

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**MILWAUKEE DEPUTY
SHERIFFS' ASSOCIATION**

and

**MILWAUKEE COUNTY
(SHERIFF'S DEPARTMENT)**

Case 546
No. 63374
MA-12564

Appearances:

Eggert Law Offices, S.C., Attorneys at Law, by **Ms. Rachel Pings**, on behalf of the Milwaukee Deputy Sheriffs' Association.

Mr. Timothy R. Schoewe, Deputy Corporation Counsel, on behalf of Milwaukee County.

ARBITRATION AWARD

Milwaukee Deputy Sheriffs' Association, hereinafter the Association, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Association and Milwaukee County, hereinafter the County or Employer. The County subsequently concurred in the request and the undersigned, Coleen A. Burns, of the Commission's staff, was designated to arbitrate the dispute. A hearing was held before the undersigned on June 17, 2004, in Milwaukee, Wisconsin. There was no stenographic transcript made of the hearing and the parties did not submit post-hearing briefs. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

STIPULATED ISSUES

Did the Sheriff have just cause to impose a ten day suspension without pay for Deputy M. B.'s violation of Department Rule 1.05.01 and Civil Service Rule VII(4)(1)?

If not, what is the appropriate remedy?

RELEVANT BACKGROUND

There is little dispute regarding the conduct that led to the imposition of discipline. At approximately 4:00 a.m. on January 2, 2004, Deputy M. B., the Grievant, while off-duty and driving a personal vehicle, swerved from the eastbound lane into the westbound lane of East Layton Avenue in Cudahy, Wisconsin. In doing so, the Grievant sideswiped the oncoming car, which had extended side view mirrors, and damaged the side view mirrors on both vehicles. No one was injured and the Grievant remained at the scene of the accident until a City of Cudahy Police Officer responded.

The Grievant failed the sobriety field tests administered by the City of Cudahy Police Officer; was arrested; and received citations for "Operating While Intoxicated" and "Operating with a Prohibited Alcohol Concentration." The breath test, which was administered several hours after the Grievant had stopped drinking, was .27. At the time, the legal limit was .08. Subsequently, the Grievant plead guilty to "Operating With Prohibited Alcohol Concentration;" paid a forfeiture; and attended alcohol assessment classes. Following the accident, the City of Cudahy Police Department contacted the Milwaukee County Sheriff's Department; explained the situation; and described the Grievant as being very cooperative.

On January 5, 2004, the Grievant was subsequently interviewed by Captain Mark A. Strachota of the Sheriff's Department Internal Affairs. During this interview, the Grievant stated that he may have an alcohol problem and requested information on the employer's "Employee Assistance Program." The Grievant acknowledged that he had been drinking heavily until 2:00 a.m.; that he stopped to eat and then fell asleep; and that, after he woke up, he was involved in the accident described above. The Grievant stated that he observed the occupant of the other car using her telephone and assumed that she had called the police; that he remained at the scene because it was the right thing to do; that he did not talk to the occupant of the other car because he did not want any confrontations; and that he had cooperated with the Cudahy Police. The Grievant further stated that he knew that he had an obligation to report the incident to the Sheriff's Department; that he intended to do so when he woke up on January 2nd; but that, Captain Strachota called while he was still sleeping.

Captain Strachota's Investigative Summary states the following:

Deputy Sheriff (M B) is in violation of:

**MILWAUKEE COUNTY SHERIFF'S OFFICE POLICY
AND PROCEDURES AND/OR RULES AND REGULATIONS:**

1.05.01 – Obedience to Laws and Rules

Members of the department shall not commit any action or conduct which impedes the department's efforts or efficiency to achieve its policies and procedures or brings discredit upon the department. Comment: This rule applies to both the professional and private conduct of all members. It prohibits any and all conduct which is contrary to departmental policies and procedures which would reflect adversely upon the department or its members . . .

MILWAUKEE COUNTY CIVIL SERVICE RULE VII (4) (1):

- (1) Refusing or failing to comply with departmental work rules, policies or procedures.

On January 16, 2004, Captain Anthony M. Delgadillo met with the Grievant and his Association Representative to review the Internal Affairs file. On February 5, 2004, Captain Delgadillo forwarded a written report and recommendation to Deputy Inspector Jerianne L. Feiten in which he agreed that the Grievant had violated the rules as alleged by Captain Strachota. This report included a summary of Captain Delgadillo's meeting with the Grievant, which summary noted that the Grievant recounted the accident of January 2, 2004 and confirmed that he had consumed numerous alcoholic beverages prior to this accident. This summary also included the following:

He further states that currently he is attending Employee Counseling sessions for Alcohol. He never attempted to flee the accident scene. Cudahy Police Department reports that this is a non-reportable accident and no injuries were involved. Cudahy Police Lieutenant Kay reports reflects that Deputy (M B) was very cooperative.

Captain Delgadillo made the following recommendation:

I reviewed Deputy (M B's) work history, his Department personnel file. This review revealed no other Sustained complaints against him. He has had Employee Activity Documentation (EAD's) for substandard performance.

His performance evaluation reports indicate satisfactory performance in most categories.

RECOMMENDATION:

In light of all of the information presented in this case, and employee's prior work history, I recommend that his case be disposed of with a one (1) day suspension without pay.

On February 6, 2004, Deputy Inspector Feiten wrote the following on the first page of Captain Delgadillo's report:

I concur with the findings but feel the suspension should be five days.

By Order dated February 13, 2004, Sheriff David A. Clarke, Jr., suspended the Grievant from duty without pay for a period of ten days for violating Department Rule 1.05.01 and Civil Service Rule VII(4)(1).

DISCUSSION

The Association acknowledges that the Grievant's conduct provides just cause for discipline. At issue is whether the level of discipline, *i.e.*, the ten day suspension without pay, is appropriate under the just cause standard.

The Association asserts that, although the incident was serious, a ten day suspension is not warranted because there are mitigating factors; the Grievant is the recipient of disparate treatment because he was more severely disciplined than similarly situated Deputies; and the reasonableness of a lesser penalty is confirmed by the conclusions of Captain Delgadillo and Deputy Inspector Feiten. The County responds that the Sheriff is not constrained by the recommendations of Captain Delgadillo and Deputy Inspector Feiten and that the level of discipline imposed by the Sheriff was reasonable given the nature of the Grievant's conduct and the Sheriff's need to maintain discipline within the Department.

The Sheriff did not testify at hearing. Captain Strachota states that the Sheriff had access to the recommendations of Captain Delgadillo and Deputy Inspector Feiten, but that the Sheriff did not tell Captain Strachota how the Sheriff arrived at his decision. Captain Strachota further states that, when making disciplinary recommendations, the Command Officers are operating within a particular bureau, but that the Sheriff must give consideration to the Department as a whole.

Captain Strachota offered the opinion that the Sheriff increased the level of discipline because it involved alcohol and that the Sheriff was becoming more forceful because prior disciplines were not stopping the incidences of alcohol related misconduct. As the Association argues, under the just cause standard, the Grievant must be disciplined for his own misconduct

and not for problems caused by other members of the Department. However, neither the testimony of Captain Strachota, nor any other record evidence, is sufficient to establish that the Sheriff disciplined the Grievant for problems caused by other members of the Department.

Under the just cause standard, the level of discipline imposed must be commensurate with the seriousness of the misconduct. The Department's Policy and Procedure 1.03.43, which identifies factors that may be considered by the Sheriff when determining disciplinary actions, includes the factor of "the seriousness of the member's conduct."

The Department has a responsibility to enforce traffic laws and protect the public. The Department has a significant interest in preserving public trust in its ability to enforce traffic laws and to protect the public. The Grievant's conduct in driving while he was intoxicated exhibited a disregard for traffic laws; posed a significant danger to the public; and jeopardized the ability of the Department to maintain the public's trust.

As the Union argues, under the just cause standard, it is appropriate to consider mitigating circumstances. Such deliberation is consistent with Department Policy 1.03.43, which suggests consideration of "all pertinent information regarding the case;" "the member's record with the Department;" "the reason for the member's behavior," and "has the member committed the act in the past; (Repeated violations will be dealt with more severely.)"

Prior to the imposition of the discipline by the Sheriff, the Grievant had been employed as a Deputy Sheriff for approximately fourteen years; did not have a prior disciplinary record; had a good driving record; had been cooperative at the accident scene and throughout the investigation; had acknowledged a drinking problem, as well as his misconduct; had requested information on seeking assistance to deal with his alcohol problem; and had attended Employee Counseling sessions for Alcohol.

The Department's Policy and Procedure 1.03.43 suggests consideration of "past policy or the position the Department has taken in similar instances." This guideline is consistent with the just cause principle that the level of discipline imposed be commensurate with the disciplines imposed in prior instances of similar misconduct.

Captain Strachota recounted certain facts relating to the discipline of Deputy E, *i.e.*, after his initial termination was overturned by the Personnel Review Board, Deputy E received an eight month suspension from the Sheriff; this suspension was for a second drunk driving offense that included a hit and run that caused injury to two motorists; less than one year prior to this suspension, Deputy E had been arrested for domestic violence related to alcohol and had been given a "fit for duty" with the condition that he abstain from alcohol and receive counseling, but that Deputy E had violated both of these conditions; and that Deputy E received a second "fit for duty" in which the consultant determined that Deputy E was not fit for duty.

Captain Strachota recounted certain facts relating to the discipline of Deputy S, who was suspended for thirty days. Captain Strachota states that Deputy S was not convicted of driving while intoxicated, but rather, had an accident involving the unauthorized use of a Department vehicle; that she left the scene of the accident; that for over an hour, she failed to report the accident; and that she was disciplined internally for alcohol related.

As Captain Strachota acknowledged at hearing, the misconduct of Deputy E and Deputy S is more egregious than that of the Grievant. These cases do not establish the level of discipline that is commensurate with the disciplines imposed in prior instances of similar misconduct.

Captain Strachota also recounted certain facts relating to the discipline of Deputy H and Deputy D. Captain Strachota recalled that Deputy H was convicted of operating while intoxicated; this was a first offense; there was no accident; and that Deputy H received a three day suspension. Captain Strachota stated that Deputy D had been stopped for drunk driving and received a three day suspension, but that he did not know the specifics of this case.

The County rightly argues that Deputy M B was extremely intoxicated. Captain Strachota, however, did not identify the alcohol levels of either Deputy H or Deputy D.

To be sure, Deputy H, unlike the Grievant, did not have an accident. It is not evident, however, that this was due to the fact that Deputy H was less inebriated than the Grievant, or presented less of a threat to the public.

The cases of Deputy H and Deputy D establish the level of discipline that is commensurate with the disciplines imposed in prior instances of misconduct of driving while intoxicated. The record does not provide a reasonable basis to conclude that the Grievant's misconduct of driving while intoxicated is significantly more egregious than the misconduct of either Deputy H or Deputy D.

Conclusion

As the County argues, the Sheriff is not obligated to follow the recommendations of either Captain Delgadillo or Deputy Inspector Feiten. However, inasmuch as each supervisor has twenty years experience in the Department, as well as significant command authority, their recommendations, while not controlling, are not without weight.

Captain Delgadillo and Deputy Inspector Feiten have judged the Grievant's offense to be sufficiently serious as to warrant a suspension. This judgment is reasonably supported by the nature of the Grievant's misconduct, which involves a serious, rather than a minor, violation of Department Rule 1.05.01 and Civil Service Rule VII(4)(1).

The Department's Policy and Procedure 1.03.43 suggests "Corrective action as a remedial solution rather than strictly punitive." This guideline is consistent with the just cause principle that the level of discipline imposed be that which is reasonably necessary to correct the misconduct.

The circumstances of the Grievant's case indicate that the Grievant's misconduct is an aberration. The Grievant's conduct in recognizing that he has engaged in misconduct; in recognizing that he has an alcohol problem; and in accepting alcohol counseling, indicate that it is unlikely that the Grievant will engage in similar misconduct in the future. Thus, the level of discipline which is reasonably necessary to correct the Grievant's misconduct is a minimum suspension. Given the evidence regarding the disciplines of Deputy H and Deputy D, the minimum suspension that is commensurate with the disciplines imposed in prior instances of similar misconduct is three days without pay.

Based upon the foregoing, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

1. The Sheriff does not have just cause to impose a ten day suspension without pay for Deputy M. B.'s violation of Department Rule 1.05.01 and Civil Service Rule VII(4)(1).
2. The Sheriff has just cause to impose a three day suspension without pay for Deputy M. B.'s violation of Department Rule 1.05.01 and Civil Service Rule VII(4)(1).
3. The appropriate remedy is to immediately:
 - a) reduce the ten day unpaid suspension imposed on the Grievant to a three day unpaid suspension; and
 - b) make the Grievant whole for any pay and benefits lost as a result of the imposition of the ten day, rather than a three day, suspension without pay;
 - c) amend the Grievant's personnel record to reflect the reduction of the discipline to a suspension of three days without pay.

Dated at Madison, Wisconsin, this 17th day of November, 2004.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator

CAB/gjc
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