BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
BROWN COUNTY SHERIFF'S DEPARTMENT NON-SUPERVISORY LABOR ASSOCIATION	Case 456 No. 45336 MA-6562
and	
BROWN COUNTY (SHERIFF'S DEPARTMENT)	

Appearances:
Mr. Frederick Mohr, Attorney at Law, appearing on behalf of the Association.
Mr. John Jacques, Assistant Corporation Counsel, Brown County, appearing on beh

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and the County or Employer respectively, are signatories to a collective bargaining agreement providing for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. A hearing, which was not transcribed, was held on May 7, 1991 in Green Bay, Wisconsin. The parties filed briefs in the matter which were received by June 10, 1991. Based on the entire record, the undersigned issues the following Award.

ISSUES

The parties stipulated to the following issues:

1. Was there just cause for this discipline?

2. If so, was this discipline appropriate?

PERTINENT CONTRACT PROVISIONS

The parties' 1989-91 collective bargaining agreement contains the following pertinent provisions:

MANAGEMENT RIGHTS RESERVED

> Except as herein otherwise provided, the management of the department and the direction of the working forces is vested exclusively in the Employer.
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> It is further agreed, except as herein otherwise provided, that the responsibilities of management include, but are not limited to those outlined in this Agreement. In addition to any specified herein, the Employer shall be responsible for fulfilling all managerial obligations, such as. . .establishing necessary policies, organizations and procedures, assigning work and establishing work schedules. . .
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> . . .
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> Article 12. DISCIPLINARY PROCEDURE
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> No regular employee shall be disciplined or discharged except for just cause. Written notice of the

discipline, suspension, or discharge and a description of the incident warranting the action shall be given to the employee with a copy to the bargaining unit.

. . .

PERTINENT DEPARTMENTAL WORK RULE

Rule 19. Every officer shall carry out the functions of the department, namely, the preservation of the public peace, protection of life and property, the prevention of crime, the arrest of violators of the law, and at all times to answer calls and obey the orders of his superiors.

FACTS

The facts are essentially undisputed. On December 15, 1990, Patrol Officer Don Stewart was working his normally scheduled shift of 7:00 p.m. to 3:00 a.m. Sometime after 11:00 p.m., Stewart spoke by radio with the shift supervisor, Lieutenant Bob Demro, who requested that Stewart work until 7:00 a.m. that morning (rather than his normal ending time of 3:00 a.m.) because the Department was short-staffed. Stewart refused to do so. He told Demro that he was too tired to work beyond the end of his shift because he had not slept in a couple of days. A radio transcription of this conversation indicates Stewart then told Demro: "Even if you've got to write me up Bob, go ahead and write me up but I'm not staying over." Demro responded that he would try and get someone else to work, but if he could not then he would have to order Stewart to stay over.

Thereafter, Demro attempted to get someone then working to stay over but was not successful. Demro then contacted Stewart again and told him he was "unable to fill that 3 a.m. shift; Is that still your decision" (to not stay over), to which Stewart replied "10-4." After his shift ended at 3 a.m. Stewart went home and went to bed. An off-duty officer filled the 3 a.m. shift.

On January 3, 1991, an internal hearing was held into the above-described matter wherein management representatives Sheriff Leon Pieschek and Captain William Craig were present. At this meeting Stewart told them the reason he refused to stay over on December 16, 1990 was because he had not been able to sleep for two successive days due to his child's illness, and was therefore exhausted. By his own admission, Stewart was sarcastic and disrespectful to Pieschek and Craig at this meeting.

On January 10, 1991, Pieschek imposed a five-day suspension on Stewart for insubordination for his conduct on December 16, 1990. In imposing this discipline, Pieschek overruled the discipline proposed by Lieutenant Demro (i.e. a written warning). Stewart grieved the suspension and the matter was appealed to arbitration.

Stewart, a 14-year employe, received a written warning six to eight years ago for reasons not contained in the record. Stewart testified without contradiction that the Department does not consider discipline that is more than three years old.

The record indicates that in the last five years the following discipline was imposed on departmental employes: 1) In 1989, a sergeant was given a

written reprimand and required to apologize for refusing to carry out a direct order; 2) In 1986, a patrolman was deprived of four hours of compensatory time as a result of arguing with a supervisor and using profane language; 3) A supervisor was given a three-day suspension as a result of a conviction for a misdemeanor theft; 4) A patrol officer was given a two-day suspension for publicly criticizing a superior in the local newspaper's "letters to the editor" section, but that suspension was later withdrawn upon an apology from the officer. Prior to the imposition of this suspension on Stewart, no officer in the Department had ever been suspended for five days.

The record further indicates that mutual hostility exists between Stewart and both Sheriff Pieschek and Captain Craig. Over the years, Stewart has been a vocal critic of both Pieschek and Craig. Additionally, several years ago Stewart ran for Sheriff in a primary election against Craig. Craig won the primary but was defeated by Pieschek in the general election. Craig testified at the hearing that Stewart should never have been hired by the department.

POSITIONS OF THE PARTIES

The Union takes the position that there was no just cause for discipline in this case. It initially contends that no direct order was ever given to Stewart by Demro. As a result, it argues there could be no violation of a direct order when no direct order was given. In the alternative, it argues that even if a direct order to stay over was given to Stewart by Demro, Stewart had a legal right to refuse to work when he was too physically fatigued to properly perform his duties. The Union submits that the County did not refute Stewart's claim that he was fatigued on the day in question. The Union also argues that if the arbitrator finds that some measure of discipline was warranted for the conduct in question, the discipline imposed here (i.e. a five-day suspension) was inappropriate and should be reduced for the following reasons. First, it notes that Lieutenant Demro recommended a written reprimand for the incident, but the Sheriff overrode this recommendation and issued a five-day suspension instead. Second, it contends that this suspension far exceeded any previous discipline issued in the department. It notes in this regard that in the only other case in the record of insubordination where an employe violated a direct order, a written reprimand was issued. Third, according to the Union, the true reasons for this suspension have to do with the individual and not with the offense. It submits that there is an obvious animosity between the principals involved in this case. In its opinion, there is no reason other than this animosity to explain why Demro's recommendation of a written reprimand mushroomed into a five-day suspension. The Union therefore asks that the grievance be granted, the discipline overturned and the grievant made whole for his losses.

The County takes the position that it had just cause to discipline the grievant for insubordinate conduct on December 16, 1990. On that date, Stewart refused to obey the directive of his immediate supervisor, Lieutenant Demro, to stay on duty for an extra four hours because of a manpower need. It further notes that when Stewart refused this order he told Demro to "write him up". According to the County, Stewart never provided a reasonable justification for refusing to comply with this order. With regard to the justification he did use, namely that he was tired, the County notes that he did not produce any supporting medical evidence as to any illness of family members or corroborate his "tired" condition from other witnesses or medical reports. As a result, the County contends Stewart did not produce any probative evidence that he was physically unable to perform police officer duties after 3:00 a.m. on the date in question. The County also argues that the penalty imposed on Stewart was entirely appropriate and should be sustained. In its view, a five-day suspension was not too severe but instead was justified given the nature of the order (i.e. providing coverage to the public and back-up for other patrol

officers) and the interest of the Employer. The Employer also notes that the Green Bay Police Department's penalty for insubordination is a five-day suspension and, in its view, this supports the reasonableness of the penalty imposed here. The Employer therefore requests that the grievance be denied.

DISCUSSION

There are two elements to this dispute. The first is whether the County had just cause to discipline the grievant for failing to obey a managerial directive to stay over past the end of his shift. If so, the second question is whether the measure of discipline was contractually appropriate.

Just Cause For Discipline

The reason Demro selected Stewart to stay over on the day in question is that it is the Employer's manning practice to have the least senior patrol officer stay over when the necessity arises. Here, the necessity arose and Stewart was the least senior patrol officer working that shift on that date. As a result, there is no question that the Employer had the managerial right to have Stewart stay over on that date.

Stewart admits he refused to comply with this directive to stay over. It is a cardinal rule in the workplace that employes are to obey supervisory orders and do what they are told regardless of whether or not they agree with it. The reason for this is obvious; there can hardly be a more serious challenge to supervisory authority, and hence to the Employer's ability to direct the work force, than the refusal to obey a supervisory order. The proper course of action then is for employes to obey orders they believe are improper and obtain redress through the grievance procedure. Thus, absent a safety issue or mitigating factor, employes are to obey supervisory orders and do what they are told. If they do not, they can be disciplined or discharged for same.

In this case, the Union has raised both a preliminary issue and a safety issue to justify the grievant's refusal to comply with Demro's directive. Each will be addressed below.

As a preliminary matter, the Union contends that Demro never gave Stewart a direct order that he was to stay over. The transcription of the recording of the actual conversation between Demro and Stewart from December 15, 1990 proves otherwise. At one point during their conversation Demro said: "I'll have to order you (to stay) over." Inasmuch as Demro's directive to Stewart contained the specific word "order", the Union is hard-pressed to claim that no "order" was given. It is therefore held that Demro gave Stewart a direct order that he was to stay over, which he refused.

Attention is now turned to the Union's contention that Stewart had a right to refuse to stay over for safety reasons, namely that he was too physically fatigued to do so. Stewart testified he was fatigued on the day in question because his sick child had kept him up most of the previous two nights. Inasmuch as this testimony was uncontradicted, the grievant was not obligated as the Employer suggests to corroborate his "tired" condition from other witnesses or medical reports or produce medical evidence showing the illness of family members. The undersigned therefore accepts on face value the grievant's assertion that he was dead tired on the morning of December 16, 1990. Be that as it may, the critical question here is whether this fact, in and of itself, excuses the grievant from obeying an order to stay over. I conclude it does not. The undersigned does not accept the Union's blanket proposition that Stewart was within his rights to refuse to work because he was dead tired and fatigued. Instead, in the opinion of the undersigned, the

grievant should have nevertheless obeyed his supervisor's directive to stay over even though he was tired. The Department's work rules (specifically Rule 19) provide that employes are to "obey the orders of his supervisors" and no exception for exhaustion has been shown to exist. That being the case, it is held that the grievant's refusal to obey a direct order to stay over constitutes misconduct warranting discipline. In so finding, the undersigned is not expressing any opinion on the wisdom of ordering an exhausted law enforcement officer to continue to patrol in a squad car against his best judgment for an additional four hours. Additionally, although the Union invites the arbitrator to interpret a provision in the DILHR Administrative Code and apply it here, suffice it to say that I am without jurisdiction to do so.

Appropriateness of the Suspension

In light of this conclusion that cause existed for disciplining the grievant for the above-noted misconduct, the question remains whether the punishment of suspension was proper. While the County has the right in the first instance to determine the severity of a penalty, it is commonly accepted that an arbitrator has the inherent authority to modify the penalty if circumstances warrant and the contract does not forbid such modifications. 1/ Such a modification is not an act of leniency, since leniency is within the province of an employer. Instead, it turns on mitigating factors and such fundamental notions of fairness as equality of treatment and proportionality. 2/ The mere fact that an arbitrator may reduce penalties does not lead to the conclusion that he should automatically do so. An arbitrator is not free to substitute his judgment for the Employer's simply because he would have made a somewhat different decision had it originally been his to make. There is a range of permissible discipline in nearly every case, and the fact that an employer has reached the margin does not strip it of its discretion. 3/ Absent evidence of a violation of established disciplinary norms (as in a claim of disparate treatment), or the presence of factors traditionally considered to mitigate a penalty, the discipline imposed may be reduced only where it is grossly out of proportion to the grievant's offense.

The penalty assessed against the grievant here was a five-day suspension. Insofar as the record shows, the grievant's only disciplinary history in his 14 years with the County is that he received a written warning six to eight years ago for reasons not contained in the record. Normally, an employer can rely on previous discipline to justify imposing more serious discipline and a suspension oftentimes follows a written warning in progressive discipline. That is not the case here, though, because the grievant testified without contradiction that the Department does not consider discipline that is more than three years old. This means that the written warning the grievant received six to eight years ago evaporated long ago and cannot be used for purposes of imposing progressive discipline.

As stated above, an employer is entitled to some latitude in setting

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1/ City of Detroit, 76 LA 213 (Roumell, 1981) at page 220; Fairweather, PRACTICE AND PROCEDURE IN ARBITRATION, 2nd Ed. (BNA 1983) at pages 501-503; Elkouri, HOW ARBITRATION WORKS, 4th Ed. (BNA 1985) at pages 667-668; Hill & Sinicropi, REMEDIES IN ARBITRATION, (BNA 1981) pages 97-105.

2/ City of Detroit, 76 LA 213 (Roumell, 1981) at page 220; Elkouri, at pages 669-670.

3/ See Stockholm Pipefittings Co., 1 LA 160 (McCoy 1945).

penalties, and an arbitrator must be sensitive to the different disciplinary practices of different employers. An arbitrator must be more sensitive, however, to consistency of discipline within the same employer. Weighing a penalty's consistency with past acts of discipline is fundamentally an act of deference to the parties' judgment of their disciplinary climate. If a penalty has been judged roughly proportional to the events in the past, an arbitrator should not apply some abstract, personal standard in upsetting the discipline, but should instead bow to the historical standard. Attempting to ensure that penalties are consistent across cases involving similar offenses and similarly situated employes also dispels suspicions of favoritism, discrimination and disparate treatment.

The instant record indicates that the Department has a history of discipline against which the instant discipline can be measured. That history is that no officer has ever been suspended for five days. An officer convicted of a crime was given a three-day suspension. In another situation, an officer who gave his superior a tongue-lashing in profane language forfeited four hours of compensatory time. Most on point though is the instance wherein an employe was insubordinate and refused to comply with a direct work order. In that instance, a written reprimand was issued.

Based on this disciplinary history, it appears to the undersigned that the Department has set a disciplinary standard of a written reprimand for refusing to comply with a direct work order. This conclusion is buttressed by the fact that the discipline recommended by Lieutenant Demro in this matter was a written warning. However, since the actual penalty imposed was a five-day suspension, it is obvious that this disciplinary standard was not followed here. The fact that this disciplinary standard was not followed here leads the undersigned to the inescapable conclusion that the severity of the discipline actually imposed was not based solely on the incident itself. Instead, it (i.e. the severity of the discipline) gives every appearance of being primarily related to the Sheriff's and Craig's animosity toward the grievant.

As previously noted, the grievant was guilty of a disciplinable act. However, the inconsistency of discipline imposed here as measured against the discipline imposed in other similar instances, in combination with the grievant's clean work record, compel the conclusion that a five-day suspension was an inappropriately heavy measure of discipline. The undersigned finds that the appropriate level of discipline, as measured against the County's own disciplinary standard, is a written warning to the grievant.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

1. That there was just cause for disciplining the grievant for refusing a direct work order to stay over on December 16, 1990;

2. That the appropriate measure of discipline was a written reprimand. The County shall reduce the five-day suspension to a letter of reprimand, and shall reimburse the grievant for any losses flowing from the suspension.

Dated at Madison, Wisconsin this 5th day of September, 1991.

By Raleigh Jones /s/
Raleigh Jones, Arbitrator