BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

GENERAL TEAMSTERS UNION LOCAL 662

and

TAYLOR COUNTY (SHERIFF'S DEPARTMENT)

Case 88
No. 59145
MA-11196

(Jay S. Thums Grievance)

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Ms. Andrea F. Hoeschen**, on behalf of the Union.

Ruder, Ware & Michler, S.C., by **Mr. Jeffrey T. Jones**, on behalf of the County.

ARBITRATION AWARD

The above-captioned parties, herein "Union" and "County", are signatories to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, and after a prolonged dispute between the parties over whether this was the proper forum to address the grievance, hearing was held in Medford, Wisconsin, on November 17, 2000. The hearing was transcribed and the parties there agreed that I should retain jurisdiction to resolve any questions arising over application of the remedy if the grievance is sustained. The parties thereafter filed briefs and reply briefs that were received by February 27, 2001.

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

ISSUE

Since the parties were unable to jointly agree on the issue, I have framed it as follows: Did the County properly terminate grievant Jay S. Thums pursuant to Article 6, Section 1, of the contract and, if not, what is the proper remedy?

BACKGROUND

Deputy Sheriff Thums was employed as a patrol officer from the time of his June 1, 1995, hire to the time of his October 21, 1997 discharge (unless otherwise stated, all dates herein refer to 1997). During that time, he was never disciplined and he had an unblemished work record. Thums was discharged because of what he did on September 24 when he witnessed Doctor Keith Cole kissing his wife and because of his subsequent actions in reporting the incident to then-Sheriff William K. Breneman, who conducted a full-scale investigation and who subsequently recommended that Thums be discharged.

Breneman spoke to Thums on the afternoon of September 25. He said that Thums then told him he had seen his wife, Cindy Thums, kiss Cole at Cole's house the evening before when he was off-duty; that he then became enraged and grabbed a two-by-four to hit Cole and that he tried to lure Cole out of the house by making his dogs bark; and that he did not do so because Cole never came out of the house and because Thums had a change of heart. Breneman on September 25 then went out to Cole's house where he saw a pickup truck with three flat tires and he subsequently read various reports prepared by other officers who spoke to Thums, along with a report by then-County District Attorney Shawn Matter. Breneman conducted a disciplinary hearing on October 2 where he first read Thums' GARRITY rights and he by letter dated October 6 informed the County's Personnel Committee that he wanted Thums terminated. He on October 6 also personally filed a criminal complaint (County Exhibit 7), against Thums and had him arrested. The Personnel Committee on October 21 conducted a disciplinary hearing where Thums and others appeared and where Thums, according to Breneman, did not deny any of the charges against him. The Personnel Committee voted to terminate Thums effective that day.

Breneman referred the matter to a district attorney who prosecuted Thums. Thums later entered into a plea agreement wherein he pleaded guilty to criminal damage to property by puncturing the three tires on Cole's vehicle (County Exhibits 8-9) and which resulted in a deferred judgment (County Exhibit 8). Under that plea agreement, Thums was ordered to: (1), not have any contact with Cole and to have no violent contact with his wife; (2), perform 100 hours of community service; (3), attend anger management counseling; (4), pay for the damaged tires; and (5), to pay $150 for each violation of County ordinances if he had an unblemished record for two years. Asked if Thums had complied with these terms, Breneman

replied: "I do not know". He also said that a local newspaper ran a story on the incident; that different "members of the public. . ." complained about the incident; and that the incident had an adverse impact on how the public and other sheriff departments viewed members of the County's Sheriff's Department.

On cross-examination, Breneman acknowledged that he was the complaining party on the criminal complaint because neither Cole nor Thums' wife wanted to press charges against him. He also acknowledged that two of the criminal charges filed against Thums were dismissed; that the City of Medford Police Department investigated the incident and that it only issued a civil, not criminal, citation against Thums; that he personally got the City of Medford to withdraw that citation so that he could file a criminal complaint; that he was unsure whether Thums told him about the slashed tires after he went out and saw them; and that neither Cole nor Ms. Thums ever provided any written statements regarding the incident. He also said that he could not recall whether he had ever previously filed a criminal complaint after the City police chief had decided to charge an ordinance violation.

Officer Harlan Schwartz testified that Thums spoke to him on September 25 about the September 24 incident and that he prepared a report (County Exhibit 12), which stated that Thums told him he tried to lure Cole out of his house so that he could hit him with a two-by-four. He also said that Thums on September 25 told him he wanted Cole dead and that if he saw Cole with his wife he would not know what he might do. Schwartz later visited Cole's house where he found a long two-by-four behind the house.

When asked on cross-examination whether Thums on September 25 was forthcoming in describing his feelings over what had happened, Schwartz replied: "Very much so."

Investigator Larry Woebbeking spoke to Thums and others on September 26 and he prepared an incident report (County Exhibit 13). He testified that Thums on September 26 told him he wanted to kill Cole; that he had tried to lure Cole out of his house to knock his head off his shoulders; that he had slashed the tires with a knife; that he thought for a moment that a knife would also work well on Cole; and that if he saw Cole and his wife together he would probably lose control. On cross-examination, he testified that he spoke to Thums as a colleague and not as part of any formal questioning.

Deputy Sheriff Roger Engel testified that he prepared an incident report (County Exhibit 14), after he spoke to Thums on September 25, at which time Thums told him he had tried to get Cole's dogs to bark so that he could knock his head off with a two-by-four. On cross-examination, he said that he did not question Thums on September 26; that he spoke to him because "he looked like he was tired or sick or something"; and that officers at times confide and tell each other what is going on in their personal lives.

Thums testified that he went to Cole's house after work at about 8:30 p.m. to apologize for suspecting that Cole was seeing his wife who worked as Cole's direct nurse in the same medical clinic. He then saw through a picture window Cole and his wife kissing each other. At that point, said he:

> I – I started to boil. I think I got – everything was hot. Everything was shaking. I was – I didn't know what to do. I was furious. I was very depressed. I was very – I don't know exactly how to explain it. And I just thought I'm going to go – I'm going to go right through that patio door and grab the guy and beat him.

Thums added that he did not know what to do; that he picked up a two-by-four from his truck to hit Cole because he thought Cole would come out of his house to see why his dogs were barking; that he went to the front door to do so; and that he finally walked away. He then used his knife to slash three tires on Cole's vehicle because in his words: "This isn't hurting anybody. They're going to know I'm here." When he was at work the next day, he related to several others what had happened "minus the fact that I – I actually stabbed a knife in Dr. Cole's tires." He then told Breneman "The same story. . ." but again did not mention the slashed tires "Because it was pretty embarrassing, I suppose." Asked whether anyone before then had any idea what transpired at Cole's residence, he replied: "It appeared to me that nobody new [sic] nothing."

Thums admitted telling others that he "would like to see Dr. Cole dead" and said that Breneman later that day told him that "the problem just got worse" because he had discovered the slashed tires – which Thums then admitted to having flattened. He also said that he paid $230 for the City of Medford citation relating to the slashed tires, and that the citation was later dismissed and the fine returned to him because Breneman had filed a criminal complaint against him. In response to that complaint, he entered into a deferred judgment (County Exhibit 8), wherein he agreed to fulfill certain conditions which he subsequently met. He thus was only charged with one crime and all of the charges were eventually dismissed by the court with prejudice (Union Exhibit 3). He also successfully completed an anger management course.

On cross-examination, Thums said that he did not "intentionally" get Cole's dogs to bark when he was outside the house and that when he appeared before the County's Personnel Committee on October 21, he did not dispute any of the charges against him. He stated that he does not recall ever telling officers Schwartz and Engel he tried to lure Cole out of his house, but that "It could have happened. I said a lot of things." He denied ever telling Investigator Woebbeking – or anyone else – that he tried to get the dogs to bark. He also stated that he grabbed a two-by-four from his truck, and not from Cole's backyard; that he did not know whether he would have hit Cole with it if Cole had come out of his house; and that

Cole later refused his attempt to make restitution for the tires in the amount of $800. He also said Cole telephoned him on September 25 and that they spoke for about an hour.

Gary W. Krueger, an investigator for the City of Medford's Police Department, testified that Thums on September 25 told him what had happened the night before at Cole's house and that he "didn't have any concern about [Thums] being a danger to me or anybody else." Krueger and Thums then went to see Breneman, at which point Thums told him what had happened and Breneman then took Thums to a counselor. Krueger also said that he himself over the years has discussed his own family problems with other officers and that he would have been embarrassed if they ever became public.

On cross-examination, he said that Thums told him he did not know what he would do if he again saw Cole with his wife and that he was not present throughout all the time Thums spoke to Breneman on September 25.

Medford Police Chief Jack Kay said that there was a "joint investigation" between the Medford Police Department and the County's Sheriff's Department regarding the September 24 incident; that the City issued Thums a citation for damaging property – which is not a criminal violation and which is not a Class A misdemeanor; and that the City issued the citation after he spoke to the City Attorney. He also said that he was unaware of any complaint from Cole against Thums and that Breneman himself had said that Cole did not want any action taken against Thums.

On cross-examination, Kay said that slashing tires is a crime under state law; that Cole on September 25 reported that the tires were slashed; that Thums told him on September 25 that he got Cole's dogs to bark to try to get Cole out of the house; and that Thums also told him he did not know what he would do if he again saw Cole with his wife. He added that criminal charges under the state criminal law take precedence over City-issued civil citations.

Ms. Thums testified that she and Thums were reconciled and that she did not hear the dogs barking on the evening of September 24 when she was at Cole's house.

Recalled as a witness by the Union, Breneman testified that the local newspaper on October 15 carried a front-page story about the criminal complaint being filed that day (Union Exhibit 5) and that he personally never spoke to the reporter who wrote the story.

POSITIONS OF THE PARTIES

The Union asserts that the County lacked just cause to terminate Thums because his "off-duty misconduct is limited to cutting Dr. Cole's tires"; because that single incident "does not justify his discharge"; and because Breneman's "criminal charges against Thums do not

convert Thums' conduct into a dischargeable offense." It also asserts that the County's "charge of 'dishonesty' provides no basis for Thums' discharge"; that an arbitrator under the contract has the authority to review the penalty imposed; and that "Just cause is the appropriate standard" to be used here. As a remedy, the Union requests a traditional make-whole order that includes Thums' reinstatement and a backpay award.

The County, in turn, claims that it properly terminated Thums because "arbitral law establishes that an employer may discharge an employee for off duty-misconduct" and that that is the situation here because Thums' actions adversely impacted on the Sheriff Department's reputation and image and because Thums is held to a higher standard of conduct than other employees in other occupations. The County also contends that I should defer to its judgment as to what penalty should be imposed here.

DISCUSSION

This case turns on the application of Article 6, Section 1, of the contract which provides:

> **Section 1**. No employee who has completed his/her probationary period shall be discharged or suspended without one (1) warning notice of the complaint in writing to the employee with a copy to the Union and Union Steward, except no warning notice is required for discharge due to dishonesty, being under the influence of intoxicating beverages while on duty, carrying unauthorized passengers in a County vehicle, recklessness resulting in serious accident while on duty, or other flagrant violations. Warning notice to be effective for **not more than four (4) months from date of notice**. Discharge or suspension shall be in writing with a copy to the Union and the employee affected. (Emphasis in original).

In applying this language here, the record establishes that while there are certain disputed facts in the record, there are yet other facts that are undisputed. Thus, it is undisputed that:

1. Thums saw his wife kissing Cole on September 24.

2. Cole did not press any charges of any kind against Thums and he in fact expressly stated that he did not want anything to happen to him.

3. Ms. Thums did not press any charges of any kind against her husband.

4. Cole telephoned Thums on September 25, at which point they spoke for about one hour in an amicable manner.

5. Thums offered to pay Cole $800 for new tires, but Cole refused to accept it.

6. Medford Police Chief Kay issued a civil citation over the September 24 incident after he had spoken to the City Attorney.

Based on these undisputed facts - particularly the first one - it can be reasonably concluded that neither Cole nor Ms. Thums wanted any publicity over what had transpired on the evening of September 24.

Yet, there was publicity galore because Breneman – contrary to Cole's direct wishes – insisted on going forward so that he could impose the maximum possible penalty against Thums.

Breneman therefore did not tell the truth to Thums on September 25 when he said that "if he were criminally charged to this level, it would be out of my hands, absolutely nothing I could do about it." That statement is demonstrably false because Breneman subsequently did everything within his power to keep the matter in his hands by: (1), insisting that the City of Medford withdraw its civil action; and (2), then personally filing the criminal complaint against Thums. (County Exhibit 7). He did that even though: (1), Cole did not want the matter to go forward; (2), Cole and Thums had resolved the matter themselves; (3), Thums offered to pay for the damaged tires; and (4), Thums never physically hurt anyone on the evening of September 24.

Hence, if Breneman had not personally filed the criminal complaint against Thums on October 6, this matter probably would have sunk to the oblivion it so richly deserved. It did not do so for one reason and one reason only: Breneman decided that he would become the prime mover in engineering Thums' discharge by filing his complaint.

Ditto for the adverse newspaper publicity that Breneman professes to be so concerned about. For without filing his criminal complaint, there would have been less adverse publicity and there would not have been a front-page headline reading: "Deputy suspended after slashing tires in a jealous rage". Hence, Breneman was directly responsible for much of the very negative publicity that he complained about here.

Moreover, Breneman's criminal complaint (County Exhibit 7) was notable for what it did not relate. For while including the ticky-tacky charge that Thums had violated the law by causing Cole's dog to bark, it managed to omit the one crucial fact which goes to the crux of this case and which explains Thums' jealous rage: i.e. that he saw his wife kiss another man. By deleting that crucial fact, Breneman's complaint failed to present a true picture of why Thums did what he did on September 24.

The judge assigned to that criminal case may have paid attention to that most important mitigating factor since he displayed the correct measure of proportionality and justice when he on April 6, 2000, dismissed the criminal charges after Thums had fully complied with the terms of the deferred judgment (County Exhibis 8-9; Union Exhibit 3). Given that dismissal, it is unnecessary for me to decide whether Thums' actions were criminal.

In addition to filing that complaint and thereby generating the very publicity that he now complains about, Breneman did something else: he waited until October 2 before he finally read to Thums his GARRITY rights (County Exhibit 2). They in essence provide that while law enforcement officials are required to fully cooperate with any investigation involving alleged wrongdoing, any such admissions cannot be used against them in a criminal matter.

By October 2, though, Thums had fully incriminated himself by making his various oral admissions. Breneman made sure that those admissions were recorded as incident reports by the officers who spoke to Thums at that time. Moreover, Breneman never told Officer Schwartz to prepare his report until after Schwartz had spoken to Thums. That is why Schwartz never warned Thums that he was conducting a criminal investigation of the incident. Breneman also never told Investigator Woebbeking ahead of time to prepare a report of his conversation with Thums. That is why Woebbeking acknowledged that his discussion with Thums represented a discussion between colleagues and that it did not constitute official police questioning. Engle also said that his conversation with Thums did not constitute official police questioning. Hence, it was only after those reports were filed that Breneman finally got around to reading Thums his GARRITY rights, which by that time were practically worthless given the mountain of evidence that Breneman had amassed.

While all of this was perfectly legal, it also was perfectly lousy because: (1), Thums reasonably believed he was talking to Breneman and other officers as colleagues, rather than as law enforcement officials who were collecting criminal evidence against him; and (2), Breneman's actions may deter other officers from discussing personal matters at work lest they, too, are caught up in a criminal investigation because of their own admissions.

Breneman's delay in giving Thums his GARRITY rights is important because Thums before October 2 was not the subject of any formal investigation. Accordingly, it was at that point, and that point only, that Thums was required to detail everything that he did on September 24th. Before then, he was not required to make any admissions which might subject him to criminal charges.

There thus is no merit to the County's claim that it properly disciplined Thums under Article 6, Section 1, of the contract because Thums was purportedly "dishonest" in not telling Breneman that he had slashed Cole's tires and because he denied trying to get Cole's dogs to bark. In fact, Thums was remarkably candid in revealing that he was at Cole's house the

night before and that he then wanted to knock Cole's head off by picking up a two-by-four and by standing outside the door. In addition, since no one else witnessed or knew about what Thums wanted to do, this charge never would have been filed against Thums except for his own admissions. Indeed, if Thums had kept his mouth shut, it is possible – if not probable – that no one would have suspected him of anything. I therefore credit Thums' testimony that when he reported for work on September 25: "It appeared to me that nobody knew anything." Moreover, the County's Personnel Committee on October 21 praised Thums for being "forthright, during the investigation and hearing. . ." (Joint Exhibit 5).

As for not immediately admitting that he slashed Cole's tires, Thums credibly testified that he did not do so because he was too embarrassed. In addition, I credit his testimony that he related that fact to Breneman on the afternoon of September 25. At that time, Thums was not the subject of any formal investigation and he was not required to make admissions that could lead to the filing of criminal charges against him.

Moreover, while the County claims that Thums lied when he denied making Cole's dogs bark, the totality of the record fails to establish that Thums ever deliberately tried to shade the truth. Indeed, Deputy Schroeder's incident report (County Exhibit 6), states that Cole "also owns two black labs which he did not hear bark all night." Since Cole was in the best position to know whether his dogs barked when Thums was outside his house, and since he said they did not bark, his statement to Schroeder shows just how elusive the truth is in trying to accurately reconstruct what happened with respect to his dogs.

The Union also correctly points out that Thums in any event was never charged with this offense when he was disciplined. The County thus is barred from raising this issue now, as it is well-recognized that an employer must stand or fall on the original reasons given for a disciplinary action and that it therefore cannot add new grounds later on.

Given all this, the County lacked sufficient grounds to discipline Thums for dishonesty.

Hence, Thums only could be disciplined for slashing three of Cole's tires, for picking up a two-by-four and going to Cole's front door for the purpose of hitting Cole, for subsequently making threats against Cole, and for supposedly violating various County rules and regulations. Such off-duty conduct certainly warrants discipline for the very reasons stated by the County and in the spate of arbitrable authority it cites which holds that discipline is proper in such cases where there is a nexus between his off-duty conduct and his employment relationship. Indeed, the County even cites one of my prior arbitration decisions wherein I ruled that an employer can discipline a police officer. See JACKSON COUNTY, DEC. NO. 45685 (1992).

If Cole had filed charges against Thums and/or if Thums did not come forward to reveal his own wrongdoing, this case would stand on a much different footing. But Cole did not come forward and he made it clear that he wanted this matter dropped. In addition, it was Thums' admissions, and his admissions alone, which revealed his own misconduct. Absent those admissions, none of this affair ever would have become public. It ended up in the public domain only because Breneman insisted on publicizing a very private and embarrassing matter. The real victims therefore are Cole, Ms. Thums and Thums himself.

As for slashing the tires, the record shows that: (1), Thums offered to replace the tires; (2), Cole refused his offer; (3), and Cole made it very clear that he did not want to pursue this matter.

All of the above must be considered in determining if: (1), Thums' actions constituted "flagrant violations" as that term is used in Article 6, Section 1; and (2), termination is the proper level of discipline for his actions.

The County cites various cases, including STOCKHAM PIPEFITTING CO., 1 LA 160 (McCoy, 1945) for the proposition: "The Arbitrator should defer to the County's determination as to the proper penalty to be imposed for the grievant's misconduct.".

While some arbitrators adhere to this view, I believe the better view is set forth in *How Arbitration Works*, supra, p. 913, which states: "Where the agreement fails to deal with the matter, the right of the arbitrator to change or modify penalties found to be improper or too severe may be deemed to be inherent in the arbitrator's power to decide the sufficiency of cause. . ." (I also disagree with the County's claim that law enforcement officials are held to a higher standard of conduct. Because of their unique job, they are held to a different standard.)

Arbitrator Harry H. Platt is thus quoted for stating:

> In many disciplinary cases, the reasonableness of the penalty imposed on an employee rather than the existence of proper cause for disciplining him is the question an arbitrator must decide. That is not so under contracts or submission agreements which expressly prohibit an arbitrator from modifying or reducing a penalty if he finds that disciplinary action was justified, but most current labor agreements do not contain such limiting clause. In disciplinary cases generally, therefore, most arbitrators exercise the right to change or modify a penalty if it is found to be improper or too severe, under all the circumstances of the situation. This right is deemed to be inherent in the arbitrator's power to discipline and in his authority to finally settle and adjust the dispute before him. Id.

See Platt, "The Arbitration Process in the Settlement of Labor Disputes", 31 *J. Am. Jud. Society* 54, 58 (1947).

See, too, *The Common Law of the Workplace: The Views of Arbitrators*, St. Antoine, Ed. (BNA, 1998), which states on p. 330:

> **Remedial Authority When the Contract Is Silent**
>
> **An arbitral appointment carries with it the inherent power to specify an appropriate remedy. Unless there is clearly restrictive language withdrawing the subject matter or a particular remedy from the jurisdiction of the arbitrator, the arbitrator generally possesses the power to make an award and fashion a remedy even though the agreement is silent on the issue of remedial authority.** (Emphasis in original).

. . .

Here, Article 6, Section 1, does not mandate automatic termination for employees who engage in "other flagrant violations". The listing of certain offenses therein - such as dishonesty, being under the influence of intoxicating beverages, carrying unauthorized passengers, recklessness, or "other flagrant violations" - thus only means that no warning notice needs to be issued before employees can be disciplined for violating those listed exceptions. Hence, even though there is no just cause provision in the contract, an arbitrator under this language must make an independent judgment as to whether a suspension and/or discharge is warranted after the County has met its burden of proving that an employee has engaged in such misconduct.

Given all of the mitigating factors here – i.e., that Thums on September 24 saw his wife kiss another man; that that put him in an emotional state which precluded him from thinking clearly; that he finally had enough sense to realize that he should not hit Cole with the two-by-four; that he in fact never physically harmed anyone; that he offered to pay for the three slashed tires; that Cole himself did not want to press charges; that Thums himself reported what had happened even though he had no legal obligation to do so; that Officer Krueger did not view Thums to be a danger to anyone when he spoke to Thums on the next day; that all criminal charges against Thums were eventually dropped; that Thums successfully completed an anger management course and otherwise complied with all of the terms of his plea agreement - given all that, I find that termination is too harsh a penalty for the highly unique facts of this case. See CITY OF JOLIET, 112 LA 468 (Percovich, 1999); CITY OF MANSFIELD, 105 LA 935 (Shanker, 1995); CITY OF CLEVELAND, 108 LA 912 (Skulina, 1997).

His termination therefore shall be converted to a five-day unpaid suspension. That discipline takes into account all of the mitigating factors listed above and it also represents the kind of proportionality rightly displayed by the criminal justice system when it dealt with Thums. A five-day suspension also would have provided needed time off after the September 24 incident and it also makes it very clear that Thums' misconduct – notwithstanding the great emotional stress he was under at that time – will not be tolerated in the future.

To rectify the County's violation of Article 6, Section 1, and to restore the *status quo ante*, the County is hereby required to make Thums whole by immediately offering him his former position and by paying to him all wages and benefits, including seniority, that he otherwise would have earned after serving a five-day unpaid suspension effective September 26 to the time of his reinstatement, minus all monies that he would not have received but for his termination. In addition, I shall retain my jurisdiction for at least sixty (60) days to resolve any questions that may arise over application of this remedy.

In light of the above, it is my

AWARD

1. That the County violated Article 6, Section 1, of the contract when it terminated grievant Jay S. Thums.

2. That grievant Jay S. Thums' termination shall be converted to a five-day unpaid suspension.

3. That to rectify its contractual breach, the County shall make grievant Jay S. Thums whole by taking the remedial action stated above which provides for his immediate reinstatement and backpay.

4. That to resolve any questions that may arise over application of this remedy, I shall retain my jurisdiction for at least sixty (60) days.

Dated at Madison, Wisconsin this 15th day of June, 2001.

Amedeo Greco /s/
Amedeo Greco, Arbitrator

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