

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MILWAUKEE COUNTY

and

MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION

Case 553

No. 63723

MA-12689

(Hagedorn Discipline Grievance)

Appearances:

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

Jonathan Cermele, Attorney at Law, 1840 North Farwell Street, Suite 303, Milwaukee, Wisconsin 53202, appeared on behalf of the Milwaukee Deputy Sheriffs' Association and Grievant, Frederick E. Hagedorn, Jr.

ARBITRATION AWARD

The County and the Association are parties to a collective bargaining agreement which provides for the final and binding arbitration of certain disputes. The Association requested and the County agreed that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve the grievance filed on behalf of Frederick E. Hagedorn, Jr., who is referred to as the Grievant or Hagedorn herein. The Commission appointed Paul Gordon, Commissioner, to serve as the Arbitrator. Hearing on the matter was held on October 6, 2004, at the Milwaukee County Courthouse in Milwaukee, Wisconsin. The hearing was not transcribed. Both parties submitted oral arguments at the hearing along with the testimony of their witnesses and joint exhibits. Both parties waived the filing of written arguments or briefs, requested an expedited award, and the record was closed.

The parties stipulated to the following issues to be decided:

Does the Sheriff have just cause to suspend Deputy Sergeant Hagedorn for one (1) day without pay?

If not, what is the remedy?

BACKGROUND AND FACTS

At all material times Grievant has been a law enforcement officer in the Milwaukee County Sheriff's Department. Effective July 2, 2004, Grievant was suspended from duty, without pay, for one (1) day by the Milwaukee County Sheriff for violation of Milwaukee County Sheriff's Office Rules and Regulations. The attachment to the Notice of Suspension contained the following:

On May 14, 2001, Deputy Kerri McKenzie complained to Sergeant Fred E. Hagedorn, Jr. about then Deputy Inspector George Paras. Deputy McKenzie stated to Sergeant Hagedorn that she believed Deputy Inspector George Paras had a problem with her because she was a female and Sergeant Hagedorn responded by saying, "Well, George thinks women are only good for fucking". Sergeant Hagedorn stated, in a lawsuit deposition, on October 3, 2002, that Deputy McKenzie first stated that Deputy Inspector George Paras thinks women are only good for fucking and he had just repeated what she had said for verification.

MILWAUKEE COUNTY SHERIFF'S OFFICE POLICY AND PROCEDURE AND/OR RULES AND REGULATIONS:

1.05.02 – Conduct of Members

Members of the department shall not commit any action or conduct which impedes the department's efforts or efficiency to achieve its policies and procedures or brings discredit upon the department.

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

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

Grievant has been with the Milwaukee County Sheriff's Department since 1979, and for the last 14 years has been a Sergeant. Deputy Kerri McKenzie has been with the Milwaukee County Sheriff's Department for 10 ½ years. As of May, 2001, Grievant was McKenzie's immediate supervisor in a drug enforcement unit and would give her direction and guidance. McKenzie was a detective. Over the course of the preceding few months McKenzie had raised several complaints to Grievant about how she was being treated by Deputy Inspector George Paras as to duty assignments, being condescending, ignoring her, and other things. Deputy Inspector Paras was directing operations of that unit. He wanted to arrange for a meeting that included himself, Grievant, McKenzie and others on or about May 10th. McKenzie was not available then, so the meeting did not take place until May 14, 2001, in Grievant's office.

Paras, Grievant and McKenzie were the only ones present at that meeting. Paras wanted to speak to McKenzie to express to her his concern and displeasure about some of her work behavior. Paras did so, and then left the meeting. McKenzie then asked Grievant if she had been insubordinate. Grievant told her he didn't think it had reached the level where she should be disciplined. McKenzie also complained to Grievant about Paras during this conversation, expressing her concerns and belief that Paras had a problem with her because she was a female. A factual dispute exists as to what was said next. McKenzie testified, credibly, that Grievant then said to her "Well, George thinks women are only good for fucking". Grievant testified, credibly, that McKenzie first said to him "George doesn't like me. George only likes women who are good for fucking", and Grievant repeated the statement to McKenzie to be sure he understood what she said, and asked why she said so to determine her basis for making the statement. Regardless of this factual dispute, Grievant did not forward a complaint about Paras up the chain of command. Apparently, Paras had a serious health condition and was not expected to be with the Department very long. Grievant did tell McKenzie that she was doing a good job, to stick it out, and that Paras wouldn't be around forever.

At the hearing in this matter, when asked "Were you bothered by his statement?", McKenzie answered "I was surprised by his statement". When asked "Were you offended by that statement?" she answered "I was surprised". She did not make a reply or response to Grievant about the statement, but later did make a complaint to the Office of Professional Standards about it sometime in 2001. She testified that some law enforcement officers are sometimes a little rough around the edges, that the language used amongst officers, deputies and supervisors, between themselves, was not always what people might consider politically correct, but that in circumstances where an officer is complaining about treatment you are receiving that is not appropriate. She testified that deputies and sergeants use swear words from time to time, and she would not take offense to that depending on what was said and the intent.

An interview of Grievant was conducted in August of 2001 by the Office of Professional Standards, the predecessor office to Internal Affairs, concerning the appropriateness of this and other matters raised by or about McKenzie concerning various aspects of the Department. A recommendation of either a verbal warning or a written reprimand to Grievant was not followed. At that time nothing further was done in any disciplinary respect to Grievant. In January, 2002 McKenzie filed a charge of sex discrimination and brought a lawsuit against the County concerning Deputy Inspector Paras for a broader range of activities than the statements at issue herein. During a discovery deposition in that lawsuit McKenzie submitted allegations of rule violations against Grievant and requested an investigation into the alleged violations. She did not believe her complaints had been handled properly the first time. That led to a new investigation and the current disciplinary action.

During the disciplinary proceedings, allegations by McKenzie of several rule violations against Grievant were investigated. Rule 1.05.02, noted above, was recommended to be sustained. It was recommended that the following alleged rule violations be unfounded:

1.05.18 – False Information

Members of the department shall not make false reports, or enter, or cause to be entered, or amend any department books, records or reports.

1.05.13 – Treatment of Citizens/Employees

No member of the department shall be disrespectful to or maltreat any person.

1.05.35 – Truthfulness

Members are required to relate the truth, whether under oath or otherwise.

1.05.41 – Derogatory Remarks

Members of the department shall not speak slightly of the race, nationality, or religion of any person in their custody or with whom they have contact in their official capacity.

1.05.46 – Written Reports

Reports must be accurate, complete and must contain all pertinent information.

At the conclusion of the investigation the one (1) day suspension without pay was issued by the Sheriff.

At the hearing in this matter Captain Mark Strachota, a 30 year veteran of the Milwaukee County Sheriff's Office and currently in the Internal Affairs department, testified on behalf of the County concerning the disciplinary investigation herein. He confirmed that as to the statements at issue here, the department found that Grievant did not treat McKenzie disrespectfully and that he did not speak derogatorily to her. He explained why the Sheriff felt it was important to have the discipline in this case. The Sheriff feels that regardless if Grievant stated that "George thinks that women are only good for fucking", or if he was merely responding to Deputy McKenzie and repeating what she said, the Sheriff still feels that it was inappropriate language for a supervisor to use in front of a subordinate, and that was not a correct response to a Deputy who had some concerns and was distraught. Strachota also addressed the basis for the rule 1.05.02 violation. The Sheriff felt that it was improper conduct as a supervisor and felt it brings discredit upon the department for the type of language he used with a subordinate, especially one that had emotional concerns. He also testified that Grievant's performance appraisals indicate he is an excellent supervisor who makes effective decisions, and has no other founded or sustained disciplines by the Sheriff's Office.

Positions of the Parties

The County argued at the hearing that Grievant made the statement, that that type of language in dealing with one another in the workplace is inappropriate and a violation of departmental rules relating to the treatment of employees and derogatory remarks. The testimony of Captain Stachota, above, sets out the basis for the rule violation in that it was improper conduct as a supervisor and brings discredit upon the department for the type of language he used with a subordinate, especially one that had emotional concerns.

The Grievant argued at the hearing that there is a dispute of facts as to who exactly said what. The basis of the investigation goes to truthfulness. The Department found that the charges of Grievant being untruthful, or treating citizens or employees improperly or disrespectfully or making derogatory remarks to employees were unfounded. The Department has accepted Grievant's version of the events. There is no just cause to believe Grievant could have violated the rule for which he was charged.

DISCUSSION

At issue is does the Sheriff have just cause to suspend Grievant for one (1) day without pay. The Parties did not introduce any contract language or stipulate to a meaning or definition of just cause for the suspension. The standard substantive inquiry is whether the employer proved that employee misconduct occurred, and if so, whether the penalty is commensurate or justified in light of the circumstances, including the Grievant's prior employment record.

In this case the County has an interest in the type of conduct involved. That is reflected in the promulgation of work rule 1.05.02, which is the work rule Grievant was alleged to have violated and for which he was disciplined. Work Rule 1.05.02 – Conduct of Members states:

Members of the department shall not commit any action or conduct which impedes the department's efforts or efficiency to achieve its policies and procedures or brings discredit upon the department.

I find that the County did not prove that this rule was violated. I do so regardless of the factual dispute as to who first said, or did not say, the statements involved here. Both McKenzie and Grievant are credible. It was not shown that the statement impeded the department's efforts or efficiency to achieve its policies and procedures, nor did it bring discredit upon the department.

The County presented no evidence of any policy or procedure that was impeded by Grievant's making the statement. It showed no law enforcement activity that was impeded. It showed no case or investigation that was impeded. It did not present any evidence as to how

any department activity was made less efficient. There was no evidence showing that the authority of Paras was undermined. There was no testimony of anything Deputy McKenzie did or did not do as a result of Grievant's statement which impeded her doing her job or performing her duties. There was no evidence that the statement reflected upon McKenzie's performance or affected her employment evaluations. There was no evidence of any problem that McKenzie encountered as a result of the statement.

McKenzie did complain to the Office of Professional Standards about the incident as part of a larger number of complaints about the department. But when asked at the hearing if she was bothered by the statement she did not say she was. Rather, she said she was surprised. Similarly, when asked if she was offended she did not say that she was. She said she was surprised. She did not reply or respond to it. She did feel it was inappropriate. But the record cannot support a finding that she or the department was somehow impeded in their efforts or efficiency because of this.

Both the County and McKenzie feel that the statement was inappropriate in the context. Yet, it is recognized that deputies and supervisors among themselves sometimes swear and say things that are not politically correct. It is apparent that the County and Sheriff would be concerned generally about the work environment for the employees and guard against allowing any type of hostile, harassing or offensive conduct towards one or more of the employees. But that is not what Grievant was alleged to have done and it is not shown that was the result of the statement or that it somehow contributed to an overall environment of harassment or hostility. Although the conclusions of the internal investigation are not binding here, it is incongruous for the County to contend the language was inappropriate when it has also concluded that the same language was not disrespectful or derogatory so as to violate other rules. No rule was presented, and it is unknown if one exists, which definitively prohibits profanity or references to sexual conduct - even under certain circumstances. Use of the statement, even if inappropriate, did not impede the department's efforts or efficiencies under the rule Grievant was disciplined for.

Rule 1.05.02 also prohibits conduct which brings discredit upon the department. There was no evidence to support a finding that the statement in this circumstance brought any discredit upon the department. The statement was not made in public and was not made in the presence of anyone other than Grievant and McKenzie themselves. Paras had left by then. And the evidence was that, although there may have been several others present when Paras first requested the meeting, the meeting did not occur until a few days later. There is no evidence to suggest that anyone other than Grievant and McKenzie heard the statement. There is no evidence that the statement was made part of any report prepared by Grievant which was later disseminated or circulated within or outside of the department. There is no evidence that the statement was shared with anyone. McKenzie certainly told department personnel about it as part of her complaint. But that cannot be attributed to Grievant. (It is unknown what, if any documents with the statement were prepared by Grievant in response to the investigation into this and related matters). There was no evidence presented of any person or entity outside

the department who in any respect felt the department, or anyone in the department, had been discredited by the statement. There is no doubt that the litigation commenced by McKenzie concerning Paras has potential to bring such discredit, but the details of that litigation were not made part of the record here. And that litigation had already been filed when the deposition in that case was taken which brought forth McKenzie's renewed complaint about the statement. There is no evidence that Grievant's statement contributed to any discredit potentially suffered by the department in that litigation.

The evidence in this case does not show a violation of rule 1.05.02 as alleged by the County. It is not proven that misconduct occurred. Accordingly, the Sheriff does not have just cause to suspend Grievant for one (1) day without pay, or impose any other discipline.

AWARD

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

Dated at Madison, Wisconsin, this 12th day of October, 2004.

Paul Gordon /s/

Paul Gordon, Arbitrator