

**IN THE MATTER OF THE ARBITRATION BETWEEN**

<b>Becker County,</b>	)	
	)	
<b>Employer,</b>	)	<b>Discharge of Deputy Chad Peterson</b>
	)	
<b>and</b>	)	<b>Case No. 22POA1234</b>
	)	
<b>Law Enforcement Labor Services, Inc.,</b>	)	<b>Arbitrator: Stephen D. Swanson</b>
	)	
<b>Union.</b>	)	

**ARBITRATION DECISION AND AWARD**

**PROCEEDINGS**

On January 19, 2022, the Commissioner of the Minnesota Bureau of Mediation Services appointed the undersigned Arbitrator to hear and determine the above-captioned arbitration matter. The Arbitrator conducted an arbitration hearing on May 11 and 12, 2022, at the Becker County Courthouse, 915 Lake Avenue, Detroit Lakes, Minnesota.

Becker County (hereinafter “Employer”) was represented by Ann R. Goering, Ratwik, Roszak & Maloney, P.A. Becker County Sheriff Todd Glander and Sheriff’s Office Chief Deputy Shane Richard attended the hearing as representatives of the Employer.

Law Enforcement Labor Services, Inc. (hereinafter “Union”) was represented by Mark J. Schneider, General Counsel, and Scott Higbee, Attorney. Chad Peterson (hereinafter “Grievant”), Keith Terlinden, Union Business Agent, and Cody Bouchie, Union Steward, attended the hearing.

At the two-day hearing, the parties had a full and fair opportunity to present their cases. Employer Exhibits (hereinafter “EE”) 1-37; and Union Exhibits (hereinafter “UE”) 101-105 were received in evidence. Becker County Sheriff Todd Glander, Chief Deputy Shane Richard, Patrol Sergeant Ty Warren, Dispatcher Amanda Miller, and Hubbard County Use of Force Instructor Tony Petrie testified on behalf of the Employer. The Grievant, Sergeant Andrew Bachmann, Lake

Park Police Department Chief Brady Burnside and Officer Brett Anderson, and Audubon Police Department Chief Eric Hegna testified on behalf of the Union. All testimony was taken under oath. The proceedings were not recorded.

At the conclusion of the hearing, the parties elected to submit written closing arguments to be postmarked on or before June 15, 2022. Upon request, the Arbitrator extended the submission time to June 17, 2022. Closing arguments were received by the Arbitrator on June 17, 2022, and the record in this proceeding closed on that date.

Based upon the evidence adduced at the arbitration hearing, the Arbitrator enters the following Arbitration Decision and Award.

### **JURISDICTION**

The Employer and the Union (hereinafter “Parties”) are signatories to a collective bargaining Labor Agreement (hereinafter “CBA”) covering the period January 1, 2020, to December 31, 2021 (UE 101). The CBA covered Union members employed as deputies in the Becker County Sheriff’s Department. Prior to the levy of discipline by the Employer, the Grievant was a deputy and member of the Union, Local 391, and therefore covered by the CBA (UE 101, Arts. 1 and 2). The CBA provides for a four-step grievance process (UE 101, Art. 7). Step 4 is binding arbitration (*Id.*).

By *Loudermill* Hearing Notice dated November 24, 2021, the Employer notified the Grievant that the Employer was considering terminating his employment based on misconduct (EE 2). By letter dated December 8, 2021, the Employer notified the Grievant that his employment was terminated, effective on that date (EE 4). By letters to the Employer dated December 10 and 19, 2021, the Union submitted a Step 3 grievance challenging the dismissal for lack of just cause

and seeking that the Grievant be made whole (EE 6). On January 19, 2022, the Union notified the Bureau of Mediation Services that it was submitting the grievance to binding arbitration.

The undersigned Arbitrator was duly appointed and has jurisdiction over this binding arbitration proceeding.

### **ISSUE**

The parties agree that the issue in this proceeding may be stated as follows: Whether the discharge of Deputy Chad Peterson effective December 8, 2021, was for just cause and, if not, what is the appropriate remedy?

### **APPLICABLE ARBITRATION PRINCIPLES**

Adjudication of the Issue in this case requires the application of the principle of “just cause” and an understanding of the role of the arbitrator in labor grievance binding arbitration cases.

Under the Minnesota Public Employment Labor Relations Act (PELRA),<sup>1</sup> peace officers, as well as other public employees, have the right to form a union and collectively bargain with their public employers.<sup>2</sup> However, peace officers, considered essential employees, may not strike.<sup>3</sup> The public employer and the union negotiate a contract called a collective bargaining agreement (CBA). They negotiate for the inclusion in the CBA of provisions that are understood by both parties; there are no secrets or surprises. As in the private sector, one central reason for peace officers to unionize is to provide for job security by ensuring that union members are not discharged or otherwise disciplined arbitrarily. To accomplish this important goal, peace officer CBAs include a “just cause” provision.

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<sup>1</sup> Minn. Stat. Ch. 179A. Underlying the Act is the public policy recognition that unresolved disputes involving public employees are injurious to the public as well as the parties, and that protecting the rights of the public as well as the parties can best be accomplished through organizing and collective bargaining undertaken within the confines of the Act. Minn. Stat. § 179A.01(c) (2020).

<sup>2</sup> Minn. Stat. §§ 179A.03, subd. 7, 179A.06, subd. 2 (2020).

<sup>3</sup> Minn. Stat. § 179A.18, subd. 1 (2020).

The “just cause” provision means that an employer cannot discharge, demote, or suspend a peace officer without just cause. The “just cause” standard incorporates a multitude of legal principles developed over many decades in labor grievance arbitrations.<sup>4</sup> In essence, the standard embodies the concept of fairness under all the circumstances, and requires a consideration of several factors, including whether the peace officer violated an employment rule imposed by the employer under the CBA; and if so, the seriousness of the rule violation, the proportionality of the discipline imposed, the peace officer’s service record, and the employer’s treatment of other officers in like circumstances. Employers and peace officer unions understand these legal principles and incorporate them into their CBAs by simply including the term, “just cause,” or a similar term. Peace officer unions rightfully expect that employers will apply these principles when imposing discipline, and unions and employers rightfully expect that arbitrators will apply these principles in the adjudication of binding arbitration cases.

If the union believes that the employer has imposed discipline without just cause, the union may file a grievance with the employer. Minnesota law requires that all public employee CBAs, including those covering peace officers, contain a provision that written disciplinary actions that are not resolved by the parties through the CBA grievance process must be submitted to binding arbitration.<sup>5</sup> In peace officer cases, the Minnesota Bureau of Mediation Services assigns an arbitrator to conduct the arbitration hearing.<sup>6</sup> At the hearing, the employer must prove, by a preponderance of the evidence, that under the terms of the CBA it had just cause in the first

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<sup>4</sup> See generally, ELKOURI & ELKOURI, *How Arbitration Works*, Ch. 15 (Bloomberg BNA 8<sup>th</sup> Ed.).

<sup>5</sup> Minn. Stat. § 179A.20, subd. 4(a) (2020).

<sup>6</sup> During its 2020 2nd Special Session, the Legislature enacted Minn. Stat. § 626.892 [Peace Officer Grievance Arbitration Selection Procedure] to govern peace officer labor grievance arbitrations. Under this new law, the Bureau maintains a roster of trained arbitrators to be assigned to peace officer labor grievance arbitrations. These arbitrators are independent contractors and not employees of the Bureau. The parties do not participate in the appointment by the Bureau of an arbitrator and cannot object to the arbitrator appointed.

instance to discipline the union member and also just cause to impose the level of discipline chosen. Based upon the evidence at the hearing, the arbitrator issues a decision, which is called an award. In preparing the award, the arbitrator must apply the terms of the CBA, including the “just cause” provision and all the legal principles incorporated into that provision. The arbitrator must be fair, impartial, and not biased in favor of or against either party.<sup>7</sup> The award must be based solely on the evidence introduced at the arbitration hearing and the arbitrator cannot be influenced by public sentiment or opinion.<sup>8</sup>

### **SUMMARY OF DECISION AND AWARD**

In the very early-morning hours of June 7, 2021, the Grievant responded to a dispatch to a private residence on a civil matter and at the residence engaged the occupant in a dangerous profanity- and vulgarity-laden shouting match. The incident was captured on the Grievant’s body worn camera. The County has proven that the Grievant’s behavior violated several Becker County Sheriff’s Office policies, Becker County personnel policies, and Minnesota POST Board policies. The Grievant admitted that he had lost control and had violated some policies, and the Union conceded the point. Rather, the Union built its case upon the theory that given the Grievant’s lengthy and good service record and considering other mitigating factors, discipline in the form of termination was clearly punitive and disproportionate to the seriousness of the violations. The Arbitrator does not agree and, for the following reasons, enters an award denying the grievance and sustaining the termination.

### **PERTINENT CONTRACT PROVISIONS AND POLICIES**

#### **(A). CBA Provisions**

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<sup>7</sup> Minn. R. 5500.2220, subp. 1 (46 SR 1388); *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes* (American Arbitration Association), § 1.A, C.3; Minn. R. 5530.0800 (46 SR 1391).

<sup>8</sup> *Id.*

The following provisions of the CBA (UE 101) are pertinent to this proceeding:

Article 7.5.B. . . . The arbitrator's decision shall be submitted in writing within thirty (30) days following close of the hearing or the submission of briefs by the parties, whichever is later, unless the parties agree to an extension. The decision shall be binding on both the Employer and the Union and shall be based solely on the arbitrator's interpretation or application of the express terms of the Agreement and to the facts of the grievance presented.

Article 10.1. The Employer will discipline employees for just cause only. Discipline will be in one or more of the following forms:

- A. Oral reprimand;
- B. Written reprimand;
- C. Suspension;
- D. Demotion; or
- E. Discharge.

Article 10.2. Suspensions, demotions and discharges will be in written form.

(B). Policies

The following written policies of the Employer are directly pertinent to this proceeding.

Only the relevant provisions of these policies are quoted below.

**(1). Becker County Personnel Policies (EE 33)**

20.2 Just Cause.

An adequate reason for "cause" for a disciplinary action shall include but not be limited to each of the following types of conduct.

2.) Wanton carelessness or negligence in the performance of duty,

3.) Offensive or brutal treatment of fellow employees or other persons;

13.) Acting in a manner not here and above specified which tends to lower discipline or morale within the County or that adversely affects the rendering of prompt courteous, and efficient service by the County and its employees to the public.

## **(2). Becker County Sheriff's Office Policies**

340. Standards of Conduct (EE 34)

### **340.5 CAUSES FOR DISCIPLINE**

The following are illustrative of causes for disciplinary action . . .

#### **340.5.5 CONDUCT**

- (c). Exceeding lawful peace officer powers by unreasonable, unlawful or excessive conduct.
- (d). Unauthorized or unlawful fighting, threatening or attempting to inflict unlawful bodily harm on another.
- (f). Discourteous, disrespectful or discriminatory treatment of any member of the public or any member of the department or the County.
- (g). Use of obscene, indecent, profane or derogatory language while on-duty or in uniform.
- (h). Criminal, dishonest, or disgraceful conduct, whether on- or off-duty, that adversely affects the member's relationship with this department.
- (m). Any other on- or off-duty conduct which any member knows or reasonably should know is unbecoming a member of the department, is contrary to good order, efficiency or morale, or tends to reflect unfavorably upon this department or its members.

#### **340.5.6. PERFORMANCE**

- (i). Any act on- or off-duty that brings discredit to the department.

## **(3). POST Board Policies (EE 22)**

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

Section 1 – Rationale: Community cooperation with the police is a product of its trust that officers will act honestly and with impartiality. The peace officer, as the public's initial contact with the criminal justice system, must act in a manner that instills that trust.

Section 2 – Rules:

- (a) Peace officers shall carry out their duties with integrity, fairness and impartiality.

Principle Five – Peace officers shall treat members of the public courteously and with respect.

Section 1 – Rationale: Peace officers are the most visible form of local government. Therefore, peace officers must make a positive impression when interacting with the public and each other.

Section 2 – Rules:

- (a) Peace officers shall exercise reasonable courtesy in their dealings with the public, other officers, superiors and subordinates.
- (b) No peace officer shall ridicule, mock, taunt, belittle, willfully embarrass, humiliate, or shame any person to do anything reasonably calculated to incite a person to violence.

## **FACTUAL BCKGROUND**

### (A). Introduction

The dispositive facts in this case are not in dispute and may be summarized as follows.

### (B). Incident Leading to Imposition of Discipline

At 12:01 a.m. on June 7, 2021, Becker County Dispatcher, Amanda Miller, received a non-911 telephone call from BES, a twenty-year-old private citizen.<sup>9</sup> BES called from work and requested assistance in removing KB, a male friend who was temporarily staying with him, from his residence.<sup>10</sup> Ms. Miller advised BES that a Sheriff’s Deputy would contact him by telephone.<sup>11</sup> Ms. Miller dispatched the request to the Grievant.<sup>12</sup>

The Grievant called BES on his cell phone.<sup>13</sup> During the conversation, BES stated that he was on his way home, and the Grievant advised BES that his request involved a civil matter that

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<sup>9</sup> EE 8.

<sup>10</sup> Testimony (hereinafter “Test.”) of Amanda Miller; EE 13 at 2, 3.

<sup>11</sup> EE 13 at 3, 4.

<sup>12</sup> Miller Test.; *Id.* at 4

<sup>13</sup> Grievant Test.; EE 25 at 3.

he would have to deal with on his own, but that if something should arise where he needed assistance, the Grievant would come.<sup>14</sup> BES cut the Grievant off and responded to the effect that “you fuckers don’t do anything,” and stated that he would return home and “beat the shit” out of KB.<sup>15</sup> The Grievant called BES at 12:16 a.m., and the call lasted two minutes.<sup>16</sup> Because of the threat, the Grievant drove in his squad to the residence, arriving at approximately 12:28 a.m.<sup>17</sup> The Grievant did not know BES and had never been to the residence.<sup>18</sup>

Upon arrival at the scene, the Grievant encountered JV, another male staying at the residence, outside the residence.<sup>19</sup> JV told the Grievant that he was kind of scared because BES and KB had gotten into it.<sup>20</sup> The Grievant observed BES dumping personal property outside of the residence and BES advised the Grievant that KB had left and was not at the residence.<sup>21</sup> The Grievant went through the residence with a flashlight and looked in the backyard to ensure that no one was hurt.<sup>22</sup> The Grievant was frustrated as he drove to the residence because he had other work to do, and BES was agitated when the Grievant went through the residence.<sup>23</sup>

While at the residence, the Grievant and BES engaged in a verbal confrontation, which lasted approximately three minutes and that was video- and audio-recorded on the Grievant’s body worn camera.<sup>24</sup> Following is a transcript of the confrontation:

GR: You Ben?

BES: Yah, he’s gone.

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<sup>14</sup> EE 25 at 3.

<sup>15</sup> Grievant Test.; EE 25 at 4; EE 19 at 7.

<sup>16</sup> EE 19 at 8.

<sup>17</sup> EE 25 at 4.

<sup>18</sup> Grievant Test.

<sup>19</sup> *Id.*; EE 25 at 6; EE 19 at 2.

<sup>20</sup> *Id.*

<sup>21</sup> Grievant Test.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> EE 11; EE 19 at 3.

GR: Has he already left?

BES: Yep.

GR: Where's he at?

BES: Don't know.

[The Grievant follows BES into the residence searching through a couple of rooms with his flashlight].

BES: Not much you're going to do anymore I guess.

GR: Was he here when you got here?

BES: Nope.

[The Grievant briefly exits the residence through the rear door shining his flashlight on the backyard. The Grievant reenters the house where both BES and JV are present].

GR: So you called me for nothing? Don't get, I asked you this on the phone, this is where this came from.

GR: All as I know is what I tell you today is if he didn't leave then call us then we will make him leave.

BES: It's a joke.

GR: What's a joke? Do you have your mom pamper your ass when you take a shit?

GR: You're a big boy.

BES: What's the point?

GR: You're a big boy.

BES: (Inaudible) police. . .

GR: Fuck you. You're a big boy take care of yourself.

BES: (Inaudible yelling), what's the point of the police if they don't come to a domestic thing huh?

GR: There was no domestic.

BES: He's trespassing (inaudible) the doors were locked.

GR: You let him stay with you.

BES: Nope, I told him he can't come back.

GR: You let him stay with you for four days.

BES: I told him he can't come back.

GR: You let him stay with you for four days. We will take care of it if he don't leave but you want to have to be a little baby about it be a little baby about it.

BES: I locked the doors.

GR: Be a little baby about it.

BES: So do you lock your doors if someone comes in you don't want them to come in? That's not breaking the law? No . . . ? No . . . ?

[The Grievant is exiting the residence at this time and BES follows him outside. JV is behind BES and also exits the residence at this time].

GR: It's not breaking the law when they're a guest here.

BES: They're not a guest. He was gone.

GR: You had him stay with you for four days you told me.

BES: Yep.

GR: Alright then.

BES: I left for the weekend. He was able to stay here because he was evicted from his house.

GR: Well eviction is more than one day in your house.

BES: What do you mean?

GR: It means if we wanted to, if he wanted to, he could complain and say I took up residency here.

BES: (Inaudible) stay here.

GR: It don't matter; it don't matter. If he takes residency up here you would have to go through the courts to evict him, not like this, and for this damage he could sue you for it.

BES: Fuck off.

GR: No, fuck you.

BES: Get fucked.

GR: No you can get fucked.

BES: You're a piece of shit.

GR: You're a piece of shit. You're a pampered spoiled rotten piece of shit.

BES: Yah?

GR: Yah.

BES: I come from North Dakota working on a fucking farm. What do you do bitch?

GR: Same thing.

BES: What do you do bitch?

GR: Go back to North Dakota. Go back to North Dakota then.

BES: What you do?

GR: Go back to North Dakota.

BES: Get the fuck out of here.

GR: Suck a dick.

BES: Get your sorry ass out of here to.

GR: Nope.

BES: Oh, you (inaudible).

GR: You got a ride?

JV: No.

GR: Need a ride?

JV: Yah.

GR: Alright, let's go. You got all your stuff out?

BES: I thought you said you weren't taking him home, hah?

GR: Hey, why don't you shut the fuck up?

BES: (Inaudible) buddy.

GR: Why don't you go suck a dick and fuck off?

BES: God you're an (inaudible).

[The Grievant was walking away from the residence at this time and turns and walks back toward BES].

GR: Come on, you want to go, let's go?

BES: Oh (inaudible).

GR: Let's go. Let's go.

BES: You want to be (inaudible) right now?

GR: Let's go.

BES: Yah.

GR: Come on.

BES: What?

GR: Let's go.

BES: No.

GR: Then shut up.

BES: God you're a pussy.

GR: I'm not a pussy you're the one sitting there bitching.

BES: (Inaudible).

GR: You're a worthless pile of . . .

BES: (Inaudible).

GR: You're a worthless pile of North Dakota shit.

BES: Yah?

GR: Yep.

BES: God you fucking (inaudible) . . .

[The Grievant says "let's go" to JV and the two leave in his squad].<sup>25</sup>

The distance between the Grievant and BES after the Grievant turned and began to walk back toward BES saying, "[c]ome on you want to go, let's go," was approximately 60 feet.<sup>26</sup> The Grievant took several steps back toward BES.<sup>27</sup>

The Arbitrator has viewed the body worn camera video several times and notes the following: MES is a physically well-developed young man; he was dressed in shorts and a T-shirt; the residence was very cluttered and messy; and much of the confrontation occurred when MES

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<sup>25</sup> The transcript, including the observations in brackets, was prepared by Lieutenant Brad Penas, Moorhead Police Department, based upon his review of the body worn camera video. EE 19 at 2-7.

<sup>26</sup> Test. of Ty Warren.

<sup>27</sup> Richard Test.; EE 21 at 8.

was standing on the stoop to his residence under an outdoor porch light.<sup>28</sup> The foregoing transcript cannot fully capture the confrontation between the Grievant and MES. When the Grievant determined that KB was not at the residence, he could have ended the call and left the premises, but he did not.<sup>29</sup> The interchange between the Grievant and MES was civil until MES commented that “[i]t’s a joke.”<sup>30</sup> That comment provoked the Grievant to profanely and vulgarly insult and demean MES.<sup>31</sup> As the Grievant and JV were walking away from the stoop and leaving, MES shouted, “I thought you said you weren’t taking him home, hah?”<sup>32</sup> Rather than continue to leave, the Grievant turned around and began to walk back toward MES, who was standing on the stoop, yelling at MES:

Hey, why don’t you shut the fuck up? . . .  
Why don’t you go suck a dick and fuck off?. . .  
Come on, you want to go, let’s go?. . .  
Let’s go. Let’s go. . .  
Let’s go. . .  
Come on. . .  
Let’s go.

After the Grievant and JV left the residence,<sup>33</sup> MES called the dispatcher to complain about the Grievant’s conduct.<sup>34</sup> MES was angry, and said he wanted to make a complaint against the Grievant.<sup>35</sup> The dispatcher transferred the call to Patrol Sergeant Andrew Bachmann, who was on duty that night.<sup>36</sup> During the conversation with Sgt. Bachmann, MES was very angry and upset,

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<sup>28</sup> The body worn camera video was received in evidence as EE 11 and has been copied to a flash drive as file 446730. The flash drive, which contains other audio recordings, was received in evidence as EE 9. The body worn camera video will be cited as EE 11.

<sup>29</sup> Grievant Test.

<sup>30</sup> EE 11.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> The Grievant testified that he gave JV a ride because JV was not welcome at the residence and could be in harm’s way.

<sup>34</sup> Miller Test.; EE 13 at 5-7.

<sup>35</sup> *Id.*

<sup>36</sup> Miller Test.; EE 13 at 7, 8; Bachmann Test.

he was screaming, and he abruptly terminated the call by hanging up.<sup>37</sup> The Grievant returned to the Sheriff's Office just as the Bachmann/MES conversation was ending, he reported the incident to Sgt. Bachmann, and later in the shift, they watched the body worn camera video.<sup>38</sup> Sgt. Bachmann decided to allow the Grievant to finish his shift and planned to advise Sheriff Glander and Chief Deputy Shane Richard of the incident the next morning after the completion of his shift.<sup>39</sup>

On June 7<sup>th</sup> at 9:54 a.m., dispatch received a non-911 telephone call from KB complaining that MES had destroyed his property.<sup>40</sup> In response to the call, Sergeant Ty Warren went to the residence at 11:00 a.m.<sup>41</sup> While at the residence, he spoke with MES, learned about the confrontation with the Grievant, and advised MES that he could file a complaint against the Grievant.<sup>42</sup> When he returned to the Sheriff's Office, Sgt. Warren reviewed the body worn camera video, and reported the matter to Sheriff Glander at 12:15 p.m.<sup>43</sup> Sgt. Warren, Sheriff Glander, and Chief Deputy Shane Richard watched the video.<sup>44</sup> The Sheriff and the Chief Deputy called Sgt. Bachmann and confirmed that the incident had occurred.<sup>45</sup>

### (C). Investigation and Termination

By letter dated June 7, 2021, Sheriff Glander placed the Grievant on administrative leave with pay.<sup>46</sup> On the basis that the Grievant's altercation with MES could possibly support a criminal assault charge, based upon a potential conflict of interest Sheriff Glander contacted Moorhead

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<sup>37</sup> Bachmann Test.

<sup>38</sup> *Id.*; Grievant Test; EE 25 at 20, 21.

<sup>39</sup> Bachmann Test.

<sup>40</sup> EE 14.

<sup>41</sup> *Id.*; Warren Test.

<sup>42</sup> Warren Test.; EE 15.

<sup>43</sup> *Id.*

<sup>44</sup> Test. of Sheriff Todd Glander; Richard Test.

<sup>45</sup> Richard Test.

<sup>46</sup> EE 1, 18.

Police Department Chief Shannon Monroe and requested that that department investigate the matter for possible criminal conduct.<sup>47</sup> On June 15, 2021, Chief Monroe assigned the matter to Moorhead Lt. Brad Penas to undertake the investigation.<sup>48</sup> His investigation was to precede the Becker County Sheriff's Office internal affairs investigation.<sup>49</sup>

Lt. Penas conducted his investigation, prepared a report dated June 30, 2021, and forwarded the report to the Clay County Attorney's Office for possible charging.<sup>50</sup> By letter dated August 4, 2021, that office advised the Sheriff's Office that it had declined to charge the Grievant with a crime.<sup>51</sup> Sheriff Glander then assigned Chief Deputy Richard to perform the Becker County Sheriff's Office internal affairs investigation.<sup>52</sup>

Chief Deputy Richard reviewed Lt. Penas' report and, following the provision of a *Garrity/Tennessee Notice*,<sup>53</sup> interviewed the Grievant on September 7, 2021<sup>54</sup>, and Dispatcher Miller<sup>55</sup> and Sgt. Bachmann<sup>56</sup> on October 5, 2021. Sgt. Ty Warren reviewed the Grievant's past body worn camera footage going back one year.<sup>57</sup> From the 150 to 200 calls that Sgt. Warren reviewed, he found only one incident that raised concerns about the Grievant's conduct.<sup>58</sup> Chief Deputy Richard issued his investigative report on October 11, 2021.<sup>59</sup> In preparing that report, he relied on Lt. Penas' report.<sup>60</sup> In his report, Chief Deputy Richard sustained BES's complaint,

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<sup>47</sup> Glander Test.; Richard Test.; EE 18; EE 19 at 1; EE 22 at 4.

<sup>48</sup> EE 19 at 1.

<sup>49</sup> Richard Test.

<sup>50</sup> EE 19 at 9.

<sup>51</sup> Glander Test.; Richard Test.; EE 22 at 5.

<sup>52</sup> *Id.*

<sup>53</sup> EE 23.

<sup>54</sup> EE 25.

<sup>55</sup> EE 13.

<sup>56</sup> EE 17.

<sup>57</sup> Warren Test; EE 22 at 10.

<sup>58</sup> Warren Test.; EE 22 at 10, 11. The incident was very minor, and did not factor into Sheriff Glander's decision to terminate the Grievant's employment.

<sup>59</sup> EE 22.

<sup>60</sup> Richard Test.

concluded that the Grievant's confrontation with BES constituted a violation of several specified Becker County, Sheriff's Office, and POST Board policies, and recommended to Sheriff Glander that the Grievant's employment be terminated.<sup>61</sup>

By letter to the Grievant dated December 8, 2021, Sheriff Glander terminated the Grievant's employment, effective on that date, for misconduct.<sup>62</sup> The letter states in part:

On or about June 7, 2021, while responding to a civil complaint, you engaged in numerous and continued use of obscene, profane, and indecent language towards the complainant, engaged in and continued an unnecessary verbal altercation, were discourteous and disrespectful to the complainant and threatened to fight with and/or cause harm to complainant. This conduct occurred while you were on-duty and in uniform.

Your conduct, as set forth above, constitutes conduct unbecoming an officer, violation of Sheriff's office policies and procedures, Becker County Personnel Policies, Minnesota POST Board policies and other good and sufficient grounds constituting gross misconduct warranting termination. Your employment is terminated, effective December 8, 2021.<sup>63</sup>

Sheriff Glander hand-delivered the letter to the Grievant on December 8, 2021.<sup>64</sup>

In making his decision, Sheriff Glander reasoned that all citizens need to feel safe in their homes, that the Grievant could have walked away without turning back to confront MES and challenge him to a fight and was obligated by training to do so, and that he, Sheriff Glander, could not put the Grievant back on the street and risk a reoccurrence of the behavior.<sup>65</sup> In making his decision, Sheriff Glander took into account the commendations received by the Grievant and his positive standing in the Sheriff's Office, but did not take into account the two minor disciplinary actions<sup>66</sup> against the Grievant reviewed by Chief Deputy Richard in his report.<sup>67</sup> At the time of the incident the Sheriff's Office was short staffed.<sup>68</sup>

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<sup>61</sup> EE 22.

<sup>62</sup> EE 4.

<sup>63</sup> *Id.*

<sup>64</sup> Glander Test.; EE 5.

<sup>65</sup> Glander Test.

<sup>66</sup> EE 27, 28.

<sup>67</sup> Glander Test.; EE 22 at 13.

<sup>68</sup> Glander Test.; Richard Test.; Anderson Test.; Grievant Test.

The Grievant has consistently accepted responsibility for his actions and apologized for his behavior during the incident.<sup>69</sup>

(D). Grievant Employment History

(1). Becker County Sheriff's Office

Prior to the incident at issue in this arbitration, the Grievant had a good employment record with the Becker County Sheriff's Office. He joined the Office in 2011 as a patrol deputy and served in that capacity until his employment was terminated.<sup>70</sup> He received training from the Office on the policies referred to above, including training on the use of force and de-escalation techniques.<sup>71</sup> Officers who appeared at the hearing, including Sheriff Glander, testified that the Grievant was a good officer and well liked, and that the incident with MES was out of character for the Grievant.<sup>72</sup> The Grievant was valued in the Office for his ability to investigate serious crimes.<sup>73</sup>

While employed with the Becker County Sheriff's Office, the Grievant received several commendation letters: (1) October 20, 2015 (Sheriff Glander – professional, courteous, and prompt response to suspicious vehicle call); (2) September 20, 2016 (Sheriff Glander – exemplary skills and teamwork in removing a gun from a suicidal individual); (3) March 7, 2017 (Sheriff Glander – rapid response, attention to detail, and coordination in the apprehension of convenience store armed robbers); (4) July 18, 2018 (Detroit Lakes Police Department – administration of Narcan to an unconscious overdose victim); and (5) December 16, 2020 (Sheriff Glander – response and assistance to a family with a child experiencing paranoia and hallucinations).<sup>74</sup>

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<sup>69</sup> Grievant Test.; Glander Test.; Bachmann Test.; EE 25 at 23, 26.

<sup>70</sup> Grievant Test.

<sup>71</sup> *Id.*; Glander Test.; EE 30, 32.

<sup>72</sup> Glander Test.; Warren Test.; Bachmann Test. Other peace officers who appeared at the hearing testified in the same vein: Chief Brady Burnside and Officer Brett Anderson, City of Lake Park Police Department; Officer Eric Hegna, Audubon Police Department.

<sup>73</sup> Glander Test.; Warren Test.

<sup>74</sup> UE 104 at 8-13.

Prior to the termination of his employment, the Grievant had been disciplined twice, both involving oral reprimands for minor violations: March 17, 2015 – use of profanity in describing a superior officer,<sup>75</sup> and October 20, 2015 – use of profanity directed at a deputy conducting firearms training.<sup>76</sup> Sheriff Glander did not take these disciplinary actions into account in making his decision to terminate the Grievant’s employment.<sup>77</sup>

(2). Mahnomen County Sheriff’s Office

The Grievant became a licensed peace officer in 2003 and on February 19, 2009, was a Patrol Deputy in the Mahnomen County Sheriff’s Office.<sup>78</sup> While responding to a call regarding a drunk driver leaving a casino, he and another patrol deputy, driving separate squad cars, encountered two armed men near a residence.<sup>79</sup> The Grievant heard shots and observed two men near the other deputy’s squad.<sup>80</sup> The Grievant responded by shooting and wounding one of the assailants who was armed; the assailants entered the residence and later surrendered after a nine-hour standoff.<sup>81</sup> The Grievant found the other deputy in the driveway of a nearby home; he had been shot in the head and was seriously wounded.<sup>82</sup> The Grievant placed the wounded deputy in another police vehicle.<sup>83</sup> The other deputy went to Colorado for rehabilitation and later died of his injuries in 2010.<sup>84</sup> The Grievant was not offered any counseling by Mahnomen County and returned to duty after nine days.<sup>85</sup> For his service during this incident, the Grievant received the 2009 Minnesota Police and Peace Officers Association Police Officer of the Year Award; the

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<sup>75</sup> EE 27.

<sup>76</sup> EE 28.

<sup>77</sup> Glander Test; EE 4.

<sup>78</sup> Grievant Test.; UE 103 at 2, 3.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> UE 103 at 2, 3.

<sup>82</sup> Grievant Test.; UE 103 at 2, 3.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Grievant Test.

Mahnomen County Sheriff's Office Medal of Honor, 2009 Medal of Valor, and a Sheriff's Certificate of Appreciation; and a Minnesota Public Safety Service Awards Committee Award of Honor.<sup>86</sup>

## **CONTENTIONS OF THE PARTIES**

### **(A). Position of Employer**

The Employer contends that the Grievant's actions during his altercation with BES violated several Becker County, Sheriff's Office, and POST Board policies, that his actions were so serious that the only option available to Sheriff Glander to protect the public from a recurrence of those actions was the termination of the Grievant's employment, and that it would be "completely unreasonable for Becker County to be forced to employ a deputy, with the power of arrest and the right to carry a gun and a taser, who could be set off" in the way the Grievant was set off in this case.<sup>87</sup>

### **(B). Position of Union**

Without identifying the precise rules that the Grievant violated, the Union concedes that the Grievant's actions during the incident with MES warranted some form of discipline under the CBA,<sup>88</sup> but the Union contends that given the Grievant's employment record and other mitigating factors, discipline in the form of termination of employment is clearly punitive and disproportionate to the seriousness of the Grievant's actions.<sup>89</sup>

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<sup>86</sup> UE 103 at 1-7.

<sup>87</sup> Employer's Post-Hearing Brief, at 12, 17.

<sup>88</sup> LELS Post Hearing Brief, at 1, 10.

<sup>89</sup> *Id.* at 10.

## **DISCUSSION, ANALYSIS, AND DECISION**

The Employer proved at the hearing that the Grievant's actions during the altercation with MES in the early morning hours of June 7, 2021, (1) was wantonly careless and negligent, in violation of Becker County Personnel Policy 20.2.2; (2) constituted offensive and brutal treatment of MES, in violation of Becker County Personnel Policy 20.2.3; (3) lowered the discipline and morale within the County and adversely affected the rendering of prompt, courteous, and efficient service to the public, in violation of Becker County Personnel Policy 20.2.13; (4) exceeded lawful peace officer powers, in violation of Sheriff's Office Policy 340.5.5(c); (5) constituted a threat against MES to inflict unlawful bodily harm, in violation of Sheriff's Office Policy 340.5.5(d); (6) constituted discourteous and disrespectful treatment of MES, in violation of Sheriff's Office Policy 340.5.5(f); (7) represented the use of obscene, indecent, profane, and derogatory language while on duty and in uniform, in violation of Sheriff Office Policy 340.5.5(g); (8) constituted disgraceful conduct while on duty that adversely affected his relationship with the Sheriff's Office, in violation of Sheriff's Office Policy 340.5.5(h); (9) constituted conduct which the Grievant should have known is unbecoming a member of the Sheriff's Office, is contrary to good order, efficiency or morale, or tends to reflect unfavorably upon the Office or its members, in violation of Sheriff's Office Policy 340.5.5(m); (10) constituted an on-duty act that brought discredit to the Office, in violation of Sheriff's Office Policy 340.5.6(i); and (11) ridiculed, mocked, taunted, belittled, willfully embarrassed, humiliated, and shamed MES, in violation of POST Board Policy Principle Five, Section 2(b). Accordingly, the Employer has proven by a preponderance of the evidence that it had just cause under Article 10.1 of the CBA to impose formal discipline.

The Union challenges the level of discipline imposed. The Union essentially makes two arguments in favor of a modification of the discipline imposed to allow the Grievant to remain employed with the Sheriff's Office as a deputy. First, the Union argues that in the internal affairs investigation, Chief Deputy Richard mischaracterized the Grievant's actions during the altercation as a true threat to the safety of MES, thereby rendering the imposed discipline punitive, instead of corrective, in nature.<sup>90</sup> Second, the Union argues that under the "just cause" provision of the CBA, the Employer was required to consider mitigating factors and impose corrective discipline instead of termination of employment.<sup>91</sup>

The Union maintains that imbedded in the concept of "just cause," are "[t]wo important and universally recognized standards . . . (1) the principle of progressive and corrective discipline and (2) the necessity of considering mitigating circumstances . . . ."<sup>92</sup> The Union also maintains that the Arbitrator has discretion to review the reasonableness of the discipline imposed.<sup>93</sup> The Arbitrator agrees with the Union's analysis as far as it goes. More fundamental to the analysis, however, is an understanding of the bases for the imposition of discipline in the context of labor and management relations. There are three legitimate bases for the imposition of discipline: rehabilitation of a potentially satisfactory employee, deterrence of similar conduct by the employee or other employees, and protection of the employer's ability to operate its business successfully.<sup>94</sup> Punishment or retribution is not a legitimate basis for the imposition of discipline.<sup>95</sup> Rehabilitation and deterrence are similar in nature and call for the use of progressive

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<sup>90</sup> *Id.* at 10, 14-21.

<sup>91</sup> *Id.* at 12, 30-39.

<sup>92</sup> *Id.* at 12.

<sup>93</sup> *Id.* at 13.

<sup>94</sup> See, COOPER, ET AL. (THE LABOR LAW GROUP), *ADR In The Workplace* (American Casebook Series), Ch. VII.B.2, at 13-15 (West Academic 2014 3<sup>rd</sup> Ed.).

<sup>95</sup> *Id.*

discipline.<sup>96</sup> However, protection of the employer's ability to successfully operate is of a different order and requires an analysis of the seriousness of the violation.<sup>97</sup>

In support of its contention that the termination of the Grievant's employment was punitive in nature, the Union argues that the Employer's investigation mischaracterized the Grievant's actions as a true threat of violence, and that the Employer failed to prove that those actions constituted a threat against MES to inflict unlawful bodily harm under Sheriff's Office Policy 340.5.5(d).<sup>98</sup> The Arbitrator does not agree. Chief Deputy Richard, as part of his internal affairs investigation, reviewed the body worn camera video and the transcript of the video prepared by Lt. Penas.<sup>99</sup> Chief Deputy Richard concluded that the Grievant had challenged MES to engage in a physical altercation, and thereby had violated Policy 340.5.5(d).<sup>100</sup> That conclusion was reasonable and there is no evidence in the record to suggest that it was an intentional mischaracterization of the facts or was based upon any personal animosity held by Chief Deputy Richard against the Grievant. Instead, the Union argues that based upon the body worn camera video, and the Grievant's testimony that by his actions he only intended to convince MES to "back off," there is insufficient evidence to prove that the Grievant's actions constituted a threat to the safety of MES. The Union points to the elapsed time on the video as proof that after the Grievant had turned around and began to walk back toward MES while yelling "let's go," he was walking slowly and in a nonthreatening manner.<sup>101</sup>

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<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> LELS Post Hearing Brief, at 19-21. The Union does not suggest that Sheriff Glander's decision to terminate the Grievant's employment was based upon personal animosity or a desire to punish the Grievant.

<sup>99</sup> EE 22 at 5; EE 19 at 3-10.

<sup>100</sup> EE 22 at 2.

<sup>101</sup> LELS Post Hearing Brief, at 19.

From the Arbitrator's independent review of the video, the Arbitrator concludes that the Grievant's actions represented a direct threat to the physical safety of MES. The Grievant was in the process of leaving the residence of MES in the company of JV and had progressed approximately 60 feet from the stoop where MES was standing at the time the Grievant turned around. There was no reason for him to turn around, to begin walking back toward the residence, and to repeatedly yell challenges to MES to fight.<sup>102</sup> The Grievant is a big man and was armed and in uniform. It was dark. Applying an objective standard, any reasonable member of the public in the same circumstances would feel threatened by the Grievant's actions.<sup>103</sup> The Arbitrator concludes that the Employer has proven that the Grievant violated Policy 340.5.5(d).

The Union's second argument is that because the Employer did not consider any mitigating factors and corrective measures and did not apply progressive discipline, it violated the "just cause" provision of the CBA, thereby rendering the discipline imposed punitive in nature. The Union requests that the Arbitrator modify the discipline in a manner that would include the reinstatement of the Grievant's employment. As mitigating factors, the Union cites the Grievant's lengthy and largely positive service record, the pressure he was under as a result

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<sup>102</sup> The parties dispute the posture and stance adopted by the Grievant as he was walking back toward MES. The Employer suggests that he was motioning with his arms. Employer's Post-Hearing Brief, at 22. Attribution for this suggestion is not offered by the Employer but may come from MES' post-incident interview with Lt. Penas or his statement to Sgt. Warren (EE 15). The audio recording of the Penas interview was received in evidence as EE 20 and is preserved on the flash drive (EE 9) as file number 446726. The Arbitrator has listened to the audio recording and at the 12:55 minute mark, MES states that the Grievant "changed his stance" as he was walking back toward him. In his report, Sgt. Warren states that MES described the Grievant as "walking forward with his arms out" (EE 15). The Union challenges these statements as untrustworthy. LELS Post Hearing Brief, at 20, n. 14. The Arbitrator does not agree. There are sufficient indicia of trustworthiness to accept these hearsay statements. Throughout the interview with Lt. Penas, MES was calm and cooperative. If anything, he minimized the significance and seriousness of the altercation. There is little reason to believe that he would have fabricated this one point. Likewise, there is little reason to believe that MES was less than candid in his statements to Sgt. Warren. In any event, the Arbitrator concludes that the Grievant's posture and stance as he was walking back toward MES is of little consequence in deciding whether the Grievant violated Policy 340.5.5(d).

<sup>103</sup> The Grievant testified at the hearing that he never intended to engage MES in a fight. His intentions are irrelevant to the inquiry. Also, considering the need to be able to prove beyond a reasonable doubt the element of intent in any criminal assault charge, the Clay County Attorney's decision to decline to charge the Grievant with a crime is likewise irrelevant.

of a staffing shortage in the Sheriff's Office,<sup>104</sup> his remorse and acceptance of responsibility for his actions, and his voluntary entrance into counseling.<sup>105</sup> While the Arbitrator agrees that the Grievant has a positive service record and has been a good peace officer in the past, for the following reasons the Arbitrator concludes that the Employer has proven just cause for the termination of the Grievant's employment.

Put simply, the confrontation with MES precipitated by the actions of the Grievant was inherently very dangerous and potentially threatened the physical safety of MES, the Grievant, and JV, an innocent bystander. The confrontation occurred at night at a private residence; the Grievant was unfamiliar with the residence or with MES; prior to his arrival at the residence, the Grievant had heard MES threaten the physical safety of KB, a person living at the residence; upon arrival at the residence, JV told the Grievant that he was scared because MES and KB had gotten into it; the Grievant observed MES, a physically well-developed young man, dumping personal property out of the residence; and although the Grievant did a cursory inspection of the cluttered residence and back yard, he had no way of knowing whether MES was armed or had easy access to a weapon. When the Grievant turned around after starting to leave and began to walk back toward MES while yelling "let's go," MES could have understood the Grievant's actions as a direct threat of physical harm and had he been armed, responded by producing a weapon or even shooting at the Grievant and precipitating a gun fight with potentially disastrous results. Or MES could have accepted the Grievant's challenge to fight and charged the Grievant, possibly resulting in the Grievant drawing his weapon or in a fist fight with an armed officer.

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<sup>104</sup> At the hearing, the Grievant testified that he was also under financial pressure at the time of the incident resulting from a contentious dissolution proceeding.

<sup>105</sup> LELS Post-Hearing Brief, at 29-39.

The Grievant had been trained in de-escalation tactics and his behavior was intentional,<sup>106</sup> extremely dangerous, and totally unacceptable for a licensed peace officer. The Sheriff's concern that the Grievant could repeat the behavior and threaten the safety of the public was justified and reasonable,<sup>107</sup> and supports the Sheriff's decision to terminate the Grievant's employment. There are mitigating factors in this matter but they are outweighed by the seriousness of the Grievant's conduct.

Viewing this case in the context of the three grounds for the imposition of discipline discussed earlier, the Arbitrator concludes that the first two grounds, rehabilitation<sup>108</sup> and deterrence, are overridden by Sheriff Glander's sworn duty to administer the Becker County Sheriff's Office "to keep and preserve the peace of the county . . . ."<sup>109</sup> This duty dictates the essential business of the Sheriff's Office. Discharge of an officer, although the harshest of disciplinary actions, is justified when necessary to ensure that the Sheriff can fulfill that duty.<sup>110</sup>

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<sup>106</sup> The Union asserts that the Grievant "did not intend to keep engaging in the inappropriate verbal banter; [and that] he simply lacked the tools and ability to get out of the tailspin in that moment." LELS Post Hearing Brief, at 25. This assertion puts the inquiry in sharp focus, and ultimately lends support to the Arbitrator's conclusion that a significant risk exists of the Grievant repeating the dangerous behavior and not being able to get out of the tailspin in the moment.

<sup>107</sup> The Union contends that generalized concern about future conduct does not provide a basis for termination of employment. LELS Post Hearing Brief, at 27. Here, however, the concern is that the Grievant may repeat very dangerous conduct that would place the public at risk.

<sup>108</sup> The Arbitrator gives the Grievant credit for starting counseling in February of this year at Marie Ridgeway & Associates and hopes that the Grievant is self-aware of its importance. At the hearing, the Grievant testified at some length regarding the shooting in Mahnomen County, which occurred 12 years before the incident in this case. His testimony revealed that he believes that that event and its lingering aftereffects continue to be a stressor and contributed to his actions during the confrontation with MES. His testimony convinces the Arbitrator that the Grievant has not successfully addressed the mental and emotional trauma that he likely suffered as a result of that shooting and that until he does so, the possibility of a repeat of the behavior exhibited in his dangerous confrontation with MES will persist.

<sup>109</sup> Minn. Stat. § 387.03 (2020).

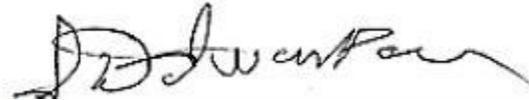
<sup>110</sup> The Union suggested at the hearing that in lieu of discharge, the Arbitrator order reinstatement subject to some form of "last chance" contingency accompanied by conditions, possibly including no same or similar conduct and the successful completion of counseling. This suggested form of discipline is somewhat akin to supervised probation in a criminal case. But unlike in a criminal case, where the court retains jurisdiction over the defendant to ensure compliance with the conditions of probation, here the Arbitrator would not retain jurisdiction over this case. An allegation by the Employer that the Grievant had failed to comply with the "last chance" contingency would be subject to the grievance process under the CBA. And if the allegation involved a repeat of the offending conduct, the damage would have already been done.

The Arbitrator concludes that the Employer has proven by a preponderance of the evidence just cause for the termination of the Grievant's employment.<sup>111</sup>

### **AWARD**

On the basis of the entire record and the foregoing discussion and analysis, the Arbitrator denies the grievance and sustains the termination of the Grievant's employment and discharge of the Grievant.

Ordered and issued this 1<sup>st</sup> day of July, 2022, in Minneapolis, Minnesota.



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Stephen D. Swanson  
Arbitrator

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<sup>111</sup> The Arbitrator's decision is based solely on the altercation with MES. The Arbitrator has taken into consideration the Grievant's service record and other mitigating factors, but not his two prior disciplines or the We Fest and handcuff incidents referred to by the Employer.