

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION

and

MILWAUKEE COUNTY

Case 573
No. 64931
MA-13061

(Reynaldo Crespo Suspension)

Appearances:

Timothy Walther, Eggert & Cermele, S.C., 1840 North Farwell Avenue, Milwaukee, Wisconsin 53202, appearing on behalf of the Milwaukee Deputy Sheriffs' Association.

Timothy Schoewe, Deputy Corporation Counsel, Room 303, 901 North Ninth Street, Milwaukee, Wisconsin 53233, appearing on behalf of Milwaukee County.

ARBITRATION AWARD

The Milwaukee Deputy Sheriffs' Association, hereinafter referred to as the Association, and Milwaukee County, hereinafter referred to as the County or the Employer, were parties to a collective bargaining agreement which provided for final and binding arbitration of all disputes arising thereunder. The Association made a request, with the concurrence of the County, that the Wisconsin Employment Relations Commission designate a member of its staff to hear and decide the appeal of Reynaldo Crespo's suspension. The undersigned was so designated. A hearing was held in Milwaukee, Wisconsin on October 6, 2005. The hearing was not transcribed. The parties filed briefs by November 10, 2005. The Association filed a reply brief on November 17, 2005. The County elected not to file a reply brief on November 29, 2005, whereupon the record was closed. Having considered the evidence, the arguments of the parties and the record as a whole, the undersigned issues the following Award.

ISSUE

The parties were unable to stipulate to the issue(s) to be decided in this case. The Association frames the issues as follows:

1. Did just cause support the rule violations as charged? If yes,
2. Did just cause support a five day suspension, and if not, what is the appropriate remedy?

The County frames the issue as follows:

Did just cause exist to suspend Deputy Crespo as charged by the Sheriff? If not, what is the remedy?

Having reviewed the record and arguments in this case, the undersigned finds that the County's wording of the issue adequately states the issue to be decided herein. My rationale for this decision will be addressed in the DISCUSSION.

APPLICABLE SHERIFF'S OFFICE 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. COMMENT: This rule applies to both the professional and private conduct of all members. It prohibits any and all conduct which is contrary to departmental policies and procedures which would reflect adversely upon the department or its members. . .

1.05.03 Violation of Policy

Members shall not commit any acts or omit any acts which constitute a violation of any of the policies, rules, procedures or orders of the department where stated in this section or elsewhere. COMMENT: This rule includes not only all unlawful acts by members, but also all acts, which although unlawful in themselves, would degrade or bring discredit upon the member of the department.

APPLICABLE COUNTY CIVIL SERVICE RULE

RULE VII, (4) (1) (l) Refusing or failing to comply with departmental work rules, policies or procedures.

BACKGROUND

The County operates a Sheriff's Department. The Association is the exclusive collective bargaining representative for the Department's deputy sheriffs. Reynaldo Crespo is a deputy sheriff who has been with the Department for about seven years. Crespo is currently assigned to the Detention Bureau, third shift. This case involves a five-day suspension imposed on Crespo for an incident which occurred April 5, 2005.

The Sheriff's Department encourages off duty deputies to carry their firearms. There are no departmental rules that identify how an officer is to carry a gun or conceal it while off duty. As a result, it is left to the discretion of the deputy how to carry their firearm and conceal it while off duty. When Crespo is off duty, he regularly carries his gun, a magazine for it, an identification card and a badge. He gets hazardous duty pay for carrying his gun off duty.

Prior to the suspension involved here, Crespo's past disciplinary history indicates that he has never served a day of unpaid suspension. He was suspended for five days in September, 2001, but that suspension was "stayed", so he did not actually serve the five-day suspension. He received a written warning in November, 2002. He has been investigated by the Internal Affairs Department before, but in those instances, the incidents were either closed as "not sustained" or closed with no disciplinary action taken by the Department.

Crespo frequently visits the area around 13th and Burnham on Milwaukee's south side. He grew up in the area and his mother lives nearby. When he goes there, he stops at El Rey's grocery store.

FACTS

Crespo was off duty on April 5, 2005 when the following incident occurred. About 12:30 p.m., Crespo drove his personal car to 13th and Burnham to visit a friend who lives nearby. He parked his car and got out. As he got out of his car, he tried as he always does to keep his gun, which he carries on his right hip, covered by his shirt. Based on what subsequently happened though, Crespo was not successful in keeping his gun covered after he got out of the car. He then stood next to a street pole and talked to a friend on his cell phone. At the time, he was wearing a tank top and shorts. Nothing about his clothing or car identified him as a law enforcement officer.

Unbeknownst to Crespo, when he got out of his car, he was apparently being watched by an elderly woman. She saw that Crespo had a handgun. Since Crespo was not wearing a uniform and had not gotten out of a marked squad car, the woman had no way of knowing that Crespo was a law enforcement officer. The woman then called 911 and reported there was a man with a gun at 13th and Burnham. In response to her call, police were dispatched to the scene. The police who were dispatched to the scene were told by the 911 dispatcher that there was a report of a man with a gun at that location. Seven or eight police cars ultimately arrived at the scene, but most of the officers did not leave their squad cars.

The first two Milwaukee police officers to arrive at the scene were officers Uirel Arenas and Paul Gossett. They did not know Crespo and he did not know them. As they approached Crespo, who was talking on his cell phone, they saw the outline of a gun through his tank top. Crespo saw the officers approaching and could tell they were looking for someone, but he did not realize until later that he was the person they were looking for. The officers did not have their guns drawn as they approached Crespo. One of the officers told

Crespo that they had been dispatched in response to a 911 call regarding a man with a gun. Officer Gossett then told Crespo to take his hands out of his pocket. Crespo did as the officer directed. Officer Gossett then told Crespo to end his cell phone conversation. Crespo did as the officer directed and ended his conversation with the person he was talking with and put his cell phone in his pocket. Crespo then identified himself as a Milwaukee County Deputy Sheriff. One of the police officers then asked Crespo if he had an identification card, to which Crespo responded that he did, and that it was in his left back pocket. One of the officers told Crespo to not get the card – they would get it. Crespo did as the officer directed and did not attempt to retrieve the identification card himself but let the officer get it out of his back pocket. After the officers retrieved Crespo's badge and identification card and looked at it, this confirmed that Crespo was indeed a deputy sheriff. One of the officers then called dispatch and essentially reported that the man with a gun in question had been identified as a Milwaukee County Deputy Sheriff, and cancelled the emergency call. There was no further questioning of Crespo by the police officers. Instead, they simply walked away. They did not say anything else to Crespo and he did not say anything else to them.

The encounter just referenced lasted a couple of minutes.

After the police officers walked away, Crespo remained where he was and got back on his cell phone. He resumed the conversation that had been interrupted.

As the two police officers walked back to their squad cars, the security guard from El Rey's grocery store, which was across the street, approached them and initiated a conversation about Crespo. The security guard told the officers that Crespo frequently hung around the store, played loud music and talked to the female store employees.

Shortly after the above-referenced incident occurred, someone in the Milwaukee Police Department (the person was not identified) brought it to the attention of Milwaukee County Sheriff David Clarke. Clarke then directed the Department's Internal Affairs Department to investigate the matter. It did. Captain Mark Strachota began an investigation the next day. He eventually interviewed Crespo, Milwaukee Police Officers Gossett and Arenas, and three people who work at El Rey's grocery store. His interviews with Crespo, Gossett and Arenas were recorded on a tape recorder, and a secretary later transcribed them. After the interviews were completed, Captain Strachota drafted a report of his findings and submitted it to Sheriff Clarke. Captain Strachota's report referenced the gun incident of April 5, 2005, as well as Crespo's past conduct at El Rey's grocery store. With regard to the latter, Strachota's report included statements from three employees of El Rey's grocery store to the effect that Crespo frequently hung out at the store, played loud music on his car's stereo, and talked to the female store employees.

On June 7, 2005, Sheriff Clarke issued Order No. 797 which suspended Crespo from duty, without pay, for five working days for violating two department rules and a civil service rule. The two department rules were 1.05.02, Conduct of Members and 1.05.03, Violation of

Policy and the civil service rule was Rule VII, Section 4(1)(l). This suspension notice quoted the rules just referenced, but made no reference whatsoever to any facts.

Pursuant to the parties' collective bargaining agreement, Crespo's suspension was appealed to arbitration.

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Crespo was the only person with firsthand knowledge of the April 5, 2005 incident who testified at the hearing. Neither Milwaukee Police Officer Arenas nor Gossett testified. Crespo was also the only person with firsthand knowledge of his conduct at El Rey's grocery store who testified at the hearing. No one from the grocery store testified.

Crespo testified that he routinely tries to keep his gun concealed when he wears it while off duty. On the day in question, he thought his shirt fully covered his gun, but he was mistaken because someone did see the gun and call 911. He testified that his gun's exposure that day was not intentional, but rather was unintentional. He surmised that the woman who saw his gun and called 911 must have watched him get out of his car, and that his shirt must have ridden up as he got out of his car, thus inadvertently exposing the gun. With regard to his contact with the two Milwaukee police officers who responded to the 911 call, Crespo testified that he followed their instructions and was respectful of them. In his view, he did not disrespect them. That said, he now realizes that they felt he was disrespectful toward them. In hindsight, he wishes he had apologized to the two officers for any unintentional harm or perceived lack of respect he may have shown.

With regard to his conduct at El Rey's grocery store, Crespo testified he frequently stops at the store while off duty, but when he does so, he does not loiter there or play loud music on his car's stereo.

POSITIONS OF THE PARTIES

Association

The Association's position is that just cause does not exist for either the rule violations or the five-day suspension which was imposed on Crespo. The Association asks that both the charges against Crespo and the discipline be rescinded. It elaborates as follows.

First, the Association contends that Crespo did not violate any departmental or County rule by exposing his gun while he was off duty on April 5, 2005. In support thereof, it notes that as a deputy sheriff, Crespo is encouraged to carry a weapon while off duty. When he does so, Crespo routinely takes the measures necessary to assure concealment of his firearm while off duty, but on April 5, 2005, for whatever reason, his efforts to conceal the firearm were unsuccessful. The Association avers that while Crespo's gun was seen by the woman who

called 911, its exposure was an unintentional act. According to the Association, an unintentional exposure, like what happened here, is both unavoidable and inevitable.

Second, the Association argues that Crespo did not violate any departmental or County rule during his brief encounter with the Milwaukee police officers who responded to the 911 call. In support of this premise, it notes that Crespo hung up his cell phone when asked, and complied with all the other directives of the officers. It further notes that the officers made no further demands to Crespo to alter his conduct or leave the area. Finally, it avers that Crespo did not get back on his cell phone until after the police left the scene. Based on the foregoing, it is the Association's view that Crespo demonstrated the necessary courtesy to the officers who responded to the 911 call. Conversely, it calls attention to the fact that the County presented no testimony at the hearing regarding the manner in which Crespo was allegedly disrespectful. In this regard, it notes that while the County, in their brief, uses hearsay and double hearsay comments to demonstrate an alleged lack of courtesy by Crespo, the Association maintains that it never had the opportunity to examine either police officer at the hearing. That being so, it questions any argument by the County based on that hearsay. Building on the foregoing, the Association maintains there is no credible evidence that Crespo's conduct with the police officers crossed the line of disrespectful conduct.

Third, the Association contends that Crespo did not violate any departmental or County rule by his conduct at the grocery store. It makes the same points about the statements in the County's brief relating to Crespo's conduct at the grocery store as it did regarding the police officers (i.e. that it never had the opportunity to cross-examine any complaining party at the hearing, so it questions any argument by the County based on that hearsay). The Association therefore maintains there is no credible evidence that Crespo had a habit of "loitering" or "playing loud music" at the store as the County contends.

The Association argues in the alternative that even if there was just cause for the departmental and County rule violation, a five-day suspension was improper. It notes in this regard that Crespo has previously never served a day of unpaid suspension, and that all the other charges against him but one have been closed as "not sustained" or closed with no disciplinary action taken. The Association argues that if any discipline is imposed, the level of punishment should be reduced to a level more fitting Crespo's behavior on the day in question and his past disciplinary history.

County

The County's position is that just cause existed for Crespo's suspension. In its view, "the problems with Crespo's conduct and demeanor were multiple." It elaborates as follows.

First, the County focuses on the fact that Crespo's gun was exposed. The County avers that Crespo "took no effective action to remove his weapon as a source of concern" for the citizen who did not know he was a law enforcement officer. The County puts it this way in their brief: "In an inner city neighborhood beset by guns and violence, the appearance of an

armed man not readily identifiable as a law enforcement officer adds to the angst and concern of residents.” As the County sees it, Crespo knew better and “should have acted in a manner so as to not rile the citizenry. . .” By doing what he did (i.e. exposing the handgun), this caused the citizen to call 911. The County avers that the 911 call put the Sheriff’s Department in a bad light.

Next, the County focuses on Crespo’s conduct with the two Milwaukee police officers who responded to the 911 call. According to the County, Crespo was disrespectful to them because he continued a phone conversation (after they began talking to him) and “impeded them in the exercise of their duties.” The County submits that Wisconsin’s two largest law enforcement agencies (i.e. the Milwaukee County Sheriff’s Department and the Milwaukee Police Department) cannot best serve the public if situations like the one Crespo caused are tolerated.

Finally, the County focuses on Crespo’s conduct at the grocery store. According to the County, Crespo’s “loitering habits” and “playing loud music” reflect poorly on him (as a deputy sheriff) and by extension, those who know him as a deputy sheriff.

With regard to the level of discipline which was imposed, the County argues that a five-day suspension was reasonable under the circumstances. To support that premise, it avers that Crespo’s past disciplinary history, while not resulting in prior suspensions, “show a disregard for public perceptions of the agency and the role of law enforcement.” Additionally, the County maintains that “the conduct was repeated”, and that this calls “for an increase in penalty to compel Crespo to reform his conduct.” The County therefore asks that Crespo’s suspension be upheld.

DISCUSSION

While the parties did not stipulate to the issue to be decided herein, both sides referenced just cause in their proposed wording of the issue(s). I adopted the County’s wording of the issue because I believe it adequately states the issue to be decided herein. That said, the matters referenced in the Association’s wording of the issue(s) (i.e. whether Crespo violated the rules as charged and whether a five-day suspension was appropriate) will be addressed in the discussion which follows.

In this case, both sides proposed a just cause standard for reviewing the suspension which was imposed on Crespo. As is normally the case, the term “just cause” is not defined in the parties’ collective bargaining agreement. While the term is undefined, a widely understood and applied analytical framework has been developed over the years through numerous arbitral decisions. That analytical framework consists of two basic elements: the first is whether the employer proved the employee’s misconduct, and the second, assuming the showing of wrongdoing is made, is whether the employer established that the discipline which it imposed was justified under all the relevant facts and circumstances.

As just noted, the first part of a just cause analysis requires a determination of whether the employer proved the employee's misconduct. Attention is now turned to making that call.

Normally, there is no question what "misconduct" is involved because the employer specifically identifies it in the notice of discipline. That is not the case here. While the notice of discipline involved here (i.e. Order 797) says that Crespo violated two departmental rules and a civil service rule, that is all it says. It does not reference any facts. The problem with this is that an employee should not have to guess or speculate about what misconduct they are charged with.

While no facts were referenced in that notice of discipline, various facts were referenced in Captain Strachota's "Investigative Summary" report. That document essentially alleges that Crespo committed misconduct by 1) exposing his gun while off duty on April 5, 2005; 2) his contact with the Milwaukee police officers who responded to the 911 call; and 3) his previous conduct at El Rey's grocery store. Those three charges will be addressed in the order just listed.

Crespo obviously exposed his gun while off duty on April 5, 2005 because an elderly woman saw it on him and called 911. While I am persuaded that the gun's exposure was accidental and unintentional, that really does not affect what happened here. Whether its exposure was accidental or not, the woman who saw Crespo and his gun had no way of knowing, based on his appearance in a tank top and shorts, that he was one of the good guys (i.e. a law enforcement officer). That was also true of the Milwaukee police officers who were dispatched to the scene to find a man with a gun. When they found their man with a gun, it turned out he was not one of the bad guys, so to speak, but rather was one of the good guys (i.e. a fellow law enforcement officer).

Since Crespo exposed his gun while off duty on April 5, 2005, one would think that if he was going to be charged with misconduct for same, it would be for violating a rule mandating that deputies conceal their gun while off duty. However, there is no such rule in the Department. In the absence of such a rule, it is left to the officer's discretion to decide how to carry their gun and conceal it while off duty. On that day, Crespo carried his gun where he always does – on his right hip – and covered it with his shirt. Nothing about the way he wore his gun that day or covered it was out of the ordinary.

Set against that backdrop, the Sheriff decided to charge Crespo with violating (Department) Rules 1.05.02, Conduct of Members and 1.05.03, Violation of Policy. The former prohibits conduct by department members which "brings discredit upon the department", while the latter prohibits conduct by department members which violates departmental policies, rules and procedures. However, other than make the bald assertion that Crespo violated those rules, the County did not prove how Crespo's exposure of his gun violated either rule. I therefore find that by exposing his gun while off duty on April 5, 2005, Crespo did not violate either of the departmental rules just referenced, or the derivative civil service rule.

The focus now turns to Crespo's conduct with the two Milwaukee police officers who responded to the 911 call. According to the County, Crespo was disrespectful to them. I find that the record evidence does not support that contention. Here's why. First, Crespo testified that while he was talking on his cell phone when the officers approached, he hung up his cell phone when the officers directed him to do so. He further testified that he did not continue talking on his cell phone while being questioned by the officers and did not get back on his cell phone until after the officers left him. Second, Crespo testified that he complied with all of the other directives of the officers. Third, Crespo testified that the officers did not tell him to alter his conduct, his appearance or to leave the area. In my view, nothing in Crespo's account of the incident raises any red flags about his (i.e. Crespo's) conduct toward the police officers, or demonstrates that he failed to show them courtesy or respect, or that he impeded them in the exercise of their duties. The County ignores Crespo's testimony regarding the above and instead relies on what the police officers told Captain Strachota about Crespo's conduct during his investigation. Those officers did not testify at the hearing. Since they did not testify and Crespo did, that means that the only witness with firsthand knowledge of the matter who testified was Crespo. That being the case, what the County essentially wants me to do here is credit what the police officers told Captain Strachota (about Crespo's conduct) over what Crespo testified to at the hearing. I decline to do that. Instead, I credit Crespo's account of his interaction with the two Milwaukee police officers. As previously noted, nothing in Crespo's account demonstrates that he disrespected the officers, or failed to show them courtesy, or impeded them in the exercise of their duties. I therefore find that Crespo did not violate either of the departmental rules previously referenced, or the derivative civil service rule, during his encounter with the Milwaukee police officers who responded to the 911 call.

Finally, the focus turns to Crespo's conduct at the grocery store. According to the County, Crespo loitered at the store and played loud music there. I find that the record evidence does not support that contention either. Here's why. Crespo testified that he frequently stops at the store while off duty, but that when he does so, he does not loiter there or play loud music on his car's stereo. The County essentially ignores Crespo's testimony regarding his conduct there and instead relies on what several grocery store employees told Captain Strachota about Crespo's conduct during his investigation. Those store employees did not testify at the hearing. Since they did not testify and Crespo did, that once again means that the only witness with firsthand knowledge of the matter who testified was Crespo. Again, what the County essentially wants me to do here is credit what the store employees told Captain Strachota (about Crespo's conduct) over what Crespo testified to at the hearing. I decline to do that. Instead, I credit Crespo's testimony concerning his past conduct at the grocery store. Nothing in his account of his conduct at the store demonstrates misconduct. I therefore find that Crespo did not violate either of the departmental rules previously referenced, or the derivative civil service rule, by his conduct at the grocery store.

Since none of the three charges against Crespo have been sustained, the County failed to prove that Crespo committed the misconduct he was charged with.

Inasmuch as the County did not prove the first element of just cause, it is unnecessary to address the second element of just cause (i.e. whether the County established that the five-day suspension was appropriate under all of the relevant facts and circumstances), and the parties' arguments with respect to same. Therefore, the Sheriff did not have just cause to suspend Crespo. Accordingly, his suspension is overturned.

In light of the above, it is my

AWARD

That just cause did not exist to suspend Deputy Crespo. His five-day suspension is therefore rescinded. The County is directed to make Crespo whole for the five days he was suspended.

Dated at Madison, Wisconsin, this 13th day of January, 2006.

Raleigh Jones /s/

Raleigh Jones, Arbitrator

