

BEFORE THE ARBITRATOR

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

and

MILWAUKEE COUNTY DEPUTY SHERIFF'S ASSOCIATION

Case 615
No. 66905
MA-13677

Appearances:

Matthew L Granitz, Cermelle & Associates, S.C., Attorneys at Law, 6310 West Bluemound Road, Suite 200, Milwaukee, Wisconsin, appeared on behalf of the Association.

Timothy R. Schoewe, Deputy Corporation Counsel, 901 North 9th Street, Milwaukee, Wisconsin, appeared on behalf of the Employer.

ARBITRATION AWARD

Milwaukee County Deputy Sheriff's Association, herein referred to as the "Association," and Milwaukee County (Sheriff's Department), herein referred to as the "Employer," jointly selected the undersigned from a panel of arbitrators from the staff of the Wisconsin Employment Relations Commission to serve as the impartial arbitrator to hear and decide the dispute specified below. The arbitrator held a hearing in Milwaukee, Wisconsin on July 10, 2007. Each party filed a post-hearing brief, the last of which was received August 22, 2007.

ISSUE

The parties stipulated to the following statement of the issues:

1. Did just cause support the rule violation charged?
2. If not, what is the appropriate remedy?

RELEVANT AGREEMENT PROVISIONS

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1.02 MANAGEMENT RIGHTS

The County of Milwaukee retains and reserves the sole right to manage its affairs in accordance with all applicable laws, ordinances, regulations and executive orders. Included in this responsibility, but not limited thereto, is:

- The right to determine the number, structure and location of departments and divisions; the kinds and number of services to be performed;
- The right to determine the number of positions and the classifications thereof to perform such service;
- The right to direct the work force;
- The right to establish qualifications for hire, to test and to hire, promote and retain employees;
- The right to assign employees, subject to existing practices and the terms of this Agreement;
- The right, subject to civil service procedures and s. 63.01 to 63.17, Stats., and the terms of this Agreement related thereto, to suspend, discharge, demote or take other disciplinary action;
- The right to maintain efficiency of operations by determining the method, the means and the personnel by which such operations are conducted and to take whatever actions are reasonable and necessary to carry out the duties of the various departments and divisions.

In addition to the foregoing, the County reserves the right to make reasonable rules and regulations relating to personnel policy, procedures and practices and matters relating to working conditions giving due regard to the obligations imposed by this Agreement. However, the County reserves total discretion with respect to the function or mission of the various departments and divisions, the budget, organization, or the technology of performing the work. These rights shall not be abridged or modified except as specifically provided for by the terms of this Agreement, nor shall they be exercised for the purpose of frustrating or modifying the terms of this Agreement. But these rights shall not be used for the purpose of discriminating against any employee or for the purpose of discrediting or weakening the Association.

By the inclusion of the foregoing managements rights clause, the Milwaukee County Deputy Sheriffs' Association does not waive any rights set forth in S. 111.70, Stats., created by Chapter 124, Laws of 1971, relating to bargaining the impact upon wages, hours or other conditions of employment of employees affected by the elimination of jobs within the Sheriff's Department by reason of the exercise of the powers herein reserved to management.

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5.04 DISCIPLINARY SUSPENSIONS NOT APPEALABLE UNDER WISCONSIN STATE STATUTE 63.10

In cases where an employee is suspended for a period of ten (10) days or less by his department head, pursuant to the provisions of s. 63.10, Stats., the Association shall have the right to refer such disciplinary suspension to arbitration. Such reference shall in all cases be made within 10 working days from the effective date of such suspension. The decision of the Arbitrator shall be served upon the Department of Labor Relations and the Association. In such proceedings, the provisions of s. 5.02(2)(c) shall apply.

....“

RELEVANT DEPARTMENT RULES

“ . . .

APPLICABLE RULE PROVISIONS

Milwaukee County 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.

...

1.05.14 Efficiency and Competency

Members shall adequately perform reasonable aspects of police work: such expected aspects include, but are not limited to: report writing, physical intervention, testimony, firearms qualification and knowledge of the criminal law.

...

1.05.25 Reports Concerning Crimes

Members shall report promptly to their supervisor or the watch commander any information concerning any crime or other unlawful action.

...

200.00 Code of Conduct

Milwaukee County Civil Service Rule VII, Section 4(l)

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

....”

FACTS

The Department is headed by the Sheriff of Milwaukee County and performs the law enforcement function at the county level. The Association represents sworn personnel of the Department. Deputy Hagen has been employed as a sworn deputy by the Department for the last 11 years. Prior to that she went to college and prior to that she was employed as a clerical employee of the City of South Milwaukee Police Department. She resides on Elm Street in the City of South Milwaukee which is in Milwaukee County. She resides with her three children, one of which is two years old. She lives next to a person hereinafter identified as “S.” S has a reputation for being abusive and argumentative.¹ He has a history of domestic abuse and alcoholism. Deputy Hagen does not speak to S. because she does not want to get involved in arguments with him.

On December 4, 2006, there was a considerable amount of snow on the ground. S or his son began using a snow blower in a way in which snow was blown in the yard and toward the window of the Deputy Hagen’s home. Hagen’s two year old son was outside playing. It was possible for him to have been struck by blown snow. Deputy Hagen did not want to confront her neighbor. She called Deputy Dittberner on his county-issued cell phone to see if he would talk to S.

Deputy Hagen was aware of Deputy Dittberner’s duty on the Targeted Enforcement Unit (herein “TEU”) and was aware that his area of his assignments included her neighborhood and that he normally was on duty at the time she called. She called his

¹ The findings with respect to S. are for the purposes of clarity in this decision and may or may not be accurate.

Department-issued cell phone. She knew this telephone number because she had worked with him for a number of years and was personal friends with him. She also had received one of the business cards discussed below, but it is unclear whether that was received as part of the normal distribution of those business cards.

Deputy Daniel Dittberner is a member of the TEU. The TEU was created in the spring of 2006. The purpose of the unit was to target law enforcement efforts to effectively reduce unlawful conduct in, and around, county parks. Part of the function of the TEU was to create a direct link between the TEU and citizens who live in, and around, the county's parks. As part of that function, TEU deputies visited local events such as, without limitation, fairs, concerts, and park events. They met with citizens at those events and distributed business cards with deputies' county-issued cell phone telephone numbers. Citizens were encouraged to call TEU deputies on their cell phones and report suspicious activity at, or near, the parks. The purpose of making the call directly to Deputies by cell phone was to reduce delays attendant by calling 911 or dispatch for parks-related concerns. TEU Deputies were instructed by their supervisors to respond to citizen complaints made to these cell phones. Deputies were routinely responding to citizen complaints made to the cell phone even if they were not related to parks and even if they were of a type normally handled by local police. This routine was of such a magnitude that these responses must have been known and approved by supervision. Deputy Dittberner personally had responded to calls on his cell phone for law enforcement services from other sworn officers of the Department at their personal residences about five or six times prior to the incident in question. There is no evidence any supervisor was aware of those calls and responses.

Deputy Dittberner responded to Deputy Hagen's call on his cell phone. She inquired if it was appropriate to ask him to respond to a dispute she was having with her neighbor. He stated that it was. She related the circumstances. Deputy Dittberner happened to be passing near Deputy Hagen's home as he was on the way to a training session nearby.

He responded to the call and went to the S home. He reported to dispatch upon his arrival both his location and that he was there pursuant to an investigation. He did not state that he was responding to a call from Deputy Hagen. It is not clear whether this was out of the ordinary nature of TEU functions to report to the dispatcher in that way

S stated that his son was operating the snow blower that day and that it was his son's first time using the snow blower. He stated he was sorry for the inconvenience to Ms. Hagen and that he would speak to his son.

Deputy Dittberner then spoke to Deputy Hagen at her home and reported that S was sorry and would take steps to see that the issue never occurred again.

S called the Department on the following day. He reported that he thought it odd that a deputy sheriff had come to his door and reported that he thought the same Deputy had been seen with Deputy Hagen.

The Department investigated the matter. Investigators suggested that Deputy Hagen should have filed a report with the South Milwaukee Police Department rather than having called a co-worker. Deputy Hagen thereupon filed a report with the South Milwaukee Police Department. As part of that report, she described S's behavior as being abusive as part of her explanation of why she did not contact him herself. She referred to frequent arguments between S and his wife and daughter, some of which involved his wife and/or screaming like she was being beaten on various occasions. The report also states that on one occasion she saw a girl running out of his driveway as S chased the girl down the street in his car.

The Sheriff imposed a one day suspension essentially for creating the appearance of impropriety and, separately, failing to report abuse crimes by her neighbor, in violation of the rules cited above. The Association filed a grievance concerning the discipline and the same was properly processed to arbitration.

POSITIONS OF THE PARTIES

Employer

The Employer had just cause to discipline Deputy Hagen for her conduct regarding off duty contact with her irksome neighbor. She called her personal friend Deputy Dittburner who was working this particular location, if he was indeed working. He responded to help a friend or colleague. Deputy Dittburner testified that he did not view his response as official police action. When Deputy Dittburner did call the dispatcher, he did not say what type of call he was responding to or that he was doing a personal favor on Employer time. Deputy Hagen's testimony shows she just does not get it. She was wrapped up in the "I will not call the Sheriff again." The real point is that she ought not use colleagues in their official capacity for personal business. Additionally, she did not follow procedure. If official police action is needed, she should have called the local police agency and not attempted to have friends do her personal bidding. Deputy Dittburner understood this and he was transferred as a result of his action.

Association

The Employer lacks just cause for imposing discipline on Deputy Hagen. Deputy Hagen is entitled to police services because she is also a Milwaukee County citizen. It is impossible for her to have brought discredit to the Department because she called for services by cell phone pursuant to the terms of the Department's own community outreach program and she would have been entitled to the disputed services even if she were not a member of the Department.

Part of the discipline imposed was for failing to report a crime because Deputy Hagen is alleged to have failed to report abusive behavior by S. In fact, this added charge is a pretext for weak discipline. Additionally, she never witnessed a crime because she never witnessed

him physically abuse someone. Technically, none of the rule violations alleged have anything to do with failing to report an alleged crime.

Alternatively, if the arbitrator concludes that just cause existed, a one day suspension is not the appropriate penalty. The discipline does not reflect Deputy Hagen's exemplary record which is devoid of any discipline in her thirteen year history. The discipline is also inconsistent with that imposed upon Dittberner and Dobson. They were given "EAD" which are not discipline. Other employees have called for assistance and have never been disciplined.

In its reply brief, the Association notes that the Employer concedes that Deputy Hagen did not witness a criminal act. The Association denies that Deputy Hagen's call to Deputy Dittberner was a personal favor. Deputy Hagen asked Deputy Dittberner when she called if he could respond to this type of call. She followed the parks program procedure. The Employer cannot avoid the fact that no other employee was disciplined for this incident. The Employer suggests that Dittbrener's transfer was discipline. That was an exercise of a management right. If the Sheriff had intended the transfer to be discipline, he would have also transferred Dobson which he did not. The Association asks that the discipline be set aside and the Grievant made whole.

DISCUSSION

1. Appearance of Improper Use of Authority

This issue concerning the intervention of Deputy Dittbbrener involves two major principles. First, is the Sheriff's authority, if not obligation, to have his deputies avoid creating the appearance of impropriety while receiving services in a way which is otherwise available to the general public. The second involves the basic principle of discipline that employees are entitled to know in advance what is expected of them.

Deputy Hagen took advantage of knowledge of a cell phone contact number which was known and used by the public to obtain services from Deputy Dittbrener which were of a nature which similar to those which the public receives from the Department. Deputy Hagen failed to realize that her request for these services created significant issues concerning propriety. First, it is rather clear that Deputy Dittbrener wanted to be helpful to a colleague. The mere request to him involved understandable conflicts of interest. Second, the involvement of a fellow officer in a neighbor dispute of a type which ordinarily would not likely be handled with police intervention clearly created the appearance that the deputies were using the power of their positions for personal advantage, even though they were not actually doing so. It was obvious during Deputy Hagen's testimony that she did not fully understand the implications of her actions.

This turns me to the other point. There is no question that deputies should know to avoid situations in which they create an appearance that they are abusing their authority.

Failure to do so violates rule 1.05.02 (bringing discredit). However, there are some situations which might not be recognizable to a deputy because they are unusual. This is one of those situations. Deputies are ordinarily entitled to the same level of services as the public. The very purpose and procedures of the TEU program involved was to obtain the early intervention of deputies by direct cell phone contact in disputes which might otherwise be handled by local police. Deputy Hagen's requesting these services was consistent with the nature of the program. Deputy Hagen inquired of Deputy Dittbrener at the time she called him as to whether it was proper to do so. I conclude Deputy Hagen did not intend to seek preferential treatment or special services. Deputy Dittbrener told her it was appropriate and I conclude that she had a right to rely on that representation. The issue in this situation is that this may be a situation in which the Sheriff may chose not to provide these specific services to off duty deputies which it normally provides to the public because of the very obvious improper appearance this creates. Thus, this is not a situation in which Deputy Hagen should have known of the impropriety. Under the basic rules of progressive discipline, she was entitled either to advance notice or at least one warning.²

2. *Failure to Take Police Action*

There is no evidence to sustain the charge as it relates to failing to report a crime. The only evidence is Deputy Hagen's alleged admission to South Milwaukee police officers as outlined above. Those admissions, even if fully accurate, do not form the basis to conclude that she witnessed a crime being committed. Deputy Hagen denied to the investigators making the statements to South Milwaukee police officers that their report reflects. There was no independent corroboration of the alleged events or the alleged statement. There was no other testimony at hearing which demonstrated that she had actually witnessed a crime. Accordingly, the discipline cannot be sustained on this ground.

3. *Penalty*

Discipline is supported with respect to only one of the two allegations. I am satisfied that had the Employer taken action only with respect to the sustained incident, it would not have imposed a one-day suspension. No disciplinary action was taken at all with respect to Deputy Dittbrener.

The sustained incident involved a situation in which I concluded Deputy Hagen could not reasonably have known that her conduct violated the rule. Under ordinary circumstances the only level of progressive discipline which it is appropriate to apply is a verbal warning. There are no extraordinary circumstances in this case. A verbal warning is appropriate because it is designed to give an employee guidance as to appropriate conduct in the future and give the employee a chance to correct his or her ways. The Employer uses non-disciplinary

² An example of an advance notice would be a policy made known to all deputies that they were not to use TEU services, but rather go through dispatch or use local police services.

actions in some instances for this purpose, but the evidence is insufficient to establish that they are used in lieu of verbal warnings in this type of situation.

AWARD

Accordingly, the evidence supports the conclusion that Deputy Hagen violated Rule 1.05.02 with respect to the appearance of improper use of services, but did not violate the rule with respect to intervening in a crime. The only appropriate level of discipline in this case is a verbal warning.

Dated at Madison, Wisconsin, this 4th of October, 2007.

Stanley H. Michelstetter II /s/

Stanley H. Michelstetter II, Arbitrator

