

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
MILWAUKEE COUNTY (SHERIFF'S DEPARTMENT)
and
MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION

Case 539
No. 63113
MA-12499

(James D. Cox Grievance)

Appearances:

Timothy R. Schoewe, Deputy Corporation Counsel, Milwaukee County, 901 North 9th Street, Room 303, Milwaukee, WI 53233, on behalf of Milwaukee County.

Jonathan Cermele, Eggert & Cermele, S.C., Attorneys at Law, 1840 North Farwell Avenue, Suite 303, Milwaukee, WI 53202, on behalf of Milwaukee County Deputy Sheriffs' Association.

ARBITRATION AWARD

According to the terms of the Collective Bargaining Agreement between the Milwaukee Deputy Sheriffs' Association (hereafter Union) and the County of Milwaukee (hereafter the County), the parties requested that the Wisconsin Employment Relations Commission appoint an impartial arbitrator to hear and resolve a dispute between them regarding the interpretation and application of certain provisions of the Agreement as they pertain to the five-day suspension of James D. Cox, imposed on December 9, 2003.

The Commission appointed the undersigned, Commission Chair Judith Neumann, to hear and resolve the dispute. A hearing in the matter took place on Thursday, April 8, 2004. Both parties submitted oral argument at the conclusion of the hearing.

ISSUE

The parties stipulated to the issue as follows:

Is there just cause to impose the discipline (a five-day suspension without pay) that was imposed on the grievant, Sergeant James Cox, by notice dated December 9, 2003? If not, what shall be the remedy?

FACTS

The grievant, Sergeant James D. Cox, had been employed by the County as a Deputy Sheriff for approximately 13 years at the time of the hearing in this matter. Prior to the incident giving rise to this grievance, he had not been the subject of any disciplinary action and had received consistently positive performance evaluations as well as at least two commendations. He had been promoted to Sergeant in 1999.

On the evening of August 31, 2003, Sergeant Cox was assigned to work at Harley Fest, a multi-day commemoration of the 100th anniversary of the Harley-Davidson motorcycle company, culminating that evening in a celebration with refreshments and entertainment at Veteran's Park in Milwaukee. Approximately 150,000 to 200,000 people were in attendance, cordoned into tightly packed sections based on ticket price. The County had arranged for approximately 50 deputies to provide crowd control and security. Because of the manner in which the crowd was cordoned and organized, there was essentially one avenue more or less in the middle where the public and the deputies could travel freely. It was difficult and potentially dangerous for deputies to enter the cordoned areas. For similar reasons, the event was not well-organized in terms of location of and access to portable restrooms. Numerous individuals attending the event were intoxicated and many individuals, lacking ready access to restrooms, urinated on the festival grounds.

At the outset of their shifts at this event, commanders instructed the deputies that they were to focus on crowd-control and preventing violence and destruction of banners and other physical property. Given the nature of the event and potential for eruptions to arise, the deputies were specifically instructed to maintain a positive relationship with the attendees, and to use discretion and reticence in responding to minor ordinance infractions, such as smoking marijuana. As a result, there were only a handful of arrests or citations that evening, most if not all stemming from fighting. While a number of individuals were escorted to the Sheriff's command post for intoxication-related disorderly conduct, ejections from the event were largely or exclusively limited to individuals fighting with security forces rather than for public intoxication. The evidence did not indicate that anyone was ejected for public urination despite its apparent prevalence that evening.

At approximately 8:00 p.m., Sergeant Cox was at the command post assisting a woman who could not find her disabled husband when he noticed two deputies, Pawlak and Schuh, escorting or assisting another individual into the command post. Concerned that the individual was ill or hurt because of the way he was walking, Cox interrupted his missing person investigation to inquire about the new situation. As he approached, Cox recognized the escorted individual as an off-duty deputy, Robert Ott, with whom Cox had worked at the County Detention Center in the past. Cox and Ott were not personal friends. Cox asked Ott if he was all right and Cox said yes. The escorting deputies indicated they were bringing Ott in

for a field investigation because members of the crowd had complained that he was drunk, repeatedly had been urinating in plain view, and had urinated on a fence. The deputies informed Cox that they had not taken the names of the complaining witnesses. In response to Cox's question, Ott denied that he had urinating on a fence and apologized for his state of intoxication. Ott and the deputies indicated that Ott was at the festival in company with other individuals, including another off duty deputy. Cox asked if Ott had driven himself to the event and Ott said he had not.

Cox exercised his discretion in handling the situation by warning Cox against public urination and instructing the deputies to return Cox to his group. Cox considered the following factors in exercising his discretion: that Ott, while quite intoxicated, was able to understand and articulate answers to Cox's questions; concern about whether Cox would make it home safely if he was ejected and separated from his group, including concern that Cox might decide to operate a motor vehicle; the impracticality of requiring the deputies to seek and question complaining witnesses, given the size and nature of the crowd and the way the event was organized; his understanding of his instructions to overlook minor offenses and allow the ticket holders to enjoy the celebration; and concern about completing the missing person investigation he had interrupted in order to see whether Ott needed help. Cox did not inquire and the evidence does not indicate whether the complaining witnesses were still in the vicinity of Cox's group when Cox returned. Cox's interaction with Ott was observed by several members of the Sheriff's department command staff who were present at the command post, none of whom questioned Cox's handling of the matter at the time or instructed him to cite or eject Ott.

In general circumstances, Ott's behavior could have warranted a citation for disorderly conduct. However, without the names of complaining witnesses, citations cannot be enforced and hence generally are not issued. Among the duties of a Sergeant are:

A Sergeant, under the direction of their commanding officer, is charged with the proper performance of duties of all personnel. They will be held particularly responsible for the efficiency, discipline, general conduct and appearance of the personnel under their supervision in the proper discharge of their duties. They shall report in writing to their commanding officer, all cases of misconduct, incompetency or neglect of duty.

...

To implement bureau policy, rules, regulations and procedures.

On September 2, 2003, Cox's immediate supervisor, Captain Chris Luedke, telephoned him seeking information regarding the Ott incident at Harley-Fest. Captain Luedke did not direct Cox to prepare a citation or take any other action against Ott after hearing a description of the event. On September 4, at the direction of Deputy Inspector Richard Schmidt, Cox

prepared a written report regarding the incident; Deputies Pawlak and Schuh also submitted written reports. On September 8, the office of Internal Affairs interviewed Cox about alleged violations of departmental rules and policies in connection with his handling of the Ott incident. During that interview, Cox was asked whether he knew that Deputy Pawlak had been told by a complaining witness that in urinating on the fence, Ott had splashed bystanders. This was the first time Cox had heard about the “splashing” element of the incident and hence he denied any such knowledge at the time of the incident.

On October 10, 2003, Captain Richard Williams submitted his written recommendation to the Internal Affairs Division that Cox be disciplined for his handling of the Ott incident by means of a written reprimand to be removed from his file after six months if no similar incidents occurred. The Internal Affairs Division recommended to the Sheriff that Cox be given a written reprimand. The specific allegations against Cox were that he had failed to conduct or direct a field interview of Ott or of the complaining witnesses, had failed to eject Ott from the Harley Fest, and had failed to issue Ott a citation for his disorderly conduct.

On December 9, 2003, without discussing the issue with any of the superior officers or Cox, the Sheriff issued Cox a five-day suspension without pay. Deputies Pawlak (a recently-hired deputy) and Schuh were not disciplined in connection with this incident.

DISCUSSION

In determining whether the County had just cause to impose a five-day suspension upon Sergeant Cox, the standard substantive inquiry is whether the alleged misconduct occurred and, if it did occur, whether the penalty is commensurate with the misconduct in light of all the circumstances, including Cox’s prior employment record. 1/ In this case, I conclude that Cox engaged in no misconduct and therefore no penalty is warranted.

1/ In this case the Union does not claim any procedural defects or lack of due process in the County’s disciplinary action.

In reaching this conclusion, I do not question the County’s prerogative to establish the standards of conduct and performance expectations for its deputy sheriffs. In general the County might be well within its prerogatives in concluding that Cox, a superior officer, should have taken stronger action against Ott for the kind of inappropriate and disorderly conduct that occurred here, even though it occurred while Ott was off duty.

However, in this case, the County had articulated a special set of standards of conduct for its deputies in carrying out their duties at Harley Fest. In light of the nature and size of the crowd, the County had specifically directed the deputies on duty to use discretion in

responding to minor Ordinance infractions and to apply a relatively relaxed approach so as to maintain a positive relationship between law enforcement officers and the crowd and minimize the possibility of inciting violent reactions. While the County cited smoking marijuana as an example of the minor infractions the deputies should largely ignore, it is clear that intoxication and public urinating were commonplace at this event. While some of these miscreants were brought to the command post for questioning, the deputies on duty generally did not respond to such conduct with citations or ejections, and superior officers apparently approved of this manner of exercising discretion. Thus, I conclude that the County itself had established a standard of conduct for its deputies at Harley Fest that encouraged discretion and tolerance.

I see nothing in Sergeant Cox's handling of Deputy Ott's behavior that violated the discretionary standard of conduct that the County had established. Cox reasonably concluded that the missing person investigation in which he was engaged was more urgent than conducting a formal field interview of Deputy Ott. Cox reasonably concluded, in view of Ott's denial of urinating on the fence and the lack of names of complaining witnesses, that issuing a citation would have been unsustainable. Moreover, Cox reasonably concluded based on the information available to him that Ott's behavior was similar to the behavior of many other festival participants, i.e., constituted a "minor Ordinance violation" which Cox had been directed to overlook. Cox reasonably considered that Ott's safety and the public's safety were better served by returning Ott to his group rather than risking the possibility that he might try to operate a vehicle. Cox reasonably concluded that it would be impractical to ask Pawlak and Shuh to locate and interview the complaining witnesses, in light of the way in which the crowd was cordoned and organized. As to field-interviewing Ott, Cox reasonably concluded that it was unnecessary, as he knew Ott's identity and had questioned Ott as to the relevant facts. There is no evidence that any of Cox's considerations were influenced by his relationship with Ott, with whom Cox was only casually acquainted and with whom Cox no longer worked.

Cox was aware that Ott was an off duty deputy and that under other circumstances it may have been appropriate to handle his misconduct differently than that of civilians. However, Cox had been directed to treat Harley Fest as a unique event warranting a departure from normal responses. Cox reasonably concluded that the same considerations that had induced the command staff to caution discretion and tolerance applied to Ott's situation, i.e., maintaining harmony within the crowd, focusing on serious situations (such as the missing person that Cox was in the middle of handling), and enabling festival goers to reach home safely. On this point, it is undisputed that several higher level command staff were present and observed Cox's interaction with Ott, as well as Ott's state of intoxication, and that none of those superiors intervened or urged Cox to handle the matter differently.

In short, I conclude that Sergeant Cox exercised the discretion he was directed to exercise in this unusual situation and therefore complied with the County's rules. This conclusion is reinforced by Cox's excellent employment record, which reflects that he has been commended for his good judgment and attention to duty.

AWARD

For the foregoing reasons, the grievance is sustained. As a remedy, the County is directed to remove the disciplinary suspension from Sergeant Cox's record and reimburse him for all lost pay and benefits associated with that suspension.

Dated at Madison, Wisconsin, this 27th day of July, 2004.

Judith Neumann /s/

Judith Neumann, Arbitrator