

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**MILWAUKEE DEPUTY
SHERIFFS' ASSOCIATION**

and

**MILWAUKEE COUNTY
(SHERIFF'S DEPARTMENT)**

Case 448
No. 56141
MA-10189

Appearances:

Gimbel, Reilly, Guerin & Brown, Attorneys at Law, by **Mr. Franklyn M. Gimbel** and **Ms. Kathryn A. Keppel** (on the briefs), on behalf of the Milwaukee Deputy Sheriffs' Association.

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

ARBITRATION AWARD

Milwaukee Deputy Sheriffs' Association, hereinafter the Association, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Association and Milwaukee 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 June 23, 1998, in Milwaukee, Wisconsin. There was no stenographic transcript made of the hearing and the parties submitted post-hearing briefs in the matter by July 24, 1998. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated to the following statement of the issue:

Was the two (2) day suspension imposed upon the Grievant reasonable, given the conduct alleged?

CONTRACT

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 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 employees; the right to transfer and assign employees, 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.

BACKGROUND

The parties stipulated to the following facts: At the time of the incident in question, the Grievant, Sergeant Luis Lopez, had been with the Milwaukee County Sheriff's Department for 17 years and had been a Sergeant in the Department since 1990. The Grievant's assignment at the time of the incident was Administrative Sergeant in the Department's Communications Center as part of the Technical and Auxiliary Services Bureau. The Communications Center is staffed by non-sworn personnel and is supervised by sworn deputies and overseen by the Captain.

In 1997, the Communications Center moved from the basement to the third floor of the same building. On July 18, 1997, the date of the incident in question, the Grievant began work at 7:00 a.m. and worked a double shift, the incident occurring at 9:00 p.m. on that day. The Grievant's conduct in question was his placing a beverage container on communications equipment in the Communications Center and also having two non-sworn subordinate personnel with water bottles at their consoles. After the Communication Center had moved to the third floor, Deputy Inspector Zenz promulgated and had posted a rule stating "All food and beverages are to remain in the kitchen area at all times per Deputy Inspector Zenz." On the date in

question, the Grievant's conduct and that of the two subordinates was observed by then-Lieutenant Moore (now Captain Welch, having married and been promoted). Lt. Moore discussed the matter with the Grievant and told him to write up a report in that regard, which the Grievant then did, as well as correct his conduct and that of the subordinates. The Grievant's report read as follows:

DATE: July 18th, 1997
TO: Lieutenant Esther L Moore
FROM: Sergeant Luis Lopez
SUBJECT: Violation of Work Rule
No Drinking in Comm Center

On this date @ approximately 9:00 pm, I was in violation of the work rule prohibiting the drinking of any kind in the Communication Center. I had been drinking a soda in the lunch room and then proceeded to my work station setting the soda down at the console.

2 other individuals were also in violation as I was informed by Lt. Esther Moore. I found 2 water bottles at the consoles. I do not know or noticed (sic) if they had brought the water out before or after I had walked in with my soda.

I was more concerned with completing some performance evaluations and simply was not paying attention nor thinking about the mistake I had made in bringing my soda out into the Comm Center.

My inappropriate behavior may have been reason for the others violating the rule and I take responsibility for it. I do extend my apologies and assure you that I will not falter in this area again.

Respectfully submitted,

Sergeant Luis Lopez

The Grievant did not deny violating the rule against having beverages in the Communications Center nor that he had failed to note the conduct of the two subordinates in having water bottles at their consoles. The original rule by Inspector Zenz was posted upon the

move to the third floor on June 25, 1997. The rule was revised in April of 1998 so as to allow personnel in the Communications Center to have water or beverages in a spill-proof container at their work station during their tour of duty.

Lieutenant Moore's original recommendation was for an employee documentation (written reprimand), however, Moore's supervisor, Deputy Inspector/Bureau Director Zenz, revised that recommendation and recommended a five-day suspension to the Sheriff. The Sheriff decided to impose a two-day suspension. The Grievant has had two prior two-day suspensions, one in 1985 and one in 1988. The Grievant had also been given a written reprimand earlier in the day on July 18, 1997 for a different rule violation.

In addition, the record discloses that Lieutenant Moore requested that the Department's Office of Professional Standards open an investigative file on the incident involving the Grievant for violation of a Bureau directive. Captain Mascari of that office testified that the Office mainly opens the file and routes it, and that it is standard operating procedure to request that the Bureau investigate the alleged violation. In this case, the matter was investigated by Lieutenant Moore, who then submitted her report to Deputy Inspector Zenz, who then made the recommendation to the Sheriff.

The Grievant grieved the imposition of a two-day suspension, which ultimately was served on April 1 and 2, 1998. The Grievant was issued the following:

ATTACHMENT TO
THE COUNTY OF MILWAUKEE
NOTICE OF SUSPENSION

JOSE L. LOPEZ

On July 18, 1997, Deputy Sheriff-Sergeant Jose Luiz Lopez violated Milwaukee County Sheriff's Department Rules and Regulations and Milwaukee County Civil Service Rules by disregarding an official work rule pertaining to the consumption of beverages in restricted work areas in the Communications Division. Based on the above, Jose Luis Lopez had been found to be in violation of

MILWAUKEE COUNTY SHERIFF'S DEPARTMENT
RULES AND REGULATIONS:

1.05.03	RULE 3	VIOLATION OF POLICY
1.05.10	RULE 10	OBEDIENCE TO ORDERS
1.05.11	RULE 11	INSUBORDINATION
1.05.75	RULE 75	NEGLECT OF DUTY

MILWAUKEE COUNTY CIVIL SERVICE RULE VII (4) (1)

(k) Refusing or failing to obey orders of a supervisor whether written or oral.

(l) Refusing or failing to comply with departmental work rules, policies or procedures.

The parties were unable to resolve their dispute and proceeded to arbitration before the undersigned.

POSITIONS OF THE PARTIES

County

The County asserts that in imposing the discipline in question, the Sheriff had available to him, and considered, the complete record of the instant offense as well as the disciplinary record of the Grievant. With regard to the offense in question, the Grievant immediately confessed his error when confronted by then-Lieutenant Moore. Further, Sergeants are expected to enforce and abide by the rules. They must conform their own behavior to the rules as well as seeing to it that their subordinates comply. The Grievant failed in that last regard as well, in that two subordinates followed his example of having beverage containers where they were forbidden. Thus, neither the Grievant abided by the rule, nor saw to it that his subordinates complied with the rule. While the Grievant questions the reasonableness of the suspension, it is clear, and he has acknowledged, that he broke the rules. The context of the matter is that this was a new facility, with new fixtures and furnishings and computer hardware. In order to preserve its investment, the Bureau set aside an area for the staff to refresh and forbade food and refreshments in the dispatch area. The Sergeants were personally briefed on the policy by Lieutenant Moore.

The Sheriff also considered the disciplinary history of the Grievant. He has twice been the subject of official reprimands for minor infractions of departmental work rules, and had twice been the subject of disciplinary suspensions. Further, the Grievant was given a new reprimand for a separate rules infraction on the same day the suspension was imposed. Thus, it must be said that the two days was not just progressive, but lenient.

The County asserts that some deference is owed to the Sheriff as the administrator who is required to make the decision. He must maintain discipline in the workplace, and Sergeants, such as the Grievant, are to assist him in that effort. In this case, not only did the Grievant violate the work rules, but he allowed subordinates to follow his bad example. The Arbitrator should not substitute his judgment for that of the Sheriff unless it is found that the penalty is excessive, unreasonable, or that the Sheriff abused his discretion. Just cause is not the issue, as it is not

disputed that there was cause for imposing discipline. While the Union attempts to denigrate the gravity of the offense, it is a case of misconduct where the employee has been disciplined on numerous occasions for similar conduct. The Grievant is a Sergeant, who holds a promoted position responsible for giving direction and achieving conduct that conforms to departmental standards. Thus, the Sheriff and the County can reasonably expect more from the incumbent in such a position. Given that perspective, perhaps the Sheriff was overly lenient.

Association

The Association first notes the rule violations listed on the attachment to the notice of suspension and points out that the actual offense is that he had a beverage at his desk in the Communications Center contrary to a posted policy that all beverages were to remain in the kitchen. It is for that breach of the rules that the Grievant was suspended for two days without pay. While the Grievant acknowledges his conduct violated existing policy at the time in question, it is noted that the policy was changed on April 13, 1998 to allow employees in the Communications Center to have water or other beverages at their work stations in spill-proof containers.

At the time in question, the Grievant was working a double shift. He admitted he violated the rule and that he did not admonish other people for similar violations and did not excuse his behavior. He explained that it had been a busy night and that he was exhausted and felt a caffeinated drink would keep him going. His actions were an oversight, and not a conscious decision to violate the policy. While the Grievant does not question that he merits discipline for the violation, a two-day suspension is excessive for what is a very minor and unintended violation. The fact that the Department could slot the conduct into a variety of rules does not change the nature of the underlying offense of drinking a soda at his desk.

The Association questions why such a minor offense was brought to the attention of the Office of Professional Standards. Captain Mascari testified that his Office's investigations usually involve third-party complaints and that while some intra-departmental complaints are investigated, in this case such conduct would normally be handled internally by the Bureau, rather than by his Office. The Association also notes that Lieutenant Moore had recommended that the Grievant's conduct be treated as "employee documentation". The Association posits that the Grievant had possibly made an enemy somewhere earlier in his career and that it was now "payback time", or that the Grievant is being singled out because he is a supervisor and therefore held to a higher standard. Regardless, it is clear that the minor circumstances involved do not warrant a two-day suspension without pay. The punishment imposed greatly outweighs the crime. The Grievant's violation was an oversight during a hectic and exhausting shift. Further, the retraction and modification of the policy that he violated further mitigates his offense.

In its reply brief, the Association notes that the County fails to mention that the Grievant was working a double shift on the day in question, or that he testified that his action was an oversight. The Grievant did not cavalierly abuse the rule, he simply needed some caffeine to get him through the rest of his shift. Further, it must be recalled that the rule had been in effect for only a short while, and that prior to that, there was no prohibition against having coffee or soda at his desk during the Grievant's 18 years as a Deputy. More striking is the County's failure to acknowledge that the rule the Grievant violated was later rescinded in part, to permit employees to consume beverages outside the kitchen area, provided they are in a spill-proof container.

The County's argument that suspension is appropriate in this case as progressive discipline because of the Grievant's past reprimands and suspensions is disingenuous, considering the two suspensions occurred years ago. While the Grievant has been "written up" over the years, the great majority of those have not been sustained. The Association posits that the Grievant is not popular with higher management. The Association also takes issue with the County's assertion that the Arbitrator should defer to the Sheriff because he is responsible to the electorate. The Association posits that while the public is concerned with police who do not follow the rules, they would prefer that the Sheriff and the Office of Professional Standards focus on investigating employees who pose a danger to the public, rather than on those who violate a now-rescinded anti-beverage rule. The County's assertion that possibly the suspension ought to be increased is simply an attempt to convince the Arbitrator that the suspension imposed is reasonable and should be ignored. The Association requests that the two-day suspension be found to be excessive and employee documentation deemed appropriate.

DISCUSSION

In deciding whether the discipline imposed was reasonable, it must be determined whether that discipline was reasonably related to the employer's interest in discouraging or preventing the conduct in question. In this case, there is no dispute, and the Grievant has acknowledged, that he in fact violated the rule of having beverages in the Communications Center outside of the break room. As a Sergeant, the Grievant is required to be aware of the rules, to obey the rules, and to see to it that his subordinates are in compliance to the rules. The Grievant acknowledged that he was aware of the rule, that he had violated the rule himself, and that two of his subordinates were also in violation of the rule at the same time.

The Grievant's un rebutted testimony is that he inadvertently broke the rule by bringing the soda with him out of the break room, and did not intentionally ignore the rule. He also testified that until Lieutenant Moore brought it to his attention, he had not noticed that two of his subordinates had water bottles at their consoles. For this reason, the charge of insubordination

cannot be supported, since the Grievant's conduct was unintentional and an oversight, and not a purposeful and intentional refusal to comply with the rule or to have his subordinates comply. Further, he admitted his error and immediately corrected the conduct of his subordinates.

The seriousness of the conduct alleged must also be considered in determining whether the discipline imposed was reasonable. The Department certainly has the right to create and enforce such a rule in order to protect its equipment. At the same time, however, violating such a rule does not rise to the same level as dishonesty or actions that would endanger the public or fellow officers or fellow employees. While the later revision of the rule does not excuse the Grievant's conduct at the time in question, it impacts on the degree of seriousness with which the misconduct may be viewed.

The County has also noted the Grievant's prior disciplinary record. While there was mention of written reprimands received over his time in the Department, there is nothing in the record for the Arbitrator to consider in that regard and the Arbitrator has no way of knowing the basis for these written reprimands. That includes the written reprimand the Grievant received the same day he received the suspension. As for the Grievant's prior suspensions, the record indicates that the last suspension the Grievant received was in 1988, almost 10 years prior to this incident. Lastly, it is noted that the Grievant's immediate supervisor, then-Lieutenant Moore, recommended "employee documentation", i.e. a written reprimand. There is no explanation in the record as to why Deputy Inspector Zenz chose to recommend a five-day suspension instead, or why the Sheriff decided on a two-day unpaid suspension. As the Association notes, while the notice of suspension lists multiple violations, in actuality the misconduct in question was the Grievant's violation of the Bureau directive not to have beverages in the Communications Center outside of the break room and his inadvertent failure to enforce the rule as to two of his subordinates.

While the County correctly notes that the Arbitrator should not substitute his judgment for that of the Sheriff, unless it is found that the discipline imposed was unreasonable, that is the case in this instance. Given the inadvertent nature of the offense, the Grievant's immediate acknowledgement that he was in violation of the rule and his immediate steps to correct the conduct of his subordinates without any attempt to excuse or deny his conduct, the relatively minor nature of the offense, the lack of information regarding the Grievant's disciplinary history, other than a reference to previous written reprimands and the suspensions from the 1980's, and the relatively minor seriousness with which the conduct was viewed by the Grievant's immediate supervisor, it is concluded that the record does not establish an adequate basis for finding a two-day suspension to be reasonable in this case. Given further that there is no dispute that the Grievant did violate the rule and failed to ensure that his subordinates obeyed the rule, some degree of discipline is warranted. It is concluded that the initial recommendation of employee documentation is the appropriate level of discipline in this instance. Therefore, it is ordered that the suspension be rescinded and an employee documentation, i.e. a written reprimand, be imposed

in its place, that the Grievant's disciplinary record be amended in that regard, and that he be made whole for the two days' loss of pay and whatever other benefits the Grievant lost as a result of the two-day unpaid suspension.

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

AWARD

The grievance is sustained. The Sheriff is directed to immediately rescind the two-day unpaid suspension imposed on Sergeant Luis Lopez and to impose an employee documentation, i.e. written reprimand, in its place. Therefore, the County is to immediately make the Grievant whole for any pay and benefits he lost as a result of the two-day suspension, and to amend the Grievant's personnel record to reflect the reduction of the discipline to an employee documentation (written reprimand).

Dated at Madison, Wisconsin, this 17th day of December, 1998.

David E. Shaw /s/

David E. Shaw, Arbitrator

