BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

CHIPPEWA COUNTY

and

WISCONSIN PROFESSIONAL POLICE ASSOCIATION/LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION

Case 223
No. 59586
MA-11344

Appearances:

Ms. Victoria L. Seltun, Weld, Riley, Prenn & Ricci, S.C. 3624 Oakwood Hills Parkway, P.O. Box 1030, Eau Claire, Wisconsin 54702, appeared on behalf of the County

Mr. Mark R. Hollinger, Katarincic & Hollinger, LLC, 205 East Wisconsin Ave., Suite 330, Milwaukee, Wisconsin, 53202, appeared on behalf of the Association

ARBITRATION AWARD

On January 22, 2001 Chippewa County and the Wisconsin Professional Police Association filed a request with the Wisconsin Employment Relations Commission seeking to have the Commission appoint William C. Houlihan, a member of its staff, to hear and decide the captioned matter. A hearing was conducted on July 18, 2001 in Chippewa Falls, Wisconsin. A transcript of the proceedings was made, and distributed on August 13, 2001. Post hearing briefs were filed and exchanged by October 18, 2001.

This Award addresses a disciplinary suspension issued to Deputy Thomas Thornton.

BACKGROUND AND FACTS

Deputy Thomas Thornton is a 10 year veteran of the Chippewa County Sheriffs Department. Prior to his employment with Chippewa County, Deputy Thornton worked as a law enforcement officer for 10 additional years. Deputy Thornton has not been disciplined prior to the incident giving rise to this proceeding.

On September 16, 2000 Deputy Thornton and Deputy Tony Marcijanik responded to a trespassing complaint which alleged that a male suspect was going in and out of complainant`s farm building. Upon arrival, Deputy Thornton discovered a man slumped over the front seat of the complainant`s pick-up truck inside a machine shed. The subject, D.A.R. was evidently asleep or passed out, was not dressed for the cold weather, was wet below mid waist, and was covered with grass and mud. The subject appeared to be intoxicated and Thornton noticed a strong odor of intoxicant on the man`s breath. Thornton asked the man if he had been drinking and the man replied that he had. Thornton asked how the man had gotten to his location and was given a number of different and conflicting answers, including that some girl may have dropped him off, but also that he had driven to the site.

The man variously indicated that he believed he was in Appleton and that he was camping. Thornton took D.A.R. for an hour long ride in a fruitless search for the man`s car and campsite. Ultimately Thornton abandoned the search, and arrested the man for trespass, obstructing, operating a motor vehicle while intoxicated, third offense, and operating after revocation. D.A. R. was transported to Victory Medical Center, where a blood draw was performed by hospital staff. D.A.R. was then transported to the County jail where he was booked and held for seven hours, until his blood alcohol level fell below 0.04, per Chippewa County Jailers policies and procedures.

Thornton unsuccessfully seached for the man`s car the next morning. On, or about, September 25 Thornton approached Lt. Gene Gutsch to inform him that he was concerned about the O.W.I. arrest in that no vehicle had been found to support the arrest. Gutsch replied that the arrest was inappropriate, and should not have been made. Ultimately the District Attorney determined not to prosecute the case because he believed he had less than a 50% chance of success, due to the lack of a vehicle, a critical element in an O.W.I. case.

On November 2, 2001 Deputy Thornton made a felony arrest of a subject, R.S. for operating a motor vehicle while intoxicated, third offense. Thornton was dispatched to the scene of the arrest by a report of a black car in a ditch with a male subject passed out in the front seat and a baby in a car seat in the back. As he proceeded to the scene, Thornton received a dispatch indicating that Rusk County was attempting to locate R.S., and further indicated that R.S. may be operating while intoxicated. Upon arrival at the scene Thornton

encountered two men and a woman holding a baby standing near a black car in a ditch. One of the men was R.S., who admitted to driving the car, falling asleep, and who indicated that the car went into the ditch. R.S. admitted to buying a 12 pack of beer, and drinking all day.

During the conversation with Mr. S., Thornton detected the odor of beer on Mr. S. breath. S. was occasionally incoherent when he spoke. Thornton observed a 32 oz. bottle of beer in the front seat of the car, with 3-4 oz. of beer left. During their conversation, S. told Thornton that his back was a little sore, that he had a previous spinal injury. Thornton determined not to conduct a field sobriety test, due to slippery road conditions, and the potential for injury to Mr. S.

Thornton placed R.S. under arrest for operating a motor vehicle while intoxicated and transported Mr. S. to the Chippewa County jail. The fact that a minor child was present in the car subjects the offense to a penalty enhancer, which lifts the charge to felony status. Thornton explained the charge and enhancer to S. and sought to test for alcohol. S. vigorously objected, and refused to submit to an alcohol test. Thornton then determined to have S. transported to the hospital for an involuntary blood draw. S resisted, and it required three Sheriff`s Department employees to restrain S. and place him in a transport belt and handcuffs. S. continued to resist transport to the hospital, exhibiting violent behavior such as wrestling and kicking at jail employees. In this context Thornton determined not to transport S. to the hospital. He indicated his decision was the product of his concern for the safety of the hospital staff, S., and himself. Departmental personnel were able to administer a PBT test, which registered a .21 reading. S. was charged with operating under the influence, and operating after revocation.

Deputy Thornton should have, but neglected to fill out a Notice of Intent to Revoke form in connection with S. arrest. The form is not a standard inclusion in the OWI packet, and Thornton forgot it.

On November 7, 2001 Lt. Gutsch met with Deputy Thornton to discuss Gutschs` concerns relating to Thornton`s handling of the two OWI arrests. Gutsch was concerned about Thornton`s understanding of departmental policies and the elements of the OWI offenses. There was no mention of discipline at the November 7 meeting. On November 16, 2000 Lt. Gutsch received notice of the disposition of the charges in the D.A.R. case, i.e. a dismissal. This notice prompted an internal review and investigation into the matter, which led to a determination that a significant disciplinary suspension would be levied, along with remedial training.

On December 13, 2000 the following letter was issued:

December 13, 2000

Deputy Thomas L. Thornton

Letter of Suspension

This letter is to inform you that you are suspended from duty without pay for a period of three weeks commencing December 13, 2000. You will be assigned to the B shift when you report back to work on January 4, 2000. You will be assigned to this shift for an indefinite period of time. Your first day back to work will consist of your meeting with Captain Folska and Lieutenant Gutsch for remedial training in arrest, search and seizure matters.

Tom, the reason for this suspension is two fold. First, you violated a subject's civil rights by arresting him without probable cause. This arrest led to false imprisonment. You also took this subject to a hospital for a blood draw, since the arrest was invalid, this blood draw constituted an illegal search. You are well aware that probable cause is needed to arrest a subject and take him into custody. This incident took place on September 19 (sic), 2000. The false arrest that took place is a very serious issue as it not only violated that individual's civil rights, you also opened the Chippewa County Sheriff's Department up to liability from civil suit by this individual. This disciplinary action is meant to be remedial in nature and to put you on notice that the Chippewa County Sheriff's Department will not tolerate this type of behavior.

Second, you failed to follow procedure in the arrest of a subject for Operating Under the Influence with a minor in the vehicle. It is our duty to follow the steps needed to collect evidence in this matter. If you felt the subject would resist, you had every option to call upon the Chippewa Falls Police Department for assistance in a forced blood draw.

You have violated county policy, as well as county work rules. The specific work rules you violated are 4.62(7) and 4.62(21). Our policy states that under the Primary Responsibilities of a Deputy Sheriff that we are to ensure the rights to all to liberty, equality and justice.

It is our duty as law enforcement officers to uphold the laws and constitutional rights of every citizen. While some arrest mandates may not be ideal, it is our job to follow proper police training.

I fully expect this to be a learning experience and that you will return to duty with an attitude of professional, courteous treatment of all citizens that this position demands of you. You are a professional and have many valuable years of service left with this agency.

Douglas J. Ellis /s/
Douglas J. Ellis
Sheriff

Subsequently, on December 20, the Sheriff issued the following statement of charges:

December 20, 2000

Thomas L. Thornton

RE: Statement of Charges

Dear Deputy Thornton:

I am, by this letter, giving you formal notice of the summary of charges as follows:

On September 16, 2000 you made an arrest for criminal offense of operating a motor vehicle under the influence of an intoxicant. As the arresting officer you failed to meet the elements of the offense and establish probable cause for the arrest. This violates the civil rights of the subject and led to false imprisonment and an illegal search. This exhibits Violation of Code of Ethics Department Policy, poor work performance as referenced in Department Policy and County Work Rules.

On November 3, 2000 you made a felony arrest for operating while intoxicated – 3rd offense with a minor in the vehicle and failed to follow procedure in the arrest. No field sobriety test was done, no Notice of Intent to Revoke completed, and no blood taken. This again demonstrates poor work performance as referenced in Department Policy and County Work Rules.

I am recommending to the Grievance Committee you be suspended for 15 working days. If you choose to request a hearing within the allotted 3-week time limit per State Statute 59.26(8)(b) you may do so. Otherwise the Grievance Committee will be hearing this case at a date chosen by the committee. At such hearing appropriate disciplinary action will be determined.

Sincerely,

Douglas J. Ellis /s/
Douglas J. Ellis
Sheriff

On January 11, 2001 Thornton filed a grievance related to his suspension.

ISSUE

The parties stipulated to the following two issues;

1) Did the County have just cause for the discipline of Deputy Thomas Thornton for his arrest of D.A.R. on September 16, 2000? If not, what is the appropriate remedy?

2) Did the County have just cause to discipline Deputy Thomas Thornton for his arrest of R.S. on November 2, 2000? If not, what is the appropriate remedy?

Additionally, the Association advances the following:

3) If the Arbitrator determines that some suspension is warranted, should Deputy Thornton have his health insurance, sick time, and vacation benefits prorated for the duration of the suspension?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

III. RELEVANT CONTRACT LANGUAGE

Article 2 – Management Rights

The County possesses the sole right to operate the County government and all management rights related to the same, subject only to the provisions of this Agreement, past practices, and applicable law. Except as expressly modified by other provisions of the contract, the County possesses the sole right to operate the County and all management rights repose in it. These rights include, but are not limited to, the following:

A. To direct all operations of the County;

B. To hire, promote, transfer, and assign employees in positions within the Sheriff's Department;

C. To suspend, demote, discharge or take other disciplinary action against non-probationary employees for just cause.

. . .

Article 7 – Discipline and Discharge

Section 1 – Just Cause: The County will not discipline or discharge any employee without just cause. Warning notices shall be given when required by established approved County work rules. Copies of such warning notices shall be given to the employee, Personnel Director and the Department Head. The warning notice must be issued within 30 days of said complaint. (When a verbal reprimand is given to an employee and it is noted for the record, the employee and supervisor will be required to initial and date the incident.)

Section 2 – Appeal: Discipline shall consist of discharge, suspension, demotion and reprimands. Any discipline must be by proper written notice to the employee which notice shall include the specific rule and/or written County or departmental policy violated and facts relating to the alleged offense. Any such discipline may be appealed to the grievance procedure (Article 4) commencing at Step 2 of the procedure. If the discipline is overturned through

this procedure, the employee shall be reinstated and any reprimand which formed the basis for such discipline withdrawn. The parties may mutually agree at any time that any employee may be reinstated with full, partial, or no compensation for lost time. All oral and written reprimands shall be purged from the employee's file after one (1) year from the date of the offense.

. . .

Section 4 – Statutory Option: For grievances involving the review of a suspension, a demotion, or a dismissal, the affected employee shall have the option of having the disciplinary action reviewed under the grievance procedure set forth in this agreement or under the procedures set forth in ss. 59.26, Wis. Stats., et seq., but not both.

. . .

ARTICLE 15 – VACATIONS – SECTION 1 – ACCRUAL: All employees hired after January 1, 1992, will accrue vacation on a per payroll basis. Vacation accrues based on the number of hours worked. . .Vacation benefits will be prorated for all employees on a per hour basis for all time off without pay.

ARTICLE 16 – SICK LEAVE – SECTION 1 – ACCUMULATION, RATE, AND PRORATION: All full time employees shall earn and accumulate sick leave on a pay period basis. . .For all employees, sick leave benefits are prorated on a per hour basis for all time off without pay.

. . .

ARTICLE 20 – INSURANCE – SECTION 1 – HEALTH INSURANCE: For all employees, health insurance premiums will be prorated on a per-hour basis. No payment of health insurance premiums shall be earned for time off without pay, unless otherwise specified in this agreement.

. . .

RELEVANT WORK RULES

4.62 **WORK RULES.** An employee may be disciplined for just cause including, but not limited to, the following infractions of work rules:

. . .

(7) Non-enforcement of County policies, regulations or any other written regulations, ordinances or laws.

. . .

(9) Non-compliance with County ordinances or written departmental rules or procedures.

. . .

(21) Poor work performance

. . .

(26) Insubordination including refusal to perform the work assignment.

. . .

4.63 **DISCIPLINE RECOMMENDED.** For consistency in administering discipline County-wide, the following discipline is recommended for violation of the above rules:

(1) For violations of Section 4.62(12), (15), (17), (18), (20), (21), (22), (23) and (28), the following steps are recommended: (Am. #4).

(a) 1st offense – Verbal reprimand.

(b) 2nd offense – Written reprimand.

(c) 3rd offense – 1 day off without pay.

(d) 4th offense – 5 days off without pay.

(e) 5th offense – Discharge.

(2) For violations of Section 4.62(8), (9), (16), (24), and (25), the following steps are recommended:

(a) 1st offense – Written reprimand.

PERSONNEL POLICY 4.63 (2)(b)

(b) 2nd offense – 1 day off without pay.

(c) 3rd offense – 5 days off without pay.

(d) 4th offense – Discharge.

POSITIONS OF THE PARTIES

The County contends that the discipline complied in all respects with the requirements of Article 7 of the contract. In the view of the County, the 30 day requirement is applicable only to written warnings or reprimands, and not to suspensions. Article 7 provides that when warning notices are required by established approved County work rules, they must be issued within 30 days of said complaint. County work rules have a scheduled set of recommendations for discipline but no requirement that a warning notice be issued for a particular violation. Thus, the 30 day notice requirement is not applicable.

In the view of the County, the purpose of the 30 day provision is to require the employer to reduce to writing reprimands within 30 days, if they will be used in the chain of discipline.

In any event the discipline was issued within 30 days of when the County was placed on notice by the District Attorney that he would not be prosecuting the arrest. There was no disciplinary event until the District Attorney made that determination.

Deputy Thornton violated work rules of which he had reasonable notice. The three week suspension was not excessive, arbitrary or capricious. The Department has a formal policy on O.W.I arrest procedures. Deputies are trained in the elements of the offenses, and schooled to follow departmental protocol. The County contends that in the arrest of D.A.R. one of the elements of the offense, the vehicle, was missing. With respect to R.S. the County contends that no field sobriety test was ever conducted, no blood was drawn, and the required Notice of Intent to Revoke was never completed. The County reviews Thornton`s explanations for his actions, and takes issue with his explanations, and the judgement exercised. The County cites arbitral authority in support of the discipline.

It is the view of the County that the Association has failed to establish that Thornton has been singled out or treated in a discriminatory fashion. The County reviewed certain incidents outlined by the Association, and distinguished them from the Thornton events. Critically, the County does not dispute that in the past there has been inconsistent discipline due to different management styles of various sheriffs. However, argues the County, lax enforcement of discipline by previous sheriffs does not mean that the current sheriff cannot discipline for current rules violations following a fair and thorough investigation.

Finally, the County argues that pro ration of benefits for disciplinary time off is required by the clear and unambiguous terms of the contract.

The Association contends that the County lacks cause to discipline Thornton for either of the incidents cited in the disciplinary notice. The charges against D.A.R were not dismissed for a lack of probable cause, contrary to the disciplinary document. Rather, they were dismissed because the District Attorney felt he could not win a conviction. Considering all of the facts, the Association believes that Thornton had probable cause to arrest D.A.R.

The Association contends that Thornton exercised appropriate discretion in determining the appropriate level of field sobriety to subject Mr. S to, and whether to initiate a forced blood draw following his stop and arrest. Thornton made a number of observations as to Mr. S. condition. He also took into account the weather and Mr. S. claim that he had a bad back. According to the Association Thornton had sufficient evidence to establish that S. was operating while intoxicated. Similarly, for safety reasons, Thornton determined not to attempt a forced blood draw after S. became violent and combative. The Association contends that the possibility of injury was real had S. continued to struggle, and been subjected to a forcible blood draw.

The Association characterizes the failure to prepare a Notice of Intent to Revoke as a harmless administrative error.

The Association claims that the Department failed to discipline Thornton within 30 days, as required by the contract. The Association believes the disciplinary action against Thornton is time barred by the 30 day clause.

The Association contends that should any discipline be sustained, no benefits should be pro rated. Past practice established that benefits have never been pro rated in disciplinary situations. Testimony from Association witnesses corroborated the existence of that practice. Association witnesses testified that the pro ration clause was proposed to apply to employees who seek voluntary leaves.

Finally, the Association contends that a 15 day suspension is unnecessarily harsh, and not within the County`s own discipline recommendations for violation of work rules.

DISCUSSION

The record establishes that Deputy Thornton, a 10 year veteran of the Department, has not been disciplined prior to the suspension leading to this proceeding. In that context, a 15 work day suspension appears extreme. The collective bargaining agreement allows for discipline, for just cause. It is common for the just cause standard to include concepts of progressive discipline, especially in areas where there exists the possibility or likelihood that discipline administered in a progressively escalating manner will operate to warn the recipient that his behavior is inappropriate, and encourage correction of that behavior. In this dispute the County has subscribed to the concept of progressive discipline, including incorporating a recommended schedule of discipline in its work rules.

The two incidents leading to this discipline are outlined above. In the D.A.R. matter, Thornton charged Mr. R. with O.W.I., without identifying a vehicle. The vehicle would appear to be an essential part of the charge of driving while intoxicated. Notwithstanding the confused and conflicting stories told by Mr. R., it appears that Thornton overcharged. Relative to Mr. S., the County questions Thornton`s judgement in failing to conduct a field sobriety test, failing to take a blood sample, and failing to complete a Notice of Intent to Revoke. It appears that Thornton could have conducted a field sobriety test. There is nothing in the record to suggest that S. was so physically compromised that putting him through the relatively modest physical movements of a field sobriety test would have risked undue harm. As to the blood sample, the record is silent as to how much force an officer is to use to compel a forced draw in the face of physical resistance. However, the County policy on O.W.I. Arrest Procedures addresses circumstances where an arrested person refuses to take a test, and provides the following:

IV. Cases where the arrested person refuses to take a test.

- A. Take the person`s D.L. and issue a “Chemical Test Refusal Driver`s License Receipt.”
- B. Fill out the Notice of Intent to Revoke form completely.
- C. Turn the arrested person over to the jailer for booking into the jail
- D. Do a complete officer`s report and turn it in for further processing.
- E. Mail copy of Notice of Intent to Revoke form to State Patrol Chemical test Section

The policy is silent as to the level of force to be used under these circumstances. By implication, it suggests that no force is to be used. All testimony was to the effect that the Deputy was to exercise judgement under these circumstances.

As to the Notice of Intent to Revoke form, Thornton simply failed to fill out and file the form.

The first arrest occurred on September 16. Thornton brought his concern over the arrest to Lt. Gutsch on September 25. The second arrest occurred on November 2. This incident was communicated to Gutsch by a Sergeant, who described it as "..just plain poor police work..." The date of this memo is unclear, but Gutsch testified that he reviewed this memo and the D.A.R. matter with Thornton on November 7. Thornton was issued the disciplinary letter on December 13, more than 30 days after any of these events.

The parties agree that Article 7, Section 1 has a number of ambiguities related to this dispute. They disagree as to how to apply the ambiguous language. The transition from the first sentence to the second in Article 7, Sec. 1 is ambiguous. The initial area of contention is what is a "warning notice" for purposes of the 30 day notice? The warning notice reference would seem to follow, and refer back to, the general reference to discipline and discharge. However, the County`s claim that the language should be applied literally, that is, to oral and written warnings only, is equally plausible.

The reference to "when required by established approved County work rules." is also confusing. Work rules admitted into the record do not "require" warning notices. They recommend and allow for a number of forms of discipline. Read literally, as argued by the County, the sentence is rendered meaningless.

Finally, the 30 timeline is triggered by "said complaint". There is no previous reference to a complaint. The sentence appears to contemplate a citizen complaint. There does not appear to be any such citizen complaint filed in this matter. The only real "complaint" in this proceeding is that of Management, which occurred before November 7.

Section 2 is titled Appeal, and is a more detailed treatment of discipline. The first sentence defines the term discipline, to include "..discharge, suspension, demotion and reprimands...." The second sentence requires that "Any discipline must be by proper written notice to the employee, which notice shall include the specific rule and/or written County or departmental policy violated and facts relating to the alleged offense." The paragraph goes on to permit appeal of any such discipline to the grievance procedure. The grievance procedure has a series of steps, each of which is accompanied by a time limit on the filing and handling of grievances. One obvious purpose of the requirement that discipline be reduced to writing is to establish the date of the event for purposes of the grievance procedure timelines.

Reading Sections 1 and 2 together brings some clarity to Section 1. If the Section 1 reference to "Warning notices" is interpreted to refer to the "written notice" contained in Section 2, then Article 7 treats the term "notice" consistently. The term 'Warning notice" is not taken from the work rules. County work rules do not use the term "warning' or the term "notice". Section 2 does use the term "notice" and does so in the context of requiring "notice" for "any discipline". The contractual requirement that discipline be accompanied by written notice derives from Section 2. The notice requirement set forth in Section 2 also directs that County or departmental rules be referenced in the "proper written notice". County work rules set forth behavior deemed inappropriate and a recommended discipline schedule.

I believe that it is the intent of Section 1 to require written warning to accompany any form of discipline issued, to require that the notice issue within 30 days of the "complaint", and to require that applicable work rules or policies be cited. This construction harmonizes Section 1 and Section 2, along with the format of the work rules. It does not result in any sentence being reduced to a nullity. It is consistent with the format of the notice issued. As a practical matter, if it is important to investigate and make a decision as to whether a written warning should issue it is every bit as important that a decision be made as to whether or not to issue a three week suspension.

The County contends that the 30 days should not begin to run until the District Attorney declined to prosecute. I disagree. The contract begins the counting period with "said complaint". The D.A. did not complain about Thornton`s work. The only complaint was that of management.

The parties have asked if there was cause for discipline arising out of either the D.A.R. or R.S. incidents. In both instances some discipline was appropriate. Under the county work rules a written reprimand is recommended for a first offense. Thornton is a first offender. Nothing in this record suggests a basis for a more severe sanction.

AWARD

The grievance is sustained.

REMEDY

The County is directed to refund the wages, benefits and any other losses incurred by Deputy Thornton, and to expunge his record of all reference to this matter. The County is not entitled to issue a reduced form of discipline in this matter due to the expiration of the 30 days.

Dated at Madison, Wisconsin, this 29th day of January, 2002.

William C. Houlihan /s/
William C. Houlihan, Arbitrator

WCH/gjc
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