

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

WISCONSIN PROFESSIONAL POLICE
ASSOCIATION/LEER DIVISION

and

EAU CLAIRE COUNTY (SHERIFF'S
DEPARTMENT)

Case 188
No. 54291
MA-9612

Appearances:

Cullen, Weston, Pines & Bach, by Mr. Gordon E. McQuillen, on behalf of the Union.
Mr. Keith R. Zehms, Corporation Counsel, on behalf of the County.

ARBITRATION AWARD

The above-entitled parties, herein "Union" and "County", are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Eau Claire, Wisconsin, on October 8, 1996. The hearing was transcribed and both parties thereafter filed briefs and reply briefs which were received by January 31, 1997.

Based upon the entire record and arguments of the parties, I issue the following Award.

ISSUE

The parties have agreed to the following issue:

Was grievant James C. Macke suspended for cause and, if not, what is the appropriate remedy?

DISCUSSION

Macke was employed by the County as a full-time Jailer since September 14, 1989. During his employment, he received a 15-day suspension in 1993 for insubordination when he refused to follow reasonable work directives during an off-site training program and when he complained about receiving a parking ticket at that program.

All Jailers must biennially take and pass a functional capacities assessment test pursuant to the County's Maintenance Of Employment Requirements which states: "Maintain ability to meet the physical demands of the job assigned to."

Macke initially took and passed his test on February 16, 1996, 1/ when he was examined by Dr. Tuenis D. Zondag, the County's Medical Review Officer, who filled out a "History/Physical Profile" which stated that Macke possessed the physical capacities to perform all aspects of his job within the Eau Claire County Sheriffs Department. Dr. Zondag also stated that Macke should be evaluated in six months. Macke at that time signed a medical release form at the end of his examination which authorized the release of his exam results to the County.

Dr. Zondag by letter dated March 18 subsequently informed Macke:

...

You participated in the biennial sheriff's department physical examination as part of your employment's requirements. After I saw you, I certified that you are qualified to continue your duties until we have done a functional capacity on you. You were found to be respirator certified. Your audiogram was normal. I encourage you to use good hearing protection both at work while shooting and at home while operating power tools.

Based upon your biennial examination's result, I have made the following recommendations:

1. Due to your known medical condition and on re-reviewing my examination, I am requesting a functional capacity assessment to make sure you are safe in performance of your duties as related to your co-workers and to yourself. We will see if accommodations are necessary for the safe performance of your duties.

2. I recommend continuation of care for your medical problems.

If you have any questions, please talk to Diane Kihl at the Eau Claire Sheriff's Department.

...

1/ Unless otherwise stated, all dates herein refer to 1996.

As a result of receiving this information, Captain Gregory J. Lieberg on April 11 told Macke that he had to take a function capacities test on April 25. Macke at that time did not voice any objection to either taking the test or signing a medical release. Lieberg admitted that he did not then order Macke to sign such a medical release.

Macke before then had never asked anyone in the County's Personnel Department or the Sheriff's Department how medical records are kept and he similarly never asked who would receive his exam results after he signed a release.

Macke showed up for the test at the Work Recovery Center ("Center") in Eau Claire, Wisconsin, on April 25. He was then given a release which stated, inter alia:

Freedom of Consent:

Your permission to perform this test is voluntary. You are free to deny consent or stop the test at any point, if you so desire.

I have read this form and I understand the test procedures that I will perform. I consent to participate in this test. I acknowledge that results of the assessment will be sent to my physician payer of services, employer and any other parties I have authorized.

Not at this time

Signature of Participant/Date

I will not authorize these parties at this time. I will sign after the information has been compiled and I have had an opportunity to review. I am willing to participate in the testing, but the Department will not allow the Recovery Center to continue with out my signature.

Signature of Witness/Date

Questions: _____

Response: _____

Macke refused to sign that release and added the comments underlined above. He at that time stated that he was prepared to take the test, but the Center refused to perform the test without Macke's signed release.

The Center at that point telephoned the Sheriff's Department to relate that Macke had refused to sign the release. Captain Berg at that point told the Center to cancel the test if Macke did not sign a release. Hence, no test was performed that day. The County nevertheless was billed \$100 by the Center regarding this incident.

Captain Lieberg - who admitted to being "angry and surprised" and who also admitted that he had prejudged Macke - then telephoned Macke at home, at which point Macke confirmed that he had refused to sign the release. Lieberg told Macke that he was in "big trouble" for failing to cooperate at the Center. Macke replied that his Union representative told him not to sign any release form.

Lieberg, who did not know the purpose of the test, related what had transpired to Sheriff Richard M. Hewitt who ordered that Macke be immediately suspended without pay pending further investigation. Lieberg by letter dated April 26 informed Macke that he was being suspended for failing to take the test at the Center on April 25.

Upon further investigation, Hewitt by letter dated April 30 suspended Macke for thirty (30) days for insubordination relating to Macke's "failure to cooperate with the staff at Work Recovery . . ." Sheriff Hewitt - who acknowledged that Macke in 1994 had earlier complained about the unauthorized release of his medical records - in that same letter ordered Macke to take a functional capacities test at the Center on May 2.

Hewitt testified here that all employee medical information is kept confidential and that his office is only told whether an employee has passed his/her test. All other pertinent information, said he, is sent to the Personnel Department.

Macke showed up at the Center to take the test on May 2, but the test was postponed by Dr. Joan Rech because of Macke's sore shoulder. Macke eventually took the test on June 18 and then signed a release "under protest".

Hewitt, Lieberg, County Personnel Director Marvin Niese, Dr. Zondag, and Diane Kihl met with Macke and Union representative Len Jaglarski on July 17 for a "staffing" where Macke's medical condition was considered. Dr. Zondag at that time stated that Macke was not fit to perform his job without giving any further explanation. The County on July 17 suspended Macke indefinitely. He was subsequently reinstated pursuant to an agreement reached by the parties at the instant hearing.

Macke grieved his suspension, hence leading to the instant proceeding.

The Union argues that the County lacked just cause to discipline him because the County failed to meet the "seven tests" enumerated by Arbitrator Carroll Daugherty in Enterprise Wire, 46 LA 359 (1966). The Union thus argues that the medical release which Macke was asked to sign represented nothing more than a "fishing expedition" under Bondex Corporation, 68 LA 476 (Arbitrator Coburn, 1977) and that Macke thus was justified in not signing it. The Union also complains over Dr. Zondag's use of Macke's confidential medical file which was kept at the same clinic where Dr. Zondag worked. The Union therefore asks that Macke's suspension be

overturned and that Macke be made whole.

The County, in turn, contends that it had just cause to suspend Macke over his refusal to sign the release on April 25 and that the Union's make-whole request cannot be granted because it "constitutes a penalty and contravenes the express language of the contract." The County thus argues that Macke never raised any questions over the release when Macke met with Lieberg on April 11; that Macke's prior work record warranted the imposition of a thirty-day suspension; that its decision cannot be overturned unless "it can be established that the decision was patently arbitrary or baseless"; and that, moreover, it has met all seven tests set forth in Enterprise Wire, supra.

This is a difficult case to decide because it involves the clash of two very important competing principles: on the one hand, the County has the absolute right to insist that its employees are physically fit to perform their jobs; on the other hand, employees ordinarily have the right to keep their medical records private. Here, this latter principle is compromised because the County has the right to insist that its employees take and pass a physical exam and that such information be passed along to the County.

This case is also made difficult by the parties' own actions. For as the Union correctly points out, the County's investigation into this matter could have been more complete and somewhat more objective. On the other hand, the County correctly points out that Macke should have known that he would be disciplined for refusing to sign the release since he knew that it was pointless to take a medical exam without providing the County with its results and since he had been previously suspended for fifteen (15) days over a prior act of insubordination. Moreover, the requirement that employees sign a release is reasonably related to a legitimate managerial need; i.e., to obtain information regarding an employees' fitness to serve.

Furthermore, Macke himself contributed to this problem by never raising the issue of a release when he met with Lieberg on April 11, just as he never asked anyone before April 25 who would have access to his medical file once he signed a release. More importantly, Macke never raised any specific questions with Lieberg when the two of them spoke by telephone on April 25. It therefore is readily understandable why Lieberg then became "angry and surprised" and why the County did what it did in subsequently suspending Macke.

If this were all that there is to this case, I would deny the grievance for the reasons advanced by the County.

However, there is one further fact which looms large and which supports a contrary result; i.e., the fact that Dr. Zondag after Macke's initial February 16 exam went to Macke's private medical file at the clinic to retrieve information about Macke's medical condition. That, apparently, is what led him to reverse course and to tell Macke by letter dated March 17 that further testing was needed "Due to your known medical condition. . ."

The releases tendered to Macke did not allow for that. They, instead, were limited to the results of the tests relating to Macke's biennial physical exam without any reference whatsoever as to whether Macke also authorized the release of any other information from his private medical file which coincidentally had been compiled by Macke's own private doctor at the same clinic where Dr. Zondag worked. Dr. Zondag therefore had no right under the contract to obtain this latter information in the absence of Macke's release to that effect, which has never been forthcoming.

At the hearing, the County asserted that it "had absolutely nothing to do with [Dr. Zondag] reviewing whatever he reviewed and whether he had a right . . . is something between Ms. Macke and Dr. Zondag. . ."

I disagree. As the County's Medical Review Officer, Dr. Zondag at all times material herein has acted as the County's agent and the County therefore is bound by his actions. Since Dr. Zondag was not authorized to examine Macke's private medical file after Macke had initially passed his February 16 exam, it follows that Dr. Zondag could not use any information contained therein for the purpose of determining whether Macke is fit to work. His subsequent March 17 letter setting up a second exam therefore was based on confidential medical information which had been improperly obtained. That being so, the County lacked any legitimate basis for ordering Macke to take another physical exam on April 25.

In addition, Macke was justified on April 25 in refusing to sign a medical release for his entire private medical file, as the County has no right to order the release of such information as a condition precedent to keeping one's job. Given his prior experiences relating to the unauthorized use of his confidential medical records, Macke therefore could not be disciplined over his refusal to surrender such information as part of his biennial exam.

To be sure, the County may not have known that Macke's confidential medical file was being improperly accessed, just as it may not have intended for Macke to agree to the release of that information. But, its benign intentions do not overcome the fact that Macke is entitled to a zone of privacy regarding his private medical condition and that he thus cannot be disciplined for refusing to release his private medical files. The County therefore lacked cause to suspend him for thirty days when he refused to sign a release on April 25.

To rectify that contractual breach, the County shall immediately make Macke whole by paying to him all wages and benefits that he lost as a result of his suspension, minus any sums of money that he received during the period of his suspension. In order to answer any questions that may arise over application of this Award, I shall retain my jurisdiction for at least thirty (30) days.

The County argues that such a make-whole remedy constitutes an improper penalty under the contract. I disagree. Such a remedy is the standard remedy ordered when an employer lacks

cause to suspend or terminate an employe. That is why such a remedy does not constitute an improper modification of the contract. Rather, it represents nothing more than trying to make whole an employe who has been harmed by the County's breach of its contractual obligations. Indeed, if such a remedy were not ordered, that in effect would allow the County to penalize Macke by withholding his pay for thirty days even though it lacked cause to do so. That is not what the contract allows.

Lastly, there should not be any misunderstanding about the narrow reach of this Award. It is limited to the very unique facts of this case which show that Macke was improperly disciplined over his refusal to sign a release relating to his personal medical file. Nothing herein therefore precludes the County from insisting that employes sign other, more limited medical releases before they are tested, just as there is nothing which precludes the County from disciplining employes who refuse to sign such releases. It therefore is up to the County to devise a proper release and to ensure that the results of any medical exam are kept as confidential as possible.

In light of the above, it is my

AWARD

1. That grievant James C. Macke was not suspended for cause.
2. That the County shall make him whole in the fashion described above.
3. That I shall retain my jurisdiction for at least thirty (30) days.

Dated at Madison, Wisconsin, this 1st day of April, 1997.

By Amedeo Greco /s/
Amedeo Greco, Arbitrator