

BEFORE THE ARBITRATOR

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

and

MILWAUKEE COUNTY

Case 609
No. 66640
MA-13586

(Christopher Wargolet Suspension)

Appearances:

Matthew Granitz, Cermele & Associates, Attorneys at Law, 6310 West Bluemound Road, Suite 200, Milwaukee, Wisconsin 53213, appearing on behalf of the Milwaukee Deputy Sheriffs' Association.

Timothy Schoewe, Deputy Corporation Counsel, Milwaukee County, 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 Christopher Wargolet's suspension. The undersigned was so designated. A hearing was held in Milwaukee, Wisconsin on May 4, 2007. The hearing was not transcribed. The parties filed briefs on June 6, 2007. The Association filed a reply brief on June 28, 2007. The record was closed on July 10, 2007 when the undersigned notified the parties that the County had not filed a reply brief. Having considered the evidence, the arguments of the parties and the record as a whole, the undersigned issues the following Award.

ISSUES

The parties stipulated to the following issues:

1. Did just cause support the rule violation as charged?
2. If yes, did just cause support a one day suspension? If not, what is the appropriate remedy?

BACKGROUND

The County operates a Sheriff's Department. The Association is the exclusive collective bargaining representative for the Department's deputy sheriffs. Christopher Wargolet is a deputy sheriff who has been with the Department for about 12 years.

The underlying matter involved here involves an improper release of a prisoner from the Milwaukee County jail. Three members of the department were disciplined as a result of that incident. One of the three was Wargolet. This case involves his discipline.

FACTS

On May 2, 2006, Deputy Wargolet was working the third shift at the jail in the jail records area. He was processing orders for inmates to be released from custody or transferred to another agency. The former (known as a standard release) are more common than the latter (transferred to another agency). Wargolet was responsible for checking the release paperwork before sending it to the Release Deputy. This was a job Wargolet had performed many times before. On average, he processed 40 to 50 inmates per shift. Insofar as the record shows, Wargolet was good at this job. He has been previously commended for his accuracy and attention to detail in performing this task. Prior to the incident involved here, he had never had an improper release or made any mistakes of a similar nature.

One of the inmates who Wargolet processed for release that night was Steven Hopkins. By happenstance, Wargolet had been one of the officers who arrested Hopkins the previous day for a parole violation. As a result, Wargolet had personal knowledge of both the arrest and the inmate. Hopkins is a convicted felon. When Wargolet processed Hopkins for release, he took the paperwork relating to Hopkins out of a box known to jail employees as the standard or regular release box. Wargolet assumed that Hopkins was to be released to the street because his (Hopkins') paperwork was in that box (i.e. the standard/regular release box). However, Hopkins' paperwork was in the wrong box. Someone – the record does not identify who – put Hopkins' paperwork into the standard/regular release box by mistake. Hopkins' paperwork should have been placed in the transfer box, but it was not. While Hopkins' paperwork was placed in the wrong box, Hopkins' paperwork clearly stated in the middle of the form that Hopkins was to be released to a representative of the (Wisconsin) Department of Corrections/Division of Juvenile Corrections, specifically a probation agent named Ronald Nord. By his own admission, Wargolet did not fully examine/read Hopkins' paperwork. Instead, Wargolet looked only at the top of the form and did not look at the middle of the form where it stated that Hopkins was to be released to a representative of the Department of Corrections (i.e. Nord). Wargolet did not see that instruction. Since Wargolet did not see that

instruction, he processed Hopkins as a general release, rather than a transfer, and released Hopkins to the street. In doing so, Wargolet released a prisoner from the jail who should not have been released.

Later that day, probation agent Nord came to the jail to pick up Hopkins and learned that Hopkins had been released to the street. Probation agent Nord subsequently located Hopkins, arrested him, and took him back into custody.

The Employer subsequently conducted an internal investigation into Hopkins' release from jail. The Employer's investigator, Captain Eileen Richards, interviewed three employees on the third shift about Hopkins' release: Wargolet, Deputy Rachelle Jackson and Captain Eric Roberson. Jackson was the release deputy and Roberson was the shift commander. Investigator Richards did not interview anyone on the second shift. Following her investigation, Investigator Richards concluded that all three of the third shift employees just referenced were culpable for the mistaken release of Hopkins because all three either overlooked or failed to read the middle portion of Hopkins' release order wherein it stated that Hopkins was to be transferred to the Department of Corrections. All three were subsequently disciplined. Both Wargolet and Deputy Jackson were given one-day suspensions. Captain Roberson was given a five-day suspension. Wargolet's suspension notice, which was signed by Inspector Kevin Carr, alleged that Wargolet had violated three department rules and three County civil service rules. The three department rules cited were 1.05.02 "Conduct of Members", 1.05.03 "Violation of Policy" and 1.05.14 "Efficiency and Competency". The three County civil service rules cited were Rule VII, Section 4(1)(l) "Failing to comply with department rules, policies and procedures"; (t) "Failure/inability to perform duties of assigned position"; and (u) "Substandard or careless job performance". This suspension notice quoted the rules just referenced, but made no reference to any facts. The suspension notice for Deputy Jackson and Captain Roberson is not contained in the record.

Wargolet appealed his suspension to arbitration, but Deputy Jackson did not. Captain Roberson appealed his suspension, but the County's Personnel Review Board upheld it.

The record indicates that prior to the incident involved here, Wargolet had a clean disciplinary record. The record does not indicate what the disciplinary history is of Deputy Jackson and Captain Roberson.

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At the hearing, Wargolet acknowledged that there should be "some repercussion" for Hopkins' mistaken release, but it was his view that a one-day suspension was too severe. He thought he should instead receive a written reprimand.

POSITIONS OF THE PARTIES

Association

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

First, the Association contends that the County did not prove that Wargolet violated any department or County rule when he processed inmate Hopkins for release, and if he did, he did not do it intentionally. The Association disputes the County's assertion that Wargolet admitted to a rule violation. According to the Association, all Wargolet admitted to was being involved in processing Hopkins' release after someone else mistakenly put Hopkins' paperwork in the wrong basket (i.e. the release basket). The Association asserts that when Wargolet processed inmate Hopkins for release, he "unknowingly perpetuated another employee's mistake." The Association suggests that the employee who made the mistake of putting Hopkins' paperwork in the wrong basket had to be an employee on the second shift (as opposed to the third shift that Wargolet worked). The Association faults the Employer for not interviewing anyone from the second shift regarding this matter. The Association characterizes the unknown second shift employee who placed Hopkins' paperwork in the wrong basket as "the most culpable for the resulting release error." The Association avers that if the employees on the second shift had performed their job correctly, and placed Hopkins' paperwork in the correct basket (i.e. the transfer basket), "Wargolet would not even have been investigated." The Association argues that by disciplining Wargolet but not the unknown second shift employee who put Hopkins' paperwork in the wrong basket, the Employer did not apply the rules fairly and is holding Wargolet responsible for another employee's misconduct.

Next, the Association argues in the alternative that even if Wargolet did commit a rule violation when he processed inmate Hopkins for release, there was not just cause for the discipline imposed for the following reasons. First, the Association emphasizes that Wargolet's past disciplinary record is clear in that he has no previous suspensions or written reprimands. Second, it submits that what happened in this matter is "completely outside his (Wargolet's) normal careful nature" because Wargolet normally shows great attention to detail. The Association argues that under these circumstances, a suspension is not necessary to get Wargolet's attention and change his behavior. Third, addressing the matter of comparable discipline, the Association argues that the arbitrator should not be guided by the discipline imposed on Deputy Jackson and Captain Roberson because it is not relevant. In support thereof, the Association avers that the record lacks sufficient evidence on the extent of their involvement in this matter. It also points out that the record is silent on their past disciplinary history. It also notes, with regard to Deputy Jackson, that the record is silent on whether she had the same documented history of attention to detail (that Wargolet did). With regard to Captain Roberson, the Association maintains that as a captain, Roberson could reasonably be held to a higher standard of conduct than a deputy. The Association argues that if any

discipline is imposed, the level of punishment should be reduced to a level more fitting Wargolet's behavior on the day in question and his past disciplinary history.

County

The County's position is that just cause existed for Wargolet's suspension. It elaborates as follows.

First, the Employer reviews the following essential facts about the incident involved. It notes that a key part of Wargolet's job is to insure accuracy in releasing inmates. It further notes that the paperwork for inmate Hopkins clearly specified that Hopkins was to be released only to a representative of the Wisconsin Department of Corrections, namely Ronald Nord. What happened though was that Wargolet and two others (i.e. Deputy Jackson and Captain Roberson) looked only at the top of the form and missed that instruction. As a result, they released Hopkins to the street instead of to the proper custodial agency (i.e. the Department of Corrections). While the inmate was later recaptured, it is the Employer's view that that does not militate against what happened (namely, that a felon was freed who should have been in custody away from the public).

Second, the County asserts that to his credit, Wargolet did not claim to be innocent in terms of his culpability in the incident. Instead, he admitted that he made a mistake in releasing Hopkins to the street. As the County sees it, it follows from that admission that Wargolet violated the department's rules and procedures which, in turn, "necessarily carries with it a finding that just cause exists to impose discipline."

Third, with regard to the level of discipline which was imposed, the Employer argues that a one-day suspension was reasonable under the circumstances. To support that premise, it notes that at the hearing, Wargolet admitted there should be some repercussion to him for Hopkins' mistaken release, but he (Wargolet) thought that a one-day suspension was too severe. The Employer disagrees. To support its contention that a one-day suspension was not too severe, the Employer emphasizes that two other department employees were disciplined for their role in Hopkins' bad release (i.e. Deputy Jackson and Captain Roberson). The Employer notes that Deputy Jackson was suspended for one day and Captain Roberson was suspended for five days. As the County sees it, their discipline justifies Wargolet's discipline. The County points out that it imposed the same discipline upon Wargolet that it imposed on Deputy Jackson. The County requests that the arbitrator give deference to that judgment. It therefore asks that Wargolet's one-day suspension be upheld.

DISCUSSION

The parties stipulated that the issues to be decided herein are whether just cause supported the rule violation and the one-day suspension imposed on Wargolet. I answer those questions in the affirmative, meaning that I find that the Employer had just cause to find a rule violation and impose a one-day suspension on Wargolet. My rationale follows.

As just noted, the parties stipulated to a just cause standard for reviewing the discipline which was imposed on Wargolet. Arbitrators differ in their approaches to analyzing just cause. One approach consists of addressing these two basic elements: first, did the employer prove the employee's misconduct, and second, assuming the showing of wrongdoing is made, did the employer establish that the discipline which it imposed was justified under all the relevant facts and circumstances. That's the approach I'm going to apply here.

The first part of the just cause analysis being used here 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 909) alleges that Wargolet violated three department rules and three civil service rules, 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 Richards' "Investigative Summary" report. That document essentially alleges that Wargolet committed misconduct when he released inmate Hopkins to the street rather than to a representative of the Wisconsin Department of Corrections.

The facts related to the release are undisputed. Inmate Hopkins was supposed to be released to a probation agent with the Wisconsin Department of Corrections. That did not happen. Instead, he was released to the street. That release was improper and should not have occurred.

Wargolet was one of three employees who were involved in Hopkins' improper release. His involvement in the matter will be addressed next. The involvement of the other two employees will be addressed later in this decision.

Wargolet was the first jail employee involved in processing Hopkins for release. Wargolet looked at Hopkins' release papers but, by his own admission, did not fully examine or read it. Had he done so (i.e. fully examine and/or read it), he presumably would have seen the instruction in the middle of the form that Hopkins was to be released to a representative of the Department of Corrections. Wargolet did not see that instruction, so he processed Hopkins as a general release rather than a transfer to the Department of Corrections.

Although Wargolet did not characterize his failure to read the instruction about Hopkins' transfer to the Department of Corrections as an accident, the Employer does not assert that Wargolet intentionally overlooked it. That being so, it is presumed by the undersigned that Wargolet's failure to follow the instruction about Hopkins' release was accidental.

Building on that premise, I have decided to begin my discussion on this matter with the old adage that accidents happen. While accidents do indeed happen, someone is often held accountable for them afterwards.

The first question to be answered here is whether fault can fairly be assigned to Wargolet for missing the instruction on Hopkins' paperwork. I find that it can. Simply put, Wargolet should have fully examined Hopkins' paperwork and/or read it. His failure to do so was inexcusable. As previously noted, had he fully examined and/or read it, he presumably would have seen the instruction to transfer Hopkins to the Department of Corrections.

In so finding, I am well aware that when Wargolet processed Hopkins, Wargolet took Hopkins' paperwork out of the regular release box. Wargolet assumed that Hopkins was to be released to the street because his (Hopkins') paperwork was in the regular release box. However, Hopkins' paperwork was in the wrong box; it should have been in another box (namely, the box for the transfers). As the Association sees it, Wargolet's conduct should be excused because someone else mistakenly put Hopkins' paperwork in the wrong box. I find that contention unpersuasive for the following reason. Wargolet was responsible for reviewing the paperwork in question – no matter what box it came from. While Wargolet was normally careful in performing this task, he was not in this particular instance because he failed to review the paperwork completely.

The next question to be answered is whether Wargolet's conduct warranted discipline. I find that it did for the following reasons. Employers have a legitimate and justifiable interest in ensuring that employees perform their work completely and accurately. Employers that tolerate incompetent and sloppy work by their employees can, under certain circumstances, expose themselves to legal and financial risks for doing so. That is why the County has adopted a civil service rule which prohibits "substandard or careless job performance" by employees and why the Sheriff's Department has adopted a work rule requiring department members to "adequately perform" their job duties. As the County sees it, Wargolet's work performance relating to Hopkins' release fits into both categories of prohibited behavior. I concur, and find that on that day, Wargolet failed to "adequately perform" his job duty pertaining to releasing inmates and that this constituted "substandard or careless job performance." Since Wargolet violated both those rules, he committed misconduct for which he could be disciplined.

The second part of the just cause analysis being used here requires that the employer establish that the penalty imposed was appropriate under all the relevant facts and circumstances. In reviewing the appropriateness of discipline under a just cause standard, arbitrators often consider the notions of progressive discipline, due process protection and disparate treatment. The undersigned will do likewise in reviewing the appropriateness of the discipline imposed here (i.e. a one-day suspension). Based on the following rationale, I conclude that a one-day suspension was appropriate here.

First, the normal progressive disciplinary sequence is for an employee to receive other formal discipline such as a written warning before a suspension is imposed. That did not happen here because Wargolet had not received any formal discipline prior to the incident involved here. Some labor agreements specify a particular sequence which must usually be followed by the employer when it imposes discipline. For example, some labor agreements provide that a verbal warning must be imposed first, then a written warning, then a suspension, etc. However, the collective bargaining agreement involved here does not contain such language. That being so, there is nothing in this labor agreement which required that a lesser form of discipline – other than a one-day suspension – had to be imposed in this particular case.

Next, there is no evidence that Wargolet was denied due process before discipline was imposed. This finding is based on the following facts. After the Employer became aware of Hopkins' improper release, Captain Richards met with Wargolet for an investigatory interview. At that time, Wargolet was given the opportunity to tell his side of the story. He did. As a result, the Employer heard from Wargolet before it issued the suspension notice. In my view, there is nothing in the foregoing facts that raise any so-called red flags regarding procedural due process. Accordingly, I find that the County gave Wargolet due process before it imposed discipline.

In so finding, I have considered the Association's contention that the Employer's investigation was flawed because the Employer did not interview anyone from the second shift regarding this matter; instead, it just interviewed three third shift employees. According to the Association, the second shift employee who placed Hopkins' paperwork in the wrong basket is "the most culpable for the resulting release error." The undersigned disagrees. In my view, whoever placed Hopkins' paperwork in the wrong box is not the most culpable for Hopkins' improper release; instead, I find that Wargolet was the most culpable for that act occurring. As previously noted, he should have fully read and/or examined Hopkins' paperwork, no matter what box it came from. The fact that someone else placed Hopkins' paperwork in the wrong box does not change this.

Finally, I find that Wargolet was not subjected to disparate treatment in terms of the punishment imposed. Here's why. Two other employees who were involved in processing Hopkins for release (namely, Jackson and Roberson) also made the same mistake that Wargolet did (i.e. they also did not fully examine and/or read Hopkins' paperwork). As a result, neither of them saw the instruction that Hopkins was to be released to the Department of Corrections. It would be one thing if either one had not been disciplined as severely as Wargolet. However, that was not the case; Deputy Jackson received a one-day suspension (just as Wargolet did), and Captain Roberson received a five-day suspension. For the purpose of this discussion, I'm not going to rely on/consider Captain Roberson's discipline because he is not in this bargaining unit. Additionally, as a supervisor, he presumably can be held to a higher standard by the Employer. Deputy Jackson is a fellow bargaining unit employee though, so her discipline can, and will be, considered. As was just noted, her discipline was consistent with Wargolet's, so both employees received identical disciplinary treatment. While Wargolet believes that his

one-day suspension was excessive and should be reduced to a written warning, the Association did not prove that via objective evidence. Consequently, there is no objective basis in the record for overturning Wargolet's one-day suspension and reducing it to a written warning.

In sum then, it is held that the severity of discipline imposed upon Wargolet was not excessive, disproportionate to the offense, or an abuse of management discretion, but rather was reasonably related to his proven misconduct. The County therefore had just cause to suspend Wargolet for one day.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

1. That just cause supported the rule violation as charged;
2. That just cause supported a one-day suspension. Therefore, the appeal is denied.

Dated at Madison, Wisconsin, this 8th day of August, 2007.

Raleigh Jones /s/

Raleigh Jones, Arbitrator

