

FEDERAL MEDIATION & CONCILIATION SERVICE  
BEFORE ARBITRATOR THOMAS F. GIBBONS

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In The Matter of the Arbitration Between: )  
 )  
ILLINOIS FRATERNAL ORDER OF POLICE )  
LABOR COUNCIL, )  
 ) Union ) GRIEVANCE ARBITRATION  
and ) Evan Schmalshof, Termination  
 )  
McDONOUGH COUNTY SHERIFF'S OFFICE, )  
 )  
 ) Employer )

FMCS #: 240313-04388

Hearing Date: September 26, 2024

Hearing Place: McDonough County Sheriff's Office  
110 S. McArthur Street  
Macomb, IL

Appearances:

On behalf of the Employer: Richard V. Stewart, Esq.  
The Stewart Law Firm, P.C.  
1224 Centre West Drive, Suite 400 A  
Springfield, IL

On behalf of the Union: IL FOP Council  
Tamara Cummings, Esq.  
General Counsel  
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Springfield, IL

Arbitrator: Thomas F. Gibbons, Esq., NAA  
Northwestern University  
339 East Chicago Avenue  
Chicago, IL

## INTRODUCTION

The Illinois Fraternal Order of Police Labor Council (hereafter the “Union” or “FOP”) filed this grievance pursuant to Article 13 (Dispute Resolution and Grievance Procedure) of the parties’ Collective Bargaining Agreement. *Jt. Ex. 1*. The Union and McDonough County Sheriff’s Office (hereafter the “Employer” or “Sheriff’s Office”) selected the undersigned Arbitrator through the Federal Mediation & Conciliation Service to hear this matter. The parties agreed the Arbitrator has jurisdiction to hear this matter and that the grievance was properly before him. *Jt. Ex. 12*.<sup>1</sup> There was no transcript of the hearing taken and the Arbitrator’s notes stand as the official record of the proceedings. The parties were afforded a full opportunity to present evidence and arguments, including examination and cross-examination of all witnesses. The Grievant, Evan Schmalshof, was present at hearing. The parties waived closing arguments in lieu of submitting Post-Hearing Briefs on or before October 31, 2024. That due date was mutually agreed by the parties to be moved twice, first to November 15, 2024 and then to November 19, 2024. Post-Hearing Briefs were timely filed on or before November 19th, whereupon the evidentiary portion of the hearing was declared closed.

## STATEMENT OF ISSUES

The Parties agreed to the following:

The Parties to this Arbitration hereby agree that the sole issue(s) before the Arbitrator are as follows:

1. Was Evan Schmalshof untruthful in his report or interrogation?
2. If so, was there just cause to terminate him?
3. If not, what shall the remedy be? *Jt. Ex. 11*

## STIPULATED FACTS

The Parties stipulate that the following facts are true and accurate for the purpose of this hearing:

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<sup>1</sup> Exhibts are marked as followed: Joint Exhibit (*Jt. Ex. #*); Employer Exhibit (*E. Ex. #*) and Union Exhibit (*U. Ex. #*).

1. On September 1, 2016, Evan Schmalshof was hired as a part-time Correctional Officer with the McDonough County Sheriff's Office.
2. On May 16, 2018, Evan Schmalshof became a part-time Deputy of the McDonough County Sheriff's Office.
3. On June 16, 2019, Evan Schmalshof became a full-time Deputy with the McDonough County Sheriff's Office.
4. This arbitration hearing stems from events that occurred while on duty and on patrol on January 27, 2023.
5. His assignment on January 27, 2023, was to work patrol between the hours of 6 p.m. to 4 a.m.
6. On January 27, 2023, the Macomb/McDonough County Central Dispatch broadcast that officers of the Macomb Police Department were involved in a pursuit.
7. Upon hearing broadcast from the Macomb/McDonough County Central Dispatch, Deputy Schmalshof responded by attempting to catch up to the pursuit.
8. Deputy Schmalshof engaged in a pursuit.
9. The pursuit ended in a fatality.
10. If called to testify, Derek Wiley, a Trooper with the Illinois State Police, would testify that the Illinois State Police were contacted by the McDonough County Sheriff's Office to assist with traffic control. He would further testify that while at the scene on January 27, 2023, he spoke with Evan Schmalshof and Evan Schmalshof told him that he (Evan Schmalshof) attempted to pass the vehicle involved in the pursuit to lay down stop sticks.
11. If called to testify, Robert Phelps, a Lieutenant with the McDonough County Sheriff's Office, would testify that he arrived at the scene after the pursuit ended. He would further testify that while at the scene on January 27, 2023 he spoke with Evan Schmalshof and Evan Schmalshof told him he (Evan Schmalshof) he was attempting to pass the vehicle in order to put out spike strips.
12. On January 30, 2023, Deputy Schmalshof was placed on administrative leave pending the outcome of the investigation into the pursuit.
13. On August 10, 2023, Deputy Schmalshof was issued a Notice of Interrogation for an interrogation.

14. On August 18, 2024, Deputy Schmalshof was interrogated as part of an internal investigation.
15. On January 19, 2024, Deputy Schmalshof was issued notice of Pre-Disciplinary Meeting scheduled for January 25, 2024 at 1030 hours.
16. Deputy Schmalshof was terminated on January 26, 2024.
17. Deputy Schmalshof is alleged to have violated Personnel Policies 102 (violation of rules), 104 (conduct unbecoming), and 105 (conduct immoral) based on statements he made to his report and during his interrogation.
18. Prior to the instant matter, Deputy Schmalshof received no prior discipline.
19. Prior to the instant matter, Deputy Scmalshof's complimentary history consists of a letter of accomplishment dated August 11, 2020 with an email from July 11, 2020 attached to it.
20. The parties agree that there are no procedural issues for resolution by the Arbitrator and that the Arbitrator has jurisdiction to hear and rule upon this matter. *Jt. Ex. 12.*

### FACTUAL BACKGROUND

The Grievant has been employed with the McDonough County Sheriff's Office since September 1, 2016, when he was hired as a part-time Correctional Officer. *Jt. Ex. 12, at 1, Jt. Ex. 9, at 20.* On May 16, 2018, the Grievant became a part-time Deputy of the McDonough County Sheriff's Office. *Id., Jt. Ex. 9, at 14.* On June 16, 2019, the Grievant became a full-time Deputy with the McDonough County Sheriff's Office, a position he held at the time of the events giving rise to this grievance. *Id., Jt. Ex. 9 at 8-9.* Prior to this incident, the Grievant had no prior discipline and one complimentary item in his personnel file. *Jt. Ex. 12.* On January 27, 2023, the Grievant was on patrol duty in the evening hours when he joined a vehicle pursuit of an individual who was evading police. Shortly after 9:00 p.m., the Macomb/McDonough County Central Dispatch broadcast that officers of the Macomb Police Department were in a vehicle pursuit of a suspect involved in a stalking/harassment incident in Macomb. *Jt. Ex. 2, Exhibit C, at 8-11.* Upon hearing the broadcast, the Grievant responded by attempting to catch up to the pursuit. *Id.* Once he caught up to the pursuit, the Grievant attempted to pass the suspect's vehicle, a blue

Pontiac Grand Prix, several times but could not because of oncoming traffic. *Id.*, at 9. “As (the Grievant) slowed and attempted to pull back in behind the vehicle, the suspect applied the brakes causing (the) vehicles to collide.” *Id.* The Pontiac spun sideways and rolled over, throwing the driver out of the vehicle into a nearby field. *Id.* Despite life-saving efforts by police, the driver was pronounced dead at the scene by emergency responders. *Id.*

In his incident report of January 30, 2023, the Grievant described his plan:

As I caught up to the suspect vehicle, I observed what I believed to be a single occupant. I believe based on the suspect vehicle travelling towards the populated town of Industry, it would be in the best interest of public safety, to get ahead of the suspect vehicle and deploy spike strips. If not able to deploy spike stripes, I may be able to divert his course off US 67 onto a less travelled roadway and away from the populated town of Industry. *Id.*

At the scene of the accident, the Grievant spoke separately to both Illinois State Trooper Derek Wiley and his supervisor, McDonough County Sheriff’s Lieutenant Robert Phelps, and he told both officers that he was attempting to pass the suspect’s vehicle in order to put out spike strips. *Jt. Ex. 12.*

On January 30<sup>th</sup>, the Grievant was placed on administrative leave pending the outcome of the investigation into the pursuit and accident. *Id.* During an interrogation on August 18, 2023, the Grievant was asked if he had planned on deploying spike strips, and stated:

The spike strips of something in my mind. I just put that in the report just to cover that you know was something that we could have utilized but my intention was just to pass him so that he would go down onto the side streets and avoid going into town or continuing on 67 since 67 has a greater amount of traffic on its than obviously like North 700 or a small county road. *Jt. Exs. 2 and 5.*

The interviewer then asked: “So you put in your report that you wanted to use spike strips but that wasn’t actually you intention you just wanted to pass?” The Grievant responded:

Initially, I wanted to put out spike strips, but I believe that once we got to the speed we were at there was no way I would have been able to put out spike strips, but that was my initial thought process...” *Jt. Ex. 5.*

Subsequently, the Grievant was issued notice of a Pre-Disciplinary Meeting that took place on January 25, 2024, and he was terminated the next day on January 26, 2024. *Jt. Exs. 2 and 6.* In his termination letter, McDonough County Sheriff Nicholas M. Petitgout held that the Grievant violated Per-105 Conduct Immoral, Per-104 Conduct Unbecoming and Per-102 Violations of the Rules of the Sheriff’s Office Policy and Procedure Manual. Specifically, Petitgout found that the Grievant violated the rules when he was untruthful when completing his report on January 30<sup>th</sup>, when he stated he planned on deploying spike strips, but when interviewed on August 18<sup>th</sup> he stated he “just put that in the report” and that he instead wanted to pass the vehicle to divert him away from the town’s population. *Jt. Ex. 2, at 2-3.* On January 29, 2024, the FOP and the Sheriff’s Office agreed to waive the contractually mandated grievance steps and to proceed directly to arbitration. *Jt. Ex. 8.* The matter is now properly before the undersigned Arbitrator for a final and binding decision.

## RELEVANT CONTRACT LANGUAGE AND SHERIFF’S OFFICE POLICIES AND PROCEDURES

### Article 7 Discipline and Discharge

Section 7.1 – Discipline and Discharge  
The parties recognize the principles of progressive and corrective discipline. Disciplinary action or measures shall include but not be limited to the following:

- Oral reprimand
- Written reprimand
- Suspension (notice to be given in writing)
- Discharge

Disciplinary action may be imposed upon an employee only for just cause. Any disciplinary action or measure imposed upon an employee may be processed as a grievance through the regular grievance procedure. Other reasonable conditions of employment may be imposed by the Employer as part of the discipline.

\* \* \*

## Sheriff's Office Policy and Procedure Manual

### Per-105 CONDUCT IMMORAL

Employees shall maintain a level of moral conduct in their personal business and professional affairs which is in keeping with the highest standards of the law enforcement profession.

### Per-104 CONDUCT UNBECOMING

Employees shall conduct themselves at all times, both on and off-duty, in such a manner as to reflect most favorably on the Department. Conduct unbecoming shall include conduct which brings the Department into disrepute, or which brings discredit upon the employee as a member of the Department or that which impairs the operation or efficiency of the Department or member.

### Per-102 VIOLATION OF RULES

Employees shall not commit any acts or omit any acts which constitute a violation of any of the rules, regulations, directives or orders of the Department whether stated in this Operating Procedure Manual or elsewhere.

## PARTIES' POSITIONS

### Employer's Position:

It is the Employer's position that the Grievant was untruthful when completing his incident report on January 30, 2023, and being truthful in all official reports is essential to members of the law enforcement profession. *Jt. Ex. 2, at 2.* By being untruthful in an official report, the Grievant failed to maintain the highest standards of law enforcement. *Id.* This is a violation of Per-105 CONDUCT IMMORAL. Furthermore, by being untruthful in his police report, the Grievant discredited himself as a law enforcement officer in violation of Per 104 CONDUCT UNBECOMING.. Finally, the Grievant's story given in his official report and his interrogation are inapposite to each other. The Grievant was ordered to be forthright during the interrogation, by telling two different versions of the same incident, he was not. Therefore, he violated the direct order of the Sheriff to be truthful and forthright in the interrogation. By violating a direct

order, he violated Per 102 VIOLATION OF RULES. *Id.*, at 3. The Employer argues the Grievant was either: untruthful when separately speaking with an Illinois State Police Trooper and his supervisor, Lt. Phelps, about the collision while at the scene on January 27, 2023 and writing his official police report regarding the fatal pursuit on January 30, 2023 or untruthful when during his August 18, 2023 interrogation conducted as part of the internal investigation. *Employer Post-Hearing Brief*, at 18. The problem for the Grievant, the Employer argues, is that both the January 30, 2023 Report and the statements made in the August 18, 2023 interrogation cannot be reconciled. *Id.* The Employer reasons if the report is accurate, then the statements made in the interrogation are inaccurate. If the statements made in the interrogation are accurate, then the January 30, 2023 report is inaccurate. *Id.* Therefore, the Grievant was untruthful one way or the other. Finally, the Employer claims termination is the only appropriate discipline since the Grievant's untruthfulness will undermine his credibility in the future as the State's Attorney will have to disclose that in any case the Grievant is involved in since withholding the finding of untruthfulness would violate a defendant's due process. *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.E. 2d 215 (1963) (Suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilty or to punishment). The Employer also objects to the FOP's motion, raised late in these proceedings, that the burden of proof in this matter should be the higher "clear and convincing" standard. It is the Employer's position that the parties did not agree in its Statement of Issues to argue the standard of proof and that the Union raised the issue too late to be considered. Accordingly, the Employer asks that the grievance be denied and the Grievant's termination upheld.

#### Union's Position:

The FOP first argues that when considering this matter the Arbitrator should hold the Employer to a higher burden of proof than a "preponderance of the evidence." In the instant case, the Union believes a higher standard is required because the Employer has terminated the Grievant for dishonesty, which if upheld will effectively prevent him from ever holding another law enforcement job in any capacity. The FOP holds that a more appropriate standard would be the "clear and convincing" standard. As to the termination, the Union argues the Employer has taken the Grievant's statements out of context and that he was not untruthful and he was not inconsistent between his initial written report and statements made during his interrogation.



The Union believes the Grievant was running through his options and initially considered using spike strips but ultimately decided against it. Finally, the FOP argues that the Sheriff's decision to terminate the Grievant was taken because of his so-called *Brady* obligations, namely he believed he would have to disclose information about Grievant that would be used to attack his credibility if he was called testify. The Union argues the Sheriff misapplied *Brady* and violated the CBA's *just cause* requirement when deciding to terminate the Grievant partially due to the prosecutor's *Brady* obligations. Accordingly, the FOP asks that the grievance be sustained and the Grievant be reinstated to his previous position with full back wages, all lost benefits and any other actions deemed equitable and just to make the Grievant whole.

### DISCUSSION AND CONCLUSION

The facts giving rise to this matter are not in dispute, only the truthfulness of the Grievant's official police report on Januar 30, 2023 and his statements made during his August 18, 2023 interrogation are in dispute. A threshold question raised by the FOP is the Employer's burden of proof required in his matter. There is no dispute that the Employer bears the burden of proof to demonstrate *just cause*, as required by Article 7 of the parties' CBA, to terminate the Grievant. It is also well understood that the normal standard of proof in ordinary discipline and discharge cases is a "preponderance of the evidence," which requires that the facts as a threshold be more likely than not to prove the issue for what they are asserted, that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. *See Black's Law Dictionary, Fifth Edition*. The Union, however, believes a higher burden of proof is required, namely "clear and convincing" proof. This means that the evidence presented by a party must be highly and substantially more probably to be true than not and the trier of fact must have a firm belief or conviction of its factuality. In this standard, a greater degree of believability must be met than the common standard of preponderance of the evidence but less than is required in a criminal case and the higher "beyond a reasonable doubt" standard. *Id.* The Union argues this higher standard is necessary because the Grievant is accused of being untruthful, an accusation of dishonesty that if upheld would not only result in his discharge from his job but effectively end the Grievant's career in law enforcement. The Employer argues that the quantum of proof should be the "preponderous of the evidence" as is typical in disciplinary and discharge cases. The parties, the Employer states, agreed to the issues to be decided and it did not include the

quantum of proof and furthermore the FOP's motion is not timely filed.<sup>2</sup> The Arbitrator disagrees with the Employer that the burden of proof issue can only be raised if the parties agree to address it. There is no prohibition for a party to raise such procedural issues, apart from the Statement of Issues, before or at hearing. Such procedural motions are routinely raised, such as timeliness as only one example. I agree, however, that the FOP's motion is untimely for being raised for the first time in its Post-Hearing Brief. To permit this would prejudice the Employer who certainly would have factored in the quantum of proof as part of its case-in-chief. Accordingly, the "preponderous of evidence" shall be the burden of proof in this matter.

### Analysis

The question here is relatively straight forward: In his incident report on January 30, 2023 or during his interrogation on August 18, 2023, was the Grievant untruthful in relating his actions when in pursuit of a suspect on January 27, 2023? In his official report, written three days after the traffic pursuit, the Grievant wrote:

As I caught up to the suspect vehicle, I observed what I believed to be a single occupant. I believe based on the suspect vehicle travelling towards the populated town of Industry, it would be in the best interest of public safety, to get ahead of the suspect vehicle and deploy spike strips. If not able to deploy spike stripes, I may be able to divert his course off US 67 onto a less travelled roadway and away from the populated town of Industry. *Jt. Exs 5 and 2, Ex. C, at 9.*

Shortly after the accident at the scene, the Grievant also told Illinois State Trooper Wiley and his supervisor, McDonough County Sheriff's Lt. Phelps, that he was attempting to pass the suspect's vehicle in order to put out spike strips. *Jt. Ex. 12.*

During his interrogation nearly seven months later, the Grievant was asked what was his plan when pursuing the vehicle, and he stated:

...So my intention was this gentleman is just trying to get away from the police if we pass him, he's going to take one of the side roads avoid the populated areas and he can go on his way. I just wanted to divert him so that he would crash on Windmill Curve, hit a house or somebody else....

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<sup>2</sup> The FOP argued for the higher burden of proof for the first time in its Post-Hearing Brief. The Arbitrator, *sua sponte*, asked the Employe if it wished to respond to the issue in a supplemental brief. The Employe filed a response on December 4, 2024.

When asked if his plan was to deploy spike strips, the Grievant responded:

The spike strips of something in my mind. I just put that in the report just to cover that you know was something that we could have utilized but my intention was just to pass him so that he would go down onto the side streets and avoid going into town or continuing on 67 since 67 has a greater amount of traffic on its than obviously like North 700 or a small county road. *Jt. Exs. 2. and 5.*

The Employer believes these statements show that the Grievant was untruthful in his earlier incident report, arguing that the Grievant said he planned to pass the vehicle to put out spike strips, but his real intention was to divert the vehicle away from a populated area. In the alternative, the Employer argues if the Grievant was truthful in his report, he was then untruthful in the interrogation. The Employer argues the two stories are not reconcilable, if one is true the other must be untrue. *Employer Post-Hearing Brief, at 12.*

However, immediately after making these statements during the interrogation, the interviewer asked: "So you put in your report that you wanted to use spike strips, but that wasn't actually your intention you just wanted to pass?" The Grievant replied:

Initially, I wanted to put out spike strips, but I believe that once we got to the speed we were at there was no way I would have been able to put out spike strips, but that was my initial thought process...." *Jt.Ex. 5.*

In attempting to assess the Grievant's veracity, the first question that comes to mind is why would he want to be untruthful about his actions on January 27, 2023? Either tactic – using spike strips or diverting the driver away from town -- would be appropriate and not a violation of any policies or procedures of the Sheriff's Office. It is, in fact, reasonable to believe the Grievant, when in pursuit of a vehicle, would consider possible best and alternative options in the midst of a high-speed car chase as unfolding events might change by the second. The Employer offers no reason, no benefit or motive, for the Grievant to be untruthful. The Employer has no obligation to prove motive, but without it the Grievant's statements must be given a more innocent construction as there is no evidence to suggest that he had anything to gain by not being truthful.

In his January 30th report, the Grievant stated that by trying to pass the suspect's vehicle, he intended to try and employ spike strips and "(i)f not able to deploy spike stripes, I may be able to divert his course." This statement makes clear the Grievant was first considering spike strips, and if not possible, he would aim to divert the driver. Both tactics required him to try and pass the vehicle, an attempted maneuver that the Employer does not dispute. In his interrogation, the Grievant makes clear he wanted to divert the driver, if he could, but said "(t)he spike strips of something in my mind" and that he included that in the official report "to cover that you know was something that we could have utilized but my intention was just to pass him so that he would go down onto the side street and avoid going into town." *Jt. Exs. 2. and 5.* Admittedly, the Grievant's statement is less than precise, even contradictory as to his intention to first use spike strips as stated in his earlier report. However, the Grievant immediately clarified his statement to his interviewer, stating: "Initially, I wanted to put out spike strips, but I believe that once we got to the speed we were at there was no way I would have been able to put out spike strips, but that was my initial thought process..." *Jt.Ex. 5.* In the Employer's view, the Grievant's response was a new lie, not a clarification of his earlier comment, because the Grievant realized he had inadvertently admitted to filing a false police when stating his real intention was to divert the driver's direction and not use strike strips. *Employer Post-Hearing Brief, at 16.*

It is difficult to accept the Employer's belief that the Grievant was being untruthful between what he wrote in his incident report and what he later said nearly seven months later at his interrogation. His statements can also be read to be more consistent than inconsistent. The Grievant said in his report that his intent was to pass the vehicle and put out spike strips, but if not possible, that he was also considering passing the driver to divert him away from town. Admittedly, the Grievant's later "I just put that in the report" statement is perplexing. However, the Grievant immediately clarified his statement to his interviewer. The evidence is uncontroverted the Grievant intended to pass the suspect's vehicle and tried to but could not do it with oncoming traffic. The evidence is also convincing that the Grievant wanted to put out spike strips as he told two law enforcement officers at the scene, and stated the same in his incident report. It is also more likely than not that the Grievant was also considering, as an alternative to spike strips, to pass the vehicle and divert his direction. He first made note of that possibility in his written report. The Employer reads the Grievant's "I just put that in the report"

statement without offering the context of the Grievant's follow-up statement that clarifies the first statement. These two statements must be read together to best understand the Grievant's intent, which the evidence points to the Grievant considering both options in the middle of the high-speed pursuit. He first prioritized using spike strips but his plan changed to diversion as events unfolded.

The burden falls on the Employer to show that it is more likely than not that the Grievant had lied in writing his official report of the incident or when he was interrogated. That burden has not been met. To parse a few spoken sentences, ignore the context of a clarifying statement made moments later, to dismiss the fact that the Grievant wrote in his incident report only days after the incident that was considering both tactics, and to offer no motive for the Grievant to be untruthful for actions that would have been equally lawful and appropriate, fails to meet the quantum of proof required here for a *just cause* termination.<sup>3</sup> A misspoken or an imprecise worded phrase or two does not stack up to the fuller context in assessing the Grievant's actions.

## AWARD

After carefully considering the record in its entirety, including all of the evidence and arguments presented by the parties, it is held that the Employer violated Section 7 of the CBA and did not have *just cause* to terminate Deputy Evan Schmalshof.<sup>4</sup>

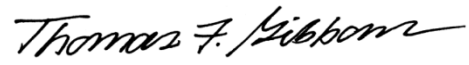
Accordingly, the Union's grievance is upheld and the Grievant is to be immediately reinstated to his full-time position as Deputy with the McDonough County Sheriff's Office with full back wages, benefits, and seniority rights, minus any earnings as mitigation since the time of his termination. The Arbitrator will retain jurisdiction over this matter for sixty (60) days to address any remedy issues that may arise between the parties.

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<sup>3</sup> This analysis is in no way a commentary, pro or con, on the Grievant's decision to try and pass the driver that night or to even engage in a high-speed pursuit that resulted in a fatality. That judgement is for another forum on another day.

<sup>4</sup> Both Parties raised the implications of the *Brady* obligations if the Grievant was allowed to continue working. The Union believes the Employer has misapplied the law while the Employer raises the concern that the Grievant's untruthfulness would be an issue in any future case in which he was involved. While this issue may have been relevant as to the Employer's rationale for termination, the issue has no bearing on whether the Sheriff's Office met the contractual *just cause* requirement to justify discharge.

It is so ordered this day, December 8, 2024.

A handwritten signature in black ink, reading "Thomas F. Gibbons". The signature is written in a cursive style with a prominent flourish at the end.

Thomas F. Gibbons, Esq., NAA  
Arbitrator