IN THE MATTER OF THE ARBITRATION BETWEEN

ANOKA COUNTY and **LAW ENFORCEMENT LABOR SERVICES, INC.**	BMS #20PA0300

ARBITRATOR:	Marlin O. Osthus
DATE OF HEARING:	December 10, 2019
DATE RECORD CLOSED:	December 10, 2019
DATE OF THIS AWARD:	December 30, 2019

APPEARANCES

FOR THE EMPLOYER:	Bryan Franz, Attorney Anoka County Attorney's Office Anoka, Minnesota
FOR THE UNION:	Scott Higbee, Attorney Law Enforcement Labor Services, Inc. Brooklyn Center, Minnesota

This matter concerns a grievance filed by Detention Deputy Steve Cater on July 19, 2019, alleging that Anoka County (Employer) violated the collective bargaining agreement between the Employer and Law Enforcement Labor Services, Inc. (Union) when the Employer issued a 20-hour suspension to Cater on July 17, 2019. The Union and Employer presented testimony by witnesses who were under oath, as well as documentary evidence during a hearing held in Anoka, Minnesota on December 10, 2019. The parties also filed briefs with the undersigned. After carefully considering witness testimony, the exhibits in evidence, as well as the parties' post-hearing briefs, I conclude that the Employer established that it had just cause to support its decision to discipline Steve Cater. However, I also find that the level of discipline imposed by the Employer is not appropriate in light of all relevant circumstances.

This decision consists of six sections. The first section describes the Employer's operation and the collective bargaining relationship between the Union and Employer, including the collective bargaining agreement in dispute. The second section sets forth the issue in dispute, as well as the parties' agreement that the issue is properly before me. The third section details the facts of this matter. The fourth section summarizes the Union's position that the collective bargaining agreement has been violated. The fifth section reviews the Employer's position that it has not violated the agreement. Finally, I explain my conclusion that while the Employer established that it had just cause to discipline employee Cater, that the discipline imposed is excessive, as well as the remedy in light of my conclusions.

THE EMPLOYER'S OPERATION AND RELATIONSHIP WITH THE UNION

While the Employer is Anoka County, Mr. Cater's location of work is the Anoka County Sheriff's Office. The collective bargaining unit represented by the Union in this case is composed of all essential employees of the Sheriff's Office whose positions do not require that they be licensed as police officers by the State of Minnesota, excluding employees who work an insufficient number of hours as defined in the agreement, part-time employees who are not included in the definition of "public employee," supervisory and confidential employees. Among the employees in the unit are deputies employed at the Anoka County Jail, including Deputy Cater.

Part of the Sheriff's Office is the Marine Unit. The Marine Unit deals with water-related accidents or issues. One example of the work of the unit is when it was called to assist when the I-35W bridge collapsed. The Marine Unit does not have any dedicated employees. Rather, about 15 individuals employed in various jobs in the Sheriff's Office work for the Marine Unit when necessary. David Wiley, a licensed sergeant who oversees a day shift of deputies for the Sheriff's Office, is also responsible for the operation of the Marine Unit. Until the discipline at issue in this case, Deputy Cater was part of the Marine Unit.

The current collective bargaining agreement is effective from January 1, 2018 through December 31, 2020. The parties to the agreement are the Union, the Employer and the Sheriff's Office. Article 13 of the agreement states that, "The employer will discipline employees for just cause only," with discipline being defined as discharge, demotion, suspension, written reprimand and oral reprimand. According to the

Employer's Personnel Rules and Regulations while the Employer considers its system of discipline is progressive, it reserves the right to take any disciplinary action it deems appropriate under the circumstances. According to those same rules, the Employer considers violating departmental or County rules or policies (among other matters) as cause for issuing disciplinary action.

The Employer also has a policy regarding the use of sick leave that is relevant to this matter. It states in part, "Employees on sick leave shall not engage in other employment or self-employment or participate in any sport, hobby, recreational activity or other activity that may impede recovery from the injury or illness (see the Outside Employment Policy)."

THE ISSUE IN DISPUTE AND MY AUTHORITY TO DECIDE THE ISSUE

The parties agree that the issue before me is, "Whether the twenty-hour suspension without pay issued to Steve Cater on July 17, 2019 was for just cause and, if not, what is the appropriate remedy?" The Employer and Union also agree that the grievance is properly before me and that I have the authority to decide the issue. They further agree that the Employer has the burden of proof in this matter.

THE FACTS

Nearly all of the facts related to deciding the merits of the grievance in this case are not in dispute.

Steve Cater has been an employee with the sheriff's office since 1994. On June 10, 2019, Mr. Cater went to see his doctor. According to Cater's testimony, he was suffering from back spasms, and had been since the previous Friday. His doctor

determined that Cater should not work until after the doctor saw Cater again on June 17. According to Cater, the doctor told him that with a combination of muscle relaxants and certain exercises, Cater's back issues would likely resolve within 2 – 5 days. Cater followed Employer policies and properly notified the Employer of his need for sick leave from June 10 through June 17. Cater further testified that in fact by Thursday or Friday of the week of June 10, he was much better, and perhaps could have returned to his job early. However, he did not attempt to get the doctor to evaluate him before June 17.

On Saturday, June 15, 2019, the Marine Unit was notified that a drowning was in progress on Lake George. Sergeant Wiley immediately went to the scene. Wiley also "paged" the members of the Marine Unit, which involves the use of an APP on the cell phones of members of the unit. Consistent with his general practice, Wiley did not limit the page to certain members of the unit, rather every member of the unit was called to the scene. According to Wiley, eleven members of the unit showed up, including Steve Cater. Cater was put to work on the sonar boat, and performed all duties assigned to him without any problems. According to Wiley, the duties assigned to Cater were not physically challenging. Recovery of the drowning victim required two days; thus, the Marine Unit (including Cater) worked on June 15 and 16.

There is no dispute that Sergeant Wiley had no knowledge that Cater was on medical leave through June 17. There is also no dispute that Wiley had no reason to know about the medical leave as he did not directly supervise Cater. Finally, there is no dispute that Cater did not inform Wiley that he was on medical leave when he reported for Marine Unit duty on June 15 and 16. According to Wiley's testimony, had he known

that Cater was on medical restrictions, he would have told Cater that he could not participate in the Marine Unit work on June 15 and 16.

According to the testimony of Operations Lieutenant David Tedrow, on June 18, 2019, the grievant submitted a slip to his immediate supervisor claiming a total of 20 hours of overtime pay for his work with the Marine Unit on June 15 and 16. Cater's immediate supervisor called Lieutenant Tedrow and told Tedrow that he did not believe Cater's request was "right" since he was on medical leave from June 10 through June 17. This was the first notice Lieutenant Tedrow received of the grievant working on June 15 and 16. As a result of the call from the immediate supervisor, Mr. Tedrow conducted a brief investigation. He asked the grievant whether the dates on the slip for the claimed overtime were correct (Tedrow noted in his testimony that sometimes employees make mistakes on the dates involved). When Mr. Cater confirmed that the dates were correct, Tedrow asked whether Cater had a new doctor's note. Cater responded negatively. Tedrow then reviewed the doctor's note dated June 10 and the return-to-work authorization from the doctor dated June 17, authorizing Cater to return to work on June 18.

On July 10, 2019, Lieutenant Tedrow met with the grievant to further investigate his conduct. Present at the July 10 meeting were Tedrow, Cater, Union Steward Michael Turnbom, Union Business Agent Jessica Mabin and Detention Sergeant Meverden. Subsequently, on July 17, 2019, Lieutenant Tedrow issued a three-page disciplinary notice, suspending Cater for 20 hours without pay. The disciplinary notice summarizes the facts, as well as Cater's July 10 responses. In addition, Tedrow informed Cater that had Sergeant Wiley known that Cater had not been cleared to work,

Wiley would not have allowed Cater to work, regardless of how Cater was feeling at the time because there was no medical authorization for Cater to work.

The July 17 disciplinary notice states that Cater violated two policies of the Employer. First, Cater violated General Order 340.5.8 (c) which prohibits employees from (among other things) omitting material information to a supervisor or other person in a position of authority, in the reporting of any office-related business. Second, Cater violated General Order 1014.3 which prohibits employees on sick leave from engaging in employment (among other things). Thus, by failing to tell Wiley about his medical restrictions when paged to go to Lake George, Cater failed to provide important information, and by working on June 15 and 16, Cater worked when he was prohibited from doing so.

At the end of the disciplinary notice are four "Conditions" imposed on Cater in order to continue his employment. The first three relate to following Employer policies, to not violating any work restrictions, and to notify any supervisor of any limitations that are in place related to work performance. The fourth "Condition," unlike the first three, is not really a condition imposed for continued employment; rather it states: "You will be suspended from the Marine Unit activities and specialty pay through October 2019 at which time your reinstatement will be reviewed." According to the Union the result of the suspension from the Marine Unit has been the loss of special pay, the loss of participation in training and the pay associated with the training, and the loss of income due to call outs of the Marine Unit. For example, employees who are part of the Marine Unit receive an extra $45/pay period, according to Section 17 of Article 7 of the current collective bargaining agreement. To date, Cater has not been reinstated to the Marine

Unit, either because the Employer has decided reinstatement is not appropriate or because the Employer is delaying consideration of reinstatement until the merits of this grievance are decided (the Employer is not certain which reason accounts for Cater's lack of reinstatement to the Marine Unit).

Finally, both the Union and Employer are unaware of any similar conduct by an employee in the past. Thus, there is no precedent – this is the first time the Employer has dealt with the question of what to do when an employee engages in employment while on medical leave from the employee's regular job.

UNION ARGUMENTS THAT THE EMPLOYER LACKS JUST CAUSE

The Union maintains that the discipline imposed by the Employer is too severe, and in effect argues that there are a number of extenuating circumstances. First, (and the Employer does not dispute this point), Cater since first challenged about his conduct has been straightforward and honest about what he did. Second, Cater did not abuse his sick leave – he had the sick leave and no one has disputed that he had a *bona fide* medical reason for his leave. Third, while Cater did indeed work for the Marine Unit on June 15 and 16, these dates were a Saturday and Sunday, which are not normal workdays since Cater's regular schedule is 8 a.m. – 4:40 p.m., Mondays through Fridays. Thus, his employment fell outside the scope of his regular hours. Fourth, because Cater was much improved by Thursday or Friday of the week of June 10, he simply did not think about the fact that he was technically on medical leave when he was summoned to work for the Marine Unit – rather he responded to an emergency

situation promptly – as he was trained to do. Finally, the Union argues that Cater's inadvertent error caused no harm, that in fact Cater performed well on June 15 and 16.

EMPLOYER ARGUMENTS THAT THE COLLECTIVE BARGAINING AGREEMENT HAS NOT BEEN VIOLATED

The Employer maintains that it had just cause to discipline Cater, and more specifically to suspend him for 20 hours because of his conduct on June 15 and 16. First, according to the Employer, it followed its progressive discipline policy, as Cater's record includes an undated oral reprimand, a written reprimand dated April 15, 2002, a one-day suspension dated May 25, 2004 (amended 7/1/2004), a two-day suspension dated October 14, 2004 and a five-day suspension dated March 20, 2008.[1] Second, even Cater's rendition of the facts establishes that he violated the two Employer policies cited in the July 17 discipline. Third, the Employer contends the sick leave policy that Cater violated exists for a number of valid reasons and the Employer cannot ignore conduct like Cater engaged in. The reasons include safety (what if Cater had been asked to do something by Wiley that he was not physically capable of), liability (what if Cater had suffered further back injuries while with the Marine Unit), protecting the employee on leave (what if an employee came back early without authorization from a doctor and was injured or caused injury to other employees), all of which could lead to even longer or more absences imposing burdens on remaining employees, including forced overtime. Finally, the Employer points to the facts that it suspended Cater for less time (20 hours) than his 2008 discipline which was five days (and presumably 40 hours) and that it paid Cater overtime pay for his work on June 15 and 16. This means

[1] The Employer acknowledges that there has been no discipline issued to Cater since March 20, 2008.

that Cater did not suffer a financial penalty since he was paid for 30 hours of work (counting overtime) compared to the 20-hour unpaid suspension.

DISCUSSION AND ANALYSIS

As the collective bargaining agreement makes clear, the Employer bears the burden of establishing that it had just cause to support its decision to discipline Cater. Analysis of whether the Employer has met its burden involves two steps: (1) Has the Employer submitted sufficient proof that the employee engaged in the alleged misconduct or behavior warranting discipline; and (2) If the Employer provides such proof, has the Employer established that the level of discipline imposed is appropriate in light of all relevant circumstances. See, *Elkouri & Elkouri, How Arbitration Works,* 15-25 (8th ed., 2016).

As to the first step, there is no question that grievant Cater engaged in the conduct that led to his discipline and that the conduct warranted discipline. Since the Employer discovered Cater's conduct until the date of the hearing in this matter, Cater has acknowledge two key facts that make clear that he engaged in the conduct that led to discipline: (1) Cater worked on June 15 and 16, (2) Cater was on medical leave and restricted from working his regular job from June 10 through June 17. Moreover, there is no question that Cater did not inform Sergeant Wiley, who is in charge of the Marine Unit, that Cater was reporting to work on June 15 and 16 in spite of being on medical leave, that Cater's engagement in employment while on medical leave violated the Employer's sick leave policy, and that Cater was or should have been aware of the Employer's sick leave policy. In fact, the Union appears to concede that some level of discipline is warranted, but contends that the discipline imposed is too severe.

On the other hand, in reviewing the July 17, 2019 Disciplinary Notice, I conclude that the Employer has not established that that the discipline imposed is appropriate in light of all relevant circumstances particularly with regard to Condition 4 on page 3 of the Disciplinary Notice.[2] In effect, Condition 4 constitutes an indefinite suspension of Cater from working with the Marine Unit, which entails loss of specialty pay, training and other opportunities connected with the Marine Unit. Neither at the hearing nor in its post-hearing brief, has the Employer attempted to justify Condition 4. In fact, part of the Employer's defense of the issuance of a twenty-hour suspension is that the penalty imposed is less than the five-day suspension issued to Cater in 2008. However, taking into account Condition 4, the Employer's actions are not more lenient than in 2008. Moreover, the Jail Commander (the person of highest authority at the detention center), in response to Employer counsel's question whether a 20-hour suspension was reasonable, responded that it was because the discipline was less than that imposed in 2008 and because in fact Cater did not lose any money (since he was paid 30 hours of pay for working on June 15 and 16 when he should not have worked, and the suspension was for twenty unpaid hours). The Jail Commander's testimony in this regard is accurate only if one ignores Condition 4 of the suspension that the Employer

[2] I recognize that the issue as framed by the parties is limited to whether the twenty-hour suspension without pay was for just cause. However, I decline to be limited to that narrow question since in my view the discipline imposed by the Employer was more than a twenty-hour suspension – it included an indefinite suspension from the Marine Unit. I view it as my responsibility to review the entirety of the level of discipline. In its post-hearing brief the Employer also argues that management has the right to withhold assignment of work – including work to the Marine Unit. While the Employer does not say so explicitly, presumably it means it has the unfettered right to unilaterally assign or withhold assignment of work. However, neither Sections 10 or 17 of Article 7 of the collective agreement, which are cited by the Employer, explicitly give the Employer the right to unilaterally withhold assignments. Even if the Employer possesses the right to unilaterally assign (or withhold assignment) of work, I do not interpret that right to include the right to impose inappropriate discipline. If the Employer's argument were accepted, it would eliminate the role of the arbitrator in assessing whether the level of discipline is appropriate.

issued. At no time did the Commander or anyone else who testified for the Employer attempt to justify the indefinite suspension from the Marine Unit. Moreover, both the Commander and Detention Lieutenant made clear that someone above them decided on the discipline to be issued to Cater.

While I consider the issue somewhat close, I conclude that the twenty-hour suspension is an appropriate level of discipline in light of all the circumstances. Those circumstances include the following:

1. The Employer utilized progressive discipline, although as the Union points out, the most recent discipline issued to Cater prior to 2019 occurred eleven years ago. Moreover, the Employer imposed a lesser suspension than it did in 2008 (if the indefinite suspension from the Marine Unit is ignored). It appears that discipline – no matter how long ago it was – remains in an employee's file and may be considered by the Employer when deciding to issue subsequent discipline.

2. As the Employer points out (if the indefinite suspension from the Marine Unit is ignored), while Cater should not have worked on June 15 and 16, he was in fact paid 30 hours of pay for twenty hours of work, consistent with Cater's request for overtime pay for his work on June 15 and 16. Thus, Cater suffered no financial penalty as a result of the twenty-hour suspension.

3. While Cater has always been honest about what he did and forthrightly explained why he acted as he did, even as of the date of the hearing he did not believe that he violated any Employer policy. Cater was asked at the hearing whether he felt that he violated the Employer's sick leave policy, and responded that he did not because the doctor took him off of work as a formality, not because he needed the time off. This response ignores the fact that whether a formality or not, Cater was on medical leave when he worked on June 15 and 16. Moreover, his response is inconsistent with his conduct on June 17 when he kept his appointment with his doctor and obtained the necessary release to return to work.

In reaching the conclusion that the twenty-hour suspension is an appropriate level of discipline, I have carefully considered various Union arguments, including its position that by working on Saturday and Sunday, Cater did not violate the Employer's sick leave policy because his regular hours of work are Mondays through Fridays. The wording of the Employer's sick leave policy does not support this argument. The

language is not limited as the Union would like it to be – rather it prohibits other employment or participation in sports, hobbies or any other activity "that may impede recovery from the injury or illness," without limitation to certain days of the week or times of the day.[3]

While I find that the twenty-hour suspension is appropriate in light of the above circumstances, I do not believe that the Employer should be able to use the July 17, 2019 suspension against Cater indefinitely. In this regard, it is clear that the Employer considers the disciplinary history of an employee when deciding subsequent discipline regardless of how long ago the discipline issued. Thus, based on the Employer's practice, as long as Cater is employed by the Employer, the July 17 discipline could be used against Cater should he have subsequent disciplinary issues. Yet there is no evidence that Cater deliberately flouted the Employer policies as opposed to acting without thinking about the consequences of his action. It appears that he did not appreciate the fact that the weekend days of June 15 and 16 were covered by the medical restrictions. Moreover, since no other employee has ever been disciplined for similar conduct, Cater had no frame of reference other than the existence of the two policies he violated, which he may have last reviewed two and three years ago.[4]

[3] Neither party litigated the question whether Cater's work during the weekend impeded his recovery from the injury. In fact, it is not clear that the Employer even investigated that issue. While I do not believe (as the Employer contends) that any employment while on medical leave is prohibited by its policy, the Union has never contended that the discipline is inappropriate because Cater's conduct did not impede his recovery.

[4] In this regard, the Employer presented evidence establishing that Cater electronically "signed" that he had reviewed the sick leave policy on October 26, 2017 and the standards of conduct policy on August 16, 2016.

ORDER

On the basis of the entire record and the foregoing discussion and analysis, I deny the grievance insofar as the Union suggests that the level of discipline should be a written warning. On the other hand, I find that the level of discipline imposed inappropriate. I therefore order that:

1. The Disciplinary Notice issued to Steve Cater dated July 17, 2019 be amended by striking any reference to suspending Cater from the Marine Unit, including striking the fourth Condition on page 3 of the Notice in its entirety. The effective date of the Disciplinary Notice shall remain July 17, 2019. The Disciplinary Notice currently in either Cater's personnel file or any other file maintained by the Employer shall be removed, and shall be replaced by the amended Disciplinary Notice. Any other references to Cater's suspension from the Marine Unit contained in any other notes, memoranda, or other written documents maintained by the Employer shall be deleted.

2. The Employer immediately reinstate Steve Cater to the Marine Unit, and the Employer make Steve Cater whole for any wages, pay or remuneration lost as a result of his suspension from the Marine Unit on July 17, 2019. This includes specialty pay, pay lost as a result of not be invited to attend training sessions held by the Marine Unit, or pay lost to the extent the Marine Unit was activated to deal with water-related issues, for the period of time from July 17, 2019 until the date of Cater's reinstatement to the Marine Unit.

3. To the extent that Cater's inability to attend training sessions held by the Marine Unit during the time of his suspension in any way affect his status as a member of the Marine Unit, provide training to Cater so that he is qualified as a member of the Marine Unit with the same standing he had prior to July 17, 2019.

4. Expunge the July 17, 2019 Disciplinary Notice from Cater's personnel file and from any other files maintained by the Employer on July 17, 2022, which is three years from the date the Disciplinary Notice issued. Effective July 17, 2022 the Employer may no longer consider the July 17, 2019 Disciplinary Notice issued to Cater as part of Cater's disciplinary history when reviewing what level of discipline to issue should Cater be disciplined on or after July 18, 2022.

Issued and ordered this 29th day of December, 2019 in Mendota Heights, Minnesota.

/s/ Marlin O. Osthus

Marlin O. Osthus
Arbitrator