BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LOCAL 990J, AFSCME, AFL-CIO

and

KENOSHA COUNTY (SHERIFF'S DEPARTMENT)

Case 238
No. 64310
MA-12866

(David Virgili Suspension)

Appearances:

Lorette Pionke, Senior Assistant Corporation Counsel, appearing on behalf of Kenosha County.

Thomas G. Berger, Staff Representative, Wisconsin Council 40, AFSCME, appearing on behalf of AFSCME Local 990.

ARBITRATION AWARD

AFSCME Local 990J (hereinafter referred to as the Union) and Kenosha County (hereinafter referred to as either the County or the Employer) requested that the undersigned be designated as the arbitrator of a dispute concerning a suspension imposed on David Virgili. A hearing was held on May 11, 2005, in Kenosha, Wisconsin, at which time the parties presented such testimony, exhibits, other evidence and arguments as were relevant. The parties submitted the case on oral arguments at the close of hearing, whereupon the record was closed.

Now, having considered the evidence, the arguments, the terms of the collective bargaining agreement, and the record as a whole, the undersigned makes the following Award.

ISSUE

The parties stipulated that the following issue should be determined herein:

Did the County have just cause to suspend the Grievant, David Virgili, for five days? If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE I - RECOGNITION

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Section 1.2. Management Rights: Except as otherwise provided in this Agreement, the County retains all the normal rights and functions of management and those that it has by law. Without limiting the generality of the foregoing, this includes the right to hire promote, transfer, demote or suspend or otherwise discharge or discipline for proper cause; the right to decide the work to be done and location of work; to contract for work services or material; to schedule overtime work; to establish or abolish a job classification; to establish qualifications for the various job classifications; however, whenever a new position is created or an existing position changed, the County shall establish the job duties and wage level for such new or revised position in a fair and equitable manner subject to the grievance and arbitration procedure of this Agreement. The County shall have the right to adopt reasonable rules and regulations. Such authority will not be applied in a discriminatory manner. The County will not contract out for work or services where such contracting out will result in the layoff of employees or the reduction of regular hours worked by bargaining unit employees.

. . .

ARTICLE III – GRIEVANCE PROCEDURE

Section 3.5. Work Rules and Discipline: Employees shall comply with all provisions of this Agreement and all reasonable work rules. Employees may be disciplined for violation thereof under the terms of this Agreement, but only for just cause and in a fair and impartial manner. When any employee is being disciplined or discharged, there shall be a Union representative present and a copy of the reprimand sent to the Union. After one (1) year, written reprimands shall not be considered in future cases to determine the level of progressive discipline, and will be removed to a closed file upon the employee's request.

> The foregoing procedure shall govern any claim by an employee that he/she has been disciplined or discharged without just cause. Should any action on the part of the County become the subject of arbitration, such described action may be affirmed, revoked or modified in any manner not inconsistent with the terms of this Agreement.
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> . . .

BACKGROUND

The County provides services to the people of Kenosha County in southeastern Wisconsin, including the operation of detention facilities. The Union is the exclusive bargaining representative for the County's non-exempt employees at the Kenosha County Jail and the Kenosha County Detention Center, including employees classified as Direct Supervision Officers. The Grievant, David Virgili, is a Direct Supervision Officer at the Detention Center.

In September of 2003, the Grievant was placed on Accident and Sickness benefits by the County, after he hurt his ankle in a fall from a ladder. He came back with restrictions on September 9th and was assigned to light duty, working in the lobby. He remained on light duty until February of 2004, when he had surgery on the ankle. On April 19th he was examined by his surgeon, Dr. Seipel, who released him to return to work on light duty. In the "comments" section of his notes, Seipel wrote "Central control or lobby – light duty." The doctor's examination notes for May, June and early August all indicated that the patient was unable to run, and that his restrictions should continue.

In June, Corporal Tim Haney noticed that the Grievant was requesting trades and leave time on Wednesday evenings. Haney was aware that the Grievant was a devoted softball player, and that Wednesday was his normal softball night. He sought and received permission to follow the Grievant when he left work on Wednesday, June 23. Haney followed him to a ball field in Milwaukee. He observed the Grievant enter the field, but did not remain to observe any activities.

Haney reported his observations in a memo to Lieutenant Mark Schlecht. Corporal Kurt Mikutis was then assigned to follow the Grievant and videotape him at games on July 14 and August 11. On July 14, Mikutis observed the Grievant pitching, playing first base, batting and coaching. On August 11, he saw the Grievant pitch six innings, though he did not bat. In his reports to Schlecht, Mikutis stated his opinion that the Grievant was moving without difficulty, notwithstanding his continued light duty status.

Lieutenant Harvey Hedden, Supervisor of the Special Operations unit, was also asked to observe and videotape the Grievant. Hedden observed a game on July 21, during which the Grievant pitched, but did no batting or running. Hedden reported that he did stretching

exercises, and walked without a limp. On July 28th, Hedden observed the Grievant pitch, and twice run some short distances to make plays on balls. He did not see the Grievant bat, but observed no limp or apparent limitation. Hedden said he could not determine from his observations which leg the Grievant had injured.

On August 26, Captain of Detention, Larry Apker, summoned the Grievant to a meeting in his office. DSO Ann McCormick, Second Unit Vice Chair of the Union, was called in as the Union Representative. Apker told them that he was conducting an investigation into reports that the Grievant was still playing softball, despite his light duty status. He directed the Grievant to write a statement about his activities. McCormick objected, saying that the meeting could lead to discipline, and that the Department had an agreement with the Union that two Union representatives would be present in meetings where discipline could result. Apker told her that it was not a disciplinary meeting, although discipline could result from the investigation, and that he was simply seeking to have the Grievant write a report. He told the Grievant to accompanying Corporal Mikutis to a room to write the report, and directed McCormick to return to her post.

The Grievant wrote out a brief statement and brought it back to Apker: "Under H.I.P.A. (sic) Regulations, I can not discuss my doctors orders or method of treatment. I have followed my doctor's advice exactly. Through this entire process unlike Kenosha County. going against my doctors order at first. I have attended some softball games." Apker looked at the statement, and ordered him to answer directly whether he had played softball. The Grievant added a statement at the bottom: "Conclusion: Approx. 4-6 games, were (sic) I played 1st base or tried to pitch, or coached."

The following day, August 27, Apker sent Chief Deputy Charles Smith a memo, summarizing the observations of Hedden and Mikutis, and stating "It is obvious that DSO Virgili has misrepresented his physical condition in order to remain on a light duty status at the KCDC. Even though he has received doctor's slips indicating the need for restricted duty, this is a clear case of misrepresentation and manipulation to get his desired result, which is light duty. It is also clear from the activity he displays on the softball field that he is able to perform the duties and job description of a DSO without limitation." He recommended a 30 day suspension.

On September 14th, Smith sent the Grievant a notice of pre-disciplinary meeting to be held on Monday, September 20th. The notice included a list of the work rules he was alleged to have violated, and advised him that a 30 day suspension was being recommended:

1. Kenosha County Uniform Work Rules:

Attendance: #12
Employees shall not engage in conduct or activities which serves to lengthen the healing period for a work-related injury.

Work Habits: #5
Employees shall not restrict the amount of work they can perform, interfere with others in the performance of their jobs, or participate in any interruption of work.

Work Habits: #11
Employees shall not falsify any reports or records, including time cards, personnel, absence, and sickness records, or falsely state or make a claim of injury. Employees found to have created a false report or record which would cause the County to pay out funds inappropriately may, as part of the disciplinary action, be required to reimburse the County.

Deportment: #21
Acts of dishonesty including, but not limited to, knowingly making false statements that could cause harm to the County or to another County employee.

Deportment: #22
Unlawful or improper conduct during non-working hours which affects the employee's relationship with his job, his fellow employees, his supervisor, or the County's reputation in the community.

2. Kenosha County Sheriff's Department Policies and Procedures:

Policy #165: Department Work Rules, II. Work Performance, H.
An employee shall not restrict the amount of work he/she can perform, interfere with others in the performance of their work, or engage or participate in any interruption of work.

Policy #165: Department Work Rules, III. Conduct, A.
Employees shall conduct themselves both on and off duty, in such a manner as not to reflect unfavorably on the Department. Unbecoming conduct shall include that which tends to bring the Department into disrepute or reflects discredit upon the employee as a member of the Department, or that which tends to impair the operation and efficiency of the Department or employee.

Policy #165: Department Work Rules, III. Conduct, C.
Employees will not give false testimony, fabricate, withhold, alter, or destroy evidence, nor will they falsify or withhold information from any official report, whether verbal or written, nor fail to perform duties prescribed by law.

You may have present at this meeting a Union representative or any other representative of your choosing.

As a result of the above infractions of the rules listed above, the following disciplinary action will be taken:

1. 30-Day Suspension Without Pay

. . .

The pre-disciplinary meeting was held before Chief Deputy Smith. Personnel Director Robert Riedl, Assistant Personnel Director Diane Yule, Captain Apker, Lt. Schlecht, and Corporal Mikutis were present for the County. Staff Representative Tom Berger and the officers of Local 990, as well as the Grievant, were present for the Union, with Berger speaking on the Grievant's behalf. Berger attacked the discipline on multiple grounds, and also alleged that the County had violated the agreement between the Sheriff and the Union by refusing to allow a second Union representative to be present during the meeting with Apker. In the course of the pre-disciplinary meeting, no one asked the Grievant if he had ever discussed playing softball with his doctor.

In his decision, Smith rejected the Union's complaint about the lack of a second Union representative, noting that the contract calls for one Union representative to be present when an employee is being disciplined or discharged. The supplementary agreement by the Sheriff to a second representative provided that it was the Union's responsibility to secure the second representative, and that the lack of a second representative would not postpone investigations or discipline. Smith found the Union's position to be, at best, a technical objection.

Smith also rejected most of the bases cited by Apker for referring the Grievant for discipline. He concluded that the Grievant did not misrepresent his physical condition to secure light duty when it was not warranted. Rather, he concluded that the Grievant had ignored his doctor's orders by playing softball, and had thereby extended his period of injury. He also concluded that the Grievant had falsified a report, in that he intentionally downplayed his physical activities and provided no detail when directed to prepare a report for Apker. Smith judged that a 30 days suspension was too harsh a penalty for the misconduct found, and reduced it to a five day suspension.

Smith's factual findings and conclusions were set forth in his September 29th report of the pre-disciplinary meeting:

Facts:

- DSO David Virgilli does have an ankle problem.
- His personal physician was concerned enough for his recovery that he issued and kept renewing orders for restricted work activity that was meant to keep him from running so his ankle would heal.

- This restriction required KCDC supervision to place DSO Virgili in a light duty position, restricting him from a full duty position.
- DSO Virgili was observed and taped playing in 4 games of baseball during his time of restriction to light duty.
- DSO Virgili ran, batted, and pitched in the observed games.
- DSO Virgili states he paid for massage therapy on his ankle during this time period to assist in healing.
- DSO Virgili states he had to wear a brace with wraps while playing baseball.
- DSO Virgili met with Lt.. Schlecht on July 18 to inform him he was still in great pain and may face cortisone injections and surgery and might be out for an additional 4 to six weeks.
- DSO Virgili was observed and taped playing baseball on July 21 and July 28.
- DSO Virgili received an extension on his restriction on August 2, indicating he was still in pain and received a cortisone injection.
- DSO Virgili was observed and taped playing baseball on August 11.
- DSO Virgili was given an opportunity to explain his actions in writing where he indicated on his report in two short paragraphs that he has followed his doctor's advice to the letter and he played 4-6 games where he played first base, tried to pitch or coached.

Conclusion

1. DSO Virgili is in violation of Sheriff's Policy 165 Work Performance. "An employee shall not restrict the amount of work he/she can perform, interfere with others in the performance of their work, or engage or participate in any interruption of work." and County Work Rule 5 Work Habits (SAA).

   It is quite apparent that DSO Virgili intentionally disobeyed his doctors restriction of no running and continually aggravated his ankle problem by playing baseball. His excuse of testing his ankle strength for work is I believe just that, an excuse. His physical actions this summer that we are aware of, have resulted in him continually being unable to be placed in a position of full duty and maintained in one of the limited light duty positions.

2. DSO Virgili is in violation of Sheriffs Policy 155 Conduct “Employees will not give false testimony, fabricate, withhold, after, or destroy evidence, nor will they falsify or withhold information from any official report, whether verbal or written, nor fail to perform duties prescribed by law".

   When provided with the opportunity to present detailed information as to his baseball actions, as he did later in the Pre-Disciplinary hearing, he chose to downplay and intentionally falsify his report stating he followed his doctors advice to the letter, among other things.

> Although disciplinary action is warranted I believe that a 30-day suspension without pay is too severe. Therefore the recommendation is reduced to a 5 working day suspension without pay.

The instant grievance was filed on October 6, challenging the suspension. It was not resolved in the lower steps of the grievance procedure, and was referred to arbitration. At the hearing, the Union presented a letter from the Grievant's doctor, dated the same day as the pre-disciplinary hearing, addressing his efforts to play softball:

. . .

> September 20, 2004
>
> The patient contacted our office. He is going to go for a second opinion, which on our last visit I had encouraged.
>
> In addition, the patient reported that he had tried to play softball during the summer, July 1st through August 8th, and he had made me aware of this before.
>
> On further discussion with the patient, apparently he only really tried to run one time and was unable to do it and he really was not even able to bat. He did pitch several games.
>
> The patient had someone helping him with taping and bracing of the ankle, but he was still unable to participate fully.
>
> I did recommend, while I was seeing him during the summer and after a cortisone injection, that he go out and try to use the ankle and see if he was able to progress to some more strenuous activities.
>
> By this report, apparently the patient was unable to despite his efforts.
>
> /s/ Robert C. Seipel, M.D.

Additional facts, as necessary, are set forth below.

POSITIONS OF THE PARTIES

The County

The County takes the position that the Grievant is guilty of misconduct, in that he misrepresented his injury and limited the amount of work he could perform for the County. He lied to the County and to his own doctor in order to pursue his own hobby. It stands to reason that if he is too limited by his injury to work normally, he is too limited to play softball. He should have understood that, and his failure to do so, even if he honestly believed he still deserved to be on light duty, evinces a disregard for his recovery and his return to full duty.

The arbitrator should reject the Grievant's claim, made at the hearing, that he was testing out his ankle, with the consent of his doctor. He played softball every Wednesday night. Those who observed him said he looked fit. That is not testing an ankle – that is engaging in physical activity that is inconsistent with being injured or recovering from an injury. One way or the other, he was violating his duty to the County.

The Grievant further violated his obligations to the County by failing to inform his superiors that his medical condition had apparently improved, and by writing his report to Apker in a clearly misleading way. He initially admitted to "attending" ball games, when he knew that was not the question, and only admitted playing softball when Apker ordered him to supplement the report. His explanation that he was responding narrowly because he believed the County was out to get him is simply paranoia on his part, and does not excuse his failure to fully and honestly answer the questions put to him.

The Grievant's behavior proves that he was either being dishonest about his condition, or that he had no concern for the interests of the Department and his co-workers in having him promptly and fully recover. In either case, through his own actions the Grievant quite plainly invited serious discipline, and he is fortunate to have received only a five day suspension. For all of these reasons, the County asks that the grievance be denied.

The Union

The Union takes the position that the County proceeded in this matter in bad faith. The County did not ask the Grievant if he was playing ball. It did not ask him if his doctor knew or had approved of his playing ball. It did not warn him that it was concerned that his activities were inconsistent with his injury or might impede a full recovery from his injury. The sole interest of the Sheriff's Department in this case was to trap the Grievant. It conducted surveillance on him. It amassed its evidence against him, without ever trying to put that evidence in context. It did not know and did not want to know whether his ball playing was consistent with his physical condition. It cared only about building a case for discipline.

Had the County approached him before deciding he deserved a thirty day suspension, he could have told them he was testing his ankle. He could have told them he was using a brace for much of the time he was playing ball. He could have told them he was doing little running in the games. He could have told them that he had discussed this activity with his doctor, and that his doctor had approved of it.

The County's complaint that the Grievant's failure to fully cooperate in the meeting with Apker constitutes paranoia completely ignores the reality of what was going on. He was summoned to a meeting to write a report. He was denied the right to additional Union representation. Despite Apker's dishonest reassurances, the meeting was obviously a disciplinary meeting. The Grievant knew that meetings like this are intended to prompt employees to write false statements, so that the Department can then compound the charges. Here, even though his statement was true, that is precisely what happened. Under these circumstances, it is hardly surprising that the Grievant was less than fully cooperative with Apker.

In the end, the Union argues, there is no rule violation in any of this. The County may have suspicions, it may not like the Grievant, it may wish he was off light duty, but none of that is grounds for discipline. His behavior was in accordance with his doctor's orders. He did nothing at all to merit discipline, and the arbitrator should therefore sustain the grievance in its entirety.

DISCUSSION

The question in this case is whether there was just cause for a five day suspension of the Grievant.[1] The County proved beyond any doubt that the Grievant played softball on at least four occasions in the summer of 2004, while he was on light duty for an ankle injury. What rule violations he committed by doing this is a matter of some dispute within the Department itself.

After reviewing the videotapes and the reports of his investigators, Captain Apker demanded a statement from the Grievant, who ultimately conceded playing ball, and contended that he was following his doctor's advice to the letter. From this, Apker concluded that the Grievant was lying about the extent of his ankle injury to secure a soft light duty assignment

[1] Neither party addressed the representation issue in its closing argument, and it is clearly a secondary matter. To the extent that it requires an answer, the denial of a second representative does not violate the contract, which by its terms requires only one representative be present for disciplinary meetings. The Sheriff's agreement to allow a second representative if one is readily available appears to be an extra-contractual commitment, although that point was not fully developed on the record. Neither did the testimony flesh out what types of meetings are considered disciplinary meetings, within the meaning of the Sheriff's memo. It is sufficient to say that the record does not allow me to find a contract violation, and to leave the basic issues of the scope and enforceability of the Sheriff's memo for a future case.

that he was not entitled to, and brought him up on charges. At the arbitration hearing, Apker reiterated his belief that the Grievant's softball playing demonstrated that he did not have the ankle injury he claimed to have.

Chief Deputy Smith, who heard the case at the pre-disciplinary hearing, concluded that the Grievant did have an ankle injury that entitled him to light duty. The misconduct he identified was in the Grievant ignoring his doctor's orders by playing softball, thereby extending his recuperation and denying the County the benefit of his full services. He also concluded that the Grievant made a false statement to Apker, when he claimed to have followed his doctor's orders "exactly." Chief Smith reiterated these conclusions at the hearing.

The County's argument in this case reflects, to an extent, these two alternate views of the evidence. However, the arbitrator is obliged to confine himself to the discipline that was imposed, not the discipline that might have been imposed. The Chief Deputy determined the grounds for discipline, and the measure of discipline. In so doing, he specifically rejected Apker's theory that the Grievant was malingering, and found as a fact that the Grievant did have an ankle injury. The Grievant served a five day suspension for extending the period of his recuperation and for misrepresenting his actions as having been consistent with his doctor's orders, and those are the bases on which the suspension must rise or fall.

The problem with the Chief's conclusion that playing softball caused an extension of the Grievant's recovery period is that, while it is a reasonable inference for a layman to draw, in the end it is a medical conclusion, with no medical support.[2] The County did not solicit any opinion from its doctors about the possible effects of playing softball, nor does it appear that it ever asked the Grievant's doctor whether softball might worsen the Grievant's condition. There is no evidence of a change in the Grievant's prognosis as a result of playing softball. Moreover, Smith's conclusion that the Grievant ignored his doctor's advice was reached without anyone ever asking the Grievant or his doctor whether the doctor knew about and had approved his participation in these ball games.

These defects would not weigh as heavily in a case where there is no medical evidence to support either side. The inference is, as noted, a reasonable one for a layman to draw. Here, however, it appears from Dr. Seipel's statement that he did know about the ball playing, and that he had encouraged the Grievant to "go out and try to use the ankle and see if he was able to progress to some more strenuous activities." This has the effect of undercutting both of Smith's conclusions. If the doctor approved his effort to engage in strenuous activities, the Grievant cannot have "intentionally disobeyed his doctors restriction of no running," the basis on which Smith concluded the softball playing was misconduct. Further, the Grievant's written statement that he had followed his doctor's orders "exactly" is not a false report.

[2] This same defect would apply to Apker's theory that playing softball proves there is no ankle injury.

The discovery that the Grievant was playing softball on an ankle which supposedly prevented him from working regular duty at the Detention Center would have raised questions in anyone's mind. The Department certainly had the right to investigate further to determine whether he was entitled to light duty and/or whether he was cooperating with his doctor in attempting to recover from his injury. Once he stated, in response to the allegations, that he was following his doctor's orders, the Department had some duty to determine whether that was true or false before concluding that he was not following his doctor's orders. It did not do so. Inasmuch as the evidence establishes that the Grievant's softball playing was consistent with his doctor's orders, it follows that the County has not born its burden of proving misconduct in this case.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

The County did not have just cause to suspend the Grievant, David Virgili, for five days. The appropriate remedy is to remove the reference to the suspension from the County's records, and to make the Grievant whole for his lost wages.

Dated at Racine, Wisconsin this 1st day of September, 2005.

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

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