

Before Arbitrator Joseph T. Moriarty

In the Matter of Arbitration
Of a Dispute Between

[REDACTED]

Grv. No. GR220826-BFFH
DAF: 2022-3237
Arb Ref: 230426-1B
[REDACTED] [REDACTED]
Written Reprimand

and

[REDACTED]

SHERIFF'S OFFICE

Appearances:

[REDACTED]

[REDACTED]

ARBITRATION AWARD

Pursuant to the provisions of their collective bargaining agreement, the [REDACTED] [REDACTED] (hereinafter referred to as either "the Union" or [REDACTED]), the [REDACTED] Sheriff's Office (hereinafter referred to as the "the Sheriff") selected the undersigned as the arbitrator to hear and decide a dispute over the written reprimand issued by the Sheriff to Deputy Sheriff [REDACTED] [REDACTED] ("the Grievant"). A hearing was conducted by the Arbitrator on May 22, 2023, at which both parties submitted evidence and made oral arguments with respect to the issues presented in the case. The parties stipulated to the Arbitrator's jurisdiction and to the arbitrability of the grievance.

I. Issue

Whether the Sheriff had just cause to issue a written reprimand to Grievant? If not, what is the appropriate remedy?

II. Relevant Contract Provisions, Department Rules, Regulations, and Policies

A. Contract Provisions

Section 14.8 Discipline:

The Employer shall not take any disciplinary action against an employee without just cause. Employees who are to be or may be disciplined are entitled to Representation consistent with the Bill of Rights. The Union and the Employer agree that discipline should be timely, progressive and accompanied by counseling where appropriate. It is understood that employees are subject to the general orders, rules and regulations of the Employer. Notification to Employees and acknowledgment of disciplinary infractions to Employer shall be delivered electronically.

Upon hire, the Employer shall provide each Deputy Sheriff covered by this Agreement with an up-to-date copy of all general orders. Upon issuance of any newly published General Order(s) or addenda, each Deputy Sheriff covered by this agreement will be tendered a copy of such Order(s) and/or addenda. Each Deputy Sheriff shall sign for his/her copy upon receipt of these general orders and/or addenda. A current copy of all General Orders will be kept by each Assistant Chief in each unit/facility for reference by the Deputies.

Forms of Discipline:

1. Summary Punishment; The employer shall reserve the right to implement summary punishment, reprimand, and suspensions of up to 29 days. Reprimands shall be grievable, up to and including Step 3 of the Grievance Procedure.

Deputies who are disciplined or recommended for discipline trader Summary Punishment may choose to appeal either through the Sheriff's "Summary Punishment Action Request" form (SPAR) or the Grievance Procedure, but not both remedies. If the SPAR form is chosen, the steps of appeal are outlined by the Court Services Department General Order 1375.1 and D.C.S.I. General Order 3.3 ADD VII (whichever is applicable). If the Grievance Procedure is chosen, the steps outlined elsewhere in this Agreement shall be followed. In either case, the Deputy shall check the appropriate box on the SPAR form, indicating which appeal process, if any, he chooses to take.

A SPAR will be disregarded and removed from the employee's personnel file after eighteen (18) months from the occurrence, provided that the employee has received no other SPARs during this eighteen (18) month period of time.

SPAR is 29 days and no time served until grievance and arbitration procedure is exhausted. Includes 90 day expedited arbitration.

2. Suspension of up to and including 29 days: Any suspension imposed by the Employer on an Employee up to and including 29 days, may be appealed at all steps of the grievance procedure or the Sheriff's appeal procedure as outlined in General Order 7000, but not both remedies.

3. Suspensions in excess of 29 days (imposed post-ratification), excluding recommended discipline where demotion(s) and/or termination(s) is sought, shall be subject to Impartial Arbitration and the following procedure:

Excluding recommended discipline that includes demotions and/or terminations that impact merit rank, all other suspensions in excess of 29 days shall be adjudicated by Impartial Arbitration that shall be scheduled within sixty (60) calendar days from the date that the employee is served with the discipline. If the Arbitration is not scheduled within sixty (60) days or does not occur as scheduled the Sheriff may impose the discipline prior to the Arbitration taking place. Suspensions under this Section shall not be subject to Steps 1 through 3 of the grievance procedure of this Agreement. Upon service of discipline to the Employee, the Employer shall also notify the Union of the suspension.

In the event that the matter proceeds to Arbitration, the Employer and the Union shall agree to a list of 7 arbitrators who will as a condition of being on the permanent panel agree to schedule the hearing within 14 calendar days of the notification of selection. As a further condition of being placed on the permanent panel, the arbitrator will agree to issue a decision within ten (10) calendar days of the date of the hearing. The parties may mutually agree to waive post-hearing briefs to expedite the decision by the arbitrator. The decision of the Arbitrator shall be binding.

Expenses for the Arbitrator's services and the expenses which are common to both parties to the arbitration shall be borne equally by the County and the Union. Each party to an arbitration proceeding shall be responsible for compensating its own representatives and witnesses.

The Arbitrator, in his/her opinion, shall not amend, modify, nullify, ignore or add to the provisions of this Agreement. The issue or issue to be decided will be limited to those presented to the Arbitrator, in writing by the Employer and the Union. His/her decision must be based solely on the interpretation of the meaning or application of the express relevant language of the Agreement. In issuing his/her decision, the Arbitrator shall be bound by the precedential rulings of the ██████████ County Sheriff's Merit Board.

All hearings will be held as close to the grievant's work site as practicable. The Employer will upon reasonable notice from the Union, release from duty any employees requested by the Union as representatives or witnesses.

The hearing will be informal. There will be no requirement that a stenographic recording of the proceedings unless otherwise agreed. Excluding recommended discipline that includes

demotion(s), and/or termination(s), suspensions in excess of 29 days shall not be presented to the █████ County Sheriff's Merit Board. The parties agree that the Arbitration forum for suspension arbitrated under this provision shall not be challenged as it relates to the jurisdiction of the █████ County Sheriffs Merit Board. The Union and Employer agree that an Arbitrator's finding that a suspension be imposed, or any other relief so found, shall be served by the employee.

B. Rules and regulations

Procedure 113 - Unauthorized Absence Procedure

113.1 PURPOSE AND SCOPE

This procedure provides guidelines, reporting procedures and disciplinary procedures for employees who incur any unauthorized absence.

113.1.1 ISSUANCE/EFFECTIVE DATE

This procedure was re-issued on Sep. 21, 2018 and shall become effective upon issuance (labor updates).

113.1.2 DEFINITIONS

Unauthorized status - Authorized statuses include but are not limited to a non-absent working status, Sick/Medical Time, Vacation Time, Personal Time, Compensatory Time, Holiday Time, Bereavement Leave (death in family), Educational Leave, Ordinary Disability, Duty Disability (Injured on Duty), Family and Medical Leave of Absence (FMLA), Maternity/Paternity Leave, Military Leave, Leave of Absence and Compassionate Leave.

Attendance Review Unit - A centralized unit that processes and tracks all pre-discipline and discipline actions for attendance infractions incurred by Sheriff's Office employees.

Occurrence - For purposes of determining progressive discipline, an occurrence as used in this procedure is either:

- (a) An unauthorized absence that lasts from one hour to one work day and where the employee returns to work the next working day; or
- (b) An unauthorized absence that lasts between two and five consecutive work days. For example:
 1. If a member has one unauthorized absence day and returns to work the next work day, that will be considered one occurrence.
 2. If a member has five consecutive unauthorized absences in a row, that will be considered one occurrence.

3. If a member has 13 consecutive unauthorized absences, that will be considered three occurrences.

Rolling 365-day period - The period of time in which unauthorized absence hours are tallied for purposes of determining whether a member violates a rule that prohibits a certain number of unauthorized absence hours within a 365-day period, as follows:

- (a) The rolling period begins on the first day a member incurs their first unauthorized absence.
- (b) Unauthorized absence hours will roll off a member's count on the one-year anniversary date of that particular unauthorized absence. For example:
 1. If 80 hours of unauthorized absences is the maximum number of unauthorized absence hours a member can have within a 365-day rolling period before termination, then a member who has a full day (eight hours for most members) of an unauthorized absence on March 15, 2012 will not have those eight hours roll off their unauthorized absence count until March 15, 2013; and
 2. If the member has nine more unauthorized absences between March 15, 2012 and March 15, 2013, then the member will be recommended to the Merit Board for termination.
- (c) Leaves of absence and all attendance-related suspensions stop the running of the 365-day period. For example, upon a member's return to the workplace from a leave of absence status or from an attendance-related suspension, the 365-day period will be re-instated, along with the total number of days the member was on leave or while serving an attendance-related suspension added to the end date of the 365-day period.

Unauthorized absence - Where an employee is absent from work but does not have the requested benefit time available for the absence or is not in an Authorized Status that excuses the absence(s), Unauthorized Absences generally fall into two categories:

- (a) Intermittent Unauthorized Absences - Less than five consecutive days (40 hours) of Unauthorized Absences.
- (b) Single Block/Long Term Unauthorized Absences- Five or more consecutive days (40 hours) of Unauthorized Absences.

Unauthorized Absence Payroll Codes - The various codes marked on the attendance record for a specific date that indicate a type of Unauthorized Absence. These include:

- (a) No Sick Time (NST/o): When an employee is docked pay due to calling in Sick/Medical time when none is available.
- (b) Absent Late Call (ALC/o): When an employee is docked pay due to calling in absent less than one hour prior to the start of duty/shift, unless the employee's respective department head or the applicable bargaining agreement provides for a different period of time.

- (c) Absent Late Call/FMLA (ALC/FMLA): When an employee calls in an FMLA absence less than three hours prior to the start of his/her duty/shift, unless the employee's respective department head or the applicable collective bargaining agreement provides for a different period of time.
- (d) Absent No Call (ANC/o): When an employee is docked pay due to failure to call in.
- (e) No Vacation Time (NVT/o): When an employee is docked pay due to attempting to utilize Vacation time when none is available.
- (f) No Personal Time (NPT/o): When an employee is docked pay due to attempting to utilize Personal time when none is available.
- (g) No Compensatory Time (NCET/o): When an employee is docked pay due to attempting to utilize Compensatory time when none is available.
- (h) No Holiday Time (H/o): When an employee is docked pay due to ineligibility to receive Holiday pay per respective collective bargaining agreements or County rules.
- (i) Unauthorized FMLA (o/FMLA Unauthorized): When an employee:
 - 1. Exceeds their certified FMLA time;
 - 2. Uses their FMLA time in a way that is inconsistent with the employee's FMLA certification and later fails to get the FMLA properly recertified; and/or
 - 3. The employee continues to call in FMLA when the employee does not have a current, approved FMLA on file.
- (j) Unauthorized Injured on Duty (IOD/Unauthorized) - When an employee is docked pay due to denial or termination of IOD/Duty Disability claim by Risk Management.
- (k) Tardiness Docked Time (o) -When an employee is docked pay due to arriving 16 minutes after the start of their duty/shift. For the purpose of this policy, an employee shall only incur an unauthorized absence if they are tardy for one hour or more after the start of their duty/shift.

113.2 POLICY

It is the policy of the █████ County Sheriff's Office to prohibit its employees from incurring Unauthorized Absences. Unauthorized Absences exacerbate absenteeism problems and strain Sheriff's Office employees and operations. Employees receive benefit time and have a variety of leave options available to cover the need for short-term and long-term absences. Therefore, even if an employee is legitimately ill or has some other reasonable excuse for being absent, the employee must obtain an appropriate Authorized Status prior to or immediately after the need for the absence.

113.3 PRE-DISCIPLINE PROCEDURES

Intermittent Unauthorized Absences:

- (a) When an employee has an Unauthorized Absence Occurrence, the Attendance Review Unit Supervisor will meet with the employee within 72 hours or three business days, upon their return to the workplace or as soon as practicable. An Unauthorized Absence counseling session will be performed, or when the Unauthorized Absence occurrence subjects the employee to progressive discipline in accordance with the provisions of this procedure, a Disciplinary Action Form will be presented. If applicable, an Unauthorized Absence counseling session constitutes a verbal reprimand.
- (b) During the Unauthorized Absence counseling session, the Attendance Review Unit Supervisor will notify the employee of the Authorized Leave options and provide instructions on how to apply for such options. The Attendance Review Unit Supervisor will also notify the employee of the progressive discipline schedule that will be used for subsequent Unauthorized Absences.
- (c) The Attendance Review Unit Supervisor will document the Unauthorized Absence counseling session by completing and signing the Unauthorized Absence Counseling Form, having the employee sign and date the Unauthorized Counseling Form, and where applicable, having the Union Representative sign and date the Unauthorized Absence Counseling Form.
- (d) A copy of the Unauthorized Absence Counseling Form will be provided to the employee.
- (e) The employee shall refer to the Authorized Absence Contact Information sheet and/ or contact the Department of Human Resources for assistance in applying for an Authorized Leave.
- (f) An employee who applies for an Authorized Leave must notify the Attendance Review Unit Supervisor within two business days of the Unauthorized Absence counseling session using the Response to Counseling Session Form. The Response to Counseling Session Form will include the following information:
 - 1. Whether or not the employee will apply for an Authorized Status/Leave;
 - 2. Type of Authorized Status/Leave to be requested;
 - 3. Approximate start date of leave;
 - 4. If the leave is medical-related, the date of physician appointment.
- (g) Upon submitting the required Response to Counseling Session Form, the employee will be permitted 30 days from the date of the Response to Counseling Session Form to successfully apply for or obtain approval for the requested Authorized Leave. The Attendance Review Unit Supervisor shall submit a copy of all forms to the Executive

Director of HR or the authorized designee, and follow up to verify if the employee complied with the form.

- (h) In the event that the employee fails to submit the required Response to Counseling Session to the Attendance Review Unit Supervisor within two business days of the Unauthorized Absence counseling session, the supervisor shall initiate the applicable disciplinary process in accordance with this procedure.
- (i) Failure to successfully apply for or obtain approval for an Authorized Status within the 30-day period will result in appropriate disciplinary action as specified in this procedure for any Unauthorized Absence during the 30-day time period and for any further Unauthorized Absence. The Attendance Review Unit Supervisor shall initiate the applicable disciplinary process according to this procedure.
- (j) At the conclusion of the 30-day period, the Attendance Review Unit Supervisor shall verify with HR that the employee has successfully applied for or obtained approval for the Authorized Status.

Single Block/Long Term Unauthorized Status:

- (a) If the employee is coded in an Unauthorized Absence Payroll Code status code for five or more consecutive days, the Executive Director of HR or the authorized designee shall send a letter to the employee via certified mail and first class mail notifying the employee of their unauthorized status and providing specific information and instructions for obtaining an Authorized Status. The letter shall include a two-week deadline to report to the █████ County Medical Unit and to HR.
- (b) Copies of the letter shall be distributed to the Attendance Review Unit Supervisor (if applicable), the Personnel Manager, the █████ County Medical Unit Supervisor and OPR.
- (c) If after the two-week deadline the employee fails to report and HR cannot confirm if the letter was received, a second and final notice shall be sent to the employee with another two-week deadline. If the employee fails to report after the final notice, the Executive Director of HR or the authorized designee will forward a Complaint Register to the OPR. The Executive Director of HR or the authorized designee will notify the Attendance Review Unit if a Complaint Register is submitted to OPR.
- (d) It is the employee's responsibility to ensure that their respective Personnel Department has an updated address and phone number. If the employee does not receive either the first class mail letter and/or certified letter due to an incorrect address on file, the employee will be subject to discipline up to and including termination. The Executive Director of HR or the authorized designee will submit a Complaint Register to OPR and make notification to the Attendance Review Unit.
- (e) If within 30 days of consecutive Unauthorized Absences the employee returns to work through the medical process, the Attendance Review Unit Supervisor shall initiate the appropriate procedures.

- (f) Failure of the employee to either return to work, apply for an Authorized Status, or obtain an approved Authorized Status during the 30 consecutive Unauthorized Unpaid Status days will result in the appropriate disciplinary action, as specified in this procedure.

113.4 DISCIPLINARY PROCEDURES

Disciplinary procedure for an employee without a Rolling Calendar clause in an applicable collective bargaining agreement will be progressive and in accordance with the applicable collective bargaining agreement.

Disciplinary procedure for non-union employees will be progressive.

The following disciplinary process shall apply only to employees who incur any Unauthorized Absence and have a collective bargaining agreement Rolling Calendar clause:

- (a) Rolling 365-day calendar:
 - 1. Any employee under a collective bargaining agreement with a Rolling Calendar clause who incurs 10 days (or 80 hours) of Unauthorized Absences, not to be confused with Occurrences, in a rolling 365-day period will be recommended to the Merit Board for termination.
 - 2. The Attendance Review Unit will obtain data from HR and provide written quarterly reports to all employees under their chain of command in the collective bargaining unit who have incurred an Unauthorized Absence during the past quarter, advising them of their available benefit time and their total number of Unauthorized Absences during the last 365-day period.
- (b) For Unauthorized Absence activity that occurs prior to 10 days or 80 hours of Unauthorized Absence in a rolling 365-day period, supervisors shall use progressive discipline, which could include termination. For the first Occurrence of an Unauthorized Absence, the Attendance Review Unit Supervisor shall counsel the employee on available leave options, the requirements of this procedure, and the progressive discipline schedule outlined in this procedure. For subsequent Occurrences of Unauthorized Absences, assuming there are not 10 days or 80 hours of Unauthorized Absences within a 365-day period, the following schedule shall be followed:
 - 1. Step One: Second Occurrence of Unauthorized Absence: The Attendance Review Unit shall issue a Written Reprimand on a Disciplinary Action Form.
 - 2. Step Two: Third Occurrence of Unauthorized Absence: The Attendance Review Unit shall issue a one-day suspension on a Disciplinary Action Form.
 - 3. Step Three: Fourth Occurrence of Unauthorized Absence: The Attendance Review Unit shall issue a two-day suspension on a Disciplinary Action Form.
 - 4. Step Four: Fifth Occurrence of Unauthorized Absence: The Attendance Review Unit shall issue a three-day suspension on a Disciplinary Action Form.

5. Step Five: Sixth Occurrence of Unauthorized Absence: The Attendance Review Unit shall issue a four-day suspension on a Disciplinary Action Form.
6. Step Six: Seventh Occurrence of Unauthorized Absence: The Attendance Review Unit shall issue a five-day suspension on a Disciplinary Action Form.
7. Step Seven: Eighth Occurrence of Unauthorized Absence: The Attendance Review Unit shall issue a seven-day suspension.
8. Step Eight: Ninth Occurrence of an Unauthorized Absence: The Attendance Review Unit shall issue a 10-day suspension.
9. Step Nine: 10th Occurrence of an Unauthorized Absence: the Attendance Review Unit shall issue a 15-day suspension.
10. Step 10: 11th Occurrence of an Unauthorized Absence: The Attendance Review Unit shall issue a 21-day suspension.
11. Step 11: 12th Occurrence of an Unauthorized Absence: The Attendance Review Unit shall issue a 29-day suspension.
12. Step 12: 13th Occurrence of an Unauthorized Absence: The Attendance Review Unit shall submit a complaint register to the Office of Professional Review seeking termination.

(c) Mitigation:

1. An employee on Step Two of this schedule must work 12 consecutive months without incurring another Unauthorized Absence in order to go up to Step One.
2. An employee on Steps 3 through 11 must work 18 consecutive months without incurring an Unauthorized Absence in order to move up to Step One.
3. An employee will only be issued an Unauthorized Absence Counseling Form once for Unauthorized Absences, and the Unauthorized Absence Counseling Form and any Employee Disciplinary Action Form will remain in the employee's Disciplinary file.
4. Notes from doctors shall not be accepted to support mitigation for those who have exhausted medical time and incurred any Unauthorized Absence

- (d) All unauthorized absence occurrences count against an employee's Rolling Calendar, but only those unauthorized absence occurrences that happen after the first unauthorized absence occurrence within an employee's open Rolling Calendar will be subject to the progressive discipline schedule outlined in this procedure, unless an employee has previously received a counseling for unauthorized absences, or has 10 or more consecutive unauthorized absence occurrences, which will result in the employee being sent to the Merit Board for termination action. This rule applies even in those instances when an employee has not been counseled for their first unauthorized absence occurrence, except where the delay in giving the counseling was unreasonable and unjustified.

OPR Complaint Registers: An OPR Complaint Register shall only be submitted once regarding an employee's attendance violation. Any additional attendance violations

must be submitted to OPR in the form of a memorandum referencing the original OPR Complaint Register and including any supporting documentation.

Pending Grievances: The Attendance Review Unit shall continue the applicable progressive discipline pursuant to this procedure regardless of any pending grievances.

III. Background

On March 23, 2016, the Sheriff counseled Grievant about compliance with Procedure 113 (Er. Exh. 3) after he violated the Sheriff's attendance policy and procedures on February 18, 2016. The evidence does not indicate the nature of the 2016 violation.

On August 9, 2022, at 6:15 a.m., 45 minutes prior to the start of his 7:00 a.m. shift, Grievant called into the Sheriff's time management system, known as "Workforce", to record an absence. (Er. Exh. 3) Under Sheriff Procedure 113, Section 113.1.2 (Er. Exh. 1), Grievant was required to call in at least an hour prior to the start of his shift. His call on August 9, 2022, was 15 minutes short of that. Grievant and the Union do not dispute the accuracy of the time record or that the call was not in compliance with Procedure 113.

Grievant testified that he is a 35-year veteran of the Sheriff's office. He has not had any attendance issues between February 2016 and August 2022. He had been on workers' compensation leave for approximately 18 months due to a work-related injury in 2020. He returned to work in June 2022, not feeling ready to return but had no other leave options available to him. He had been nursing his injury since he returned to work. He did not sleep well on the evening of August 8 and morning of August 9 and as a consequence was late to call in his absence.

IV. The Arguments of the Parties

A. The Position of the Sheriff

The Sheriff contends the evidence is undisputed that the Grievant violated Procedure 113 by calling in late on August 5, 2022. Additionally, the Sheriff notes that a written reprimand is appropriate because the Sheriff had previously counseled the Grievant in March 2016. The Sheriff contends that counseling does not age out for purposes of its progressive discipline system (*See*, Er. Exh. 1, Section 113.4(c)(2)); therefore the length of time between the counseling and the written reprimand is immaterial.

B. The Position of the Union

The Union argues that the Sheriff did not have just cause to issue a written reprimand to the Grievant. While it concedes that the Grievant violated the Sheriff's procedures, it contends it is unjust to move to the second step of a progressive discipline schedule when the first step was implemented more than 6 years prior to the current incident. It also argues that the Grievant's injury and illness and his 35 years of service must be weighed into the arbitrator's calculation of whether the discipline is just. It contends that both considerations militate against moving Grievant to the second step of progressive discipline under the Sheriff's system. It concludes that the most appropriate action here is for the Sheriff to counsel Grievant on compliance with the Sheriff's disciplinary policies and procedures.

V. Discussion

The Sheriff bears the burden of proving that the Grievant committed misconduct that violated its rules and that the discipline is justified. *See*, Elkouri & Elkouri, "Discharge and Discipline" in How Arbitration Works, 7th Ed. (New York: Bloomberg BNA, 2016), pp. 15-23-24. *See also*, Fairweather's Practice and Procedure in Labor Arbitration (4th Ed. 1999) at pp. 273-275. The Union and the Grievant do not argue that a violation of Procedure 113 did not occur or that some form of corrective action is justified. Rather, they contend that the Sheriff's progressive disciplinary system is flawed to the extent that it permits the Sheriff to rely on an aged first discipline - in this case, a 6-year-old - prior counseling on compliance with the policy.¹ The grievance is denied and the written reprimand will stand.

The Application of Procedure 113's progressive discipline was not Unreasonable or Unjust in this case.

I am mindful that an essential element of demonstrating just cause is an individualized assessment of the circumstances and positions of the parties at the time discipline is decided. In this regard, the Union's argument that the temporal distance between progressive disciplinary

¹ The parties stipulated to my jurisdiction to hear the matter and to the arbitrability of the grievance. Additionally, no procedural issues were raised at the hearing. Sheriff's Procedure 113 specifically defers to the collective bargaining agreement with respect to disciplinary procedures where the collective bargaining agreement does not have a Rolling Calendar clause. The parties have not identified any such clause in the collective bargaining agreement and I have found none. Consequently, I find that the disciplinary steps in Section 113.4 of Procedure 113 are inapplicable here, and the just cause provision in Article 14.8 of the collective bargaining agreement guides my disposition of the grievance.

steps is a relevant consideration. But the Sheriff's rules are also entitled to great weight. *See*, Brand, Norman. Discipline and Discharge in Labor Arbitration, (Chicago: ABA 1998) at p. 90.

A review of the Sheriff's Procedure 113 reveals two important things relevant to this case: First, though it is somewhat ambiguous on this point, Procedure 113 does not appear to even consider counseling as a form of discipline under the progressive discipline system.² Rather, it treats counseling a pre-disciplinary matter. *See*, Er. Exh. 1, Section 113.3(a). Second, it recognizes the principle advanced by the Union with respect to the formal disciplinary steps. It "ages-out" discipline and restarts the progression after the expiration of a certain time period. It restarts discipline at a written warning for an employee who has received a one-day suspension 12 or more months ago; and for those who have a 2-day suspension or greater discipline, it restarts discipline at a written warning, if there is more than 18 months distance since the suspension was imposed. *See*, Employer Exh. 1, at Section 113.4 (c)(1) and (2). But Sheriff's Procedure 113 does not require it to return to the pre-disciplinary step of counseling regardless of how long ago the counseling occurred.

Some commentators have opined that a reasonable connection in time between disciplinary steps is essential to any just cause analysis. Brand, Discipline and Discharge, *supra*. at p. 90. But the connection can become more or less relevant depending upon the level of discipline previously imposed and that currently being imposed, to wit: the more serious the current discipline, the more important it is that the prior discipline is relatively close in time; for less serious discipline, the less important the temporal distance between the disciplinary steps is. *Id.* Absent the presence of other considerations, I am adherent to that view. It is consistent with principles of due process which have historically included a similar sliding scale test, *i.e.*, the higher the stakes, the more process that is required.

In this case, the Union contends that the Sheriff should have given Grievant a clean slate since he had had no violations of Procedure 113 in the six years before the current incident. A written reprimand is not high-stakes discipline. It involves no tangible loss to the Grievant and there are many other, more severe disciplinary steps in the progressive discipline process. Moreover, it is the first formal step in the process. The Sheriff has adopted a policy that, while

²Inconsistently, however, Procedure 113.3 (Employer Exh. 1) does provide that counseling will be considered an oral reprimand "if applicable." The Procedure does not make clear what circumstances would require it to be considered an oral reprimand. But clearly, an oral reprimand is a form of discipline.

allowing discipline to restart at Step 1 (written reprimand) when the employee has had no discipline for some period of time, does not require the Sheriff to start in the pre-disciplinary phase of the disciplinary process, which is counseling. For the reasons discussed above, that policy is reasonable on its face and, I hold, reasonable as it was applied to Grievant in this case.³

I do have some empathy for the Grievant's desire to end his long career with the Sheriff without a disciplinary record. The Union urges me to take that into consideration as part of my analysis of whether the Sheriff has met the requirement of just cause to discipline. While the length of service is a valid consideration, what is being urged here is that the Sheriff issue no discipline for Grievant's admitted misconduct. Just cause limitations do not require an employer to ignore employee misconduct based on the employee's length of service. That's an act of grace that is not the Arbitrator's to make.

AWARD

In light of the foregoing, GR220826-BFFH is denied in its entirety. DAF 2022-3237 shall stand. If it has not done so already, the Sheriff may issue a written reprimand to Grievant in accordance with this award.

Signed and issued this 6th day of June at [REDACTED]

[REDACTED]
Joseph T. Moriarty, Arbitrator

³ This case might have been different had the Sheriff modified its policy in the intervening years but there's no indication that anything along those lines occurred. Procedure 113 appears to have been reissued in 2018 but there is no indication that it was altered or contained any material changes. That might be a relevant consideration in a future grievance.