BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION

and

MILWAUKEE COUNTY (SHERIFF'S DEPARTMENT)

Case 458
No. 56432
MA-10283

Appearances:

Gimbel, Reilly, Guerin & Brown, by **Attorney Franklyn M. Gimbel** and **Aaron M. Hurvitz**, 2400 Milwaukee Center, 111 East Kilbourn Avenue, Milwaukee, Wisconsin 53202, appearing on behalf of the Association.

Mr. Timothy R. Schoewe, Deputy Corporation Counsel, Milwaukee County, Milwaukee County Courthouse, Room 303, 901 North Ninth Street, Milwaukee, Wisconsin 53233, appearing on behalf of the County.

ARBITRATION AWARD

Pursuant to a request by Milwaukee Deputy Sheriffs' Association, herein "Association," and the subsequent concurrence by Milwaukee County, herein "County," the undersigned was appointed arbitrator by the Wisconsin Employment Relations Commission on July 17, 1998, pursuant to the procedure contained in the grievance-arbitration provisions of the parties' collective bargaining agreement, to hear and decide a dispute as specified below. A hearing was conducted by the undersigned on October 5, 1998, at Milwaukee, Wisconsin. The hearing was not transcribed. The parties completed their briefing schedule on December 1, 1998.

After considering the entire record, I issue the following decision and Award.

ISSUES

The parties stipulated to the following:

1. Was the policy reasonably applied to the grievant pursuant to Section 1.02 (Management Rights) of the collective bargaining agreement as it relates to the imposition of discipline?

In addition, the Association proposed the following issue:

2. Did the Sheriff violate the collective bargaining agreement when he created the Sick Leave/Absenteeism directive?

FACTUAL BACKGROUND

General Background

By letter dated January 29, 1997, the County notified the Association of the Sheriff's intent to create rules governing the conduct of members of the County Sheriff's Department. Issues to be covered included: "Sick leave/absenteeism policy." Meetings were held with the Association on February 4, 1997, and thereafter. On April 21, 1997, the County notified the Association that the proposed work rule relating to Sick Leave and Absenteeism would be implemented beginning May 4.

From May 4, 1997, until the instant grievance was initiated on February 13, 1998, the Association did not challenge said work rule.

On December 1, 1997, the Association and the County entered into a Collateral Agreement. Paragraph #2 of that pact stated in pertinent part:

> The attached work rules are hereby agreed to by the Association and it agrees that the Sheriff was within his authority to issue them and the Union will not challenge their validity. However, their application to individual situations would remain open to challenge should it arise.

The work rule on Sick Leave/Absenteeism set forth in the COLLATERAL AGREEMENT section of this Award was one of said rules referenced by paragraph #2 above.

Facts Giving Rise to the Instant Dispute

Between May 6, 1997, and November 12, 1997, the grievant Deputy Gregory Kupczyk missed assigned duty on seven separate occasions because of illness. To take this time off, the grievant used accumulated sick leave hours. On several occasions, the grievant provided doctor's slips although not required to do so by the parties' collective bargaining agreement.

The grievant was ill on the dates noted above with bronchitis for which he was taking antibiotics and using an inhaler. The grievant also had some stomach problems as a result of the medicines he was taking.

On December 17, 1997, the grievant received a reprimand for violating the Sheriff's Department Sick Leave/Absenteeism policy. In particular, the grievant was disciplined for "Unexcused, unauthorized or excessive absence."

The grievant was aware of the aforesaid policy and its requirements. Also, he was given employe documentation prior to the instant reprimand.

On February 13, 1998, Deputy Kupczyk filed a written grievance over the matter requesting for relief that the written reprimand be removed from his personnel file.

PERTINENT CONTRACTUAL PROVISIONS

PART 1

. . .

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.

. . .

3.16 SICK LEAVE

(1) Employes shall earn a leave of absence with pay on account of illness or other special causes at the following rates, subject to the provisions of s. 17.18, C.G.O., and based upon years of continuous service:

(a) Less than 5 years -- 4.6 hours per pay period;
(b) After 5 years – 3.7 hours per pay period;
(c) All employes hired on or after January 4, 1970 – 3.7 hours per pay period.

(2) In addition to other causes set forth in s. 17.18(4), C.G.O., sick leave may be taken for the purpose of enabling employes to receive non-emergency medical attention during duty hours. Such leave may be allowed for scheduled appointments for any type of medical or dental care.

. . .

PERTINENT COLLATERAL AGREEMENT PROVISIONS

The following shall constitute a collateral agreement pursuant to Section 4.05 of the 1997 Agreement between Milwaukee County and the Milwaukee Deputy Sheriffs' Association.

The parties agree to the following language:

. . .

2. The attached work rules are hereby agreed to by the Association and it agrees that the Sheriff was within his authority to issue them and the Union will not challenge their validity. However, their application to individual factual situations would remain open to challenge should it arise.

. . .

DIRECTIVE NO. 24-97

November 21, 1997

NOTE: Directive No. 24-97 replaces Directive No. 9-97 due to a change in the call-in procedure.

RE: 108.00 SICK LEAVE/ABSENTEEISM

TO BE DISTRIBUTED AND POSTED

Effective immediately for sworn and civilian personnel.

108.00 SICK LEAVE/ABSENTEEISM

108.01 PURPOSE
Absenteeism and tardiness by a relatively few employees can cause staffing problems. Absenteeism causes employees to be "held over" to work forced overtime after working their assigned shifts.

Some employees may not understand the basic reasons for a paid absence plan and the cost of absenteeism in general. A paid absence plan is meant to insure that employees' pay will continue when they are ill. The plan is not intended to be an additional off duty fringe benefit.

All employees who are absent will be interviewed by their immediate supervisor. This will allow the administration to:

1. Maintain written records of all absences and the reason given for the absences.
2. Identify the chronic absentee or potential abuser.

3. Identify the immediate causes of the absence and any possible underlying causes.
4. Assist the absentee to correct the basic and immediate causes.

108.02 POLICY
The following actions will be taken with any employee who is absent within a one year time frame (year is defined as a twelve month period):

1st through 3rd Absence: Supervisor interview;
4th Absence: Noted on Employee Activity Documentation Record;
5th and Subsequent Absence: Refer documentation to Office of Professional Standards for appropriate disposition. Based on the disposition appropriate disciplinary action, if necessary, will be decided by the Sheriff and may require a doctor's excuse and increment denial.

Only the Sheriff or his/her designee is empowered to deviate from the above procedures because of unusual circumstances.

Time approved under the Family and Medical Leave Law or any excused absence will not be considered for disciplinary purposes nor will time off be taken into account for job evaluation purposes or salary increment decisions.

If you have a problem that is causing you to be absent, please contact the Employee Assistance Program (327-5197). The program is designed to assist employees in solving problems. All interviews are confidential.

. . .

PARTIES' POSITIONS

Association's Position

The Association basically argues that the Sheriff Department's Sick Leave/Absenteeism policy is invalid because it conflicts with rights guaranteed under the collective bargaining agreement. In support thereof, the Association maintains that said policy as applied to the grievant conflicts with Section 3.16 of the agreement which permits the grievant's use of sick leave without penalty. The Association also maintains that the aforesaid policy violates the Municipal Employment Relations Act by changing a term of the parties' agreement without the Association's agreement. Finally, the Association maintains that it did not agree to the aforesaid policy in the December 1, 1997 Collateral Agreement as alleged by the County except "*as long as they did not conflict with the terms and conditions of employment under the CBA.*" (Emphasis in original)

The Association maintains, contrary to the County, that it filed the grievance challenging the aforesaid policy in a timely manner because it is proper "to challenge the rule's validity . . . when the Sheriff *applied* the rule, not when he *promulgated* the rule." (Emphasis in original) The Association points out that the grievant filed his grievance in a timely manner so that "the validity of the sick leave policy is properly an issue for the Arbitrator to decide."

For a remedy, the Association asks that the Arbitrator find that the County did not have the right to impose an unratified sick leave policy that conflicted with rights guaranteed under the agreement and that the Arbitrator order the Sheriff to remove the grievant's reprimand from his record and return his suspended day with pay.

County's Position

The County initially argues that the Association's second proposed issue is not arbitrable because of the parties' Collateral Agreement which clearly specifies that the Association agreed to the policy at bar and which makes it unnecessary for the Arbitrator to resort to extrinsic means to ascertain the precise meaning of said Agreement's simple and clear text. The County adds that if parol evidence is necessary the Arbitrator need only look to bargaining history to support its position that the Association agreed to the Sick Leave/ Absenteeism policy as part of its agreement to the Collateral Agreement in December, 1997.

The County also argues that the bringing of the second issue is time barred under the terms of the labor agreement.

Regarding the merits of the grievance, the County maintains that the grievant received notice that he could be disciplined for excessive absence, that his absences did not fall within any of the rule's exceptions, that his absences fell generally immediately before or after his regularly scheduled off days, that the grievant's past use of sick demonstrated a necessity for an attendance control program for the grievant, and that based on the grievant's seven occasions of sick leave use the County was warranted in applying the aforesaid policy to the grievant and in disciplining him.

In support of the above, the County argues that the grievant has conceded that he violated the work rule and that "Once the violation occurred, the mutually agreed upon sanction follows." The County claims that the reprimand itself is not onerous since prior to this the grievant had been counseled and the next step in the process is a more formal effort by the Sheriff to rectify conduct – the written reprimand. The County concludes that absent a policy to the contrary the action taken could have been more severe, such as a disciplinary suspension without pay.

The County also argues that the true issue which the Association "might legitimately attack is the reasonableness of the Sheriff's sanction" but that no such argument was made and "no evidence was placed in the record to support such a contention."

Finally, the County argues that since the Association specifically agreed to the validity and vitality of the Sheriff's Sick Leave/Absenteeism policy it cannot now complain of its application when the facts are not in dispute.

Based on the foregoing, the County requests that the grievance be denied and the matter be dismissed. In addition, the County requests that the aforesaid policy be declared "effective" and the application of the disputed sanction (reprimand) by the Sheriff be determined "reasonable" under the facts and the rule.

DISCUSSION

Reasonableness of the Discipline Imposed

Regarding the first issue before the Arbitrator, the County points out that the grievant admitted that he was absent on the seven (7) occasions during the time in question. The County notes that none of the absences fall within the rule's exceptions. The County adds that the grievant was counseled about the rule; received employe documentation regarding same and that the procedures in the policy were rigidly adhered to. Based on the foregoing, the County maintains that the grievant had excessive, unexcused absences within the meaning of the Sheriff's Department Sick Leave/Absenteeism policy and that his conduct warranted the discipline imposed.

However, the record supports a finding that the grievant was ill on the dates in question and unable to perform his work duties. Consequently, he was contractually entitled to use sick leave on said dates pursuant to Section 3.16 of the parties' collective agreement. The grievant has no prior discipline for sick leave/absenteeism or for any other matter regarding his employment with the County.

The County argues that the grievant's absences, except the first one, immediately precede or follow Deputy Kupcyzk's regularly scheduled off days. However, the County offered no persuasive evidence of same at hearing.

In addition, the County did not offer any evidence that the grievant's absence on the dates in question had any negative impact on the County's ability to efficiently operate the Sheriff's Department.

There is no fixed or generally accepted rule as to when the "excessive" absence point is reached—the particular facts and circumstances of the given case often will be considered along with the number of absences, the amount of time involved, and the prospects as to future absences. ELKOURI AND ELKOURI, HOW ARBITRATION WORKS, FIFTH EDITION, PAGE 797 (1997). Moreover, an arbitrator may require considerable tolerance on the part of management where the equities in favor of the employe are strong. ELKOURI AND ELKOURI, HOW ARBITRATION WORKS, FIFTH EDITION, PAGE 797 (1997).

Here, where the grievant used sick leave on only seven separate occasions over a seven month period of time, where the sick leave was for one or two days at a time (unrebutted testimony of the grievant), where the grievant used sick leave appropriately to take care of his bronchitis problem, where his absence had no adverse impact on the County's operations, and where there is no evidence that the grievant's bronchitis is an ongoing illness that will require excessive absence in the future, the Arbitrator finds that the grievant's absences were not excessive.

The County argues contrary to the above that as a twenty-four year veteran the grievant has expended over 1,600 hours of sick leave, the equivalent of an entire work year of sick time. The County maintains that this demonstrates the necessity for an attendance control program for the grievant.

However, the County offered no persuasive evidence in support of this contention. There is no evidence in the record as to the grievant's use of sick time compared to other unit employes; for example, whether he used more or less sick leave than other employes during the period of time relied upon by the County. As noted above, the grievant has never been disciplined for sick leave/absenteeism. The County has not proven that the grievant needs an attendance control program.

The County also argues that the grievant has conceded he violated the work rule and once that occurs "the mutually agreed upon sanction follows." However, there is no mutually agreed upon sanction. The Collateral Agreement simply states that for the 5th and subsequent absence the matter will be referred to the Office of Professional Standards "for appropriate disposition: and based on the disposition "appropriate disciplinary action, *if necessary,* will be decided by the Sheriff. . . ." (Emphasis added) Therefore, the Arbitrator rejects this argument of the County.

The County next argues that the discipline imposed is not "onerous" since it followed informal counseling and was the logical next step in the process by the Sheriff to rectify the conduct in question. The County adds that absent the disputed policy the Sheriff could have imposed a more severe form of discipline such as a disciplinary suspension without pay.

Assuming arguendo that the basic premise noted above is correct, the issue before the Arbitrator, by stipulation and conceded in the County's brief, is still whether the Sheriff acted reasonably under the facts and the rule when he imposed a written reprimand on the grievant. For all the reasons discussed above and below, the Arbitrator finds that he did not.

It is true, as pointed out by the County, that the Association did not address this issue in its brief. However, contrary to the County's assertion, the Association did argue the matter at hearing and did present evidence to support a finding that the Sheriff did not act reasonably when he imposed the aforesaid discipline on the grievant.

Finally, the County argues that since the Association agreed to the Sheriff's Sick Leave/Absenteeism policy it cannot now complain of its application when the facts are not in dispute. However, the parties' Collateral Agreement specifically provides that the application of the Sheriff's rules "to individual factual situations would remain open to challenge should it arise." Nowhere in said Agreement does it say that the Association cannot challenge the application of the policy when the facts which are the basis for the disciplinary action are not in dispute. Therefore, the Arbitrator likewise rejects this argument of the County.

The aforesaid Sick Leave/Absenteeism policy provides that for the fifth and subsequent absence within a twelve-month period the matter will be referred to the Sheriff for possible discipline. The parties' Collateral Agreement noted above provides that the application of said policy herein may be challenged. The parties have stipulated that the issue before the Arbitrator is whether or not said policy was reasonably applied to the grievant pursuant to the Management Rights (Section 1.02) clause of the collective bargaining agreement as it relates to the imposition of discipline on the grievant. Based on the above, and all of the foregoing, and the record as a whole, the Arbitrator finds that the answer to said issue as framed by the parties is NO, the policy was not reasonably applied to the grievant pursuant to the aforesaid contractual provision because the reason for said discipline - excessive, unexcused absenteeism – is not supported by the record.

Sick Leave/Absenteeism Policy

The County objects to consideration of the second issue proposed by the Association. For the reasons discussed below, the Arbitrator agrees.

The Association argues that the Sheriff violated the agreement when he created the Sick Leave/Absenteeism policy. However, said policy was implemented May 4, 1997. The Association did not challenge the policy until February 13, 1998. Section 5.01, Subsection (9) provides:

> (9) No grievance shall be initiated after the expiration of (60) calendar days from the date of the grievable event, or the date on which the employe becomes aware, or should have become aware, that a grievable event occurred, whichever is later.

It is undisputed that the Association was notified of the implementation of the policy. In addition, the Association was provided a copy of said policy at the time it was implemented. (County Exhibit No. 4) Based on same, the aforesaid contract provision, and all of the foregoing, the Arbitrator finds that the Association did not file a timely objection to the Sick Leave/Absenteeism policy. Therefore, the Arbitrator is unable to address the second issue raised by the Association.

The Association argues, however, that the proper time to challenge the rule's validity began when the Sheriff applied said rule to the grievant. The Association notes that the Sheriff used the sick leave policy to discipline the grievant on December 17, 1997. The Association claims that this is the proper date to begin the "60 day limit" referred to in Section 5.01, Subsection (9) above because that is the date upon which the grievant became aware of the "grievable event."

The record, however, does not support such a finding. In this regard, the Arbitrator notes that the Collateral Agreement expressly provides that the Association agreed to the aforesaid rule retaining only the right to challenge the rule's "application to individual factual situations."

Based on the above, and the entire record, the Arbitrator finds that the second issue as raised by the Association is not arbitrable. Having reached this conclusion, the Arbitrator is unable to address the other arguments raised by the Association in support of its position that the Sheriff violated the agreement when he created the aforesaid policy.

Remedy

For a remedy, the Association requests that the Arbitrator order that the Sheriff remove the grievant's reprimand from his record and return his suspended day without pay. However, the instant grievance states as the cause of Deputy Kupczyk's grievance the written reprimand that he received on December 17, 1997. It requests as relief that the written reprimand be removed from the grievant's personnel file. Based on the foregoing, the Arbitrator has no jurisdiction over the one-day suspension. However, based on the answer to the first stipulated issue, the Arbitrator finds that it would be appropriate to order the County and the Sheriff to remove the written reprimand dated December 17, 1997, from the grievant's personnel file.

Based on all of the above, it is my

AWARD

1. That the grievance of Deputy Kupczyk is hereby sustained.

2. That the County/Sheriff shall immediately remove the written reprimand dated December 17, 1997, from the grievant's personnel file.

Dated at Madison, Wisconsin, this 4th of January, 1999.

Dennis P. McGilligan /s/
Dennis P. McGilligan, Arbitrator

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