BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

MILWAUKEE DEPUTY SHERIFF'S ASSOCIATION

and

MILWAUKEE COUNTY (SHERIFF'S DEPARTMENT)

Case 410
No. 52829
MA-9121

Appearances:

Gimbel, Reilly, Guerin and Brown, by Mr. Franklyn M. Gimbel, appearing on behalf of the Union.

Mr. Timothy R. Schoewe, Deputy Corporation Counsel, appearing on behalf of the County.

ARBITRATION AWARD

The Employer and Union above are parties to a 1994-96 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the grievance of Deputy Steven Gunn, protesting a five day disciplinary layoff. The undersigned was appointed.

In lieu of a hearing, the parties stipulated the facts in a written submission. Briefs were filed by both parties, and the record was closed on March 10, 1997.

Issue:

Was the level of discipline given to Deputy Steven Gunn excessive?

Relevant Contractual Provisions:

> **1.02 MANAGEMENT RIGHTS.** The County of Milwaukee retains and reserves the sole right to manage its affairs in accordance with all applicable laws, ordinances, regulations and executive orders. Included in this responsibility, but not limited thereto, is the right to determine the number, structure and location of departments and divisions; the kinds and number of services to be performed; the right to determine the number of positions and the classifications thereof to perform such service; the right to direct the work force; the right to establish qualifications for hire, to test and to hire, promote and retain employes; the right to transfer and assign employes, subject to existing practices and the terms of this

Agreement; the right, subject to civil service procedures and ss. 63.01 to 63.17, Stats., and the terms of this Agreement related thereto, to suspend, discharge, demote or take other disciplinary action; the right to maintain efficiency of operations by determining the method, the means and the personnel by which such operations are conducted and to take whatever actions are reasonable and necessary to carry out the duties of the various departments and divisions.

In addition to the foregoing, the County reserves the right to make reasonable rules and regulations relating to personnel policy procedures and practices and matters relating to working conditions, giving due regard to the obligations imposed by this Agreement. However, the County reserves total discretion with respect to the function or mission of the various departments and divisions the budget, organization, or the technology of performing the work. These rights shall not be abridged or modified except as specifically provided for by the terms of this Agreement, nor shall they be exercised for the purpose of frustrating or modifying the terms of this Agreement. But these rights shall not be used for the purpose of discriminating against any employe or for the purpose of discrediting or weakening the Association.

Stipulated Facts:

Between March 1994 and March 1995, Deputy Gunn operated his personal automobile without valid Wisconsin license plates attached. During this time Gunn received six citations for parking violations from Milwaukee Police Department employees. Gunn did not pay them. Gunn knew the citations were incomplete. Gunn parked in a location that was metered and for which Gunn would have had to leave his assigned post to pay required meter fees. Gunn covered the vehicle identification number (VIN number) on the car's dashboard with a Milwaukee Sheriff's Department field interview card. Gunn checked law enforcement records on a computer and found they were not entered.

On March 22, 1995, a Milwaukee Police Department employee attempted to enter Gunn's car to move the filed (sic) interview card and reveal the VIN number. Entry was being attempted by using a "Slim Jim" when Gunn confronted the parking checker. Gunn entered the car and threw the "Slim Jim" into the street. Deputy Sheriffs who witnessed the confrontation report that Gunn directed profanities at the checker. Parking Checker Holter described Gunn's demeanor as "upset, but not shouting, like some maniac," and does not recall hearing Gunn use
any profanity from that point on. Gunn was issued a $10 parking

citation, No. 130722432, for an expired meter violation.

> Based upon the information revealed in Office of Professional Standards Investigation #95-084, a copy of which is attached as Joint Exhibit #1, then Sheriff Richard Artison issued an order suspending Gunn for five (5) working days for violation of Sheriff's Department Rules and Regulations (1.05.01, Obedience to Rules; and, 1.05.02, Conduct of Members) and Milwaukee County Civil Service Rule VII, Section 4(1)(L).
>
> Gunn does not dispute that rules (sic) violations occurred. Nor does he dispute that a factual foundation exists upon which the Sheriff may impose discipline. He disputes the level of discipline imposed as being unreasonable under the circumstances. Departmental records reveal that Gunn has not previously been the subject of discipline by the Sheriff.

The parties also submitted the complete investigative file concerning the incident in question, including among other documents the 16 page transcript of a hearing held by the Sheriff's Office of Professional Standards on May 17, 1995.

The Union, in its brief, concedes that Deputy Gunn violated "various rules" of the department. Challenged here is the reasonableness and propriety of a five day suspension under the circumstances. The Union contends that in a case decided in 1988 by Arbitrator Richard McLaughlin, a five day suspension was recommended by Sheriff Artison for another deputy, when that deputy had been charged with drunk driving in Mississippi while on an assigned trip for purposes of picking up a prisoner. The Union notes that the arbitrator in that case reduced the five day suspension to a written warning, based on disparate treatment of that deputy in comparison to a second deputy also present in the car at the time and implicated in the same events. The Union contends that the end result of that matter was that a deputy who violated both Mississippi and Wisconsin law prohibiting operating a motor vehicle while under the influence of an intoxicant, and whose conduct clearly and unequivocally put not only his own life but also that of his partner and unknown third parties at substantial risk, received only a written warning for his conduct.

The Union argues that the same Sheriff has sought to impose here the same five day disciplinary suspension level for two widely disparate rule violations. The Union contends that not only did Sheriff Artison seek to impose a five day suspension for the previous deputy's "drunk driving while dangerously exceeding the speed limit" and not only did he seek the same suspension here for Gunn's parking tickets and failure to attach his license plates, but the previous discipline was actually overturned at that level. The Union contends that this demonstrates that the five day suspension for both cases was patently unreasonable, and that it would also be patently unreasonable to impose greater discipline on Gunn than the written reprimand which the previous deputy received in the end. The Union requests that the discipline here be reduced to a written reprimand.

The County contends that a primary cause of the discipline here was the fact that the

grievant had an off-duty altercation with members of the Milwaukee Police Department, a confrontation which occurred in public and while Gunn was in full uniform. The County contends that the altercation combined with the perception that the grievant was engaged in a continuing practice of attempting to evade plugging the parking meter, to lead Sheriff Artison to impose a five day suspension. The County contends that the grievant repeatedly parked at City meters and failed to pay the required fees, failing in the process to display vehicle registration by covering his vehicle identification number with a Sheriff's Department field interview card. The City notes that there is no dispute that the grievant failed to place his license plates on the vehicle for a period of 14 months from the time he acquired the vehicle. The County notes that in its investigation, another Sheriff's Department deputy who was present at the time of the altercation between the grievant and the City of Milwaukee's parking enforcement employe termed the grievant's conduct during the altercation as unprofessional.

The County contends that the pattern of the grievant's activity suggested to the reviewing officer that the failure to license the vehicle was deliberate, in order to secure free parking. The County argues that the grievant would know as a deputy sheriff that he could avoid prosecution for parking violations if neither the vehicle identification number nor the license plates could be recorded by parking enforcers. The County argues that this conduct holds the department up to criticism and ridicule, and strains relations between the state's two largest law enforcement agencies. The County contends that the Arbitrator ought not to substitute his judgment for the on-scene manager charged with running the agency and maintaining effectiveness, efficiency and public reputation of the department. The County requests that the Arbitrator sustain the five day suspension imposed by the Sheriff.

On review of the record, I do not find sufficient evidence here of disparate treatment to warrant overturning management's decision as to the level of discipline. First, the grievant's conduct as a whole appears to support management's interpretation that he was deliberately concealing the identity of his vehicle in order to secure free parking on an ongoing basis. While the grievant in his discipline hearing on May 17, 1995 admitted receiving five or six tickets since acquiring that vehicle, he averred that he had lost the plates in the course of moving house twice. Yet he also admitted finding the plates in or about October, 1994. (Interview, page 7-8). The altercation involved here did not occur until March 22, 1995. Gunn testified that he never paid any of the tickets which he received prior to March 22 because "they never showed up in the computer to pay them." The investigating officer then asked "They never showed up in the computer . . . you checked the computer?" And Gunn replied "Over at the one on 27th Street is where I pay my tickets. I always pay my tickets." I note that there is evidence not only that the grievant did not pay these tickets, but that the grievant might have received many more tickets if his car had been identifiable. Apparently one reason the parking enforcement employe eventually decided to use a "slim jim" to get into the grievant's vehicle was that she had felt unable on other occasions to issue tickets for this car -- it seems "incomplete" tickets are returned to the issuing employe.

When asked whether he had deliberately covered up his vehicle identification number, the grievant replied "I don't think it's . . . it was an intentional thing. If she wanted to know -- get my VIN number or whatever, she could have talked to me about it and I would have -- I could have told her what the plate number was. I just didn't take the time to put them on."

I find the grievant's explanation of his failure to put the license plate on the car difficult to credit in view of his occupation, in view of the fact that by his own admission the license plates had been found six months before the incident in question here, and in view of the consistency of placement of a Sheriff's Department investigation card covering up the vehicle identification number. This, especially when combined with the grievant's admission that he checked the computer for outstanding parking tickets against him, strongly suggests that the grievant was doing exactly what the investigating officer concluded he was doing: Using his knowledge of law enforcement procedure to evade paying for parking on a continuing basis.

The discipline documents note accurately that the parking enforcement employe, contrary to a sheriff's deputy who happened to be near by at the time of the altercation, did not allege that the grievant used profanity in his response to finding her in the act of opening up his vehicle. According to the documentary record this appears to have been taken into consideration in setting the penalty. The discussion therefore centers on the pattern of parking violations rather than on the altercation.

Under these circumstances, one possible ground for lessening discipline would be if the level imposed by an employer "shocked the conscience" of the arbitrator. I do not find that the five day discipline shocks the conscience. The County's act was in response to what appeared to be a pattern of activity, not a single event, and despite the fact that the grievant had no previous discipline on his record, there is nothing in the collective bargaining agreement which explicitly restricts management to a lesser discipline for a first offense.

What remains is the question of disparate conduct as compared to the Johns case decided by Arbitrator McLaughlin in 1988.

Comparison between these two cases is, indeed, somewhat troubling. As the Union argues, the possible consequences to other persons from a high-speed drive by a drunken sheriff's deputy in another jurisdiction are, on all levels, greater than the possible public consequences of the grievant's conduct here. The Union's argument that the discipline imposed here should not be greater than that imposed in the other incident is entitled to serious consideration.

Yet I do not find a clear and consistent parallel between the two cases. I do not read Arbitrator McLaughlin's decision as finding the five day discipline imposed upon the deputy in question unreasonable in general terms based on that officer's conduct. The discussion of reasonableness in that award centers instead on comparison between the two deputies in the car at the time, including evidence that it was the second deputy who behaved most inappropriately when the car was finally stopped by Mississippi law enforcement. That direct comparison between two officers involved in the same incident, one of whom received a written reprimand and the other of whom received a five day suspension, appears to have been the operating principle on which Arbitrator McLaughlin determined that it was appropriate to reduce the five day suspension to a written warning.

No such direct comparison can be drawn here. Instead, the more general comparison between two dissimilar incidents is the closest that this record will allow. In that context, the

Union is entitled to the full weight of its perception, which I share, that the ultimate consequences to society of Deputy Johns' conduct were likely to be greater than the ultimate consequences of Deputy Gunn's conduct. Yet the matter does not end there. The County, similarly, is entitled to have taken into consideration the evidence that Deputy Gunn had engaged in a repeated pattern of evasion of the law. Arbitrator McLaughlin's discussion of the other case reveals no such perception on anyone's part of a repeated offense.

I note that neither party has cited any other case in the department's history as evidence of reasonableness or unreasonableness of this discipline. There is therefore nothing for me to draw on other than the Johns case. Yet I cannot find that there is a clear relationship between that case and this one as to appropriateness of the penalty, without making a determination that the potential for physical harm present in the Johns case outweighed the evidence of repeated and deliberate violation of laws and rules present in this one. Such weighing and comparison is precisely what management is supposed to do under a collective bargaining agreement providing for management to engage in its customary functions. And there is nothing in this record to demonstrate that management acted unreasonably in weighing evidence of repeated, deliberate flouting of parking rules relatively heavily against the grievant, compared to a single rash and irresponsible action by another officer. Without evidence to show that management has previously treated a repeated offense more leniently than it did here, I cannot enter into the kind of comparison the Union would have me make without supplanting management's decision making with my own, a privilege not extended to an arbitrator under this Agreement. The discipline is accordingly sustained at the five day level.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. That the five day disciplinary layoff assessed against Deputy Steven Gunn was not excessive.

2. That the grievance is denied.

Dated at Madison, Wisconsin this 5th day of June, 1997.

By Christopher Honeymen /s/
Christopher Honeyman, Arbitrator