

**IN ARBITRATION
BEFORE GARY AXON**

**JOHN NIEDER
and
THE ISLAND COUNTY DEPUTY SHERIFF'S GUILD
vs.
THE ISLAND COUNTY SHERIFF'S OFFICE**

In Re: The Termination of John Nieder

ISLAND COUNTY'S POST-HEARING BRIEF

June 23, 2015

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I. INTRODUCTION

On May 11-13, 2015, a hearing was conducted in this matter by Arbitrator Gary Axon in Coupeville, Washington. Former Deputy Sheriff John Nieder ("Nieder" or "the employee") and his collective bargaining association, the Island County Sheriff's Deputy Guild ("the Guild") were represented by attorneys James Cline and Erica Shelley Nelson. The Island County Sheriff's Office ("employer" or "the County") was represented by attorney Charles Lind.

The controversy at issue arises from the termination of John Nieder's employment following reports that he had been sexually harassing and denigrating another deputy in the department, Lynda Seixas ("Seixas"). Nieder and the Guild contend that sufficient cause did not exist for his termination, and thus the decision was in violation of the parties' collective bargaining agreement ("the Agreement").¹ The County disagrees, and contends that the Sheriff's termination decision was compelled by the seriousness of the offense, the high professional standards and expectations related to law enforcement officers like Nieder, and the disruptive impact that sexual harassment by one officer against another generates within a

¹ The parties' collective bargaining agreement has been admitted as Union Exhibit 1. The parties are in agreement that Union Exhibit 1 contains the applicable and controlling provisions for this proceeding, although the cover identifies it as the collective bargaining agreement for 2006-2008.

small sheriff's office. The County notes that the employee was notified by the complainant that his behavior was unwanted, unwelcome, and offensive and—although he changed his behavior for several weeks—he nevertheless eventually resumed physically touching and making sexually suggestive comments to the complainant after that. The County maintains that sufficient cause supported the Sheriff's termination decision, and that the decision was consistent with the parties' collective bargaining agreement. The County asks the Arbitrator to uphold this decision.

II. ISSUE

A. Statement of the Issue

The parties could not agree how best to frame the issue. The County proposed the following:

Whether the discharge of Deputy John Nieder for sexual harassment (engaging in inappropriate touching and conversation of a sexual nature) of another deputy sheriff and disparaging that deputy sheriff in front of members of the public violated the parties' collective bargaining agreement?

The parties agreed that the arbitrator could frame the issue as he saw fit following the hearing.

B. Relevant Provisions of the Parties' CBA and Department Policies

1. Collective Bargaining Agreement Provisions

The parties are in agreement that Union Exhibit 1 contains the relevant provisions of the parties' collective bargaining agreement, which are as follows:

Article 6, Section 6.1²

Just Cause—The Employer shall not discipline any non-probationary employee unless just cause for such discipline exists. Probationary employees may be disciplined with or without cause.

2. Island County Sheriff's Office Policy Manual Provisions

Policy 328 Discriminatory Harassment

Policy 328.1 PURPOSE AND SCOPE

This policy is intended to prevent department members from being subjected to discrimination or sexual harassment.

Policy 328.2 POLICY

The Island County Sheriff's Office is an equal opportunity employer and is committed to creating and maintaining a work environment that is free of all forms of discriminatory harassment, including sexual harassment and retaliation. The Department will not tolerate discrimination against employees in hiring, promotion, discharge, compensation, fringe benefits and other privileges of employment. The Department will take preventive and corrective action to address any behavior that violates this policy or the rights it is designed to protect.

The non-discrimination policies of the Department may be more comprehensive than state or federal law. Conduct that violates this policy may not violate state or federal law but still could subject a member to discipline.

Policy 328.3 DISCRIMINATION PROHIBITED

Policy 328.3.1 DISCRIMINATION

The Department prohibits all forms of discrimination, including any employment-related action by an employee that adversely affects an applicant or employee and is based on race, color, religion, sex, age, national origin or ancestry, genetic information, disability, military service, sexual orientation, and other classifications protected by law.

² Nieder and the Guild may contend that Article 6, Section 16.2 is also relevant—were they to do so, the County would respectfully disagree. That provision only applies to the maximum time periods for which letters of discipline and other records of serious discipline can be retained and used as steps of progressive discipline. This provision does not mandate progressive discipline steps.

Discriminatory harassment, including sexual harassment, is verbal or physical conduct that demeans or shows hostility or aversion toward an individual based upon that individual's protected class. It has the effect of interfering with an individual's work performance or creating a hostile or abusive work environment.

Conduct that may, under certain circumstances, constitute discriminatory harassment, can include making derogatory comments, crude and offensive statements or remarks, making slurs or off-color jokes, stereotyping, engaging in threatening acts, making indecent gestures, pictures, cartoons, posters or material, making inappropriate physical contact, or using written material or department equipment and/or systems to transmit or receive offensive material, statements or pictures. Such conduct is contrary to department policy and to the department's commitment to a discrimination free work environment.

Retaliation is treating a person or applicant differently or engaging in acts of reprisal or intimidation against the person because he/she has engaged in protected activity, filed a charge of discrimination, participated in an investigation or opposed a discriminatory practice. Retaliation will not be tolerated.

Policy 328.3.2 SEXUAL HARASSMENT

The Department prohibits all forms of discrimination and discriminatory harassment, including sexual harassment. It is unlawful to harass an applicant or an employee because of that person's sex.

Sexual harassment includes, but is not limited to, unwelcome sexual advances, requests for sexual favors or other verbal, visual or physical conduct of a sexual nature when:

- (a) Submission to such conduct is made either explicitly or implicitly a term or condition of employment, position or compensation.
- (b) Submission to, or rejection of, such conduct is used as the basis for employment decisions affecting the member.
- (c) Such conduct has the purpose or effect of substantially interfering with a member's work performance or creating an intimidating, hostile, or offensive work environment.

Policy 328.4.1 SUPERVISOR RESPONSIBILITY

Each supervisor and manager shall:

- (a) Continually monitor the work environment and strive to ensure that it is free from all types of unlawful discrimination, including harassment or retaliation.
- (b) Take prompt, appropriate action within their work units to avoid and minimize the incidence of any form of discrimination, harassment or retaliation.
- (c) Ensure their subordinates understand their responsibilities under this policy.
- (d) Ensure that employees who make complaints or who oppose any unlawful employment practices are protected from retaliation and that such matters are kept confidential to the extent possible.
- (e) Notify the Sheriff in writing of the circumstances surrounding any reported allegations or observed acts of discrimination/harassment no later than the next business day.

Policy 328.4.2 Supervisor's Role

Because of differences in individual values, supervisors and managers may find it difficult to recognize that their behavior or the behavior of others is discriminatory, harassing, or retaliatory. Supervisors and managers shall be aware of the following considerations:

- (a) Behavior of supervisors and managers should represent the values of the Department and professional law enforcement standards.
- (b) False or mistaken accusations of discrimination, harassment or retaliation have negative effects on the careers of innocent members.
- (c) Supervisors and managers must act promptly and responsibly in the resolution of such situations.
- (d) Supervisors and managers shall make a timely determination regarding the substance of any allegation based upon all available facts.

Nothing in this section shall be construed to prevent supervisors or managers from discharging supervisory or management responsibilities, such as determining duty assignments, evaluating or counseling employees or issuing discipline, in a manner that is consistent with established procedures.

Policy 328.5 INVESTIGATION OF COMPLAINTS

Various methods of resolution exist. During the pendency of any such investigation, the supervisor of the involved members should take prompt and reasonable steps to mitigate or eliminate any continuing abusive or hostile work environment. It is the policy of the Department that all complaints of discrimination or harassment shall be fully documented, and promptly and thoroughly investigated. The participating or opposing member should be

protected against retaliation, and the complaint and related investigation should be kept confidential to the extent possible.

Policy 328.5.1 SUPERVISORY RESOLUTION

Members who believe they are experiencing discrimination, harassment or retaliation should be encouraged to inform the individual that his/her behavior is unwelcome. However, if the member feels uncomfortable, threatened or has difficulty expressing his/her concern, or if this does not resolve the concern, assistance should be sought from a supervisor or manager who is a rank higher than the alleged transgressor.

Policy 328.5.2 FORMAL INVESTIGATION

If the complaint cannot be satisfactorily resolved through the process described above, a formal investigation will be conducted.

The employee assigned to investigate the complaint will have full authority to investigate all aspects of the complaint. Investigative authority includes access to records and the cooperation of any members involved. No influence will be used to suppress any complaint and no member will be subject to retaliation or reprisal for filing a complaint encouraging others to file a complaint or for offering testimony or evidence in any investigation.

Formal investigation of the complaint will be confidential to the extent possible and will include, but not be limited to, details of the specific incident, frequency and dates of occurrences and names of any witnesses. Witnesses will be advised regarding the prohibition against retaliation, and that a disciplinary process, up to and including termination, may result if retaliation occurs.

Members who believe they have been discriminated against, harassed, or retaliated against because of their protected status are encouraged to follow the chain of command but may also file a complaint directly with the Sheriff, Human Resource Director, or the Board of Island County Commissioners.

Policy 340.2 DISCIPLINE POLICY

The continued employment of every employee of this department shall be based on conduct that reasonably conforms to the guidelines set forth herein. Failure of any employee to meet the guidelines set forth in this policy, whether on-duty or off-duty, may be cause for disciplinary action.

An employee's off-duty conduct shall be governed by this policy to the extent that it is related to act(s) that may materially affect or arise from the employee's ability to perform official duties or to the extent that it may be indicative of unfitness for his/her position.

Policy 340.2.1 PROGRESSIVE DISCIPLINE

The administration of discipline is generally expected to be progressive in nature, with relatively minor violations of rules resulting in minor disciplinary action for first offenders. Repetitive similar violations, or more serious violations, would generally result in progressively more serious forms of discipline being administered.

Nothing in this policy is intended to preclude the administration of more serious forms of discipline, including termination, for a first offense when warranted by the seriousness of the offense(s).

Policy 1000.3.6 PERSONAL SENSITIVITY [related to RECRUITMENT AND SELECTION]

...

(f) The following shall be disqualifying [for recruitment and selection]:

1. Having been disciplined by any employer (including the military and/or any law enforcement training facility) for acts constituting racial, ethnic, or sexual harassment or discrimination.

....

III. POSITIONS OF THE PARTIES

A. Position of Deputy John Nieder and the Guild

Employee John Nieder argues that probable cause for his discharge does not exist. First, Nieder contends that the investigation into his conduct was flawed, biased, and unfair. He claims that Ms. Melanie Bacon of the Island County Human Resources Department was not qualified to conduct the sexual harassment investigation in this case, and that she did so inadequately. The employee contends that Ms. Bacon asked leading questions of witnesses

and failed to note or follow up on what Nieder claims are inconsistencies in the responses of witnesses. Instead of Ms. Bacon, it has been suggested that the Sheriff's Office should have engaged a more qualified human resources investigator or an outside police agency to conduct the investigation. Counsel for Nieder declared in opening statement that Ms. Bacon had no training in conducting investigations and had no training sufficient to equip her to look into sexual harassment complaints.³

Nieder also contends that Ms. Bacon's investigation was flawed by the biased and unfair manner in which she questioned witnesses. He complains that Ms. Bacon openly expressed sympathy with Detective Seixas during the detective's interview, and that Ms. Bacon made statements during the interview of what she (Ms. Bacon) believed had occurred.

Nieder also argued that Ms. Bacon was, in fact, merely the face of an investigation controlled by Undersheriff Kelly Mauck. Nieder contends that Undersheriff Mauck was actually controlling Ms. Bacon's investigation so as to focus her on the employee, avoid being interviewed, and to divert her focus from his office's supervisory failures.

Nieder claims that just cause for his discharge is lacking because his conduct was simply consistent with the character and nature of his work place at the Island County Sheriff's Office. He argues that management allowed a culture to exist that fostered the type of conduct and conversations in which he engaged. In opening statements, Nieder's counsel described the employee as a "frat boy," and said that his behavior was "not out of character" for the culture that management allowed to exist. That culture was one of juvenile camaraderie, jesting, and horseplay between colleagues. Closely connected to this, Nieder claimed that he was never aware that his conduct was degrading or sexually harassing to Detective Seixas, and he likewise claimed that he was caught off-guard by her complaint about him. Nieder stated that he was also going through a personal crisis at the time (later

³ As noted below, these opening statements were contrary to Ms. Bacon's later testimony.

explained to be his divorce) that may have made him less aware of the impact of his own behavior.

Nieder also claims that his close and friendly relationship (like “brother and sister”) with Seixas made him unaware that his conduct was harassing her. He said that his relationship with Seixas was characterized by being “mutual”— they mutually joked with each other and mutually talked about the personal parts of their lives. Nieder’s counsel claimed in opening statements that detectives were openly talking about sex “all the time,” and explained that this sort of “black humor” was characteristic of how they as law enforcement officers communicated with one another. Nieder insisted that the humor and jokes around the office were often off-color or risqué.

Nieder claimed that Seixas voluntarily told him stories about her own sexual history, about her previous marriage, and about her current relationship with a woman. He denied asking her about these things against her will or questioning her about her bisexuality. Nieder also stated that everyone in the unit teased each other, and teasing Seixas in front of members of the public was simply part of this pattern.⁴ Nieder claimed that Seixas was a willing participant in that culture. He stated that Seixas often teased colleagues as well.

Nieder claims that he is a “touchy-feely” person with his co-workers. During an incident on June 2, 2014, where he admits that he rubbed Seixas’ shoulders, Nieder claimed that he only did that because she told him that her shoulders were sore. Sexual harassment, he contends, is *unwanted* verbal and physical conduct, not behavior that is mutually acceptable.

Nieder also argues that the evidence against him was not reliable.⁵ He claimed that Detective Seixas embellished her accounts of his behavior to divert attention from her own

⁴ Interestingly, however, no detective or deputy except Nieder testified that it was appropriate to disparage a colleague outside of the confines of the office, and certainly not in front of members of the public.

⁵ It is difficult to reconcile Nieder’s claim that his conduct was mutual, not “unwanted,” and part of the accepted workplace culture with his claim that Seixas fabricated or exaggerated the stories about his conduct with her.

performance failures. He similarly claimed that Seixas' field training didn't go well, and her reports about him—as her field training officer—were simply an attempt to explain away or distract from her own workplace deficiencies.

Nieder agrees that he and Seixas went to lunch on May 8, 2014, outside a gas station/delicatessen at the intersection of Highway 20 and Main Street, and concedes that they sat in the car and spoke.⁶ However, Nieder insists that Seixas only told him during that time that she didn't want to be “labeled” or “put in a box” regarding her sexual orientation. He denied that Seixas ever told him to stop touching her, to stop making sexual innuendos towards her, or to stop asking her about her sexuality. Instead, he claimed, the conversation mostly involved him telling her about her professional deficiencies and how poorly Seixas was progressing towards a point where she would be removed from employment probation and be able to conduct sex crime investigations on her own without his assistance.

Nieder testified that Seixas never told him that touching her made her feel uncomfortable or that it was unwanted physical contact. He insisted that if she had done so, he would have stopped touching her.⁷ He denied asking Seixas about her sexuality or about her sexual orientation except insofar as Seixas raised the issue when they were working on long drives together. Nieder claimed that Seixas never appeared uncomfortable or upset about being with him, with how he spoke to her, or how he touched her, and thus he was never aware that his conduct was unwanted or unwelcome.

B. The Position of the Island County Sheriff's Office

The County asserts that Detective John Nieder was very familiar with what constitutes sexual harassment. Detective Nieder worked for the Sheriff's Office for thirteen years, and during that time acknowledged multiple times that he had read the office policies

⁶ This critical interaction is when Seixas testified that she clearly and emphatically told the employee that his conduct was unwanted and offensive.

⁷ It is important to note that Nieder does, in fact, admit to touching Detective Seixas throughout their relationship. The question is whether Seixas is more credible when she states that she did not like the physical contact and asked Nieder to stop it on May 8.

prohibiting sexual harassment. Nieder was also trained on sexual harassment by the County and engaged in two online training programs in March 2014, while or shortly before some of these events were occurring. Nevertheless, during a period of just five or six months,⁸ Nieder engaged in a pattern of unwanted touching and inappropriate sexual conversations with Detective Lynne Seixas, the person he was training⁹ to take over his duties and responsibilities investigating sexual crimes. In doing so, he created an offensive and hostile work environment for Detective Seixas.

Nieder claimed that he thought his relationship with Seixas was all part of his camaraderie with her. He also claimed that there was nothing wrong with disparaging or denigrating Seixas in front of members of the public: on one occasion, telling her that something she said was the “stupidest thing he’d ever heard” (in front of a store clerk) and another time implying in front of a store clerk that Seixas could not successfully shoot her service weapon. Nieder claimed that this was all part of teasing each other; but while other detectives testified that they joke and kid each other within the office, not one witness testified that it was appropriate to do so outside of the office in front of members of the public. Even witnesses that Nieder called to the stand thought this was inappropriate.

By the spring of 2014, Seixas complained to other detectives about the employee’s behavior with her and discreetly sought their advice. She even asked Detective Felici, the lead detective who had an office adjoining the other detectives’ work area, to move her work station so that she didn’t have to be by Nieder.¹⁰ At one point in early May, while Seixas was

⁸ Seixas testified that she began working with the Island County Sheriff’s Office in October 2013 and worked for a short period on Camano Island, a portion of Island County’s jurisdiction. She began working in Detectives in November 2014. By late April and early May 2014, Seixas was seeking advice from fellow detectives regarding Nieder’s conduct towards her.

⁹ In a sense, Nieder was supervising her activities, but he was not Seixas’ supervisor in the technical sense of being responsible for discipline and her evaluation. Nieder was overseeing her training and development to take over the sex crime investigations in anticipation of him transitioning to another assignment.

¹⁰ Felici testified that he didn’t understand why she was asking this at the time, but he recalled the request and accommodated her by moving Seixas to a different work station within the office.

seated at her computer and Nieder was leaning over her, Detective David Dennis walked into the detectives' office area. According to Detective Dennis, Nieder noticed him enter the room and he (Nieder) pulled his hand back abruptly. Detective Dennis later spoke to Seixas and asked her what was going on—he said that it looked as if Nieder “got some side boob” while standing over her. Seixas told Detective Dennis that John had, in fact, done so and brushed against her breast. Detective Dennis told Seixas that she needed to report what the employee was doing or Detective Dennis would make the report himself.

After speaking to Detective Dennis, Seixas spoke with Detective Felici and Undersheriff Kelly Mauck about the situation with Nieder. She told them about the “inappropriate and unprofessional” actions and behavior by Detective Nieder towards her. She told them that she has expressed her disapproval, but without results. However, in the middle of the conversation, Seixas asked for the opportunity to meet again with Nieder and tell him once and for all that his conduct was offensive, unwelcome, and very troubling to her. She urged them not to get “management” involved until she had an opportunity to speak with Nieder about his conduct.

The next day, May 8, 2014, Seixas invited the employee to eat lunch with her outside of the gas station/delicatessen. Seixas later testified that she told him clearly and unequivocally during the conversation that she did not want him to continue asking her questions about her sexuality and did not want him to touch her or make sexual innuendos to her. Seixas said that Nieder apologized and appeared to truly understand. She testified that it was a very professional conversation. On May 9, Seixas and Nieder left for a training in Spokane together.

Ten days later, on May 19, Seixas emailed Undersheriff Mauck and reported that she and Nieder had had the May 8 conversation, that the discussion had been very professional, that Nieder had apologized and that the employee's behavior had significantly changed following their discussion. She later wrote in her statement that things had improved during this period better than she imagined they would.

This situation did not last, however. Seixas wrote in her statement and testified at the hearing that that during the last week of May Nieder again began poking her, pulling her hair, and attempting to rub her shoulders. On June 2, Seixas testified that Nieder attempted to rub her shoulders. She told Nieder to stop and tried to squirm away. Nieder continued to press down on her shoulders. Sergeant/Marshall Rick Norrie was in Detective Felici's office next door and saw Nieder trying to touch Seixas, and noticed Seixas trying to squirm away from Nieder's touch. Consistent with Seixas' testimony, Norrie said that Seixas looked annoyed about what was going on.¹¹

IV. FACTUAL CONTEXT

The following background information, facts, and documentation were presented to the arbitrator during the hearing on May 11 through 13, 2014. The County incorporates by reference into this section all testimony and exhibits admitted at the hearing.

Lynne Seixas testified that she began her law enforcement career in Philadelphia, working first in corrections and later moving to the Philadelphia Police Department. While working in Philadelphia, Seixas explained that she became very familiar with the "blue code," the police culture that mandates that an officer should not "rat out" or report on another law enforcement officer. After coming to Island County and being bothered by Nieder's conduct towards her, Seixas told her colleagues—and testified at the hearing as well—that she didn't want to become *that* officer. She was a new officer in a new department, and she was very reluctant to make waves and become ostracized from her new colleagues by reporting a long-serving deputy with the department.

Seixas moved to Island County and began working for the Sheriff's Office in October 2013. Because she had worked as an undercover vice officer in Philadelphia, the Island

¹¹ It should be remembered that Detective Nieder called Norrie to testify. Norrie also testified about what a serious and disruptive offense sexual harassment is within a small sheriff's office.

County Sheriff's Office believed that she was prepared to be a lateral hire into their detectives unit. In fact, Seixas admits that she was not ready to make that jump into detectives and she had difficulty adjusting to all the things she had to learn. Seixas admitted there was a learning curve in her new state and new department. She spent some time working in other units—including working briefly on Camano Island, another part of Island County's jurisdiction, but then was returned to the central office where she could be supervised more closely as she was learning what she needed to know.

Seixas was moved to the detectives unit in November 2013. The plan was that Detective John Nieder, who was handling sex crimes, would move to other duties and Seixas would take over the responsibilities of the detective investigating sex offenses. Seixas was assigned to work with Nieder in anticipation of this transition.

She said that Nieder worked Tuesday through Friday and she worked Monday through Wednesday, meaning that they had three overlap days each week. Seixas said they weren't really partners—Nieder instead was her FTO (field training officer) for sex crimes, and Seixas testified that they actually worked together on the same case only "intermittently." Nevertheless, Seixas told the arbitrator that the inappropriate conduct by Nieder began "right from the start" when she moved into the detectives unit. According to Seixas, something happened with Nieder almost every day they worked together.

Seixas admitted that she and Nieder spoke about their lives and where they grew up. She also conceded that she talked to Nieder and other detectives about the fact that she had been married to a man previously. Seixas testified that it was well-known that she was in a relationship with another woman at the time she was working for Island County, and she didn't try to hide the relationship with her partner.

Seixas also said that there were times when she and Nieder discussed their prior sexual history to some degree. Seixas also conceded that she and Nieder had discussed that at one time when she was very young 25 years before she had worked for a period of time as a stripper. However, Seixas was visibly upset at the hearing when counsel for the employee

asked whether she had told Nieder that she previously “slept around a lot” and was “a whore.” Seixas adamantly denied that she had said this to Nieder or ever characterized herself as a whore.

Despite their working relationship and the fact that Nieder was her training officer, Seixas said that his behavior caused her to seek out others when she had questions about work. For example, when she had questions about the “Spillman” system¹² and entering data, Seixas would seek out Detective Felici or Detective Wallace rather than Detective Nieder. Seixas said that she sometimes worked with and traveled with Detective Felici as well.

Seixas was asked at the arbitration about the atmosphere of the detectives unit. She admitted that there was collegial joking, but said that there were limits or lines drawn. She also said that they would tease each other, but only in the workplace. Seixas denied that denigrating each other outside of the workplace in front of members of the public was appropriate. Other detectives who testified, like Detective Wallace and Detective Felici, agreed that there was a certain camaraderie in the office—but everyone testified that there were limits and professional standards that had to be observed.

Seixas was bothered by the way that Nieder would touch her and told him to stop it. Nieder would touch her shoulders and pulled her hair on occasion. Seixas was also bothered by Nieder’s sexual innuendos, which went beyond what was consistent with the normal joking that was part of the detective’s culture. Seixas became so bothered by Nieder’s behavior that on occasion she called in sick if she thought they would have to work together closely. She testified that she called in sick so that she could avoid him.

Seixas began to talk to some of her fellow detectives, who told her that she needed to report Nieder’s behavior. Seixas was reluctant to do so. Steeped in the “blue code” during

¹² Testimony at the hearing established that Spillman is the data system used by the Island County Sheriff’s Office.

her original law enforcement experience, Seixas didn't want to be *that* cop who told on other officers.¹³

It was about this time that Seixas said Nieder was leaning over her while she sat at her computer terminal in the office. Nieder had his hand by her side as he did so, and was brushing against her breast. Detective Dave Dennis walked into the office, and testified at the arbitration that as he did, Nieder abruptly pulled his hand back. Dennis knew that something didn't look right and spoke to Seixas about it. He told Seixas that it looked like Nieder was "getting some side boob." Seixas confirmed that Nieder had done so. Dennis told Seixas that either she should talk to the administration or he would do it. Seixas agreed to do so.

In May 2014, Seixas and Nieder were scheduled to take a trip to Spokane. Seixas believed that if they were to travel together, she needed to do something first. Seixas spoke to lead detective Rick Felici and Undersheriff Kelly Mauck on May 7, 2014, and explained what she was experiencing with Nieder. However, Seixas told them that she wanted to try and handle it herself.¹⁴ Seixas insisted that she wanted to meet with Nieder before the administration got involved and took action. Seixas said that she wanted to make certain that she spoke very plainly to Nieder and told him that his behavior was unwelcome, unwanted,

¹³ Seixas shared her feelings with investigator Melanie Bacon about her struggle with whether or not to report Nieder's conduct: ". . . I kinda didn't know what to do. I'm new to the department and I felt I have a lot—a lot to prove and I probably have the cards against me and me being you know new I just I knew that I—I was probably gonna be watched more than you know and I kinda wanted to—to do the right thing. I wanted to you know I—I just—I didn't want it to be any heavier. . . . I had enough to—to worry about so I kinda just figured you know what I am not gonna you know ruffle any feathers, blow any whistles. I'm not gonna—I'm just gonna do my job and you know I'll try to avoid him. I'll try to avoid you know any kind of situation of him or if it gets to the point then I'll just try to talk to him against but I told them I didn't want anybody to do anything from a [managerial]—from management um capacity because I didn't want to see him get in trouble and I certainly didn't want to deal with any kind of backlash from me do—from me speaking out in the first place." Guild's Exhibit 37 (Transcript of Interview with Detective Lynne Seixas), page 6.

¹⁴ Consistent with Island County Sheriff's Office Policy 328.5.1.

and that he needed to stop. Undersheriff Mauck respected Seixas' desire to handle the concerns in this manner.

The following day, on May 8, Seixas very publicly told Nieder that she wanted to have lunch with him. Seixas testified that everyone in the office knew why she was asking Nieder to come with her and what the lunch was all about. Seixas and Nieder drove to a nearby gas station at the corner of Main Street and Highway 20 in Coupeville. This station has a convenience store and delicatessen where officers sometimes buy sandwiches. On this day, however, Seixas said that they sat in the car and talked. Seixas testified that she told Nieder very plainly that she didn't want him to touch her any longer; that she didn't appreciate him making sexual innuendos; and that she didn't want him to keep asking her questions about her sexuality. Seixas testified that there was no confusion or ambiguity about the conversation, and that Nieder clearly understood what was being said. Seixas testified that Nieder acknowledged and apologized for his conduct. The next day, Seixas and Nieder drove to a training/conference together in Spokane.¹⁵

On May 19, eleven days later, Seixas emailed Undersheriff Mauck and Detective Felici to follow up after her conversation with Nieder. Seixas said that the conversation was "mutually respectful, positive, and professional." Seixas also wrote that following the conversation she and Nieder were able to work closely together and attend the out of town training (in Spokane) with no further incidents. Seixas thanked the Undersheriff for his "insight and sensitivity in this matter." County Exhibit 5. During the week between returning from Spokane and when she wrote her email, Seixas later stated that "things were moving along better than I imagined." County Exhibit 6.

However, Nieder began to revert to his old pattern of behavior soon afterward. During the last week of May, Seixas wrote that Nieder began to "poke at my ribs and abdomen again, come up behind me and start to rub my shoulders, and pull my hair. I would

¹⁵ See County Exhibit 6, Statement of Detective Seixas, for a timeline of events.

pull away and say ‘knock it the hell off John’ [A]t one point he leaned over and told me ‘you are hurting my feelings, you don’t want me to touch you....it hurts me’.” County Exhibit 6.

On June 2,¹⁶ Seixas says that Nieder came into the office, came up behind her as she sat at her desk, and began to rub her shoulders. Seixas said that she told Nieder to stop, but Nieder just “applied more pressure and continued.” County Exhibit 6. Seixas said that she believed at one point Sergeant/Marshall Rick Norrie was standing on the other side of the door that led from the detectives’ work area to Detective Felici’s office. *Id.* During his testimony, Sergeant/Marshall Norrie testified that he did, in fact, notice Nieder’s trying to rub Seixas’ shoulders, one day; Norrie testified that he saw Seixas flinching as if to avoid the contact. Norrie testified that Seixas looked annoyed.

On June 3, Seixas and Nieder drove to Bellingham to conduct a “forensic interview” for part of a sex crimes investigation. They stopped at various places on their return to the office, including REI. There, Seixas asked the clerk about a “dog hammock” for her dog to sleep in. Nieder said to her in front of the clerk, “That’s the stupidest thing I’ve ever heard of!!” Seixas said that she was embarrassed by the comment, which was consistent with the way that Nieder would disparage her or make her look stupid. Seixas was also embarrassed that this was said in front of the clerk. The clerk look truly shocked and didn’t know what to say.

On their way back to Whidbey Island, Seixas and Nieder had a discussion related to the case they were investigating about what constitutes rape. They began to disagree on some points, and Seixas shared with Nieder that she had once been the victim of rape.

Nieder claims that they stopped by Seixas’ house on the way back to the office so that Seixas could show him some work that she had been doing at her home, of which she was very proud. Nieder said that they pulled up in front of the house, but Seixas noticed that her

¹⁶ There was some discrepancy in the dates as witnesses and attorneys recounted these events during the arbitration hearing—the dates are confirmed by Seixas’ statement contained in County Exhibit 6.

partner was not home. For some reason that Nieder did not explain in his testimony, they never went into the home or even left the car at that point. They simply drove away and continued on to their office. Seixas testified that they did not stop by the house on this trip and simply drove towards their office from Bellingham.

At one point, Seixas told Nieder about the blinds that she was hoping to get for the window of her master bathroom. She complained that she had no shades. Nieder asked her where the bathroom window was located, and Seixas asked why he wanted to know. Nieder replied, "So I know where to stand when I rub one out" (i.e., masturbate).¹⁷ Seixas became very upset at the vulgar statement. She called Nieder an "asshole" and told him if he did that she would shoot him. Seixas and Nieder returned to the office.

The next morning, June 4, Detective Felici noticed that Seixas was very upset and he spoke to her. She reported what had happened during the day before and said that she refused to work with Nieder any longer. See Guild's Exhibit 13 (Voluntary Statement Form of Rick J. Felici) for more details.

Seixas then spoke to Undersheriff Mauck and told him what had occurred. She said that she was reluctant to report Nieder and didn't want him to lose his job over the incidents. She said she was very concerned that reporting the harassment would reflect negatively on her. Mauck assured Seixas that it would not, and he advised her that retaliation of any type would not be tolerated. See Guild's Exhibit 14 (Statement/Log of Undersheriff Kelly T. Mauck) for more details. She was encouraged to write out a formal complaint to initiate an investigation.¹⁸

On the morning of June 5, Undersheriff Mauck contacted Island County Human Resources Director Melanie Bacon. Ms. Bacon was designated by the Sheriff to conduct the

¹⁷ As noted below, Nieder claims that he only said that he wanted to know where he could put a chair or a stool. As Ms. Bacon pointed out in her testimony, even if one were to accept Nieder's statement, the implied meaning is still the same.

¹⁸ Nieder was not in the office following June 4 because of another, unrelated matter, so the events of this week took place in his absence.

investigation into Seixas' complaints because Ms. Bacon was outside of and detached from the Sheriff's Office. County Exhibit 7 (See the Argument section, below, for more details).

On June 9, Undersheriff Mauck notified the Guild president of the internal investigation. Seixas completed her formal complaint on June 10. See County Exhibit 6. On the same date, John Nieder was formally placed on administrative leave regarding this matter and notified by Sheriff Mark Brown that an internal investigation was being initiated regarding his violation of the law enforcement code of ethics, his oath of office, policies about discriminatory harassment (Policy 328), and conduct expectations (Policy 340). Guild Exhibit 2.

Ms. Bacon interviewed witnesses, Detective Seixas, and Nieder as part of her investigation. (For more details of the investigation, see below). The investigation was completed and provided to the Sheriff. The Sheriff notified Nieder in a letter on July 8, 2014, of his intent to discipline Nieder. Guild Exhibit 3. On July 15, a *Loudermill* hearing was held with the Sheriff, Undersheriff Mauck, the Guild president, Deputy Scott Davis, attorney Erica Shelley Nelson, and John Nieder. See County Exhibit 11 for a transcript of this proceeding.

Following this meeting, the Sheriff wrote Nieder on July 21 notifying him that the Sheriff had decided to terminate his employment. County Exhibit 9; Guild Exhibit 4. The guild elected to grieve the Sheriff's decision and met with the Sheriff on August 4. On August 7, the Sheriff issued a response to the meeting and denied the grievance. See Guild Exhibit 6 (redacted).

On September 17, Ms. Nelson notified the Sheriff of the Guild's intent to arbitrate the grievance. The arbitration was held at the Island County Administration building before Gary Axon on May 11 through May 13, 2015.

V. ARGUMENT

The initial question in this matter is whether just cause existed for John Nieder's termination from the Island County Sheriff's Office. If so, the Arbitrator should uphold the Sheriff's decision and deny Nieder's grievance. If the Arbitrator is not persuaded that just cause existed, the Arbitrator nevertheless has broad discretion in fashioning a remedy. The Arbitrator must decide whether returning Nieder to his law enforcement position with Island County is in the best interest of the community.

A. Just Cause for Termination of John Nieder

Arbitrators have adopted, in one form or another, seven tests for just cause that were first articulated by Arbitrator Carroll R. Daughtery in *Enterprise Wire Company*, 46 LA 359 (1966). Whether there is just cause to discipline an employee involves such elements as procedural fairness, the presence of mitigating circumstances, and the appropriateness of the penalty. Raymond Hogler, *Just Cause, Judicial Review, and Industrial Justice: An Arbitral Critique*, 40 Lab. L.J. 281, 286 (1989). One arbitrator in Washington formulated the seven factors as:

(1) Whether the company gave the employee forewarning of the possible disciplinary consequences of the employee's conduct; (2) whether the company's rule was reasonably related to the orderly, efficient, and safe operation of the company's business and the performance that the employer might properly expect from the employee; (3) whether, before administering discipline, the employer made an effort to discover if the employee did in fact violate or disobey a rule or order of management; (4) whether the employer's investigation was conducted fairly and objectively; (5) whether there was substantial evidence that the employee was guilty as charged; (6) whether the employer applied its rules, orders, and penalties even handedly and without discrimination; and (7) whether the degree of discipline administered was reasonably related to both the seriousness of the offense and the record of the employee in his service to the employer.

Kitsap County Deputy Sheriff's Guild. v. Kitsap County, 140 Wn. App. 516, 163 P.3d 1266 (2007), *rev'd on other grounds*, 167 Wn.2d 428, 219 P.3d 675 (2009).

1. The Sheriff's Policies prohibiting sexual harassment were critical to following federal and state law, and running an orderly and efficient law enforcement department; Nieder had forewarning of these policies and the fact that disciplinary consequences could follow violations of the policies.

In the present case, Sheriff Brown had just cause to terminate John Nieder for sexually harassing Detective Lynne Seixas. First, there is no dispute that the policies of the Sheriff's Office clearly prohibited sexual harassment and other discriminatory conduct, and that such work a place rule was reasonable and necessary to uphold federal and state law. Policy 328 of the Sheriff's Office stated that all employees must be free of all forms of discriminatory harassment, including sexual harassment. County Exhibit 2 (Policy 328, Discriminatory Harassment). Sexual harassment is defined, in part, as verbal or physical conduct that has the effect of interfering with an individual work performance or creates a hostile or abusive work environment. *Id.* The Sheriff's Office considers sexual harassment such a serious offense for a law enforcement officer that it disqualifies from the hiring process any potential applicant who has been disciplined by a previous employer for such conduct. County Exhibit 2 (Policy 1000.3.6, Personal Sensitivity (Recruitment and Selection)).

Moreover, there is no dispute that John Nieder was on notice—or should have been on notice—that workplace sexual harassment was prohibited and treated very seriously by the Sheriff's Office. At his *Loudermill* hearing, Nieder and his attorney acknowledged that the Sheriff's policies “clearly state that sexual harassment is. . .prohibited in the workplace” and that “prompt attention is going to be taken to acts of sexual harassment” and “they’re going to be dealt with.” County Exhibit 11, p. 19. Nieder acknowledged multiple times over several years receipt of the Sheriff's Office's policies and amendments that prohibit sexual harassment. See County Exhibit 3. He likewise acknowledged receipt in 2006 of a county resolution that reemphasized the prohibition against harassment and discrimination, specifically in the context of sexual orientation. *Id.* On March 4, 2014—during the time that

he was supposed to be training Deputy Seixas—Nieder completed the County’s training entitled “*Preventing Sexual Harassment: A Guide for Employees (Course)*.” County Exhibit 4. On the same date, he completed the County’s online training entitled “*Sexual Harassment—What Employees Need to Know (Course)*.” *Id.* There is no question that Nieder had sufficient information to know that sexual harassment of a coworker was a serious offense, was wrong, and was prohibited by his employer’s policies. In fact, when asked by his attorney at his *Loudermill* hearing if Nieder understood the seriousness of the allegation, he responded that he did, and after reading the investigation he realized how inappropriate his actions really were. County Exhibit 11 (Transcript of John Nieder’s July 14, 2014 *Loudermill* Hearing), p. 6-7.

The Sheriff’s Office clearly communicated to its employees that it was intolerant of sexual harassment in the workplace. Policy 328.2 explicitly states that conduct in violation of the discriminatory harassment policies (Policy 328), even if not technically in violation of state or federal law, still could subject a member of the Sheriff’s Office to disciplinary action. County Exhibit 2. Sexual harassment of a co-worker after that person has communicated that sexual communication and physical touching is unwanted and unwelcome is a serious violation of a deputy sheriff’s oath of office and compromises the trust and confidence that the community must have in its law enforcement offices. Under the department’s policies, any reasonable deputy in this situation would have to acknowledge, as Nieder did, that such conduct is serious and that disciplinary consequences could result from his behavior.¹⁹

Policy 340.2 .1 notifies employees that even a first offense for misconduct can result in termination when warranted by the seriousness of the offense. *Id.* Policy 340.3.2 contains conduct that could result in discipline. Section 340.3.2 (k) notifies deputies that discourteous or disrespectful treatment of any member of the department will subject an employee to

¹⁹ At his *Loudermill* hearing, Nieder’s counsel (Ms. Nelson) acknowledged to the Sheriff that Nieder’s behavior was serious and he “has agreed and definitely understands that—that discipline as to happen in this scenario.” County Exhibit 11, p. 20.

discipline. Section 340.3.3 provides notice that violations of the County's policies prohibiting discrimination and harassment are misconduct that could result in discipline. *Id.*

There is likewise no question that the policies and rules against sexual harassment in the Sheriff's Office are related to the "orderly, efficient, and safe operation" of a law enforcement office. These policies reflect the requirements of federal and state law prohibiting sexual harassment in the workplace, and conduct in violation of such policies is disruptive to the entire department. Witness after witness—including Sheriff Mark Brown—testified about the serious nature of sexual harassment when it is inflicted on a co-worker by a member of the Sheriff's Office who is sworn to uphold the law and protect individuals from discrimination, intimidation, and oppression. Witnesses like Sergeant/Marshall Rick Norrie corroborated the Sheriff and detectives who said that such conduct completely disrupts the orderliness and efficiency of a law enforcement agency, and had that effect in this case. Witnesses like Detective Felici and Detective Seixas testified that Nieder's conduct not only impacted her workplace efficiency and output, but the ensuing investigation had a serious impact on the work of the entire detective's unit.

2. The Sheriff's Office properly determined before administering discipline whether the sexual harassment took place by initiating a fair and objective investigation of the allegations.

It cannot be disputed that before administering discipline in this case, an effort was made to discover if Nieder did, in fact, sexually harass a co-worker. The Sheriff's Office properly initiated an investigation into Nieder's conduct before taking any action. Although Nieder now seeks to challenge that investigation, the testimony at the hearing demonstrated that the investigation was thorough, fair, and objective. The final report prepared by investigator Melanie Bacon of the County's Human Resources Department supported the Sheriff's conclusion that sexual harassment had, in fact, occurred. Undersheriff Mauck testified that the Sheriff's Office ordinarily uses its own detectives to investigate allegations of misconduct within their department. Mauck, however, said that they turned to Melanie

Bacon in the County's Human Resources Department because all of the detectives in the office had a close working relationship with both Nieder and Seixas, and they wanted the investigator to be someone who was not regularly working with either employee. It seemed more fair and objective to have the investigation performed by someone outside of the Sheriff's Office. Mauck testified that unlike some allegations of misconduct that might involve more technical aspects of law enforcement work, sexual harassment was something with which an experienced human resources administrator would be familiar. Ms. Bacon was a natural choice for the Sheriff to designate as the investigator in this matter.²⁰

Ms. Bacon's training and experience provided her the background necessary to be the investigator in this case. Ms. Bacon testified about her extensive human resources experience in a variety of different work settings.²¹ Ms. Bacon testified that she had performed numerous investigations in the past, and that she was specifically trained in doing workplace investigations. She also testified that she was very familiar with and trained in sexual harassment issues, although she conceded that she has not had any training specifically in investigating sexual harassment. Ms. Bacon developed policies and employee handbooks for former employers. See Guild's Exhibit 40.

Bacon testified at length about her investigation during the hearing. She testified that she approached the case with an open mind and had no preconceived notions or ideas. She spoke to a wide range of witnesses from the Sheriff's Office and the Island County

²⁰ The Sheriff's Office is the office of an independent elected official and somewhat autonomous from other parts of county government. The Sheriff's Office's policies apply just to that department, and Ms. Bacon testified that she was not really familiar with the individuals that she interviewed.

²¹ Ms. Bacon's resume when she applied to work with Island County was admitted as Guild's Exhibit 40. As Ms. Bacon said in her testimony, her resume was prepared with information and experience relevant to the HR position for which she was applying with the County and she did not list every training that she had been to. However, it should be noted that Ms. Bacon did include in her resume her experience writing policies for the workplace (at the SPX Corporation corporate office), writing employee handbooks (at SPX Corporation in California), and developing and facilitating HR training on a variety of topics that included professional conduct and complaint investigations (at SPX Corporation in Minnesota).

Prosecutor's Office who might have observed the alleged sexual harassment or other inappropriate conduct, and she interviewed both the complainant and the employee accused of harassment. She testified that she allowed people to say what they wanted, although she said that sometimes she tried to sound sympathetic or provide affirmation during interviews—especially with the complainant—to encourage the witness to speak out and to draw more information out from her. Although Nieder and some of his witnesses criticized Bacon's style and said that they wouldn't have asked questions the way she did, there was no credible evidence or argument elicited to support a conclusion that her investigation was unfair. During his testimony, Nieder was very critical of the questioning by Ms. Bacon; but when given an opportunity to provide the Arbitrator information or say anything that Ms. Bacon had not elicited from him or that he was unable to express during his interview, Nieder was unable to come up with anything.

Some suggestions were made that Bacon's questions were incomplete, or that she asked "leading" questions. It is important to note that the witnesses being interviewed in this case were all intelligent adults and, in most cases, professional law enforcement personnel or members of the county Prosecuting Attorney's Office. There is no support for a claim that witnesses were led into saying something that they didn't intend to say, or that they were not able to share what they wanted to share because of the way Ms. Bacon asked questions. In short, the complaints about Ms. Bacon's interviews have no merit, and there is nothing to suggest that her investigation was anything other than fair and objective.

The Guild and Nieder have suggested that Ms. Bacon was merely doing the bidding of Undersheriff Mauck, and that the Undersheriff was really directing the investigation. For this reason, the Guild introduced as exhibits numerous emails between Ms. Bacon and Undersheriff Mauck. However, both Ms. Bacon and the Undersheriff testified that this suggestion simply isn't true. Ms. Bacon testified that she conducted her own investigation and was not directed or controlled by Undersheriff Mauck. However, Ms. Bacon testified that while she had conducted investigations for other parts of the County government, she

had never conducted an investigation for the Sheriff's Office and was unfamiliar with the format of the report with which they were accustomed and with some of the procedures unique to interviewing deputies of the Sheriff's Office. Undersheriff Mauck likewise testified that the emails he sent to Ms. Bacon were not intended to guide or control the substance of her investigation, but were instead intended to help her with processes, formats, and collective bargaining guidelines important to interviews conducted with members of the Sheriff's Office. Undersheriff Mauck provided Ms. Bacon the underlying documentation for the investigation and the Sheriff's Office's policies relevant to addressing the complaints. Guild Exhibit 16. Mauck also wrote Bacon an email on June 11 explaining her need to provide employees seventy-two hours' notice prior to interviews; he explained "*Garrity* warnings"²² and provided her a copy of such warnings attached to the email; and he explained the Sheriff's Office's practice of recording interviews. Guild Exhibit 17 and 18. Mauck provided Bacon a digital recorder for her to use while recording interviews, and coordinated the schedule for her to interview Sheriff's Office employees. Guild Exhibits 19 and 20. Mauck suggested potential employees to determine whether they had relevant information and provided information about other employees scheduled to be interviewed who told the Undersheriff that they had no relevant information. Guild Exhibits 21 and 22. In anticipation of Bacon interviewing Nieder, Mauck provided Bacon the language from the *Notification of Internal Investigation* that was sent to Nieder on June 10 and discussed further scheduling and timing issues. Guild Exhibit 24. Mauck suggested that Bacon read and become familiar with the Sheriff's Office collective bargaining agreement's "Employee Bill of Rights" prior to her meeting with Nieder and provided her with the customary practices and format of the Sheriff's Office related to interviewing employees. Guild Exhibits 25, 26, and 27. Mauck also arranged for the transcribing of Bacon's recorded interviews and sent the

²² *Garrity* warnings are provided to a law enforcement officer when an investigatory statement is compelled by his employer, and notify the employee regarding the limited use of such statements.

transcripts to her once they were completed. Guild Exhibit 28, 29, and 30. Bacon explained that typically she does not provide a recommendation when she completes an investigation, and she has customarily used a different format for her report than what the Sheriff's Office is accustomed to. Bacon testified that Mauck gave her the format that the Sheriff's Office wanted for her report, but not the conclusions themselves. Ms. Bacon testified emphatically that the Sheriff's Office did not influence her investigation—that she came to her own conclusion that sexual harassment had occurred. Bacon said that the conclusions were already what Bacon had reached on her own and she supplied her own recommendation, not something that was dictated to her. See Guild Exhibits 31, 32, and 33. In short, Ms. Bacon was adamant that the investigation, the findings, the conclusions, and the recommendations were hers and hers alone; the scheduling of witnesses, the format in which she conducted her interviews, and the format in which she wrote her final report were the customary process of the Sheriff's Office with which Undersheriff Mauck assisted her. But the Sheriff's Office did not influence the substance of her report. Any insinuation otherwise is simply contrary to testimony at the hearing.

3. The decision to terminate Nieder for sexually harassing another deputy was without discrimination, and reasonably related to the seriousness of the offense.

There is no suggestion that John Nieder was treated differently than any other employee of the Sheriff's office in this investigation. The real issue in this matter and the heart of the conflict lies in whether termination of a law enforcement officer under these facts is reasonably related to the seriousness of the offense he committed. The County submits that it was.

There is no question that sexual harassment is a serious offense.²³ Witness after witness at the arbitration hearing, whether called by the County or called by the employee,

²³ Although the collective bargaining agreement between the parties does not address progressive discipline except insofar as how long documents are retained in personnel files, Island County Sheriff's Office Policy 340.2.1 states that administration of discipline is generally expected to be progressive in nature, "with relatively minor violations of rules resulting in minor disciplinary

testified that sexual harassment is the type of serious offense that, when committed by one employee upon another, has a devastating impact on the work environment. Sexual harassment is a form of discrimination that violates both federal and state law, as well as the County rules and the stated policies of the Sheriff's Office. At the arbitration hearing, witnesses like Sheriff Brown pointed out that sexual harassment can subject a public agency to a lawsuit and financial liability under various federal and state laws, including Title VII and Title IX.

Moreover, sexual harassment by one employee against another has the potential of substantially disrupting the work environment, impeding the efficiency and work flow of an office, and—in the case of a public agency like the Island County Sheriff's Office—impacting the larger community. When a complainant's work performance is impacted by the sexual harassment that the complainant is experiencing, work production naturally slows. In a sheriff's office, the justice system itself is impacted; investigation of crime and the prosecution of offenders become back-logged when, as here, an employee simply stops coming to work to avoid the sexual harassment. The mandatory investigation of the allegations in this case turned the department “upside down,” according to some witnesses. Unlike some personal misconduct that impacts just the employee, sexual harassment by one law enforcement officer against another in a small, rural agency impacts and disrupts the entire community.

Another important factor to consider is whether the termination is related to the employee's record, length of service, and overall performance. Part of this question is whether the degree to which this behavior appears to be part of a pattern of conduct. John Nieder served as a deputy for the Island County Sheriff's Office from 2001 until he was terminated. Although his personnel file contained some appreciative notes from citizens, his

action for first offenders.” However, the policy also notes that more serious violation can be sanctioned with “more serious forms of discipline, including termination, for a first offense when warranted by the seriousness of the offense.” See County Exhibit 2.

work history was fairly average. Supervisor Sergeant Legasse (called by Nieder to testify at the hearing) described Nieder as an “effective” police officer—hardly a ringing endorsement. Sergeant Legasse also said that Nieder was having personal problems during this time. Nieder would later confirm that he was drinking and taking pills, having difficulty with work, and having difficulty with attendance following the 2013 separation with his wife. Lieutenant Myers, called by Nieder to testify, described Nieder as a “competent” deputy—again, a strangely bland description of a veteran officer with twelve years of experience in law enforcement. No witness touted Nieder’s performance or praised his contributions to law enforcement.

Witnesses did, however, testify that Nieder had no sense of personal boundaries with co-workers and physically touched them in ways that were inappropriate and made them uncomfortable. Nieder had a habit of slapping people in the office on the buttocks, something that offended many of them. When confronted by co-workers about his behavior, Nieder had a tendency to deflect criticism and wouldn’t take responsibility for or acknowledge his conduct. Detectives Wallace and Felici testified that Nieder would reply something to the effect of “why are you hating me for being me?” Nieder’s co-workers told him repeatedly to stop doing this and pointed out that slapping people on the buttocks was inappropriate in a professional working environment. Nevertheless, Nieder continued to do it. Nieder went so far as to hit the elected Sheriff on the buttocks at one point and say “good game!” Observers were surprised to see him do that and didn’t believe it to be appropriate. Nieder also struck a young deputy prosecutor (Chris Anderson) more than one time on the buttocks, once as he passed by Anderson while Anderson was talking to someone in the hallway. Anderson testified at the hearing that he really didn’t know Nieder that well and found it unusual. Another supervising prosecutor and lead detective Rick Felici later confronted Nieder about this and told him that it was inappropriate and he needed to stop doing it. Detective Ed Wallace testified that he had to tell Nieder repeatedly not to hit him (Wallace) on the buttocks and finally threatened him before Nieder stopped. Detective Felici

also threatened Nieder after being struck on the buttocks. Through this sophomoric behavior, Nieder demonstrated a pattern of personal boundary issues and poor judgement that was consistent with the conduct that eventually led to his termination. Nieder also demonstrated that he wouldn't always change his conduct when someone told him that it was inappropriate and needed to end.

Nieder's personnel file also contained a reprimand for prior misconduct that evinced his serious lack of judgment. In July 2012—just twenty-four months prior to the events that gave rise to this arbitration—Nieder was reprimanded for an incident that occurred in neighboring Skagit County. See County Exhibit 13. A sergeant from the Skagit County Sheriff's Office clocked Nieder driving in his patrol car in excess of 80 miles per hour in a 55 mile per hour zone. When GPS data was later collected by the Sheriff's Office to investigate this report, the GPS data revealed that Nieder had been driving at times *in excess of 100 miles per hour*. Nieder later admitted to driving at speeds of more than 100 miles per hour and apologized to Island County Sheriff Mark Brown. Nieder claimed later that he was trying to overtake a vehicle that had passed a car recklessly. However, the GPS data also showed that Nieder had left work early and was not within his assigned patrol area when he was still on duty. Sheriff Brown expressed frustration with this practice in his letter of reprimand and told Nieder that if he left his patrol area early again, his take-home patrol vehicle would be taken away. The Sheriff warned Nieder that his behavior was extremely dangerous and was unreasonable under the circumstances, especially when Nieder was outside of his jurisdiction in a neighboring county. The Sheriff advised him that the letter of reprimand for his conduct would remain a part of his employment record and used for progressive disciplinary purposes. *Id.*

The sexual harassment in the current matter isn't precisely the same type of misconduct documented in the employee's letter of reprimand, but both demonstrate a common theme: Nieder has demonstrated a lack of judgment and a failure to conform to the reasonable expectations of behavior that the community demands of responsible law

enforcement officers.²⁴ The Sheriff expressed in the 2012 letter of reprimand that Nieder needed to use reasonable judgment in how he performs his duties—and yet it is that continued lack of judgment that caused Nieder to cross boundaries with Lynne Seixas and harass her with physical contact and sexually suggestive comments even after she warned him explicitly that such conduct was unwelcome. Simply put, John Nieder has demonstrated once again that he fails to use good judgement.

4. The Sheriff's Office followed their policies and initiated a formal investigation when it became clear that Seixas' conversation with Nieder was not stopping his sexual harassment of her.

It is anticipated that the Guild and the employee will argue that the Sheriff's Office superiors should have taken more steps when Seixas first reported Nieder's misconduct. Counsel suggested at the arbitration hearing that under the applicable policies and procedures, the Sheriff's Office should not have allowed Seixas to address her concerns with Nieder without supervisors intervening; instead, Undersheriff Mauck should have begun an investigation immediately after Seixas spoke with him on May 7. The suggestion is that a failure to promptly investigate Seixas' concerns somehow mitigates Nieder's misconduct and warrants lesser discipline.²⁵ This argument is a red herring and without merit.

Prompt investigation and imposing prompt discipline is intended to help a *complainant* by taking steps to end sexual harassment. Failure to take prompt action while

²⁴ The Sheriff wrote in his August 7, 2014 grievance hearing conclusions that the cases had a similarity: "While the facts are different, a consistent theme runs through that incident and the current situation: your failure to conduct yourself in a manner that demonstrates professional judgment and appropriate behavior." Guild Exhibit 6 (Sheriff Brown's Grievance Hearing—Conclusions [redacted]), p. 9.

²⁵ Counsel for Nieder may also argue that a prompt investigation would have put Nieder on notice that his conduct was inappropriate and needed to stop. However, given the Office's policies of which he had notice, his training on sexual harassment, and the experience John Nieder had as a veteran law enforcement officer, any claim that he didn't understand the wrongfulness of his acts is not credible. Moreover, Seixas clearly communicated to him that his harassing conduct needed to end—and after a few weeks he resumed his conduct anyway. Seixas was clear and emphatic in her testimony and had no reason to lie or otherwise misrepresent her conversations with Nieder. Nieder, on the other hand, was clearly equivocal and evasive in his testimony.

sexual harassment continues may subject an employer to liability related to a victim, but it does not somehow excuse or mitigate the perpetrator for such discriminatory misconduct where a perpetrator knows—or should know—that his conduct is wrong and in violation of the employer’s policies, and where he has been clearly and explicitly notified that his conduct is unwelcome, unwanted, and offensive.

The Sheriff’s Office’s policy allows the employee experiencing such misconduct by a co-worker to confront that employee and communicate clearly that the behavior is unwelcome. See County Exhibit 2 (Policy 328.5.1). Detective Seixas asked to do so in this case and expressly asked that management not get involved. Only if the complainant feels uncomfortable, threatened, or has difficulty expressing his/her concerns—or if talking colleague-to-colleague does not resolve the concerns—should this process not be relied upon. If the complaint cannot be satisfactorily resolved through the process detailed in Policy 328.5.1, a formal investigation will be conducted. County Exhibit 2 (Policy 328.5.2). That is precisely what the Sheriff’s Office did in this case.

When Deputy Seixas approached lead detective Felici and Undersheriff Mauck, she made it very clear that she did *not* want management to take action and she wanted to speak with Nieder herself consistent with Policy 328.5.1. Seixas intended to make certain that there was no confusion and to speak clearly and unequivocally about the harassment she was experiencing. Seixas emailed her supervisors afterwards—and testified at the hearing as well—that this meeting went very well. She testified at the arbitration hearing that she told Nieder very plainly and clearly that she did not want him to touch her any longer, she did not want him to ask her questions about her sexuality or make sexual comments to her, and she didn’t want him to disparage or denigrate her in public and make her feel stupid. Seixas was adamant that there was no confusion in this discussion. She said that Nieder understood, that he apologized, and that the communication was very professional. Seixas was pleased to report back to Mauck and Felici that the Policy 328.5.1 process had apparently been successful, and that things had improved.

Unfortunately, Nieder's good behavior lasted just a short period of time. On June 10, Deputy Seixas wrote a statement as part of a formal investigation—and she testified at the hearing as well—that toward the end of May, Nieder once again began to poke at her, pull her hair, and rub her shoulders. Seixas said that she would pull away and tell Nieder to knock it off. Nieder would simply act wounded and tell her that “you are hurting my feelings”. On June 2, Seixas said that Nieder came up behind her and began to rub her shoulders. She said that she told him to stop, but he continued. Nieder admitted in his testimony that he had rubbed Seixas' shoulders, but he said that he only did it because she complained that she was sore from working at her house, and that he was doing it to help her. He implied that this was mutually acceptable, and that Seixas did nothing to prevent him from doing it. As noted below, Nieder's version of events simply is not credible.

5. Nieder's testimony was not believable and evinces his recklessness with the truth.

On three important points Nieder has a very different version of events than Seixas, and each scenario represents a key point that if Nieder were to concede, it would significantly undermine his case. These points raise genuine issues about Nieder's credibility.

First, Nieder admits meeting with Seixas on May 8, but denies that she told him to stop asking her questions about her sexuality or making sexual comments to her, to stop touching her, or to stop disparaging her. Nieder says simply that Seixas told him that she didn't want to be “labeled” or “put in a box” concerning her “bisexuality.” Nieder claims that Seixas said nothing else. Nieder claims the rest of the conversation was about her performance problems as a detective.

As Seixas stated emphatically on the stand, there is only one reason that she participated in this process and came back from California to testify at the hearing: to see that the right thing was done. Seixas had no motivation to lie about the May 8 conversation and, in fact, was complimentary of Nieder when she reported back to Felici and Mauck on

May 19 that he had improved his behavior. She praised him as being very professional during the meeting and pointed out that Nieder responded to the discussion in a way that demonstrated he was being conscientious about his behavior—at least for a few weeks. Seixas' May 7 conversation with Felici and Mauck, her insistence on addressing the matter with Nieder face-to-face and not having management involved, and her May 19 e-mail to Undersheriff Mauck and Detective Felici are all circumstantial evidence that Seixas is credible and has no motivation to lie or get Nieder in trouble. She simply wanted the conduct to end, and tried to do it in a manner that would benefit everyone.

Nieder, on the other hand, had every reason to lie or at least distort the conversation with Seixas on May 8. To do otherwise would be to admit that he had been wrong and inappropriate in how he touched and talked with a new female employee under his training supervision, and that she had to call him out on it. It would be to acknowledge that Seixas needed to tell him to stop touching her, talking about her sexuality, and to stop disparaging her. More importantly, if that conversation occurred as Seixas testified, it places the subsequent events in a terrible light for Nieder—the touching and conversations with Seixas at the end of May and the early days of June would be subsequent to his having been clearly and unequivocally informed that his conduct was unwelcome, and Nieder would have had no excuse for conduct about which he was previously warned. Nieder has no other choice but to deny how the conversation on May 8 actually occurred.²⁶ The manner in which he testified will assist the Arbitrator in making the necessary credibility determination in this case.

²⁶ In his *Loudermill* hearing, Nieder made the incredible statement: “I wish that it—we could go back to May, like Erica had said, and that there had been a bright-line conversation with somebody to say, these are the allegations, this is the issue, this needs to stop. Because, like I said, up until that point where I opened that envelope . . . it was the last thing that I would have expected to have seen. You know, I wish that when—when Lynn had brought her concerns to the—to the attention of others that somebody had—had sat down and had, like I said, a bright-line conversation of—of exactly what was going on.” The Sheriff asked: “So are you saying that Lynn did not bring a bright-line conversation to you when she had discussion with you?” Nieder replied: “No. We had—we had a conversation at the gas station. It was basically a check-in conversation between her and I: my concerns about her ability to communicate what she knew and didn’t know . . .” County Exhibit 11 at p. 26-27. Lynne Seixas made very clear in her testimony that she and Nieder had this “bright-

Nieder also must misrepresent how the June 2 events occurred when he was rubbing Seixas' shoulders. Nieder's version made it sound as if Seixas welcomed the relief for her "sore" shoulders, and he denied that she seemed bothered or upset by his touching. Seixas, on the other hand, said that she told him not to do it and was upset by it. In this instance, however, a third party noticed the interaction. Sergeant/Marshall Rick Norrie was in Detective Felici's office and briefly saw the interaction through the doorway. Norrie saw Nieder with his hands on Seixas, and noticed that Seixas took a whack at him and told him to stop. Norrie didn't recall much, but he testified that Seixas looked annoyed or upset when Nieder touched her. Nieder's version of this interaction is simply not credible. Again, this is critical because Nieder has maintained that any physical touching and sexual communication was mutual, and that he had no notice Seixas was upset or offended by what he did or said. Rick Norrie supports Seixas' version of the events and the conclusion that Nieder's testimony is simply false.

On June 3, there is the third incident where Nieder's version of events is significantly different than Seixas' version. On the way back from Bellingham where they conducted an investigatory interview together, Nieder and Seixas stopped by the REI store where Nieder made the comment in front of the clerk that Seixas' question was the stupidest thing he'd ever heard. On the way back to Whidbey Island, Seixas said that they were talking about her plan to put shutters in her master bath where she currently had no shades. Nieder asked about the window's location, and Seixas asked why he wanted to know. Seixas said that Nieder replied, "so I know where to stand and rub one out." Nieder admitted that this conversation occurred, but he claimed that he only said that he would get a stool and stand by the window. He denied that he said he would "rub one out" (i.e., masturbate). However, other colleagues who have known Nieder for years testified at the hearing that this phrase was very consistent

line conversation" and that Nieder changed his behavior following the conversation. The Sheriff also asked if Seixas "never said that she was uncomfortable with you touching her?" Nieder replied that she only said she was ticklish. *Id.* at 28-29. Nieder understands that denying these conversations and what Seixas told him is critical to his case.

with something that Nieder would say. It defies logic and common sense to conclude that Seixas merely concocted or misunderstood this portion of Nieder's statement. As Melanie Bacon said, suggesting that Nieder would even get a chair or stool and watch Seixas through her bathroom window was bad enough.²⁷ Once again, Nieder's credibility is in question, and must be evaluated.²⁸

Credibility questions are a continuing theme with Nieder. In his *Loudermill* hearing, he and his attorney acknowledge the seriousness of sexual harassment and the need for discipline. County Exhibit 11 at p. 20. He admitted that he crossed boundaries with Detective Seixas. *Id.* at 11. He claims that Seixas never had a "bright-line conversation" with him on May 8 telling him the allegations and that he needed to stop. *Id.* at 26-27. Nevertheless, he declared that Seixas was not to blame, that the allegations were not her fault and she did nothing wrong. *Id.* at p. 32. Yet he was also alleging that her complaint was a factual lie—and a reasonable person who was being disciplined for false allegations would certainly not acknowledge that his lying accuser was doing nothing wrong.

Interestingly, in November 2014 Nieder participated in an unemployment hearing. See County Exhibit 12 (Transcript of John Nieder's November 20, 2014 Unemployment Hearing). At the hearing, Nieder was asked if he violated any policy of the Island County

²⁷ Ms. Bacon testified that this was even more troubling because during the drive from Bellingham, Seixas revealed to Nieder that she had been raped. Ms. Bacon said that Nieder's comment just a short time after hearing this revelation from Seixas demonstrated to Ms. Bacon that Nieder "just doesn't get it" and led to her recommending that he be terminated from his position as a law enforcement officer.

²⁸ Another portion of this testimony seemed a bit odd and inconsistent. Seixas denied that she took Nieder to her house on this trip. Nieder insisted in his testimony that they were stopping by her house on the way back to the office because Seixas wanted to show Nieder her house and the work she had done it. He said she was very proud of it. However, Nieder then said that they pulled up to the house and Seixas saw that her partner's car was gone and she was not home. Nieder said that they left. When asked by the Arbitrator to clarify, Nieder confirmed that they did not get out of the car and simply drove away. It's unclear why, if the purpose was to see the work she had done to the house, Nieder and Seixas would drive away after arriving without getting out of the car. On the other hand, if Nieder's recollection is correct and Seixas forgot this portion of the trip, one can only assume that Seixas was uncomfortable being in the house with Nieder without someone else there. When she saw that her partner was gone, Seixas and Nieder left without getting out of the car.

Sheriff's Office. He replied "I don't think I did." *Id.* at p. 68. He repeated that statement later, and was asked whether he admitted in his *Loudermill* hearing that he violated county policy. Nieder said no. *Id.* at 72. This is simply inconsistent with statements that he "crossed boundaries," that Lynne Seixas had no blame and did nothing wrong, and that the allegations were serious and called for discipline. Nieder is simply not credible.

6. Even if the Arbitrator were to find elements of just cause absent, the Arbitrator would not need to require the Sheriff's Office to reinstate him

The Island County Sheriff's Office strongly asserts that just cause for Nieder's discipline is clear and evident in this case, and that termination is reasonably related to the seriousness of this offense. But if the Arbitrator were to conclude that one or more procedural elements of just cause to discharge Nieder were missing, the Arbitrator would still not be required to *reinstate* Nieder.

In *State of Washington DSHS, AAA Case No. 75-390-00393-08 (2009)*,²⁹ Arbitrator William Greer was faced with just such a question. The State of Washington charged a 26-year employee (hospital attendant) with sexually harassing other employees. The State established that the grievant had engaged in serious misconduct by proving some, but not all, of the allegations. However, the union showed that the disciplinary process was flawed and the State failed to investigate complaints when the state knew or reasonably should have known of the grievant's misconduct. The Arbitrator concluded that the State was lax in enforcing the sexual harassment rules and that the investigation was incomplete. The investigator did not testify at the hearing.

The Arbitrator noted that the parties' collective bargaining agreement did not limit his authority to fashion a remedy. He also noted that "[w]here discharge is found

²⁹Available online at http://www.ofm.wa.gov/labor/arbitration/grievance/decisions/07-09/WFSE_DSHS_Davis_Termination.pdf.

to not have been for just cause, but the employer-employee relationship has deteriorated to the point where it is no longer viable or there is little doubt that the grievant, if returned to work, would be fired again, reinstatement may make no sense. The arbitrator may then award full or partial back pay but permit the termination to stand.” (quoting *George Kock Sons, Inc.*, 102 LA 737 (Brunner 1994), where a 37-year employee was discharged for just cause after a single incident). Arbitrator Greer concluded that a make whole order, without reinstatement, was the appropriate remedy in the case.

In the present case, the collective bargaining agreement does not limit the Arbitrator in fashioning a remedy. Although the Sheriff’s Office maintains that just cause for John Nieder’s termination has been established by the facts of this case and that a fair and objective investigation and other procedural steps have been properly observed, the employer recognizes that the Arbitrator could disagree. If that were to be the case, the Sheriff’s Office would respectfully ask the Arbitrator *not* to reinstate the employee.

Sheriff Brown best summed up the employer’s position in his August 7, 2014, response denying Nieder’s grievance:

It is my conclusion that sufficient cause exists for your termination. The department afforded you ample warning that sexual harassment, discrimination, and treating colleagues with disrespect would not be tolerated. The elimination of sexual harassment and disrespectful treatment of colleagues is not only required by federal and state law, but it is essential to the orderly, efficient, and safe operation of a law enforcement agency. It is a fundamental expectation of law enforcement officers that they treat the public and each other with respect and dignity, and that they model the lawful behavior which they are charged with enforcing. Before administering discipline in this case, the department conducted a thorough investigation to look into your conduct, and that investigation was conducted in a fair and objective manner. I am persuaded that both the direct and circumstantial evidence in this investigation, including the testimony of both law enforcement officers and members of the prosecutor’s office, support the allegations that have been made.

The final question, then, is whether the termination that has been proposed is reasonably related to both the seriousness of your conduct and the record of your service. I believe that it is. Sexual harassment of another law enforcement officer is an egregious offense, especially where a colleague has made it clear to you that your verbal and physical conduct is unwelcome, unwanted, and inappropriate. Ethical conduct, trustworthiness, and good judgment are critical characteristics for a law enforcement officer. Because we have a small agency covering a large rural county of more than 200 square miles, our officers patrol alone and often encounter citizens with no other persons present. Both I, as an elected official, and the community that we serve must have confidence that our deputies will perform their duties and interact with others in a manner that is always appropriate and above reproach. I do not have the confidence that you are capable of doing so.

Moreover, your credibility as a law enforcement officer is vital to your effectiveness. Viewing the totality of the investigation and the pattern of your misconduct that has emerged based on the observations and experiences of those around you, I do not believe that you have been credible or forthright during the investigation about your actions. You have specifically denied allegations or facts about which the complainant has been very clear. I am not persuaded that your version of events is accurate, nor am I persuaded that this is simply a matter of different perspectives. Following this investigation and your responses to the allegations, I do not have confidence in your credibility.

I likewise believe that this investigation reveals a deplorable lack of judgment on your part. In this context, your July 2012 written reprimand is not entirely dissimilar, even though it involved different facts. . . .

Any other discipline in this case is simply unrealistically. Every employee has the right to work in an environment that is free of the type of repeated sexual harassment and demeaning conduct that you have demonstrated toward the complainant. The Island County Sheriff's Office has less than forty deputies, including our detectives, and it is unrealistic to expect that I can guarantee any employee the right to the type of harassment-free environment to which she is entitled if you continue as a law enforcement officer in the department.

Guild's Exhibit 6 at pg. 7-8.

There is no question that Nieder has lost the confidence of the elected official who is responsible for assigning him law enforcement duties. Sheriff Brown has

expressed that there is no place in a small department covering a large rural county where he could assign John Nieder, were he to be returned to duty. Sheriff Brown is ethically unable to do so in light of the duties and obligations with which he has been entrusted by the community for which he is responsible. As he stated in his letter, Sheriff Brown has lost all confidence in Nieder's credibility, his ability to conduct himself ethically, and his ability to exercise good judgement. The relationship has deteriorated such that the Sheriff cannot return him to the community to serve as a police officer. Were the Arbitrator to find deficiencies in the just cause analysis, the Sheriff's Office would respectfully request a remedy that does not reinstate the employee to a law enforcement position in Island County.

VI. CONCLUSION

Island County respectfully requests that the Arbitrator find that the Sheriff had just cause to terminate John Nieder from his employment as a Deputy Sheriff. Nieder's sexual harassment of Deputy Lynne Seixas continued after being told clearly and unequivocally that it was unwelcome and offensive. The Sheriff's Office conducted a fair and objective investigation of the facts, and provided John Nieder all the procedural due process to which he was entitled. In any event, he should not be reinstated as a law enforcement officer in Island County.

Submitted this 23rd day of June, 2015.

By s/Charles W. Lind
Charles W. Lind WSBA #19974
Of Attorneys for Island County Sheriff's
Office

CERTIFICATE OF SERVICE

I hereby certify that on this day, June 23, 2015, I deposited into the US Mail a copy of the District's Post-Hearing Brief and also emailed a PDF version of the brief to:

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I further certify that upon further instructions or agreement, I will email a PDF version of the District's Post-Hearing Brief to:

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DATED this 23rd day of June, 2015.



Evan J. Seeder