many letters of appreciation and commendation, the investigatory write ups make no mention of his long and positive career.

The Union asks that the grievance be upheld and an appropriate remedy be issued.

OPINION:

The documents that were generated by Chief Helvey at the beginning of the investigation do not support the Employer's proposition that "The investigation initially involved Mr. Harris' misreporting of his duty time." The first notice of investigation created by Chief Helvey says;

If the allegations are true, I believe you have violated several CCSO Policies including but not limited to those listed below.

1.04.00 Values, 7.01.00 Canons and Standards of Ethics, 7.06 00 Inducement to Commit Illegal Acts or Violations, 7.07.0 Truthfulness, 7.17.00 Teamwork and

Cooperation, 1504.00 Falsification, Destruction of Records, and 24.02.00 Radio Communications Procedures.

From the very start the Employer was looking for conduct that was untruthful, deceptive and serious enough to result in discipline, otherwise Mr. Harris would have been treated like all other department employees had always been treated in similar circumstances. In the past, when Sheriff's department employees have run afoul of the 8-hour rule or failed to follow radio procedures, they have been counseled but no discipline has ever been imposed.

If, for example, it appeared from the time records that the grievant was claiming compensation for more time than he worked, an internal investigation would have been appropriate. However, the grievant was claiming compensation for less time than the Employer believed he was on duty.

While there was some testimony that violation of the eight (8) hour rule raises safety concerns, not a single sentence in the documents generated through the investigation and other disciplinary steps references safety.

A fact that can be established by simply looking at the time records in this case is that Sergeant Harris was not benefiting financially from the alleged misreporting. By signing in at 11:00 AM rather than 8:00 AM Sergeant Harris was claiming three hours less compensation than Detective Mathena at overtime rates. Hence, the inquiry went to whether he inappropriately signed into service and violated the eight (8) hour rule. Neither alleged violation has ever resulted in discipline of a Sheriff's department employee.

There is no dispute over whether grievant was scheduled to work at 11:00 AM on October 19, 2014 nor is there any dispute that his overtime shift at the Leavenworth Oktoberfest ended at approximately 3:00 AM on October 19, 2014. The grievant undeniably worked the hours he was scheduled and claimed compensation for his hours worked. However, the investigation was focused on Harris' alleged violation of sign in and sign out policy. One of the policies cited was the department rule regarding radio communications standards **24.02.00**, which says in part "Field units are to keep RiverCom advised of their status and availability during the entire time they are on duty. This includes advising RiverCom of your "inservice" and "out of service" status." The radio communication rule does not define "on duty." However, the collective bargaining agreement at **Article 5, Section 5.5** says "... field deputies who choose to reside outside the area of their assignment must be within the assigned area at the beginning of their work, and time spent traveling to and from the area of assignment shall not be considered work time." If "on duty" time is "work time," then the grievant did not violate the collective bargaining agreement, when he did not claim drive time hours nor did he violate a department regulation. If "on duty" has some meaning other than "work time", there is no evidence that the Employer ever notified bargaining unit members that "on duty" is some form of time distinct from "work time" for which compensation is being paid. In simple terms, the Employer failed to establish by a preponderance of the credible evidence that Sergeant Harris violated department rule **24.02.00**, on October 19, 2014. The department produced no rule defining "on duty" as something other than "work time."

Similarly, the collective bargaining agreement at **Article 5, Section 5.10** says employees “shall be guaranteed a minimum of eight (8) hours between shifts.” Normally, a shift is “work time” for which an employee is entitled to be compensated. Sergeant Harris worked the shifts he was assigned.

Sergeant Long had some difficulty recalling specifics of the conversations he had with Sergeant Harris regarding the October 19, 2014 Grant County marine patrol. It is clear that Sergeant Long had been delegated the responsibility of scheduling overtime. Sergeant Long realized that the grievant would have to drive to the Wanapum dam site. Neither Sergeant Long nor Sergeant Harris raised the question of whether the drive time to the Grant County site was part of Harris’ shift. The Employer did not establish by a preponderance of the credible evidence that grievant violated **Article 5, Section 5.10** of the collective bargaining agreement. No rule defining a “shift” as time other than “work time” for which an employee is entitled to be compensated was produced at hearing.

At hearing there was testimony over whether the guarantee of eight (8) hours between shifts was the responsibility of management or bargaining unit members and Sergeant Harris’ perceived attempt to circumvent the rule was central to the argument that the grievant engaged in untruthful and deceptive conduct. In fact, the collective bargaining agreement at **Article 2, Section 2.1** says:

Subject to the express terms and conditions of the Agreement, all of management’s inherent rights, powers, authority and functions shall remain vested exclusively in the County. It is expressly recognized that such rights,

power, authority and functions include, but are not limited to ... the right to control the scheduling of all work...

The collective bargaining agreement clearly and unequivocally places the responsibility for scheduling work in management. Sergeant Harris had no contractual responsibility for making schedule determinations. If the eight (8) hour requirement was violated by management, Sergeant Harris' responsibility was to "act now, grieve later." The Employer did not establish by a preponderance of the credible evidence that grievant engaged in any behavior for the purpose of circumventing the guarantee to employees that they will have eight (8) hours between shifts.

The arbitrator does not find that the grievant lied by claiming that he had permission from Sergeant Long to work his plan for October 19, 2014. Sergeant Long knew the hours the grievant intended to work and that he would have to drive from Wenatchee to Wanapum Dam to launch a boat for the marine patrol. Sergeant Long clearly knew that Sergeant Harris intended to begin his shift at 11:00 AM on the 19th of October. There is no clear department policy that defines the beginning of a shift other than the **Article 5, Section 5.5** use of the term "work time". There was testimony at hearing that signing in and out with the dispatch center, when getting into a patrol vehicle is a well known and presumably understood policy of the Sheriff's department. However, there is no evidence of a written rule that was circulated to the bargaining unit or posted in a place where bargaining unit members would expect to find it other than the radio communication policy. There is no showing that the Employer provided specific training or explanation to the

bargaining unit informing employees that being “in service” as reference in the radio communication rule is something different than “work time.” In order for management to enforce a rule or policy through the disciplinary procedure, it must first create the rule or policy and inform the bargaining unit of the rule.

The Employer did not establish by a preponderance of the credible evidence that grievant was deceptive or lied in his interview with Chief Helvey about Sergeant Zimmerman or Corporal Haynes saying he did not have to “honor” the eight (8) hour shift provision in the contract. Harris’ comment in the transcript from the interview about the eight hour rule was as follows:

“... he goes that’s fine, just make sure you have eight hours, and it was either Andy or Monika said well that doesn’t pertain to us, that’s Admin saying they can’t , make us work with eight hours,...”

First, the comment is nearly incomprehensible. Second, the grievant simply did not say that either Sergeant Zimmerman or Corporal Haynes said he did not have to honor the eight-hour provision. It was Sergeant Harris’ recollection that either “Andy” or “Monika” said something about eight hours. Neither of the individuals recalled making the comment. Even if Sergeant Harris was wrong about the comment being made at 2:30 AM, at an Oktoberfest celebration two weeks earlier or wrong about the source of the comment, the evidence does not support a finding that he lied, any more than it supports a finding that grievant was mistaken, or grievant conflated the comment with comments made at a different time.

The Employer failed to establish by a preponderance of the credible evidence that grievant lied about the time he got on the water at the Grant County site.

Detective Mathena testified that he did not establish the time he got on the water by looking at his watch. Hence, the evidence given by Detective Mathena is likely imprecise and clearly unreliable. Detective Mathena did not recall who signed in with the dispatcher. If Detective Mathena did not actually sign in and did not look at his watch when he got on the water, the accuracy of the sign in time is suspect. The Union provided testimony and calculations based upon road maps and personal recollections that support Sergeant Harris' recollection of what time he launched on the water. The Employer made no follow up investigation. Detective Mathena's recollections were simply accepted as accurate and Sergeant Harris' recollections were presumed to be false.

The Union's analysis of the travel time to the Wanapum Dam launch site from Wenatchee was presented at a *Loudermill* hearing. When presented with a credible alternative explanation, the Employer did not evaluate the evidence by doing it's own drive through. Hence, the factual investigation was not thorough. The Employer did not establish by a preponderance of the credible evidence that Sergeant Harris lied about what time he got on the water.

The just cause standard requires that some work rule be violated and that the employee has notice of the rule. The Employer failed to establish that grievant violated a work rule.

The Employer failed to establish a credible reason for initiating an internal investigation. No other Sheriff's Department employee has ever been disciplined for the same or similar rule violations alleged by the Employer. The treatment of Sergeant Harris was disparate, which violates the just cause standard.

The investigation was neither thorough nor was it unbiased. The investigation presumed statements made by Sergeant Harris to be untruthful when the evidence would equally support findings that the statements were mistakes, conflations, and/or misunderstandings. During the arbitration hearing Chief Mathew was asked who initiated the complaint against Sergeant Harris. Chief Mathew recalled a conversation with Detective Mathena, wherein Mathew believed Detective Mathena complained about Sergeant Harris “ falling asleep or being sleepy or something” on the way home. Detective Mathena did not recall the conversation. Because Chief Mathew has a different recollection than Detective Mathena, it does not mean that either of the men lied in the arbitration. The two men have different recollections. Similarly, because Sergeant Harris’ recollections were somewhat different over minor points than those of Sergeant Long, Sergeant Zimmerman, Corporal Haynes and Detective Mathena it does not mean that any of the individuals were lying. They simply had different recollections.

The Employer did not establish by a preponderance of the credible evidence that it had just cause to discharge the grievant, Mike Harris.

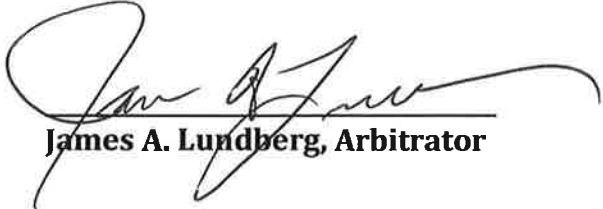
The Employer should be directed to reinstate the grievant to his former position with full back pay, and all benefits, including appropriate retirement fund contributions from the date of discharge. The Employer should pay interest on the back pay at the same rate provided for by Washington State Statutes on judgments obtained through the judicial process. If the parties are unable to agree upon the appropriate interest rate, they should submit written explanations for their positions to the arbitrator in a post award memorandum. The arbitrator should

retain jurisdiction over the remedy in the above matter for a period of 120 days from the date of this award.

AWARD:

- 1. The Employer did not have just cause to discharge the grievant Mike Harris.***
- 2. The Employer is directed to reinstate the grievant to his former position with full back pay, and all benefits, including appropriate retirement fund contributions from the date of discharge.***
- 3. The Employer shall pay interest on the back pay at the same rate provided for by Washington State Statutes on judgments obtained through the judicial process. If the parties are unable to agree upon the appropriate interest rate, they shall submit written explanations for their positions to the arbitrator in a post award memorandum.***
- 4. The arbitrator shall retain jurisdiction over the remedy in the above matter for a period of 120 days from the date of this award.***

Dated: April 16, 2016



James A. Lundberg, Arbitrator