

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 611
No. 66856
MA-13662

Appearances:

Matthew L. Granitz, Cermele & 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 Department.

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 "Department," 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 October 31, 2007. Each party filed a post-hearing brief, the last of which was received December 14, 2007.

ISSUE

The parties stipulated to the following statement of the issues:

1. Was there just cause to find a rule violation?
2. Was there just cause to discipline Sgt. R. G. with a 5 day suspension?
3. 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.

. . .

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.

. . . .”

Milwaukee County Civil Service Rule VII (4) (1):

(1) 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. Sergeant R. G. has been employed as a sworn deputy by the Department for the last 16 years, the last 8 of which have been as a Sergeant. Sergeant R. G. has been under treatment for anxiety and depression.¹ At the material times, Sgt. R. G. was married, but separated from his wife. He had been married about one year and a half. She had filed for divorce. The two lived in separate residences. The wife lived at the former marital residence, a single family home. The wife is a Milwaukee Police Officer. Sergeant R. G. retained a key to the marital home at all material times. Sergeant R. G. was off duty at the time of the underlying incident.

Sergeant R. G. had been very close to his grandmother who had passed away. On October 21, 2006, Sgt. R. G. attended the funeral of his grandmother. He remained in off duty status at all material times. He had expected to meet his wife at the funeral but she did not come. He went to the marital residence in an attempt to find her, but she was not home. Although he could have entered the house, he proceeded to drive his truck into the garage and close the garage door even though his truck was running. He used his cell phone to call his wife. He may also have sent her a text message. The wife, who did not testify at the arbitration hearing, reported in the internal investigation telephone interview conducted by Captain Eileen T. Richards on October 27, 2006, that R.G. during the incident had sent her a text messages and called her from the garage. She believed Sgt. R. G. intended to kill himself using a gun.² Although he called from the garage, the wife did not suspect that he was going to commit suicide by carbon monoxide or any other method besides using a gun. On the basis of her fear that Sgt. R.G. would commit suicide, she called the Milwaukee Police Department emergency number. On-duty Milwaukee police officers responded to the scene. The wife arrived shortly thereafter. The wife reported at page 4 of the transcript of the internal investigation interview that she has talked to Sgt. R. G. since the incident and she believes that there has been a material improvement in his mental condition.

The Department reassigned Sgt. R. G. to administrative duty when it learned of the incident. It sent him to its consulting psychologist, Dr. Nicholas E. Claditis, EdD, for a fitness-for-duty psychological examination. Dr. Claditis interviewed Sgt. R. G. on

¹ The parties stipulated to relying upon reports filed by medical practitioners even though the same were hearsay and each party did not have the opportunity to cross examine the person filing the report.

² The transcript of the internal interview with the wife indicated that he otherwise never made any overt threats of suicide. In the next line the wife indicates that at least on one occasion he made an implicit threat to commit suicide using a running vehicle in their garage. Because the wife did not testify, little weight can be put on this testimony other than the wife did have a fear that Sgt. R. G. might try to commit suicide. The wife stated that she keeps a gun or guns in the house and that Sgt. R. G. would have been able to get a gun from her house on the night of the occurrence.

November 6, 2006 and wrote his first report on November 13, 2006. The report reads in substance as follows:

. . . . Based on the results of my evaluation, I feel he is able to resume his full duties as a sergeant in your department. I found no ongoing evidence of depression or debilitating anxiety.

There are two issues that need to be highlighted, however: (1) [R.G.'s] suicide attempt does not appear to be genuine. (2) He appears to be in denial at this time and minimizing his emotional involvement/commitment to the referring episode. Consequently, it is important that he continue to see his psychotherapist and remains compliant with his medications.³

The Department apparently sought more information from Dr. Claditis, but the nature of the request and discussion with Dr. Claditis is not in evidence. He wrote a follow-up letter, dated December 5, 2006, the substance of which states as follows:

This letter is intended to clarify my previous letter of November 5, 2006 regarding the Fitness-For-Duty Evaluation of [R.G.]. In my previous letter, I indicated that I did not consider [R.G.'s] suicide attempt to be genuine. The reason for this conclusion was based on my professional opinion that [R.G.] was using this method to obtain his estranged wife's attention and reconciliation. In this regard, he succeeded, i.e., he is now living back at his house with his wife. The insincerity of his suicide attempt, however (sic) is based on the fact that two times in the course of that event, [R.G.] left the truck in the garage and went outside to get some fresh air. That is much too calculated to suggest suicidal distress. Again, in my professional opinion, it is unlikely he would attempt to do this again, i.e. attempt suicide by sitting in a garage with his truck motor running.

The second issue I highlighted in my earlier letter referred to the fact that, in my professional opinion, [R.G.] is minimizing his emotional involvement in the episode. I continue to believe this, especially since he was able to effect a reconciliation with his wife. In other words, he got his way. An, because it worked once, I believe he would manipulate events to his advantage again if the necessity arose. (But not a suicide attempt by leaving his truck running in a garage.) Intellectually, he knows that while he did was wrong. At an emotional level, it worked. That is why I suggested that he remain compliant with his medications and continue in psychotherapy. He needs to learn and understand how to deal with the negatives in his life in a more constructive way.

³ The letter refers to a "report" being enclosed, but the same was not in evidence in this proceeding.

I hope this helps clarify my earlier letter.

[bracketed substitution, arbitrator's]

Sergeant R.G. did not confirm during his internal investigation interview or arbitration testimony that he left the garage two times.

The Department opened a formal internal investigation of this incident on December 7, 2006, and assigned Captain Eileen T. Richards to conduct the investigation. She had conducted the informal investigation up to that point. She interviewed Sgt. R. G. on December 13, 2006. He acknowledged having told his wife at some time well prior to the incident that he did not think life was worth living, but denied ever saying he would commit suicide or shoot himself. He admitted going to the marital home after his grandmother's funeral. He admitted that he had been drinking. He denied text messaging his wife, but acknowledged calling her by cell phone from his truck while it was parked in the garage with the garage door closed and the motor running. He denied that he made any specific statement to his wife in either message suggesting that he intended to commit suicide. He denied that it was his intent to have her conclude that he was going to commit suicide or harm himself during the incident. He stated he was "overwhelmed, depressed and in need of help." He stated that his wife was the person he was closest too.

He acknowledged that Milwaukee police officers arrived at the scene and that the fire department came to the scene and examined him. He stated that Milwaukee police officers then transferred him for involuntary psychiatric evaluation at the Milwaukee County Mental Health Complex under Sec. 52.13, Stats. Sergeant R. G. has performed similar duties in the course of his official duties. He denied that the police officers ever interviewed him about the incident during the course of their handling of the incident. He stated that he believed that he would have had access to his wife's weapon in the house had he so desired, but that he made no attempt to secure her weapon prior to running his truck in the closed garage. He acknowledged that his actions could have been interpreted as a suicide attempt. When the police officers arrived they found him in the truck, motor running, and garage door closed. He denied that he intended to manipulate his wife in any way. He stated that by the time police officers arrived he had given up and had thought his wife was not going to come at all.

On or shortly after October 25, 2006, Sgt. R.G. submitted to the Department a report From his treating psychotherapist the substance of which reads in relevant part:

I have known and previously worked with Sergeant [R.G.] since June of 2002. Over the years, he has worked on various personal and relationship issues which stirred within him various degrees of anxiety and depression. Most recently, Saturday, 10/21/06, he was struggling with thoughts of failure, hopelessness and aloneness. The combination of these thoughts, the feelings they opened up, and the confusion worsened by having led to needs to drink all resulted in an impulsive, desperate decision – to try to gas himself in the garage.

Although I do not believe [R.] has a drinking problem, that day of drinking escalated his emotions and terrible decision making. This drinking is not typical of him as far as a problem.

Also, although dealing with a great deal at this time in his life, I do not think he is a danger to himself nor to others. He is aware of many reasons for which suicide is not the answer, especially his love for his sons.

He will continue to be in therapy with me and I'm sure, from his history with me, that he will work hard and cooperate. While in therapy as well as after we stop treatment, I believe he can function very adequately as a police officer and fulfill his responsibilities.

Hopefully this letter is helpful to you in your working with Sergeant [G.] and in helping you make decisions regarding him. If I can be of further assistance, please don't hesitate to contact me.

[Bracketed changes by arbitrator]

Dr. Mele did not testify at the arbitration hearing. This report appears to assume that the suicide attempt was genuine.

On March 14, 2007, Milwaukee County Sheriff David A. Clarke imposed a 5 day suspension on Sgt. R.G. for violating Department Rule 1.05.02, Conduct Of Members, and Milwaukee County Civil Service Rule VII(4)(1). The suspension memorandum stated in relevant part:

In summation, Dr. Claditis stated that in his opinion, [Sgt. R.G.'s] suicide attempt 'does not appear to be genuine.' Dr. Claditis further stated in a follow up letter, '[R.G.] was using this method to obtain his estranged wife's attention and reconciliation.

[bracketed substitution, arbitrator's]

The Association filed a grievance concerning the suspension and the same was properly processed to arbitration.

POSITIONS OF THE PARTIES

Department

The Department had just cause to discipline R.G. Part of the problem giving rise to his problem is his denial. R.G. may have genuine emotional problems but it is his conduct in relation to those personal problems which put the Department in a bad light.

Association

Just cause does not support the discipline in this case. R.G. is charged with two rule violations. One of them is bringing discredit to the Department. R.G. did not bring discredit to the Department. Discredit occurs when an employee's conduct brings unfavorable publicity. In this case, the employee experienced a medical emergency. The Department bases its argument on the fact the Milwaukee Police responded to this incident. R.G. was not charged with a crime. They instead did what they were trained to do; they transported R.G. for observation. It is problematic that the Department wants to discipline an employee for a medical problem. The Department never refuted that R.G. was overwhelmed and depressed. The Department believes that because R.G. had negative contact with another police agency that he must be disciplined. Additionally, the Department utterly failed to prove that R.G.'s conduct impeded Department efficiency.

The Department's presumption that this was not a medical situation is not warranted. The Department relies upon Dr. Claditis's report. The credibility of that report is questionable. It was based only upon a fifteen minute interview. R.G.'s treating therapist, Dr. Meske, is credible. He confirmed that numerous factors played a role: R.G. experienced feeling of failure, hopelessness, and aloneness. Therefore, Dr. Meske does not believe R.G.'s actions were a mere ploy to garner attention. Dr. Meske is more credible. He saw R.G. the night of the incident and is his treating therapist.

In any event, just cause does not support the discipline imposed. R.G. has a long, unblemished disciplinary record and fifteen years of service. Association President Roy Felber testified that another deputy who had been detained for psychological evaluation was not disciplined. Clearly, R.G. was singled out. The discipline should be reduced. The Association requests that the grievance be sustained and R.G. be made whole for all lost wages. Alternatively, the level of punishment should be dismissed.

DISCUSSION

The positions of the parties are relatively similar as to the governing principles. The parties essentially agree that it is not "conduct unbecoming an officer" within the meaning of the rule to have a mental illnesses or mental conditions. Similarly, deputies, like other public employees, are generally entitled to the legitimate use of public emergency services like every other citizen. The Department challenges the legitimacy of Sgt. R.G.'s use of those services. By contrast, the Association does not seriously contest that employees who deliberately engage in the type of behavior which is the subject of this action for the purpose of manipulating others is an abuse of public services and clearly risk bringing serious discredit to the department. Underlying this dispute is a fundamental disagreement as to when employees may be disciplined for conduct while they are affected by mental illness or disorder.

I conclude that the mere fact that Sgt. R.G. has emotional difficulties does not necessarily absolve him of the consequences of his choice to behave in the manner he did. The determinative issue in this matter is whether the Department made a credible judgment that his

emotional difficulties at the time of the disputed occurrence were not such that he lacked sufficient control over himself to be held accountable.⁴ Stated more formally, the test must be whether at the time of the disputed actions Sgt. R.G. could reasonably have foreseen the potential that his conduct had to embarrass the Department. I conclude the evidence is insufficient to support the judgment of the Department.

When Sgt. R.G. reported for duty, the Department sent him to its consulting psychologist for a “fitness-for-duty” evaluation. It did not request a full psychological evaluation or judgment from Dr. Claditis concerning the effect of his emotional situation on his judgment during the disputed incident; it merely requested a judgment as to whether he could perform his duties. Dr. Claditis’s first report is limited to the purpose for which it was given and does not answer the question as to the psychological circumstances at the time of the incident. Further, Dr. Claditis’ statement that the “. . . suicide attempt does not appear to be genuine . . .” does not necessarily lead to the conclusion that Sgt. R.G. was sufficiently in control of his emotions that he should be held accountable.⁵ It is conceivable that Sgt. R.G. was still so out of control of his emotions that he could not be held accountable for even an insincere attempt to commit suicide.

The Department sought clarification from Dr. Claditis which he gave on December 5, 2006. The letter does not answer the question and is insufficient to make that judgment. It explains the factual basis for Dr. Claditis’ conclusion that the suicide attempt was not genuine; i.e. there was no suicidal intent. It states that:

. . . intellectually he knows what he did was wrong. At an emotional level it worked. That is why I suggested that he remain compliant with his medications and continue in psychotherapy. He needs to learn and understand how to deal with the negatives in his life in a more constructive way.

Accordingly, the assumption underlying the discipline in this case was that because Dr. Claditis concluded that Sgt. R.G.’s suicide attempt was not “genuine” that Sgt. R.G. must have been able to foresee the consequences of his actions. However, Dr. Claditis’s reports do not indicate that he drew that conclusion. Instead, Department supervisors drew that conclusion. Under the circumstances of this case, that conclusion would require a professional judgment rather than a judgment by supervisors.

⁴ I note that alcohol use contributed to R.G.’s conduct. The choice to engage in alcohol use and the foreseeable consequence of lowered judgment does not absolve R.G. of the responsibility for his actions. He is a trained law enforcement officer and knows better. However, there are too many intervening emotional events and psychological issues to conclude that but for the alcohol use the events in question would not have occurred.

⁵ The inference was apparently based upon Dr. Claditis factual conclusion that Sgt. R.G. left the garage on two occasions while waiting for his wife to return. The evidence is insufficient to demonstrate that Sgt. R.G. did, in fact, leave the garage twice.

The facts and circumstances raise questions as to whether Sgt. R.G. was sufficiently in control of himself to be able to foresee the consequences of his actions upon the public perception of the Department. Specifically, the Milwaukee police officers at the scene did not arrest him and he was not criminally charged. Sergeant R.G. was operating under extreme and unusual personal stress at the time of the incident. Thus, there is no basis to generalize from his later ability to understand the consequences of his action that he was capable of understanding them at the time of the incident. Sergeant R.G.'s testimony at the arbitration hearing was deliberately evasive. Nonetheless, a negative inference of intent is not available under these circumstances. Next, to the extent the conduct was intentional, it was intended to engage Sgt. R.G.'s estranged wife and not necessarily become public knowledge or involve emergency services. Finally, the conduct is so bizarre that it strongly supports a conclusion that Sgt. R.G. was not in a position to foresee the consequences of his action.

For the reasons above, the record does not support the underlying conclusions by the Department. Accordingly, the discipline must be set aside. Accordingly, the Department has not demonstrated cause for this discipline. The discipline imposed in this case cannot be sustained. I have entered an appropriate remedial order.

AWARD

That since the Department has failed to demonstrate "cause" for the discipline imposed in this case, the same is set aside. The Department shall expunge the discipline from Sgt. R.G.'s record and make him whole for all lost wages and benefits. .

Dated at Madison, Wisconsin, this 17th of January, 2008.

Stanley H. Michelstetter II /s/

Stanley H. Michelstetter II, Arbitrator

