

BEFORE THE ARBITRATOR

 In the Matter of the Arbitration :
 of a Dispute Between :
 : Case 292
 MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION : No. 44173
 : MA-6194
 and :
 :
 MILWAUKEE COUNTY :
 :

Appearances:

Ms. Marna M. Tess-Mattner, Gimbel, Reilly, Guerin & Brown, Attorneys at Law, 2400 Mi
Mr. Timothy R. Schoewe, Deputy Corporation Counsel, Milwaukee County, Room 303, Mi

ARBITRATION AWARD

Milwaukee Deputy Sheriffs' Association (hereinafter Association) and Milwaukee County (hereinafter County or Employer) have been parties to a collective bargaining agreement at all times relevant to this matter. Said agreement provides for arbitration of disciplinary suspensions for a period of 10 days or less by an Arbitrator appointed by the Wisconsin Employment Relations Commission (hereinafter Commission) from its staff. On June 15, 1990, the Association filed a request to initiate grievance arbitration with the Commission. The County concurred in said request on July 18, 1990. On July 24, 1990, the Commission appointed James W. Engmann, a member of its staff, to act as the impartial arbitrator in this matter. A hearing was held on October 4, 1990, in Milwaukee, Wisconsin, at which time the parties were afforded the opportunity to present evidence and to make arguments as they so desired. No transcript was made of the hearing. The parties submitted briefs, the last of which was received on October 16, 1990, and they waived the filing of reply briefs. Full consideration has been given to the evidence and arguments of the parties in reaching this decision.

STATEMENT OF FACTS

The Grievant, John R. Krueger, has been a Deputy Sheriff in the Milwaukee County Sheriff's Department since at least August 4, 1975. Since May 13, 1979, he has been assigned to the Process/Courts Bureau of the Department. On March 23, 1990, the Grievant was assigned to serve process in the cities of St. Francis, Oak Creek, and South Milwaukee and in the southeast corner of Milwaukee to as far north as the 2300 block of south 12th street. For that date, he filed a Report Narrative which states in relevant part as follows:

On Friday, March 23, 1990, at approximately 1409 hours, while westbound on west Clybourn street, at approximately 22nd street, I observed a green pick-up truck traveling at a faster rate of speed than the posted limit of 30 miles per hour. I was too far behind the subject to accurately pace the vehicle. However, I believe his speed may have been 35-40 miles per hour. I decided to stop the subject to warn him of his excess auto speed and put on my red revolving light, (sic) on the dashboard of my squad. The green pick-up turned left, (sic) into a parking lot . . . , pulling in approximately 75 feet and stopped. He then pulled up about another 25 feet and stopped. I stopped my squad approx. 15 feet behind the truck. Suddenly the truck backed up and struck the front of the squad, damaging the entire grill and left headlight assembly and bending the front of the left front quarter panel. I observed no damage to the rear bumper of the truck. No injury was incurred by myself or the operator of the truck, (The truck operator's) statement at the scene was simply that he did not see my squad behind him.

I advised the Department Dispatcher, via radio, of the accident at approximately 1409 hours and asked them to advise my Sergeant

On March 26, 1990, Lieutenant John T. Lagowski spoke with the Grievant regarding the incident of March 23, 1990, after which the Lieutenant prepared an Employee Activity Documentation which states, in part, as follows:

On Friday, March 23, 1990, at approximately 2:09 p.m., (the Grievant), while operating (his squad), did act in a careless and dangerous manner by stopping, or attempting to stop, what he presumed to be a violator traveling between 5-10 miles over the limit on a city street in the area of 2601 W. Clybourn. (The Grievant) damaged Squad 114-370 (a 1979 Plymouth) by destroying the entire grill, damaging the left front headlight

assembly, and bending the left front quarter panel.

(The Grievant) was negligent in not calling into the dispatcher prior to this incident occurring, advising the dispatcher that he was attempting to stop a violator and that the violator had pulled into a private parking lot, in what would be considered to be a high-crime area on the near west side of the inner city. The only transmission received from (the Grievant) was when he finally called the dispatcher to notify the city that he was involved in an accident and to request a picture squad be sent by the Sheriff.

. . . When I spoke to (the Grievant) and showed him his allocation for Friday, March 23rd and mentioned that there was not one paper in the area of Clybourn Street that he should have been attempting service on, and that his area deals with St. Francis, Oak Creek, South Milwaukee, and some area around the 2300 block of South 12th Street, which is as close to the north side as he would have been allocated to be, he stated that he was looking for a man having property in the inner city, around Clybourn, but he didn't know exactly where. I then asked him to show me the paper. He gave me a paper . . . His only information for finding this man on the near west side was that he drove a Mercedes. The (Process Report) 50 did not substantiate (the Grievant) as the information was not documented with any information indicating he was in the area trying to locate a specific person. . . . In my estimation of what is required, the (Process Report) 50 was not documented properly and did not, according to what was visible on today's date (3/26/90), give (the Grievant) authority to be in that area of town.

I believe (the Grievant) violated Rule 105.75, Neglect of Duty, that being, failure to properly patrol district, sector, or zone, and unauthorized absence from assigned duty. He also violated sub-section #5 of that rule, Failure to Properly Care for Assigned Equipment, by damaging vehicle due to neglect and carelessness. . . .

On June 5, 1990, Sheriff Richard E. Artison ordered the Grievant suspended for one working day effective June 13, 1990 for violation of Sheriff's Department Rule 1.05.75 - Neglect of Duty. The attachment to said order states in relevant part as follows:

This suspension is made because on Friday, March 23, 1990 at about 1409 hours, at 2601 West Clybourn Avenue, (the Grievant) was negligent in not calling into the dispatcher prior to the incident (stopping a traffic violator), failed to properly patrol his district ([the Grievant] was assigned to serve process in a different area), and failed to properly care for assigned equipment (the squad [the Grievant] was driving was involved in an auto accident, \$808.00 damage to vehicle).

Based upon the above incident, (the Grievant) violated the following rules:

SHERIFF'S DEPARTMENT

1.05.75 - RULE 75 - Neglect of Duty

Failure by any member to take proper action. . . .

The examples of Neglect of Duty are not all inclusive but are presented as a guide.

. . . .

---Failure to properly patrol district, sector or zone and to make assigned reports to headquarters. Unauthorized absence from assigned area, or failure to respond to radio call.

---Failure to properly care for assigned equipment and vehicles or any department property. Damaging or causing damage to county property due to neglect or carelessness.

PERTINENT CONTRACT LANGUAGE

5.05 DISCIPLINARY SUSPENSIONS NOT
APPEALABLE UNDER S. 63.10, STATS

In cases where an employe is suspended for a period of 10 days or less by his department head, pursuant to the provisions of s. 63.10, Stats., the Association shall have the right to refer such disciplinary suspension to arbitration. Such reference shall in all cases be made within 10 working days from the effective date of such suspension. The decision of the Arbitrator shall be served upon the Department of Labor Relations and the Association.

ISSUES

At hearing the parties stipulated to framing the issues as follows:

Whether Deputy Krueger violated the rules as alleged by the Department?

If he did, is a one day suspension an appropriate remedy?

If a one day suspension is not the appropriate remedy, what is the appropriate remedy?

On brief, the Association states that the issues before the Arbitrator are as follows:

(1) Did Deputy Krueger violate the rules of the department as alleged?

(2) What is the appropriate remedy?

The County does not state the issues in its brief. Therefore, while the issues as framed by the Association are not inconsistent with the issues as the record indicates were stipulated to at hearing, I will limit my discussion to the issues as the record indicates were stipulated to at hearing.

POSITION OF THE PARTIES

A. Association

The Association argues that the Grievant was fulfilling his law enforcement function and was acting according to department policy at all times during the incident in question; that he did not fail to patrol his assigned area since he had no responsibility to be in his assigned area but, on the contrary, he was required to be on his way back to the department; that the Grievant did not neglect his duty by failing to call the dispatcher; that the Grievant had no opportunity to make the call because the other driver backed up as soon as the Grievant pulled in behind him; and that nothing in the evidence supports the allegation that the Grievant failed to properly care for his vehicle.

The Association therefore request the arbitrator to rescind the Grievant's suspension, to order the department to restore the Grievant's lost pay and to order the Department to delete from all records all references to the incident, he resulting discipline and this grievance procedure.

B. County

The County argues that it is clear from the testimony and exhibits that the Grievant violated Department Rule 1.05.75 - Neglect of Duty; that the Grievant ventured miles out of his assigned patrol district; that by doing so, he jeopardized his own personal safety by not informing his supervisor and/or the dispatcher of his whereabouts per procedure; that the Grievant never called the dispatcher until after he had been involved in a property damage-only collision with an alleged traffic violator; that he never flashed his headlights, sounded his siren or beeped his horn; that he may not have turned on his red revolving emergency light until he was in a parking lot directly behind the alleged traffic violator; and that prudence, as well as department policy, would dictate that other measures should have been taken.

The County asserts that the Grievant has been counseled about similar activity in the past; that the rule is clear on its face, as is the violation; that the arbitrator should find that the Grievant violated the rule as alleged; and that the arbitrator should sustain the penalty of a one-day suspension.

DISCUSSION

The parties have stipulated to three issues to be decided by this arbitrator. The first issue is whether the Grievant violated the rules as alleged by the Department. The Grievant is charged with three violations of Department Rule 1.05.75 - Neglect of Duty for which he received a one-day

suspension. Specifically, the County alleges that the Grievant failed to call the dispatcher prior to the incident (stopping a traffic violator), failed to properly patrol his district (Grievant was assigned to serve process in a different area) and failed to properly care for assigned equipment (the Grievant's squad received \$800 damage).

As to the allegation that the Grievant was negligent in not calling in to the dispatcher prior to the incident, the testimony conflicts as to when you call in to the dispatcher--as you stop or after you stop the speeder. The County does not point to a written policy to support its allegation that the Grievant should have called in prior to stopping the speeder. There is no doubt that once the Grievant did stop the subject, he had no time to call in to the dispatcher prior to the accident. Thus, I find no neglect of duty here.

As to the second allegation--that the Grievant failed to properly patrol his district--the Association argues that the Grievant did not fail to patrol his assigned area by detouring through the area where the accident occurred on his way back to the department; that he had no responsibility to be in his assigned area at the time the accident occurred; that, on the contrary, he was required to be on his way back to the department so as to be there by 2:15 p.m. and that he cannot be derelict in his duty to patrol his area when he had no responsibility to be in his assigned area.

The evidence is clear that the Grievant's territory did not include the area in which this incident occurred. The Grievant testified that his purpose for being there was to serve process on a person who drove a brown Mercedes and owned income property in the area where the incident occurred. The Grievant testified that on his way to the department he stopped in the area to look for the person. Yet when questioned several days later, the paperwork did not support the Grievant's story, although the paperwork did so support him later on. At no time did the Grievant receive authorization to leave his district, nor did he ever call to advise the dispatcher that he was leaving his area. Certainly, as argued by the Association, the Grievant could leave his district to return to the department. But in this case, the Grievant did not just stop somewhere on his way back to department; he had to go out of his way to be in the area in question.

The example of Rule 1.05.75 - Neglect of Duty which covers "Failure to properly patrol district. . ." also includes "Unauthorized absence from assigned area. . .". The Grievant was either suppose to be patrolling his district or returning to the department; as he had no authority to be in the area where the accident occurred, I find a violation of Rule 1.05.75 - Neglect of Duty on the part of the Grievant.

As to the alleged failure to properly care for assigned equipment, the County's evidence consists of allegations that the Grievant should have sounded his siren, used his headlights or honked his horn to alert the speeder of the Grievant's presence. The testimony and evidence conflicts as to when the Grievant turned on his red revolving emergency light. If the Grievant turned on his red light while driving west on Clybourn Street and the speeder saw the red light, one would assume that the speeder would have pulled over to the right side of the street. Instead, the speeder turned left in to a parking lot. Regardless of whether the Grievant turned on his red light while driving west on Clybourn Street or after he entered the parking lot, one would assume that if the speeder had seen the red light, he would come to a complete stop. Instead, the speeder pulled into the parking lot about 75 feet, stopped, pulled up another 25 feet and stopped again. At this point it would be reasonable for the Grievant to question whether the speeder had seen the Grievant's red light and whether the speeder was aware of the presence of the Grievant's vehicle. Nonetheless, the Grievant stopped his squad 15 feet behind the speeder and, suddenly, the speeder backed up and struck the front of the squad. Indeed, the speeder said he had not the Grievant's squad.

The County's point is that the Grievant should have done more to insure that the speeder saw that the Grievant was behind him. The speeder's behavior (first, turning left into a parking lot, and second, stopping, pulling forward and stopping again) should have warned the Grievant of what was true--that the speeder had not seen the squad behind him--and it should have alerted him to use other tools at his disposal to advise the speeder of his presence. This he did not do. The example of Rule 1.05.75 - Neglect of Duty that involves "Failure to properly care for assigned equipment and vehicles. . ." also includes "Damaging or causing damage to county property due to neglect or carelessness." While he did not fail to properly care for assigned equipment, his lack of care did result in damage to a squad. For this reason, I also find a violation of Rule 1.05.75 - Neglect of Duty in this regard.

Thus, as to first issue -- Whether the Grievant violated the rules as alleged by the Department? -- I find that he did not do so in regard to the allegation involving not calling into the dispatcher prior to the incident, but I do so find in regard to the allegations involving failure to properly patrol his district and failure to properly care for assigned equipment.

The second issue is whether a one-day suspension is an appropriate remedy if the Grievant did violate the rule as the Department alleged. The County

argues that a more severe penalty could have been imposed so the one-day suspension should be upheld. The Association argues that a one-day suspension is unreasonably harsh in light of the circumstances of this case and the Grievant's exemplary record.

The Grievant has been a deputy sheriff for 15 years with no record of any disciplinary action being taken prior to this incident. The County points to an incident in the spring of 1989; however, the Grievant received no discipline as a result of that incident. It resulted in, at most, a job instruction. Because of the Grievant's employment record and because I found above that the Grievant did not violate Rule 1.05.75 in one of the three counts, I find that a one-day suspension is not an appropriate remedy.

As to Issue 3 -- If a one-day suspension is not the appropriate remedy, what is the appropriate remedy? -- the Association argues that only the most minimal level of discipline -- a verbal reprimand -- is appropriate. While the parties profess some allegiance to progressive discipline, they have not sworn themselves to it by placing progressive discipline in the collective bargaining agreement. In any case, a verbal reprimand may have been sufficient if the Grievant had not received a job instruction prior to this incident and if he had violated the rule in only one instance. As I found that he violated Rule 1.05.75 in two instances, an appropriate discipline is a letter of reprimand.

For these reasons, based upon the foregoing facts and discussion, the arbitrator issues the following

AWARD

1. That the Grievant did not violate Rule 1.05.75 - Neglect of Duty in regard to not calling into the dispatcher; that the Grievant did violate Rule 1.05.75 - Neglect of Duty in regard to properly patrolling his district; and that the Grievant did violate Rule 1.05.75 - Neglect of Duty in regard to caring for assigned vehicle.

2. That a one-day suspension is not an appropriate discipline; that the Department rescind said one-day suspension; that the Department make the Grievant whole for any loss he received as a result of the imposition of this one-day suspension; and that the Department expunge from its records all references to said suspension other than this Award.

3. That a letter of reprimand is an appropriate discipline; and that the Department issue a letter of reprimand to the Grievant consistent with this Award.

Dated at Madison, Wisconsin, this 13th day of February, 1991.

By James W. Engmann /s/
James W. Engmann, Arbitrator