

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

PORTAGE COUNTY DEPUTY SHERIFF'S
ASSOCIATION, WISCONSIN PROFESSIONAL
POLICE ASSOCIATION/LAW ENFORCEMENT
EMPLOYEE RELATIONS DIVISION

and

PORTAGE COUNTY (SHERIFF'S DEPARTMENT)

Case 123
No. 53036
MA-9207

Appearances:

Cullen, Weston, Pines & Bach, Attorneys at Law, by Mr. Gordon E. McQuillen,
appearing on behalf of the Association.

Mr. Brian G. Formella, Corporation Counsel, and Mr. Gerald E. Lang, Personnel
Director, appearing on behalf of the County.

ARBITRATION AWARD

The Portage County Deputy Sheriff's Association, Wisconsin Professional Police Association/Law Enforcement Employee Relations Division, hereinafter referred to as the Association, and Portage County, hereinafter referred to as the County, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Association made a request, with the concurrence of the County, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over a suspension. The undersigned was so designated. Hearing was held on November 14, 1995, in Stevens Point, Wisconsin. The hearing was not transcribed and the parties filed post-hearing briefs which were exchanged on January 17, 1996.

BACKGROUND:

The basic facts underlying this case are not in dispute. On March 31, 1995, Plover Police Officer Gary Widder brought a prisoner to the Portage County jail at around 10:15 p.m. to be booked on a warrant from Winnebago County. The Portage County jail has a garage area called a sally port which has a simple garage door and opener whereby a squad car can drive in and park. The sally port has a door which leads directly to the booking area. Officer Widder brought the squad into the sally port, put his gun in a lock box in the sally port and then removed his prisoner

from his car and took him to the booking area where the grievant, Jailer Robert Woehr and Jailer Scott Strojny were on duty. In the booking area a notice is posted in several locations which states:

NOTICE

**TRANSPORTING OFFICERS MUST REMAIN
WITH THEIR PRISONER UNTIL PRISONER IS
PLACED IN A CELL OR THE JAIL STAFF HAS
RELEASED YOU. NO EXCEPTIONS.**

**BY ORDER OF:
CPT EVAN HANSEN,
JAIL ADMINISTRATOR**

The grievant began processing the prisoner and then Jailer Strojny began asking the prisoner questions to fill out the required forms. The grievant left the booking area to perform duties related to booking the prisoner. Officer Widder had remained with the prisoner during this time. While Strojny was getting the information from the prisoner, Widder stated he was going into Dispatch to send a teletype to Winnebago County. Strojny did not respond either because he did not hear Widder or because he was occupied with the prisoner. Widder went into the Dispatch area and when the grievant returned to the booking area, he asked Strojny if he had released Widder and Strojny stated he had not. The grievant went to the Dispatch area and said something to Widder but apparently Widder did not hear it or could not understand it. The grievant then took the prisoner into the sally port and put the prisoner into the back seat of Widder's squad car. The grievant did not inform Widder that the prisoner was now in his squad car. Officer Widder came out of Dispatch and went into the sally port, retrieved his gun from the lock box and got into his car. The prisoner was apparently laying down in the back seat when Widder initially got in his car. The prisoner sat up surprising Widder. Widder repeated the process of bringing the prisoner to the booking area and said words to the effect of "very funny." Widder asked if the jailers could handle it from there and they said yes he could leave and Widder then left. A little while after Widder had left, the grievant went to Dispatch and advised them to send Widder a message, "April Fool, one hour early," which Dispatch did.

Sheriff Peter Thrun had Detective Sergeant Allen R. Kraeger of the Waupaca County Sheriff's Department conduct an investigation of this incident. On June 28, 1995, the Sheriff gave the grievant a one-day suspension in a letter which stated the following:

On March 31, 1995, you were processing a prisoner into the jail and when the officer who brought the prisoner to the jail left the prisoner and went into the communications room, you stopped processing the prisoner, took him to the sally port, and placed the prisoner in the officer's squad car. You did not notify the officer of what you had done.

This incident was investigated by Detective Sergeant Allan Kraeger of the Waupaca County Sheriff's Department. You have been given a copy of the investigation report. The investigation revealed that Captain Hansen had given you and other Corrections Officers verbal orders that it was appropriate for Corrections Officers to return prisoners to the sally port if the officer who brought them in left the prisoner during the booking process. This was an a (sic) questionable order; however, you performed your duties in an unprofessional and unsafe manner when you placed the prisoner in the officer's squad car and you did not inform the the (sic) arresting officer that the prisoner was in his squad car. This placed the arresting officer in possible danger. You did not perform your duties in a manner that provided for safety and security of Officer Widder. Also, you inappropriately directed Communications Control Technician Landowski to send a radio message to the officer after he had left the sally port, "Message from 512. April Fool one hour early!"

You are hereby given an unpaid one-day suspension for placing the prisoner in the squad car without informing the officer that the prisoner was in his squad car, and using the radio to deliver your April Fool message.

In the future, you are to perform your duties in the process of booking prisoners and sending radio messages in a professional manner and in a manner that provides for the safety and security of the public, the inmates and the staff.

The suspension was grieved on June 29, 1995, and processed through the grievance procedure to the instant arbitration.

ISSUE:

The parties stipulated to the following:

Did the Sheriff discipline the grievant without just cause?

If so, what is the remedy?

PERTINENT CONTRACTUAL PROVISIONS:

SECTION II - MANAGEMENT RIGHTS

The County possesses the sole right to operate the Sheriff's Department and all management rights repose in it, subject only to the provisions of this contract and applicable law. These rights include, but are not limited to, the following:

. . .

- D. To suspend, demote, discharge and take other disciplinary action against employees for just cause;

. . .

COUNTY'S POSITION:

The County contends that the Sheriff had just cause to discipline the grievant for his actions on March 31, 1995. It claims that the seven criteria commonly used to establish just cause have been met. With respect to notice, the County argues that basic common sense dictates that a jailer not return a prisoner to the officer's squad without at least notifying him of that very important fact and commenting on the incident as an early April Fool's joke violates basic standards of professionalism. The County maintains its Policy is reasonable. It points out that Jail Admission Policy provides that the jail be operated in a manner as to provide for the safety and security of the public, the inmates and the staff. It submits that this policy is reasonable and the grievant violated it by placing the prisoner in Widder's squad without Widder's knowledge. It also asserts that the April Fool's message was unprofessional and utilized equipment for other than its intended purpose violating Policy 103.07 -- Use of Department Equipment. It alleges that these rules are reasonable and necessary and the grievant violated them.

The County maintains that it conducted a fair investigation. It notes that Detective Kraeger from Waupaca County, an outside agency, investigated the incident. The County points out that

the grievant told the investigator that Captain Hansen had told him that if an officer does not remain with his/her prisoner, the jailer can put the prisoner in the sally port. Captain Hansen, according to the County, told jailers that they were to put the prisoner in the sally port until the officers were there for the booking process, and Captain Hansen testified that the failure of the grievant to notify Widder that he had returned the prisoner to Widder's squad warranted discipline. The County also refers to Jail Sergeant Bodzislav, who, when he heard about Captain Hansen's statement, advised the grievant not ever to release a prisoner into the sally port. The County takes the position that the investigation was fair and thorough and revealed that the grievant violated policy and common sense.

With respect to proof, the County points out that the grievant does not deny the actions he took and he cannot deny that he put a law enforcement officer in potential danger and violated Sergeant Bodzislav's order to him.

The County believes that the Sheriff has applied the policies and penalties even handedly and without discrimination as no other jailer has engaged in conduct similar to the grievant. As to the penalty, the County asserts the one-day suspension is justified. It states that endangering an officer and later joking about it warrants higher discipline, but given the grievant's record, the discipline meted out was less than might otherwise be indicated. The County considers that it was fortunate that nothing happened to Widder or the prisoner, but it is of the opinion that his nominal level of discipline must be weighed against the potential of danger. It suggests that the grievant could have used the chain of command to address the perceived disregard of a jail rule but rather took matters into his own hands, compromised Widder's safety and later joked about it.

In conclusion, the County argues that it had just cause to suspend the grievant. It makes clear that the discipline was not for merely placing the prisoner in the sally port area, but rather it was how he did it and his failure to tell Officer Widder about it, placing Widder in an unsafe environment. It requests that the grievance be denied.

ASSOCIATION'S POSITION:

The Association contends that the Sheriff was obliged to adhere to the just cause tests set forth in Sec. 59.21(8)(b)5m. a. through g., Stats. It claims the evidence establishes that the Sheriff failed to prove just cause to discipline the grievant, and even if just cause for any discipline did exist, the punishment was excessive. The tests of just cause set out by the Association are:

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

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

3. 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.
4. Whether the effort described under subd. 5m. c. was fair and objective.
5. Whether the sheriff discovered substantial evidence that the deputy violated the rule or order as described in the charges filed against the deputy.
6. Whether the sheriff is applying the rule or order fairly and without discrimination against the deputy.
7. 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.

The Association submits that the first test must be answered no because the grievant's conduct was consistent with Captain Hansen's verbal order. It observes that Captain Hansen's initial report stated that the conduct of jail staff was appropriate but then he began to fudge his opinion in that he admitted telling jail staff to place a prisoner back out in the sally port but wrote that this was never reduced to a directive, and still later wrote that there was no formal direction put in writing. The Association argues that there is nothing to show that a verbal order is less binding than a written one, nor is there anything that states verbal orders are to be ignored. It submits that as no formal direction was given to jail staff, the grievant had no forewarning that he might be disciplined for his conduct. It states that the grievant was placed into a Hobson's choice which was to obey Hansen's order and the County cannot now discipline him for violating other rules. It asserts that just cause does not exist because the grievant had no forewarning of possible discipline.

The Association claims that the rule or order the grievant allegedly violated is unreasonable. It contends that the two rules, 210.01 and 103.07, are so vague and over broad as to fail any test of reasonableness. It insists that this is particularly true where a specific rule has been issued by a Sheriff's Department Captain as the Sheriff is alleging violation of a more general rule by the grievant's following the narrower rule. It takes the position that the Sheriff's belief that the narrower rule violates the general rule is not the grievant's problem. It questions whether the rules asserted to be violated are really the rules utilized by the Sheriff and it speculates that the grievant was disciplined for putting the prisoner into the squad rather than the sally port or failing to handcuff the prisoner. With respect to the message, the Association maintains that the grievant did not transmit the message and has no authority over the dispatcher and the dispatcher was free

to transmit or not transmit it and the fact that it was transmitted suggests the dispatcher did not regard the message as out of the ordinary or the misuse of equipment. It asks how the grievant would know that sending such a message was misuse of equipment and answers that he would not as the rule is overly broad and vague and thus unreasonable.

The Association claims that the Sheriff did not make a reasonable effort to discover whether the grievant did in fact violate a rule or order. It asserts that although the investigation was done by a deputy from another County, the Sheriff largely ignored those results and decided to suspend the grievant despite the results of the investigation.

The Association alleges that the Sheriff's investigation effort was neither fair nor objective as the Sheriff ignored the results of the investigation in favor of a prior conclusion that the grievant violated policy. It claims the grievant had asked the Sheriff six times for some specification of the rule alleged to be violated and the Sheriff's failure to do so made it difficult to respond. After the seventh request, it notes that the Sheriff did respond but by then the Sheriff had already decided to suspend the grievant for one day. It concludes that the Sheriff failed to conduct a fair investigation and the one-day suspension should be rescinded.

The Association maintains that the Sheriff failed to discover substantial evidence that the grievant violated the rule or order described. It asserts that the evidence fails to support the Sheriff's decision. It claims that there was only one specific rule and that was put the prisoner back in the sally port and the more general rules cannot overcome the basic rule. As to the radio message, the Association points out that the grievant did not send it and even if he did cause it to be sent, he should not be disciplined.

The Association argues that the Sheriff did not apply the rule fairly and without discrimination because he disciplined Captain Hansen less severely than the grievant when even Captain Hansen had stated that if he was punished, the grievant should not be.

It contends that the discipline was not reasonably related to the seriousness of the offense or to the grievant's past record. The Association contends that the entire situation gives new meaning to the expression "tempest in a teapot" and the alleged incident was not serious, the prisoner posed no threat and everyone agreed this was an appropriate response to a chronic problem of officers dumping their problems on jail staff.

It argues that placing the prisoner in the back of the squad was much safer than putting him in the sally port and the radio transmission was, at most, horseplay. It observes that no one has been disciplined before for "misuse" of the radio and the grievant was never disciplined or cautioned for any previous misuse of equipment.

The Association concludes that the Sheriff failed in this test and the suspension should be expunged. It maintains that the Sheriff lacks just cause to impose a one-day suspension on the

grievant and it should be set aside. It suggests that, at most, the grievant should receive the same sort of reprimand imposed on Captain Hansen.

DISCUSSION:

It is difficult enough to be a police officer these days without members of the law enforcement community also adding to the officer's burden. It is undisputed that Officer Widder did not comply with the posted notice to remain with his prisoner until released by the jail staff. There are a number of ways of dealing with this situation; the easiest is to simply inform Widder of the requirement or to follow the chain of command and report what occurred. Here, the grievant was so intent on ensuring compliance with this notice that he overreacted by putting the prisoner back into Widder's squad without notifying Officer Widder that the prisoner was in his squad. The result could have been tragic if Widder had overreacted and/or the prisoner had become belligerent. The grievant has asserted that there were no rules that prohibited his conduct. There are some types of conduct that simply are unacceptable and it is impossible to make a rule for every instance. People in law enforcement are expected to have common sense and to handle matters in a professional manner and not everything can be legislated. Common sense cannot be described completely by rules and even when rules are followed, common sense may dictate a different result. For example, smoking may be prohibited in all areas except a designated area; however, a known gas leak or flammable liquid spill in the designated smoking area would be enough for a person with common sense not to light up. In summary, no amount of rules will give someone common sense.

In the instant case, a reasonable jailer would know that putting a prisoner back into a squad car without informing the police officer that the prisoner was there could be potentially dangerous and would most likely result in a shocking experience for the police officer. In other words, the grievant exercised very poor judgment with the questionable result of teaching the officer to follow the posted notice. The grievant also had to rub Officer Widder's nose in it by sending him a message, "April Fool, one hour early."

Did the Sheriff have just cause to suspend the grievant for one day? The facts are really not in dispute. The grievant did what was asserted. His conduct was not professional and it is by sheer luck that nothing tragic happened other than Widder getting a shock. Common sense dictates that the grievant knew what he did was improper. The grievant's reliance on Captain Hansen's verbal statement to put the prisoner in the sally port is no defense to his conduct. It must be noted that the discipline in the Sheriff's June 28, 1995 letter was for placing the prisoner in the squad car without informing the officer that the prisoner was in his squad car. Why didn't the grievant tell Widder where the prisoner was? It was to teach him a lesson but it also put the safety of Widder as well as the prisoner in jeopardy. Undoubtedly, the grievant knew this yet he endangered both officer and prisoner solely to make a point which could have been done simply by requesting Widder to follow the posted notice. The Sheriff has the right to expect professional

performance from the grievant and he didn't get it. The grievant knew or should have known that his actions were improper. The Sheriff properly investigated the incident and the punishment fits the grievant's misconduct. Thus, the Sheriff had just cause to discipline the grievant.

Based on the above and foregoing, the record as a whole, and the arguments of the parties, the undersigned issues the following

AWARD

The Sheriff had just cause to suspend the grievant for one day without pay, and therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 7th day of March, 1996.

By Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator