

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :  
of a Dispute Between :  
: Case 512  
BROWN COUNTY SHERIFF'S DEPARTMENT : No. 50010  
NON-SUPERVISORY EMPLOYEES : MA-8124  
:   
and :  
:   
BROWN COUNTY (SHERIFF'S DEPARTMENT) :  
:  
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Appearances:

Mr. Frederick J. Mohr, Attorney at Law, on behalf of the Brown County  
Mr. John C. Jacques, Assistant Corporation Counsel, on behalf of Brown

Sherif  
County

ARBITRATION AWARD

Brown County Sheriff's Department Non-Supervisory Employees, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and Brown County, hereinafter the County, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The County subsequently concurred in the request and the undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on February 9, 1994, in Green Bay, Wisconsin. A stenographic transcript was made of the hearing and the parties submitted post-hearing briefs in the matter by April 18, 1994. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUE

The parties stipulated to the following statement of the issue:

Was there just cause for disciplining Bob Shaha for  
failing to report to work on August 17, 1993?

CONTRACT PROVISIONS

The following provisions of the parties' Collective Bargaining Agreement are cited:

Article 3. 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.

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 normal managerial obligations, such as planning, changing or developing new methods of work performance, establishing necessary policies, organizations and procedures, assigning work and establishing work schedules and of applying appropriate means of administration and control; provided, however, that the exercise of the foregoing rights by the County will not

be used for the purpose of discrimination against any member of the Association or be contrary to any specific provision of this Agreement, and provided that nothing herein shall be construed to allow management to affect wages, hours and conditions of employment of Association members as outlined in Section 111.70.

. . .

Article 12. DISCIPLINARY PROCEDURE

No regular employee shall be disciplined or discharged except for just cause. . .

. . .

Article 33. VACATIONS

. . .

Traffic sergeants shall select vacations separate from all other personnel, and only one sergeant from each separate shift may be on vacation at any one time.

RULES AND STATUTES

The County also cites the following rule from the Brown County Sheriff-Traffic Department's "Rules and Regulations":

Rule No. 55

All officers shall be punctual in reporting for duty at the times designated by their superior officers.

The Union cites Sec. 59.21(8)(b)5m, Wisconsin Statutes which reads, in relevant part, as follows:

59.21(8)(b)5m. No deputy may be suspended, demoted or discharged by the grievance committee under subd. 3 or 5, based on charges filed by the sheriff, undersheriff or a majority of the members of the civil service commission for the selection of deputies unless the committee determines whether there is just cause, as described in this subdivision, to sustain the charges. In making its determination, the committee shall apply the following standards, to the extent applicable:

a. Whether the deputy could reasonably be expected to have had knowledge of the probable consequences of the alleged conduct.

b. Whether the rule or order that the deputy allegedly violated is reasonable.

c. Whether the sheriff, before filing the charge against the deputy, made a reasonable effort to discover whether the deputy did in fact violate a rule or order.

d. Whether the effort described under subd. 5m. c. was fair and objective.

e. Whether the sheriff discovered substantial evidence that the deputy violated the rule or order as

described in the charges filed against the deputy.

f. Whether the sheriff is applying the rule or order fairly and without discrimination to the deputy.

g. Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the deputy's record of service with the sheriff's department.

#### BACKGROUND

The Grievant, Sergeant Robert Shaha, is a Traffic Sergeant in the Brown County Sheriff's Department and has held that position since 1987. He has been employed in the Department for approximately twenty years. The Grievant works the "A" shift, 7:00 a.m. to 3:00 p.m., and his immediate supervisor is Lieutenant Van Lanen, the Day Shift Commander. As a Traffic Sergeant, the Grievant checks in with the Lieutenant at the start of the shift to see what needs to be carried out that day and checks the daily calendar. Employees who are out or on vacation are logged in on the calendar. Also, as a Traffic Sergeant, the Grievant has access to the Department's Communications Center and the daily calendar and the vacation log book kept there. Sergeants may sign their own vacation requests as long as they advise the Lieutenant on duty they are doing so.

There are two vacation procedures in the Department. One is the sign-up beginning in January and consisting of two rounds of selecting vacation days. After that is completed, officers may request vacation on other days by submitting a "Request Card". The person signing the card authorizing the vacation request is then responsible for seeing that it is logged in the vacation book and on the calendar. At the time in question, the officer requesting vacation only got back the request card if the request was denied. Only one patrol sergeant may be off on vacation at a time on the day shift.

The Grievant's normal off days in August of 1993 were August 1-3, 10-12, 19-21, 28-30. The Grievant had also requested vacation on August 6-9, 13-16, 22, 23, about which there is no question. The Grievant testified that he also submitted a request card for August 17-18 around the end of May or first part of June, guessing that he laid it on the Lieutenant's desk. The Grievant did not check either the vacation book or the daily calendar to verify whether his request for August 17 and 18 had been granted, but assumed that it was. There is no indication in the vacation book or calendar that the Grievant was scheduled for vacation on those dates, although the other dates he requested in August were logged in. It is not unusual for an employee to leave the Request Card on the Lieutenant's desk if the latter is not there at the time.

On August 17, 1993, the Grievant, assuming that he was still on vacation, did not report for the start of his shift. The Grievant's absence was reported to Lt. Van Lanen, who then checked the calendar and vacation log to see if the Grievant was down for vacation. The calendar and log did not show the Grievant to be on vacation and Lt. Van Lanen then called the Grievant's home. He let the phone ring several times and hung up when he heard the Grievant's answering machine answer. Lt. Van Lanen then called Sgt. Zehms to come in on overtime to cover the Grievant's absence. At around 11:00 a.m. Lt. Van Lanen again called the Grievant's residence and left a message on his answering machine. The Grievant returned the call shortly thereafter and Lt. Van Lanen asked him why he was not at work. The Grievant responded that he thought he was on vacation and the Lieutenant told him that he was not and that he was also scheduled to work the next day, to which the Grievant replied that he thought he was also off the next day. The Grievant told the Lieutenant he had submitted a Request Card to take vacation on both days and offered to come in, but Lt. Van Lanen said he had already called in Sgt. Zehms on overtime.

Lt. Van Lanen made out a disciplinary report on the Grievant for a violation of Rule 55 due to his failure to report for work on August 17th. On August 18, 1993, the Grievant was notified of an informal hearing on the alleged infraction to be held on August 24th and that the anticipated discipline would be no pay for the eight hours not worked and an eight-hour suspension without pay. After the informal hearing with the Chief Deputy the punishment imposed was a written warning and the Grievant was allowed to use one vacation day for August 17th. Sergeant Shaha grieved the written warning.

The parties attempted to resolve the matter, but were unsuccessful and proceeded to arbitrate the dispute before the undersigned.

#### POSITIONS OF THE PARTIES

##### County

The County takes the position that it had just cause to discipline the Grievant. Article 3 authorizes management to make work rules. Work Rule No. 55 requires officers to be punctual in reporting for duty at the designated time. That rule was clearly violated when the Grievant did not report for the start of his shift on August 17th.

The County characterizes the dispute in this case as being whether the reasons given by the Grievant for his failure to report on August 17th justified his absence. The County asserts that they do not. It was the Grievant's responsibility to check the vacation book and the daily calendar or to otherwise verify with his supervisor that his vacation request had been granted. It is uncontroverted in the record that he did not do any of those things. He also admitted that he noted August 18 as a vacation day on his personal calendar. The evidence shows that the other sergeant on that shift was granted vacation for that day and, per Article 33, only one sergeant per shift may be off on vacation. It was the Grievant's sole responsibility to verify that the dates for which he had requested vacation had been granted. His failure to do so constitutes just cause for the written warning. His assumption that his request for vacation had been granted for August 17 was not warranted and does not constitute an excuse. Since only one sergeant per shift may be off on vacation, a sergeant cannot just assume all of his vacation requests have been granted. The Grievant could easily have verified whether his request had been granted for August 17th, but he made no attempt to do so, and did not provide a valid reason for that failure. The County is not required under Article 33 to grant all vacation requests and given the restriction that only one sergeant per shift may be off on vacation, the Grievant's assumption that his request had been granted was unreasonable.

The County reiterates its arguments in its reply brief and asserts that the Grievant's mistaken belief that he was on vacation on August 17th was solely his fault. He could easily have verified whether his request had been granted and it was his responsibility to do so. The burden on the Grievant was extremely light and it was his misfeasance that caused him to violate Rule 55.

The Union analogizes the Grievant's case with an earlier case involving Deputy Drootsan, but the facts are not similar. Deputy Drootsan gave his request to his supervisor and spoke to his supervisor who indicated there was "no problem". The Grievant left his request on an empty desk and failed to check with his supervisor about his request. The written warning given the Grievant is also consistent with what has been done in the past for failure to show up for a shift.

The County asserts that the "extremely light" discipline imposed is fair and commensurate with the first infraction of a long-term employee. Under the Union's assertion that the discipline was unreasonable based on the Grievant's work record, the lowest form of progressive discipline could never be imposed on an employee who had not been disciplined before that. Further, sergeants are considered role models for the other officers and the performance and

expectations for sergeants are higher than for regular officers such as Drootsan. Thus, the written warning was justified under the circumstances.

#### Union

The Union cites the statutory standards for finding just cause under Sec. 59.21(8)(b)5m, Stats., and asserts that those standards have not been met.

With regard to the foreseeability of discipline for his actions, the Grievant submitted a request card for vacation for August 17, a day available even on that date, and he had no reason to believe his request had been rejected. The evidence shows that the procedure at the time for requesting vacation in the Department was sloppy and that difficulties had arisen in the past from the procedure, e.g., the similar case involving Deputy Drootsan. The record shows the Union sought to correct the problems after the Drootsan case, but that it was not until after this case that management changed the procedure.

From the evidence, one must conclude that the Grievant submitted a vacation request card and it was later misplaced or discarded. The Grievant was seeking a substantial block of time off in August. He has a perfect work record spanning 20 years with no unexcused absences or lateness. The County's witnesses testified that they did not think the Grievant was lying about submitting a request card and that the Grievant believed that he was on vacation. The only misfeasance on the part of the Grievant was his failure to check the vacation book to verify that his request had been approved. There is no rule, however, that requires an officer to check the book for verification. Therefore, the Grievant could not reasonably expect to be disciplined for his failure to verify his vacation approval. Since that is the only infraction of which the Grievant can be accused, the first standard has not been met and the discipline must fail.

Secondly, there is no substantial evidence that the Grievant violated Rule 55. That rule requires an officer to be punctual in coming to work. Both Lieutenant Van Lanen and the Grievant testified that it was Department policy to call officers who are late for work and that if the individual makes a timely effort to show up, he is not disciplined. If the Lieutenant had followed procedure and left a message for the Grievant when he first called at 7:00 a.m., the Grievant would have responded and there would have been no discipline. It was the Lieutenant's inadvertence in not leaving a message that resulted in the failure of the Grievant to rectify the confusion over the vacation day.

The Union also asserts that the rule is being applied unfairly and in a discriminatory manner with regard to the Grievant. There has been a history of problems with the processing of vacation request cards to the extent that the Union had requested that management make duplicate cards so that there would be immediate verification of approval. The Department acknowledged the deficiency in the Drootsan case and refused to discipline Drootsan under similar circumstances. It is uncontested that the Grievant submitted a vacation request card for August 17th in accord with the then-existing procedure and it was later misplaced. To be fair and nondiscriminatory, the County must treat the Grievant the same as it treated Drootsan as the alleged infractions in the two cases are identical, i.e., failure to verify approval. Captain Craig conceded there is no Departmental rule requiring such verification and there is no evidence that a new rule to that effect was adopted after the Drootsan case. Thus, fairness requires that, like Drootsan, the Grievant not be disciplined.

Lastly, the Union contends that the discipline imposed does not reasonably relate to the seriousness of the offense given the Grievant's perfect twenty year work record. The Department is lax as to officers who are late for work, but make an effort to show up. The Grievant followed existing

procedures for requesting the vacation day, and if Lt. Van Lanen had followed Department policy and left a message for the Grievant when he first called, there would not have been a problem. The Grievant acted reasonably under the circumstances and violated no work rule.

The Union requests that the discipline not be upheld and that the written warning be expunged from the Grievant's record.

#### DISCUSSION

The Arbitrator wishes to make it clear that he perceives his role to be limited to interpreting and applying the parties' labor agreement. The statutory tests for just cause cited by the Union are similar to the tests often applied by grievance arbitrators under a contractual just cause standard, and to that extent, they are of some aid, but they are no more binding on the Arbitrator in deciding this dispute than are those utilized by other arbitrators.

With regard to the merits of the dispute, it is noted first that there is no dispute that the Grievant did not report for his shift on August 17, 1993; that he was scheduled to work that day; and that he believed that he was on vacation. The evidence also establishes that the Grievant made no effort to verify that his vacation request for August 17 had been approved and that it would not have taken much effort on his part to do so. However, the evidence also establishes that the Grievant followed the procedure in effect at the time for requesting vacation and that it was not unusual for an officer to leave the Request Card on the shift supervisor's desk if he was not there at the time. The procedure in August of 1993 required the person approving the vacation to log it into the vacation book and daily calendar, but did not provide direct notice back to the requesting officer unless the request was denied. In the latter case the Request Card was then returned to the officer with "denied" circled on the card. If the request was approved, the card was then processed through payroll and was not returned to the officer.

Both Lieutenant Van Lanen and the Chief Deputy conceded that the old procedure had at times resulted in situations similar to this one. The Department, for that reason and with the urging of the Union, subsequently changed the Request Card and procedure so that the requesting officer receives a copy of the card and with the indication of whether it has been approved or denied.

In essence, the Grievant followed the normal procedure for requesting vacation and, having not received the Request Card back marked rejected, he assumed his request for August 17 was granted. While it would have been a good idea for him to check the vacation book to make sure, there is no indication from the evidence that the officers had been informed that it was necessary or required. In fact, Lieutenant Van Lanen testified that less than half the officers checked the vacation book to verify whether their request had been approved. 1/ August 17 was available when the Grievant put in his Request Card and it remained available to that very date. Under the procedure that existed at the time, it was not unreasonable for the Grievant to assume that his vacation request for August 17 had been granted.

Despite the County's protestations to the contrary, it appears that the situation in this case is much the same as that in the earlier Drootsan case. Although Officer Drootsan felt his supervisor had indicated that there was no problem with his request for a vacation switch with another officer, the

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1/ The November 6, 1990 memorandum (Co. Exhibit No. 8) states only that vacation time must be approved, it does not state that officers and sergeants must verify that approval.

supervisor denied he had given such an indication. The Sheriff's decision in that case stated, in relevant part:

2. The Sheriff's Department lacks a system of notification of vacation and vacation cancellation requests.
3. Officer Drootsan should have verified the results of his vacation request. However, failure to do so is not a department rule violation.

No disciplinary action will be taken against Officer James Drootsan.

While, as a Sergeant, it would have been easier for the Grievant to check the vacation book and calendar to verify whether his request had been granted, there is no evidence that Sergeants were advised that they would be held to a different standard from the officers in that particular regard and there was no express rule requiring verification. As to the other instances cited by the County where officers were given a written warning for failing to report to work, there is no indication in the record regarding the circumstances in those cases. It is, therefore, not possible to determine whether they represented situations analogous to this case.

Lt. Van Lanen also testified that when an officer does not report for the start of his shift, the officer is called, and if the officer then reports in to work, no discipline is imposed. Lt. Van Lanen called the Grievant when he did not show up on August 17, but he did not leave a message on the Grievant's answering machine because he assumed the Grievant was still up north on vacation. He conceded it was likely the Grievant would have come in to work that day if he had contacted him. The Grievant did indeed offer to come in when Van Lanen did contact him later that morning.

Given the lack of any Department rule requiring that officers and sergeants take steps to verify whether their vacation request has been granted, the lack of a verification system in the vacation request procedure at the time resulting in the confusion in this case, the Grievant's acknowledged long and excellent work record in the Department, 2/ and the disposition in the earlier Drootsan case, it is concluded that there was not just cause for issuing Sergeant Shaha a written warning for his absence on August 17, 1993.

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

AWARD

The Grievance is sustained. The written warning is to be removed from Sergeant Shaha's record.

Dated at Madison, Wisconsin this 13th day of July, 1994.

By David E. Shaw /s/  
David E. Shaw, Arbitrator

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2/ The Chief Deputy acknowledged the Grievant's reputation for being punctual and not missing work and indicated there was no need to teach him a lesson.