

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

SHEBOYGAN COUNTY LAW ENFORCEMENT
EMPLOYEES LOCAL 2481, AFSCME, AFL-CIO

and

SHEBOYGAN COUNTY

Grievance of
Thomas Epping
dated 11-8-91

Case 159
No. 47899
MA-7423

Appearances:

Ms. Helen Isferding, District Council 40 Staff Representative, 1207 Main Avenue,
Sheboygan, WI 53083, appearing on behalf of the Union.

Ms. Louella Conway, Personnel Director, Sheboygan County Courthouse, 615 North 6th
Street, Sheboygan, WI 53081, appearing on behalf of the County.

ARBITRATION AWARD

The Wisconsin Employment Relations Commission designated the undersigned Arbitrator to hear and determine a dispute concerning the above-noted grievance under the grievance arbitration provisions of the parties' 1989-91 collective bargaining agreement (herein Agreement).

The parties presented their evidence and arguments to the Arbitrator at a hearing held at the Sheboygan County Courthouse on December 7, 1992. The hearing was not transcribed, but the parties authorized the Arbitrator to maintain an audio cassette recording of the proceeding exclusively for his own use in award preparation. Briefing was completed on January 19, 1993, marking the close of the record.

STIPULATED ISSUES

At the hearing, the parties authorized the Arbitrator to decide the following issues:

1. Is the grievance procedurally non-arbitrable due to the time it was initiated?
2. If not, what shall be the disposition of the grievance on its merits?

PORTIONS OF THE AGREEMENT

ARTICLE 5

MANAGEMENT RIGHTS

Except as otherwise provided in this Agreement, the Employer shall have the right to:

. . .

2. To hire, promote, transfer, demote, discipline, suspend or discharge for just cause its employes.

. . .

4. To adopt reasonable rules and policies and amend the same from time to time.

. . .

ARTICLE 26

GRIEVANCE PROCEDURE

For purposes of this Agreement, the term "grievance" means a dispute between the County and the Union or between the County and any employee concerning the effect, interpretation, application, claim of breach or violation of this Agreement.

The County shall not be required to process any grievance which is based upon an occurrence more than thirty (30) days prior to the date of it being offered as a complaint, or a complaint which is filed more than thirty (30) days after the union knew, or should have known of the existence of grounds for such complaint, except that in discharge and suspension cases the time limit shall be five (5) days. When an employee is suspended or discharged the employee and the Union shall be notified in writing of such action and the reason for same.

BACKGROUND

The Union represents a unit of non-supervisory law enforcement personnel employed in the County Sheriff's Department. Grievant has been employed in the Department since July of

1974 and has held the rank of Detective since 1983.

On October 3, 1991, Lt. David Adams issued the following report and recommendation concerning an incident involving the Grievant the previous day:

STATEMENT OF INCIDENT: On October 2, 1991, Detective Epping worked on a burglary complaint, Complaint No. 39596, a burglary of antiques. Detective Epping recovered a portion of the antiques which Detective Epping was advised by myself, Lt. Adams, to attempt to ascertain if there were latent prints on the stolen property. Detective Kaczowski dusted the stolen articles and retrieved two latent fingerprints on October 2, 1991. On October 2, 1991 at approximately 1515 hours, the general assignment detectives had a weekly divisional meeting at which Detective Epping's case was discussed. During the meeting Detective Bloedorn was assigned to compare the two latents lifted from the stolen property to ascertain if the arrested party, his girlfriend or another male suspect's fingerprints were those lifted. Shortly after 1600 hours on October 2, 1991, I, Lt. Adams, was advised by Detective Bloedorn that the two fingerprints lifted from the stolen property were positively identified by himself as belonging to the female suspect, X____. Detective Bloedorn stated that he had informed Detective Epping of this identification and that Detective Epping asked Bloedorn that he would withhold the information from me. On October 2, 1991 at approximately 1640 hours, I made contact with Detective Epping in his office. Detective Epping was seated at the desk working with Detective Bloedorn and Officer David Schafhauser from the Sheboygan Police Department, going over articles in Detective Bloedorn's file cabinet. Detective Epping was asked by myself if the fingerprints had been identified from the latents lifted. Detective Epping did not respond and continued to work at his desk. Detective Epping's attention was obtained by myself and at that time I re-asked the question if Detective Epping was aware of who the fingerprints were off of the latents. Detective Epping responded to my question that he did not know and informed me that I would have to ask Detective Bloedorn.

Detective Bloedorn was asked if he was able to determine who the latents belonged to and Detective Bloedorn stated the female individual, X____.

At this time Officer Schafhauser and Detective Bloedorn walked to the basement area and I followed. Detective Bloedorn was talked to by myself in the hallway by himself and asked if in fact Detective Epping had been made aware of the fact prior to the question being asked, that the fingerprints belonged to X____. Detective Bloedorn stated that in fact he had personally informed Detective Epping of the match of the suspect's fingerprints.

Conduct by Detective Epping is in violation of Department Policy 1-8-26 Untruthfulness; 1-8-25 Destruction of Evidence, Falsification of Reports; and 1-8-2 Proper Conduct.

ACTION RECOMMENDED: A 3-day suspension without pay is recommended for the above incident. Any further violations of Department Policy could result in long term suspension, demotion or termination.

The cited portions of the Sheriff's Department Policies provide, as follows:

Sec. 1-8-26 UNTRUTHFULNESS

RULE - Untruthfulness by any employee will not be tolerated at any time.

Sec. 1-8-25 DESTRUCTION OF EVIDENCE; FALSIFICATION OF REPORTS

RULE - Employees shall not manufacture, destroy, or withhold evidence in any case, falsify or intentionally withhold any information from an official form, document or report, either written or verbal.

Sec. 1-8-2 PROPER CONDUCT

RULE - Employees shall conduct themselves, both officially and unofficially, in such a manner so as not to bring discredit to the department and/or disgrace or dishonor themselves.

The factual recitation in Adams' report was questioned in only two respects, but it is supported by the record evidence in all material respects. First, Bloedorn testified that it was a Det. Sheels rather than Bloedorn who had the communications noted as occurring shortly after 1600 hours after having heard Grievant ask Bloedorn not to tell Adams that day about the print

comparison results. Adams also admitted in his testimony that in retrospect he was not sure whether it was Bloedorn or Sheels with whom he had that conversation. However, whether Adams had that conversation with Sheels or with Bloedorn is of no consequence to the outcome in this case. Second, Grievant testified that he did not recall what he said in response to Adams' inquiry of him at approximately 1640 hours, but thought he "probably" just referred Adams to Bloedorn. Adams' testimony and report and Bloedorn's testimony and contemporaneous written statement are both consistent with Adams' report in that regard and are credited over Grievant's admittedly foggy recollection about what he said in response to Adams.

It is clear that Adams showed Grievant a copy of his report and recommendation on October 4, 1991 and that Grievant signed a copy of that report before the Sheriff had signed it. By all accounts, the suspension did not become effective until it was approved by the Sheriff. While the Sheriff ultimately did approve and sign a copy of Adams' report, the document bears no notation showing when he did so. Neither Adams nor the Sheriff could say when the Sheriff ultimately approved and signed the report. The Sheriff testified that he usually acted on his subordinate supervisors' disciplinary recommendations within five days after they are issued; however he was sure that in this case he did not make his final decisions until after meeting with Grievant privately about the matter at the latter's request. The Sheriff was not sure when that meeting took place. Grievant testified that he was not sure about that either, but thought it might have been on October 7. By all accounts the Sheriff did not state during the meeting what his disposition of Adams' recommendation would be. The record establishes that the suspension was served on November 5, 6 and 7. Grievant and Bloedorn (who was then acting Union president and with whom Grievant conferred about the situation) both testified that Grievant held off filing the grievance until Grievant had an opportunity to meet with the Sheriff and until the Sheriff reached a final decision regarding Adams' recommendation of a three-day suspension. Both Grievant and Bloedorn were sure that Grievant filed on the last day he could do so in conformity with the five-day contractual time limit.

The grievance was filed on November 8, 1991, asserting that the suspension violated the Article 5 requirements that discipline be for just cause and that rules and policies be reasonable. By way of relief, Grievant requested "Review of complaint including charges stated, discipline administered and reduction of said discipline." The grievance was processed through the pre-arbitral steps of the contractual procedure, including written denials by the Sheriff and the County Personnel Director. At no stage prior to the arbitration hearing did the County object that the grievance had not been timely initiated.

POSITION OF THE COUNTY

The grievance was not filed within five days of the date Grievant knew or should have known that a three-day suspension was being imposed. Lt. Adams' written report of the circumstances and recommendation of a three-day suspension was dated October 3, 1991 and shown to Grievant the next day. It bears Grievant's signature. The Sheriff testified that he

believes he signed the discipline the day Grievant discussed it with him personally, which Grievant, in his testimony, recalled to have been on Monday, October 7, 1991. The Union discussed the question of filing a grievance in the matter as early as October 8, 1991. The Grievant's meeting with the Sheriff gave Grievant no reason to believe the recommended penalty would be lessened or dropped as a consequence of that meeting. Thus, Grievant reasonably knew on October 7, 1991 that he would be required to serve the three-day suspension. The grievance was filed on November 8, 1991, well beyond the contractual five-day time limit.

If the merits are reached, the three-day suspension should be sustained. The Grievant relayed false information to Lt. Adams about evidence in an ongoing criminal investigation. Grievant also requested his co-worker to withhold the information from Adams, their supervisor. Grievant intentionally withheld that information from his supervisor, answered a direct request in a less than truthful manner and did not conduct himself in an upright manner, thereby violating each of the rules cited in Lt. Adams' report. Such conduct is particularly serious because it constitutes a recorded incident of untruthfulness that can be exploited by defense counsel in attacking Grievant's credibility as a witness in criminal proceedings.

Adams conferred with superior officers about the level of discipline to be imposed. Consideration was given to the County's Disciplinary policies and to past practice. The same criteria and process previously resulted in the same three-day suspension penalty in a similar instance in which an employe was untruthful in completing an expense voucher. No grievance was filed in that case. The County reviewed the circumstances involved in the incident, investigated and questioned the individuals involved, reviewed the disciplinary practices of the department and acted fairly and without prejudice or unreasonableness. Accordingly, the County's disciplinary action in this case did not violate the Agreement and its determination as to the appropriate penalty ought not be second-guessed by the Arbitrator.

POSITION OF THE UNION

The grievance was filed within five days of the Sheriff's decision to suspend Grievant. Grievant filed it promptly upon his return to work after serving the three-day suspension imposed. The suspension, in turn, was imposed and served immediately after the Sheriff approved and imposed it. Before the Sheriff made his decision, the Grievant had unsuccessfully conferred with him in opposition to Lt. Adams' written recommendation for a three-day suspension. That recommendation, of which Grievant had written notice sometime earlier, did not impose the suspension until the Sheriff decided to approve and impose it.

Just cause requires that the penalty fit the offense. In this case a three-day suspension is too harsh. Grievant had no disciplinary action on his record at the time the suspension was imposed. All he did was flippantly ask a co-worker not to tell Lt. Adams about the print results so that Grievant would not be assigned to work overtime at the end of the shift. The co-worker did not take Grievant seriously and, instead, proceeded to tell Adams that the print results were in and

what they were. When Adams, who already knew the results, asked Grievant about them, Grievant referred him to the print expert who had done the print work involved and who was standing in the same room only a few feet away and within earshot. Grievant did not intend to destroy evidence, falsify a report, or to keep information from Adams. Any problems Grievant may have on witness stands in the future will be of the County's own making by making an untruthfulness mountain out of a flippant expression of displeasure at the thought of overtime. Under the County's disciplinary policies, a first offense for falsifying a report is listed as a verbal warning; a first offense for disobeying a written departmental rule is listed as a one-day suspension, and other first offenses much more serious than Grievant's are listed at far less severe penalties than that imposed on Grievant. Accordingly, the Arbitrator should sustain the grievance by reducing the penalty.

DISCUSSION

Timeliness of Grievance Filing

The County bears the burden of persuasion that the grievance was not timely filed. Arbitrators generally resolve doubts about time limit compliance in favor of reaching the merits.

The County has failed to prove that the grievance was not timely filed. While Grievant knew as of October 4 that Adams was recommending a three-day suspension, he could not then know what the Sheriff's final action on that recommendation would be. The record establishes that the Sheriff did not act on the matter until sometime after he met privately with Grievant about it. The record does not reliably identify the date of that meeting. Grievant was by no means certain when it occurred, though he said it might have been on October 7. What is clear is that the suspension was not served until November 5, 6 and 7. Grievant's filing of the grievance on November 8 could have been in time if the Sheriff's final decision and the dates on which it was to be served were given to Grievant immediately in advance of the dates the suspension was served on November 5, 6 and 7. In the face of Grievant's and Bloedorn's clear recollections that Grievant waited to file on the last day of the five-day limit, the County's failure to establish when it gave Grievant notice of the Sheriff's final decision defeats the County's procedural timeliness defense.

The foregoing makes it unnecessary to determine whether the County waived the timeliness defense by processing and responding to the grievance on its merits without reserving its procedural objection.

Merits of the Grievance

A review of the merits of the grievance requires determination of whether Grievant committed the rules violations specified in Adams' report and whether in all of the circumstances of the case there is a basis to interfere with management's exercise of judgment as to the appropriate disciplinary action.

Neither party's characterization of the Grievant's misconduct is wholly persuasive. When Grievant asked Bloedorn not to tell Adams about the fingerprint results, he explained that he wanted to avoid the possibility that Adams would assign him to work overtime that day following up on those results. Grievant admitted that he was not joking when he said those things to Bloedorn, even if Bloedorn thought he was. Thus, Grievant did intend to keep information about an on-going investigation from Adams in an effort to slow the possible pace of the investigation. However, Grievant's purpose was only to avoid overtime that day; he was not trying to keep the information from Adams indefinitely, and there has been no showing that the investigation would have been affected in any way had Adams not learned of the results until the following day.

When Adams asked Grievant what the status of the fingerprint comparison was, Grievant at first did not respond. When asked again, he said something to the effect of, "I don't know, ask Kirk [Bloedorn]." While Grievant was, as the Union asserts, referring Adams to the individual present in the room who knew best what those results were, Grievant had also only moments before urged Bloedorn, in effect, to hold off until the following day telling Adams about those results. For that reason, Grievant's referral to Bloedorn does not persuasively establish that Grievant had given up on the idea of trying to keep the information from Adams for the balance of that day.

For those reasons, Grievant's conduct was arguably violative of each of the Rules cited in Adams' report. Grievant withheld information from a verbal report requested of him by Adams. He was untruthful when he told Adams he did not know the results and referred Adams to a co-worker whom he had asked to keep the information from Adams. And such misconduct by Grievant has the potential to discredit the Department or to dishonor the Grievant if, for example, it were discovered and used against Grievant's credibility in a criminal trial.

With regard to the penalty imposed, the County's investigation of the facts and its basic procedure for deciding what disciplinary action would be taken were appropriate. Nevertheless, in various respects the County's decision making regarding the penalty was flawed by arbitrary and unreasonable elements such that a modification of the penalty is warranted in the circumstances.

Grievant was a seventeen year veteran of the Department who at the time of the subject incident had no other disciplinary actions on his record. The "Level[s] of Discipline in Usual Case Without Aggravating or Mitigating Circumstances" for various first offenses prescribed in the County's existing written disciplinary policy are as follows:

"Falsifying or refusing to give testimony when job related incidents are being investigated" -- "Verbal reprimand";

"Falsifying reports or records" -- "Verbal reprimand";

"Falsifying time cards" -- "Written reprimand"

and "Non-compliance with County Ordinances or written Departmental rules or procedures" -- "1 day off w/o [without] pay."

The County's witnesses testified that they considered all of those factors in deciding what penalty to recommend and impose, but that they decided on a three-day suspension because if untrue or incomplete reporting by detectives to their superiors went unchecked it could seriously harm both the investigative process and Department discipline; because incidents of dishonesty reflected in law enforcement officers' personnel records are increasingly being discovered and exploited by defense attorneys in attacks on officers' credibility; and because that was the penalty that had been imposed previously for a first offense submission of false claims for reimbursement of unincurred expenses.

The County persuasively argues that the special importance of integrity, discipline, communication and cooperation in a law enforcement agency performing criminal investigations supports a penalty in this case that is more severe than that specified in the County policies for a "Usual Case" first offense of falsification of a report.

However, while Grievant's responses to Adams' question were untrue and intended to keep relevant information from him for the balance of the day, those aspects of Grievant's misconduct are significantly mitigated by the fact that Adams' sole purpose in questioning Grievant about the status of the prints comparison was to give Grievant an opportunity to commit a more serious disciplinary offense. For, Adams admits that he had been informed about the results of the prints comparison before he approached Grievant with his question about the status of the prints comparison. Because Adams' use of what was essentially a "sting" against Grievant in no way advanced the on-going criminal investigation, it significantly reduces the consideration due the County's otherwise legitimate concerns about Grievant's future effectiveness as a witness possibly being undercut by a history of dishonesty in his personnel record. Had Adams simply spoken to Grievant about what Grievant had said to Bloedorn, Adams could have made his point about the importance of full communication and cooperation without unnecessarily creating an opportunity for Grievant to compound his misconduct so as to create the sort of blemished personnel record that the Department considers so harmful to its mission.

The seriousness of Grievant's misconduct is also mitigated by the facts that it appears to have been a highly isolated, spur-of-the-moment mistake prompted in part by a particularly stressful workday that had earlier included remarks by Adams in the Divisional meeting that were highly critical of Grievant's handling of an aspect of the investigation in question.

The County's reliance on its ungrieved prior imposition of a three-day suspension for falsely claiming reimbursement for unincurred expenses appears unreasonable. That prior offense

amounted to an attempted permanent taking of monies from the County to which the employe was not entitled. As such, it was tantamount to theft and more akin to a falsification of time card offense than to providing an incomplete or untruthful report as to the status of an investigation. Under the County's disciplinary policy, a time card violation is treated as a more serious offense than falsification of a report, yet here the County has drawn no such distinction. There is also no showing that mitigating factors of the sort noted above were present in the earlier case.

In sum, while management conducted a full and fair factual investigation after the subject incidents of October 2 had taken place, the record does not establish that management had a reasonable basis for imposing a first offense penalty on a long service employe so far in excess of the "Usual Case" penalties specified in the County's published disciplinary policy. Management's determination of penalty does not appear to have taken meaningful account of the differences between Grievant's misconduct and that involved in the earlier three-day suspension case or of the extent to which Adams bears responsibility for creating an unnecessary opportunity for Grievant to compound his misconduct.

For those reasons, and in consideration of the record as a whole, the Arbitrator finds it appropriate to reduce the penalty imposed in this case to a one-day suspension.

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole it is the DECISION AND AWARD of the undersigned Arbitrator on the STIPULATED ISSUES noted above that:

1. The grievance is not procedurally non-arbitrable due to the time it was initiated.
2. The disposition of the grievance on its merits shall be as follows:
 - a. The grievance is granted to the extent that the three-day suspension imposed on Grievant in this case is reduced to a one-day suspension. The County shall promptly modify the suspension report and its records accordingly and shall make Grievant whole without interest for the pay he lost on account of the second and third days of the instant suspension.
 - b. Except as noted in 2.a., above, the relief requested in the grievance is denied.

Dated at Shorewood, Wisconsin
this 7th day of April, 1993 by

Marshall L. Gratz /s/
Marshall L. Gratz, Arbitrator