BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION	Case 299 No. 44878 MA-6445
and	
COUNTY OF MILWAUKEE	

Appearances:

Marna M. Tess-Mattner, Gimbel, Reilly, Guerin & Brown, Attorneys at Law, 2400 Milwaukee Center, 111 East Kilbourn Avenue, Milwaukee, Wisconsin 53202, appearing on behalf of Milwaukee Deputy Sheriffs' Association, referred to below as the Association.

Mr. Timothy R. Schoewe, Deputy Corporation Counsel, Milwaukee County, Room 303, Milwaukee County Courthouse, Milwaukee, Wisconsin 53233, appearing on behalf of the County of Milwaukee, referred to below as the County.

ARBITRATION AWARD

The Association and the County are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the arbitration of certain disputes. The Association requested, and the County agreed, that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in a grievance filed on behalf of Frank Eder. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held in Milwaukee, Wisconsin, on February 28, 1991. The hearing was not transcribed and the parties filed briefs and a reply brief, or waived the filing of a reply brief by April 4, 1991.

ISSUES

The parties stipulated the following issues for decision:

> Did the Grievant, Deputy I Frank Eder, violate the rules as alleged by the Sheriff?
>
> If the answer to issue one is yes, is the discipline imposed by the Sheriff excessive?
>
> If the answer to issue two is yes, what is the appropriate discipline?

RELEVANT DEPARTMENTAL RULES

> 1.05.02 - RULE 2 - CONDUCT OF MEMBERS
>
> Members of the department shall not commit any action or conduct which impedes the department's efforts or efficiency to achieve it's 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 policy's and procedures which would reflect adversely upon the department or its members.
>
> The following examples are unacceptable conduct of officers and are not all inclusive but are presented as a guide:
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> CONDUCT UNBECOMING AN OFFICER
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> -- Accepting a bribe or gratuity in return for service;
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> -- Failure to report an offer of a bribe;
>
> -- Commission of, or party to a crime;
>
> -- Using insulting language/conduct to anyone while on duty;
>
> -- Breach of discipline;

-- Keeping fee or reward, given for the performance of duty, other than official awards made in recognition of meritorious service;

-- Disorderly conduct.

1.05.69 - RULE 69 - PERSONAL SAFETY CONDUCT

Members shall not, by action or omission, create a situation of risk of injury to themselves or others. Included without limitation as examples of such conduct are the following:

(1) Failure to exercise proper precautions in guarding prisoners;

(2) Failure to make a proper and thorough search of prisoners for weapons or instruments;

(3) Negligently or carelessly leaving personal or confiscated weapons or instruments, in a location which allows accessibility.

1.05.75 - RULE 65 - NEGLECT OF DUTY

Failure by any member to take proper action. Failure to properly supervise subordinates, or to prefer disciplinary charges, or to make other appropriate disciplinary action.

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

-- Failure to report as a witness when duly notified or subpoenaed;

-- Allowing departmental vehicle to be stolen for failing to remove keys when unattended;

-- Failure to thoroughly search for, collect, preserve and identify evidence of persons, property and locations in any arrest or investigation;

-- 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.

-- Conducting private business on duty.

BACKGROUND

The parties stipulated the following facts:

The facts contained at page (2) of Joint Exhibit 2 can be taken as true.

Page (2) of Joint Exhibit 2 reads thus:

This suspension is made because of the following events:

(1) On Sunday, April 22, 1990 at 1300 hours, Deputy Frank Eder discovers that an inert training aid is missing from the E.O.D.'s K-9 aids storage area.

(2) Deputy Eder's training records indicated that the last time the aid was used in training was on Tuesday, April 17, 1990.

(3) On Tuesday, April 17, 1990 at approximately 10 AM, Deputy Frank Eder conducted a training exercise with his E.O.D. K-9 "MIRZA". Deputy Robert Szablewski was assigned to assist Deputy

Eder with the exercise. Deputy Szablewski selected the aids to be used in this exercise from the K-9 storage area. He then "planted" the aids on American Airlines aircraft #N433AA. As he "planted" these training aids on the aircraft he made notes as to what aids were placed where. After the training exercise Deputy Szablewski removes the training aids and returns them to their proper place.

(4) On Tuesday, April 17, 1990 at approximately 11:15 AM, Deputy Robert Szablewski assisted Deputy Frank Eder and his E.O.D. K-9 'MIRZA' with another training exercise. Again Deputy Szablewski selected the aids to be used. This exercise was conducted with Eastern Airlines, in the baggage area. In this exercise, the training aids were placed inside the baggage of passengers on an Eastern Airlines flight that was to depart at 1220 hours. Once again, Deputy Szablewski made notes of what aids were placed where. After the training exercise again Deputy Szablewski removes the training aids and returns them to their proper place.

(5) Deputy Robert Szablewski states that to the best of his knowledge the aids were picked up. But due to the fact that the one was missing, "I could be mistaken."

(6) Employees of American Airlines searched aircraft #N433AA and were unable to locate the aid.

(7) A flight manifest for the Eastern Airlines flight which departed Mitchell International Field at 1220 hours was obtained. All of the passengers that could be contacted have been, with negative results.

The parties also stipulated the following facts:

Both deputies, Frank Eder and Robert Szablewski, were each classified as a Deputy I.

Neither deputy has any prior departmental discipline.

Frank Eder has been with the department for six years. Robert Szablewski has been with the department twenty-two years.

Frank Eder is one of two EOD K-9 handlers in the department.

The training aid which is missing is not a training aid which would explode or detonate without a detonating device. However, it would burn intensely if ignited.

The department did receive some adverse publicity as a consequence of the incident.

For this same incident, Robert Szablewski received a written reprimand.

The Grievant is assigned as part of the security force at Mitchell International Airport. He serves as an Explosive Ordnance Disposal (EOD) K-9 Handler. As an EOD K-9 Handler, the Grievant is responsible for maintaining his own and his dog's proficiency at detecting hidden explosives at a level established through FAA regulations. He does so through daily training. Optimally, this training requires one other deputy, who hides explosives known as training aids, and then observes and criticizes the efforts of the Grievant and his dog in locating, or failing to locate, the explosives. The Grievant does not handle the training aids unless no other deputy is available to assist him. This is to avoid the possibility that the Grievant's knowledge of the location of the training aids would alter his behavior, thus "cuing" the dog to the location of the explosives.

The County maintains an inventory of nine explosive materials which can be used as training aids. Each type of explosive is separately kept in a sealed container to avoid mingling the scents of each explosive. The containers are housed in a locked storage facility. As of April of 1990, 1/

1/ References to dates are to 1990, unless otherwise noted.

each container was labelled regarding the type, but not the amount, of explosive.

On April 17, the Grievant asked Szablewski to assist him in a training exercise. The Grievant gave Szablewski a key to the storage area, and asked him to select and hide certain training aids on an airplane and in a luggage handling area. The Grievant did not give Szablewski any instruction on what type of training aid to use, or on how much to use. This was left to Szablewski's discretion to avoid cuing the Grievant or the dog on what they were searching for. The Grievant and his dog searched the plane first, then the luggage area. At the end of the exercise, Szablewski returned the explosives to the storage area. When Szablewski returned, the Grievant asked if all the training aids had been put away, and Szablewski answered that they had.

Szablewski had trained with the Grievant many times before April 17. Szablewski has no training in dog-handling or in the disposal of explosive ordnance. The Grievant has received over five months of EOD training.

Szablewski testified that, as of April 17, he would record the type of explosive he had removed from storage, but not necessarily the number of items within that type. He would record the locations at which he hid the training aids, and would record his observations of the Grievant's and his dog's behavior. He did not necessarily hide each item he removed from storage. At the end of the exercise, Szablewski would share his records with the Grievant. Szablewski stated he took C-4 explosive from the storage area for the April 17 exercise, and believed he returned it all to the storage area after the exercise had been concluded. He stated he could have been mistaken, but based that belief solely on the fact that the missing block of C-4 could not be accounted for.

On April 22, the Grievant was unable to secure any assistance for a training exercise, and went to the storage area to remove some training aids to use in self-training. He opened the container of C-4 explosive, and discovered it contained only three blocks. It should have contained four. The Grievant searched the other containers to see if the C-4 had been misplaced. The Grievant then called the other EOD K-9 Handler, who informed the Grievant that he had not used C-4 explosive for a number of days. The Grievant then checked his own records to determine when he had last used C-4, and discovered that the April 17 exercise was the most recent instance. The Grievant then called Szablewski, who informed the Grievant that he had returned all the C-4 to the storage area. The Grievant then reported the missing explosive to American and Eastern Airlines and to his sergeant.

The department investigated the incident and, through at least February 28, 1991, had not found the missing block of C-4. As of April 17, the department had no written procedures regarding the handling of training aids. Following this incident, the department implemented a procedure which requires training aids to be logged in and out through a sergeant. No such requirement existed as of April 17. As of April 17, approximately four to five employes had keys to the storage area. As of February 28, 1991, only three employes, including the Grievant, have keys to the storage area.

The Sheriff issued the Grievant a one day suspension for the loss of the training aid.

Further facts will be set forth in the DISCUSSION section below.

THE PARTIES' POSITIONS

After a review of the evidence, the Union opens the argument section of its initial brief by asserting that the Grievant's conduct does not constitute a violation of Rule 2. This rule, according to the Association, prohibits "conduct unbecoming an officer", which implies "a measure of intentional wrongdoing, or at least gross negligence". Noting that the Grievant did not handle the C-4; that the procedures followed in handling the C-4 had been followed hundreds of times before; that the Grievant asked, and Szablewski affirmed, that all of the explosive had been returned to storage; and that it remains unknown when or how the C-4 disappeared, the Association concludes that none of the Grievant's conduct "can be considered as even bordering on intentional misconduct or gross negligence". It follows, according to the Association, that the charge regarding Rule 2 should be dismissed.

The Association further contends that the charge regarding Rule 69 should be dismissed. The C-4 "will not explode unless detonated by a device designed for that purpose", according to the Association, thus its loss did "not constitute an inherent hazard to anyone who may encounter it." Beyond this, the Association urges that the Grievant never handled the C-4, and can not be considered personally responsible for its disappearance. Thus, the Association concludes, no violation of Rule 69 has been proven.

Rule 75, according to the Association, "refers, in relevant part, to failure to take proper action and failure to properly supervise subordinates." The Association contends that the evidence will not support a finding that the

Grievant violated either aspect of the rule. The Grievant reasonably relied on Szablewski's statement that he had returned the C-4 to the storage area, and both deputies reasonably relied on the procedures they had developed over hundreds of prior training exercises, according to the Association. Beyond this, the Association questions the validity of the County's assertion that the Grievant should be considered Szablewski's supervisor and the assertion that the inadequacy of the safety procedures followed by the deputies can be judged from the post-incident procedures implemented by the County. The Association concludes that the third charge must be dismissed.

Assuming that a basis for the imposition of discipline exists, the Association argues that the suspension is excessive. Noting that the County can not prove how or when the C-4 was misplaced, the Association concludes that any discipline can be no more severe than that imposed on Szablewski.

The Association asserts that the evidence will support, at most, the issuance of a written reprimand, since any other discipline would ignore the Grievant's unblemished record, and would constitute disparate treatment.

The County argues that the charges at issue here "were issued as an outgrowth of an investigation into missing explosive devices" at the airport. Noting that the Grievant was more extensively trained in the handling of explosives than his partner, and that Szablewski was dependent on the Grievant's directions, the County contends that the Grievant "was in charge, providing the direction of the exercise and was the trained person responsible for both the conduct of the exercise and the inventory and security of the explosive devices/training aids."

It is apparent, the County contends, that "the loss of the C-4 explosive was the result of neglect." It follows that "both deputies were really responsible, to some extent, for this neglect of duty", according to the County. More specifically, the County urges that Szablewski was responsible for handling the material properly, while the Grievant "was responsible because he was in charge of the exercise and, further, was the trained expert in this field." The County characterizes the import of the evidence on this point thus:

> . . . Deputy Eder was the only party who knew with precision the number and type of training aids which should have been returned to their storage at the close of the training exercise. By his own admission, he did not do this . . . (T)he only people who accessed the missing C-4 explosive were Deputies Eder and Szablewski. The failure of the members to return all of the training aids . . . constitutes a failure by a member to take proper action.

Rule 65 is sufficiently expansive to address this neglect, according to the County. The County characterizes "the loss of the C-4 explosive" as "the failure to properly care for assigned equipment and the loss of key departmental property" in violation of Rule 65.

The County also contends that Rule 2 has been violated, since "(c)learly the loss of a training aid, and one with such inherently dangerous potential as a C-4 explosive, impairs the department's efficiency and it also . . . brought the department into disrepute by the reception of bad publicity."

Beyond this, the County argues that the Grievant's conduct violated Rule 69 since the loss of the C-4 "creates a risk of harm to anyone in its vicinity." Acknowledging that the C-4 "will not self-explode", the County notes that "it will explode with the proper mechanism in place" and is "highly flammable". The County argues that the implications of its loss are clear: "The loss of this explosive/training aid does present a risk of harm not only to the deputies, but also to the general public as well."

The County rejects the assertion that the Grievant was disciplined excessively, reasoning thus:

> It is contended here that the culpability and roles of the two officers are different. While both the grievant and Deputy Szablewski are equal in rank, it is clear from the testimony of both those deputies that Deputy Eder was in charge. He was the trained expert; it was his training exercise; he was in custody and control of the devices and was responsible for their inventory and security. Deputy Szablewski served only as his assistant and responded to his instruction. While both share culpability, the overall responsibility for the exercise and the continued proficiency of the unit belong to Deputy Eder.

Contending that "the Sheriff's determination rested not so much upon the number of rules alleged to be violated as opposed to examining the totality of the circumstances", the County concludes that the discipline imposed was

reasonable, and reflects "a higher level of discipline to the person with overall responsibility". It follows, the County concludes, that the discipline must be sustained.

The Association starts its reply brief by noting that the County bears the burden of proof, and "has not established that Deputy Eder violated the three rules in question". Beyond this, the Association questions the accuracy of the County's assertion that only the Grievant and Szablewski had access to the missing C-4. The evidence demonstrates, according to the Association, that "several other people had access to the cabinet where the training aids were kept." The Association also notes that the County has not proven when or how the C-4 disappeared.

The Association also challenges the County's assertion that the C-4 is "inherently dangerous", and that its loss impaired departmental efficiency. In the absence of proof that danger exists at all times regarding C-4, the Association concludes that it can not be considered so dangerous that its loss, standing alone, impaired departmental efficiency. Questioning whether C-4 can be considered "highly flammable", the Association concludes the County has exaggerated the risk posed by the loss of the C-4.

Beyond this, the Association questions the County's rationale for imposing more stringent discipline on the Grievant. More specifically, the Association notes that the two deputies are equal in rank; that Szablewski is more senior than the Grievant; and that Szablewski was familiar with the procedures of the training exercise. The Association argues that no basis for disparate discipline exists, since even if Szablewski is considered the Grievant's subordinate, "his fault is greater" since he "gave a false report to his superior." The Association concludes that any discipline imposed should be even-handed.

The Association closes by requesting the dismissal of the charges against the Grievant "or, in the alternative, (the reduction of) the discipline to a written reprimand."

DISCUSSION

The County and the Association dispute whether, as the County puts it, the Grievant's discipline reflects "a reasonable imposition of discipline consistent with the conduct the Sheriff believes to be in breach of departmental rules."

The parties' have stipulated the issues which pose this dispute. The first stipulated issue is whether the Grievant violated the rules as alleged by the Sheriff. The rules alleged are Rules 2, 69 and 65.

Rule 2 concerns "CONDUCT OF MEMBERS", and focuses on "CONDUCT UNBECOMING AN OFFICER". To have violated this rule, the County must demonstrate some conduct on the Grievant's part which "impeded the department's efforts or efficiency". No such conduct has either been alleged or proven by the County. It has not been, and probably can not be, proven that the loss of the C-4 is traceable to the Grievant's conduct. Rather, the County asserts that the Grievant's training procedures were inadequate to prevent the loss of the C-4. This point raises issues under Rules 69 and 65, but is ill-suited to analysis under Rule 2, which focuses on an officer's "professional and personal conduct." Nothing in the Grievant's conduct on April 17 or 22, can be considered, standing alone, objectionable. The adverse publicity referred to by the County is traceable to the loss of the C-4, not to the Grievant's personal or professional conduct. To stretch Rule 2 to cover the facts at issue here risks creating a catch-all rule applicable to every situation because it lacks any clear definition. There is no demonstrated basis for concluding the Grievant committed any violation of Rule 2.

Rule 69 squarely poses the County's disciplinary interest in this case, for it extends to conduct "by action or omission" which creates "a situation of risk of injury" to the officer or to "others". The Association challenges both whether the loss of the C-4 constitutes a "situation of risk of injury" and whether any act or omission on the Grievant's part created the situation. The Association's assertion that no situation of risk of injury was created since the C-4 is an inert explosive which requires a detonator is unpersuasive. The Association notes that the Grievant acted appropriately to alert supervision and the airlines of the missing explosive. The necessity and propriety of this notice is rooted in the explosive properties of the C-4. It can not be contended on the one hand that the Grievant's prompt action to seek to locate the missing explosive is evidence of appropriate conduct, while asserting on the other that no true situation of risk or injury was posed. To inform a police officer or an airline traveler that C-4 explosive was missing, and could be on a public conveyance, and then to offer that officer or traveler the assurance that no detonator was known to have been lost with it is to offer faint assurance. The reason the C-4 was used as a training aid, and the reason the Grievant has received the training he has, is because material of this type poses potential situations of risk of injury.

As noted above, the Grievant's conduct on April 17 and 22, can not be

considered inappropriate. The discipline asserts, however, that the Grievant failed to provide sufficient oversight of the training exercise to prevent the unaccounted for loss of the C-4. This omission can focus either on the Grievant's failure to personally check the C-4 inventory on April 17 or on not establishing a procedure which would have tracked the handling of the C-4 on that date. The Grievant's ability to establish a secure procedure can be exaggerated. There is no evidence he could have, without supervisory approval, limited the number of employes having access to the explosives' storage area, or established a logging procedure that included a sergeant's oversight. However, even acknowledging that the time and means of the loss of the C-4 can not be established, it can be noted that the training procedure followed by the Grievant on April 17 was insufficient to document that the loss of the C-4 could not have happened on that date. However characterized, this is a breach of airport security and the Grievant is assigned as an airport security officer. His failure to personally check the C-4 on April 17, or to have Szablewski document what he removed and replaced from the explosives' inventory is an omission in which the Sheriff must be said to have a disciplinary interest under Rule 69.

Rule 65 is not, on the present facts, sufficiently dissimilar from Rule 69 to warrant extensive discussion. Two points, however, deserve some mention. First, it should be stressed that the neglect the County can hold the Grievant liable for is not the loss of the C-4. Rather, the neglect involves the Grievant's failure to have followed a training procedure which would have been sufficient to establish the C-4 was not lost due to the April 17 training. As noted above, this would have required no more than that the Grievant double-check the explosives' inventory after the exercise. Second, it should be stressed that the Grievant's violation of Rule 65 does not involve a "(f)ailure to properly supervise subordinates". There is no persuasive evidence that Szablewski can be considered the Grievant's subordinate. He is senior to the Grievant and shares the same rank. The Grievant did not assign Szablewski to the April 17 training exercise. Rather, he sought his cooperation. That the Grievant self-trained on April 22 is an indication of his lack of supervisory authority. The neglect relevant here focuses not on the Grievant's supervision of Szablewski, but on his oversight of the security of the explosives' storage area. Whatever is said of the Grievant's authority, he was more familiar with the explosives' inventory than was Szablewski. His reliance on Szablewski's assurance that the inventory was complete on April 17 is understandable. The inventory involved, however, was explosives and the failure of the Grievant to personally oversee the inventory check, or to document it, can not be ignored.

In sum, the Grievant can be considered to have violated Rules 65 and 69, but not Rule 2.

The next stipulated issues question whether the one day suspension was excessive, and if so, what discipline is appropriate. These two issues are inextricably intertwined. Although the Association asserts that the Grievant never handled the C-4 on April 17, and thus that Szablewski is the more culpable employe, the evidence affords no persuasive basis to conclude the Grievant should receive less discipline than Szablewski. As noted above, the Grievant was more familiar with the explosives' inventory than was Szablewski, and as one of five employes with access to the locked storage area, was more directly responsible for the oversight of its security. At most, Szablewski would have been aware of what part of the inventory he took on April 17. The evidence indicates that only the Grievant would have an ongoing familiarity with the amount of each explosive within the sealed containers in the storage area.

The second and third issues essentially question, then, whether the County reasonably concluded that the Grievant should receive a harsher level of discipline than Szablewski. While the County has successfully argued a theoretic basis for this distinction, the evidence will not support a factual basis for it. The County asserts that the Grievant had "overall responsibility for the occasion giving rise to discipline in the first instance." This assertion would warrant the application of more severe discipline, but lacks foundation in the evidence. Initially, it should be noted that the County has been unable to demonstrate when or how the C-4 disappeared. Thus, it overstates the record to assert that the April 17 training exercise was the "occasion" giving rise to the discipline. Szablewski acknowledged that he may not have returned all the explosive he took on April 17, but this states his candid acknowledgement of the fallibility of memory. He believes he returned all the ordnance, and the evidence offers no basis to question that belief.

Beyond this, the record, as noted above, does not support the assertion that the Grievant was in charge of the training exercise. Rather, the evidence indicates the Grievant consistently relied on the cooperation of other deputies. The exercises were, then, a team effort. In this case, neither member of the team followed a rigorous enough procedure to prove the C-4 could not have disappeared as a function of the April 17 training. Szablewski exclusively handled the explosives and neither documented nor sought corroboration of their return. The Grievant relied on Szablewski's assurance, and did not personally double check the inventory. Each employe's conduct contributed to a breach in security. Neither can be said to be more culpable than the other. It follows that the County has failed to demonstrate any

factual basis for meting out a more severe level of discipline to the Grievant than to Szablewski. In the absence of a factual basis for the distinction, the distinction can not be said to be reasonable.

AWARD

The Grievant, Deputy I Frank Eder, violated Rules 65 and 69 as alleged by the Sheriff.

The discipline imposed by the Sheriff was excessive.

The appropriate discipline is that Deputy I Frank Eder receive a written warning for his violation of Rules 65 and 69 in failing to personally verify, or to document, the return to the locked storage area of the explosives used for training on April 17, 1990. The County shall take the action necessary to amend the Grievant's personnel records to reflect the appropriate discipline, and to make him whole for the wages and benefits lost, if any, due to the Sheriff's imposition of a one day suspension.

Dated at Madison, Wisconsin, this 15th day of April, 1991.

By_____
Richard B. McLaughlin, Arbitrator

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