

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**LAW, LOCAL 116,
PRICE COUNTY PROFESSIONAL DEPUTIES ASSOCIATION**

and

PRICE COUNTY

Case 96
No. 66837
MA-13650

(Joe Lillie Grievance)

Appearances:

Mr. Thomas A. Bauer, Labor Consultant, Labor Association of Wisconsin, Inc., 206 South Arlington Street, Appleton, Wisconsin 54915, appearing on behalf of Local 116, Price County Professional Deputies Association.

Ms. Lori Blair-Hill, Price County Director of Human Resources, 126 Cherry Street, Phillips, Wisconsin 54555, appearing on behalf of Price County.

ARBITRATION AWARD

The Price County Professional Deputies Association, Local 116, hereinafter the Union, requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and Price County, hereinafter the Employer or the County, in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The Employer subsequently concurred in the request and the undersigned, Steve Morrison, of the Commission's staff, was designated to arbitrate the dispute. A hearing was held before the undersigned on September 5, 2007 in Phillips, Wisconsin. The hearing was not transcribed. The parties submitted post-hearing briefs in the matter by November 8, 2007. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated to the issue to be decided by the Arbitrator as follows:

Did the Employer have just cause to issue a reprimand to Deputy Joe Lillie for insubordination and dereliction of duty for the events on October 6, 2007?

If not, what is the appropriate remedy?

RELEVANT CONTRACTUAL PROVISIONS

PREAMBLE

. . .

It is intended by this Agreement to promote harmony among the employees and their Employer, Price County, and to provide for the efficient operation of the Sheriff's Department of the County and effective law enforcement, and to achieve as the ultimate goal of all parties concerned, a high level of protection of persons and property and the preservation of law and order in Price County and to delineate the responsibilities and duties of the employees affected thereby.

ARTICLE 2 -MANAGEMENT RIGHTS

The County possesses the sole right to operate County Government and all management rights that repose in it, subject only to the provisions of this Contract and applicable law. These rights include, but not (sic) limited to, the following:

- A. To direct all operations of the County;
- B. To establish reasonable work rules and schedules of work;
- C. To hire, promote, transfer, schedule and assign employees to positions within the County;
- D. To suspend, demote, discharge and take other disciplinary action for just cause against employees;
- . . .
- F. To maintain efficiency of County Government operations;
- . . .
- J. To determine the kinds and amounts of services to be performed as pertains to County Government operations;
- . . .
- L. To determine the methods, means and personnel by which County operations are to be conducted;

. . .

The Association and the employees agree that they will not attempt to abridge these management rights, and the County agrees it will not use these management rights to interfere with the rights established under this Agreement. Nothing in this Agreement shall be construed as imposing an obligation upon the County to consult or negotiate with the Association concerning the above areas of discretion and policy.

ARTICLE 23 - DISCIPLINE

No employee will be disciplined without just cause. All discipline will be reduced to writing and the employee will be provided with a copy, which he/she shall initial and date. Any discipline which constitutes an oral warning shall remain in the employee's file for 12 months from the date of the infraction. Any discipline which constitutes a written warning shall remain in the employee's file for 24 months from the date of the infraction. Any employee who receives a suspension shall have that documentation remain in their file for 3 years from the date of the infraction. Thereafter, it shall be purged from the file.

BACKGROUND

On October 6, 2006, Joe Lillie (hereinafter Grievant) and Joshua Isaacson were employed as jail officers for Price County. On occasion jail officers were utilized to transport prisoners from Price County to other locations. The Grievant's direct supervisor was Lt. Dan Greenwood and it was his responsibility to assign the jail officers, including Grievant, to duty assignments and, in the event a transport was required, to assign a specific deputy to the transport duty. On the date in question Deputy Lillie was assigned by Lt. Greenwood to stand his regular post in the jail. Deputy Isaacson was assigned by the Lt. to transport a prisoner to Madison, Wisconsin.

Upon his arrival at work at 6:00 a.m., Grievant had a conversation with Deputy Isaacson and was informed by Isaacson that he (Isaacson) had been assigned to transport a prisoner along with another member of the Department, Investigator Al Cummings. Grievant asked Isaacson if he could switch assignments with him and take the transport because he (Grievant) had not been on a transport for a year or so. They discussed the assignment change between the two of them and with Investigator Cummings and decided that there wouldn't be a problem with the assignment change. Investigator Cummings is not a supervisor and has no authority to authorize assignment changes. The three did not contact their supervisor, Lt. Greenwood about the assignment change and Grievant took the transport.

Upon his arrival at the jail at 8:00 a.m. Lt. Greenwood discovered that Isaacson was still on the premises and asked why he was not on the transport. Isaacson told him that he and the Grievant had decided to swap assignments and that Grievant was on the transport. When Grievant arrived back from the transport, Lt. Greenwood asked Grievant who had made the

decision to change the assigned duties and was informed that Grievant and Isaacson had made that decision. The Lt. asked Grievant which supervisor had approved the switch and was informed that no supervisor had been contacted about the change.

Following this event Lt. Greenwood issued formal discipline in the form of a written reprimand to both Isaacson and Grievant. The testimony reflects that Investigator Cummings was not disciplined because his assignment was to take the transport and he carried out that assignment. Grievant filed the instant grievance whereupon Sheriff Krenzke asked the Grievant if he disputed any of the underlying facts in support of the discipline. The Grievant responded that he did not dispute any of the facts and the Sheriff denied the grievance. The denial of the grievance then proceeded to the Price County Personnel Committee where it, too, was denied.

This action followed.

THE PARTIES' POSITIONS

The Union

Grievant, Isaacson and Cummings discussed the idea of switching assignments and decided that it would not be a "big deal" because 1) There was no adverse monetary effect upon the County because the transport would be completed before Lillie ended his shift at 6:00 p.m., therefore, there was no overtime caused by the officers switching duties; and 2) since all of the jail staff perform fundamentally the same duties, Lillie was qualified to assist in the transport and Isaacson was qualified to assume Lillie's duties in the jail.

There have been instances in the past when employees have switched assignments and have not been disciplined for it. Deputy Mabie testified that during her tenure with the Sheriff's Department she traded assignments on at least three occasions during the three p.m. to eleven p.m. shift. She traded desk duties with another deputy for road duty. On a separate occasion another deputy, Deputy Stibs, testified that he was approached by a senior Deputy and told that he was "pulling seniority" and taking a transport that Stibs had been assigned to take. No permission was received from Lt. Greenwood on that occasion. When confronted by Lt. Greenwood later in the day about the incident Stibs testified that Lt. Greenwood simply replied "OK" and went back to work. Lt. Greenwood's obvious lack of concern about this incident clearly shows that the change in work assignments was not important to him.

One of the primary principles of just cause is that the employer has applied its rules, orders and penalties evenhandedly and without discrimination to all employees. In this case it is clear that the Employer had imposed a level of discipline upon the Grievant greater than it imposed on former employees guilty of the same offense. If the Employer desires to correct its prior lax enforcement of the rules the Employer should have advised all employees of its intent to enforce all rules as written. Quoting Arbitrator Howell: "an employee can hardly be expected to abide by the 'rules of the game' if the employer has not communicated those rules, and it is unrealistic to think that, after the fact, and arbitrator will uphold a penalty for conduct

that an employee did not know was prohibited.” (*How Arbitration Works*, Elkouri and Elkouri, 6th Ed., at pages 990-991)

Grievant was not guilty of insubordination by going on the transport. He testified that his duties include transports, among other duties, and in order to prove insubordination the Employer must show at a minimum the following elements:

2. (sic) An employee’s refusal to work or obey must be knowing, willful and deliberate; (Here, Grievant never refused to perform his assigned duties as a corrections officer since all of the jail staff perform the same duties anyway, and he discussed the transport with Isaacson and Cummings and they all determined that the County would not be adversely affected by the switch. Grievant and Isaacson simply traded duties for the day.)

3. (sic) The order must be both explicit and clearly given, so that the employee understands both its meaning and its intent as a command; (There was never an explicit order given that employees couldn’t switch assignments and the County never produced any evidence that the Grievant was in violation of any rule relating to leaving his post without permission.)

4. (sic) The employee must be made aware of the consequences of failing to perform the work or follow the directive. (The Employer never clearly enunciated to its employees, or to the Grievant, the consequences of switching assignments without supervisory authorization and the Employer should not be allowed to discipline Grievant when it has never disciplined other employees for trading assignments.)

Grievant was not derelict in his duties because an employee cannot be derelict in his duties when such duties were properly performed. Had he forgotten his duties in the jail and taken the transport he then would have been derelict in his duties but because he and Isaacson went out of their way to make sure their respective duties were covered, no dereliction occurred.

Lt. Greenwood failed to conduct an investigation nor did he make any effort to ask the Grievant any questions as to why he changed assignments with Isaacson. Just cause requires a fair and objective investigation and requires that the employee be allowed to defend his or her actions. While Lt. Greenwood asked Isaacson questions regarding the switch, he never gave Grievant the same courtesy.

The Employer should expunge the letter of reprimand along with all related documentation from the personnel file of the Grievant because it did not have just cause for discipline.

The Employer

The facts in this case are not disputed. The employees involved admit they failed to call a supervisor to request a change in duties and took it upon themselves to switch work assignments. It is Management's right and responsibility to assign work duties and failure to notify and request permission to make changes in assignments warrants discipline. Because both employees received the same level of discipline, Management's exercise of discipline was fair and consistent.

Management acknowledges that both employees are equally trained and qualified to perform the duties of transport but this case is not about whether one was more qualified than the other. The issue here is that Management made the assignment in the manner it did because it had other reasons for deeming Deputy Isaacson the more appropriate choice for this particular mission and because Article 2 gives it the right to direct all operations of the County and to determine the methods, means and personnel by which County operations are to be conducted.

The fact that the three employees discussed the possible detrimental effects of the switch is not relevant. They are not members of the Management team and are not privy to all of the information and discussions and other possible liabilities of each transport and are not vested, as is Management, with the right and responsibility to make duty assignments. This is why employees are required to contact Management and request permission before changing duty assignments.

All Department supervisors are required to be on-call 24 hours a day, 7 days a week and are routinely contacted after hours, usually in the middle of the night, to deal with Department issues. So, the statement by the Grievant that the three employees failed to contact Lt. Greenwood because they didn't want to wake him up does not hold water.

Regarding past employee failures to contact a supervisor when making changes in assigned duties, Management points out that every situation involving employee misconduct is unique and has its own set of circumstances. Thus, each situation is considered given those circumstances. Levels of discipline may vary depending on those circumstances. Discipline is not a "cookie cutter" action and although some circumstances may look similar to the outside observer, Management is often aware of other considerations calling for more or less severe discipline. This is why it is Management's right and responsibility to determine when, and if, discipline is given. Deputy Mabie's situation is not an applicable comparison to the present one. When she and another deputy switched desk and road duties without asking for permission, they were told not to do it again without supervisory permission. They are in a different unit with a different supervisor and were both in the early stages of their careers and their supervisor at the time considered this in his assessment of the proper level of discipline. As for the Stibs incident when another officer "pulled seniority" and took the transport assignment away from him, Stibs had only been on the job for a couple of months. In light of that, Lt. Greenwood determined that a dressing down (referred to in the testimony as an "ass chewing") of both employees was the more appropriate discipline given the overall circumstances at the time.

Both employees switched assignments without asking for permission to do so and both employees acknowledged this to be the case. Both employees were given the same level of discipline after Lt. Greenwood considered the circumstances of the case. Both employees had been with the Department long enough (9½ years in the case of the Grievant, about two years in the case of Isaacson) to have been aware of the need to contact Management in the event they wanted to change assignments. Both failed to seek supervisory approval and left their assigned posts and both failed to carry out their assigned duties by doing so. Just cause exists and the discipline was appropriate.

DISCUSSION

The primary issue before the Arbitrator is whether the Employer had just cause to issue a reprimand to the Grievant for insubordination and dereliction of duty by virtue of the fact that he switched duty assignments with another deputy without first obtaining permission from his immediate, or for that matter any, supervisor. The Agreement requires just cause in order to discipline the Grievant but the Agreement does not specifically set forth the standard to be used in the just cause analysis, nor have the parties stipulated to the application of one. In the absence of such a standard it is my view that a just cause analysis must address two specific elements. There must be a determination that the employer has established employee misconduct in which it has a disciplinary interest and there must be a determination that the employer has established that the discipline imposed reasonably reflects that disciplinary interest.

There is no question, and the Union does not argue otherwise, that Management is vested with the right to direct the operations of the County; the right to establish schedules of work; the right to assign employees to positions within the County; the right to discipline employees for just cause; the right to maintain efficiency of County Government operations; the right to determine the services to be performed as pertains to County Government; and the right to determine the methods, means and personnel by which County operations are to be conducted. These rights are found in Article 2 of the Agreement entitled Management Rights and these rights are not modified or extinguished by other language in the Agreement. The preamble to the Agreement (although it is not specifically referred to as a “preamble”) recognizes the overall intent of the parties to, among other things, “achieve as the ultimate goal of all parties concerned, a high level of protection of persons and property and the preservation of law and order in Price County and to delineate the responsibilities and duties of the employees affected thereby.” The County argues, quite rightly, that it has not only the right to do the above mentioned things, but a corresponding *responsibility* to do them. The recognition of this responsibility is important because it underscores the basic fact that it is management which is charged with the responsibility to achieve the goal of efficiency in Price County Government and it is through the implementation of the rights enumerated under Article 2 that it fulfills that responsibility.

The Sheriff’s Department has a chain of command, as do all other areas of government, and it may not be argued with any degree of persuasion that the members of the Department,

including the Grievant, were somehow unaware of that chain of command. In the instant case the Grievant's immediate commander was Lt. Greenwood. Lt. Greenwood is a member of the management team by virtue of his rank. The Grievant is not a member of management. Part of Lt. Greenwood's responsibility as a member of management is to assign the deputies under his command to specific duties. In my view this assignment constitutes an order. The deputies assigned by Lt. Greenwood may be qualified to perform other functions than those to which they are assigned, but those qualifications do not allow them to disregard the duties to which they are assigned in favor of other duties which may be more palatable to them. The record in this case demonstrates that Lt. Greenwood and the management team had ample justification for making the assignments it made here and that its actions were not arbitrary or capricious. His considerations included the fact that Isaacson was the "5th man", a kind of floater available to fill in as needed. For this reason, among others, Lt. Greenwood chose Isaacson. This reason alone would have been sufficient but the record supports the conclusion that management also had other valid considerations. For these reasons, I conclude that the County had the requisite disciplinary interest.

Insubordination has been defined as "deliberate defiance of . . . supervisory authority." Bornstein and Gosline, *Labor and Employment Arbitration*, (Mathew Bender, 1996) at Sec. 20.0. The Grievant himself testified that the reason he and Isaacson failed to contact Lt. Greenwood about the switch was so they would not awaken him early in the morning. This testimony is not credible to me and confirms that the officers *considered* calling their supervisor. I conclude that they considered calling him because they knew that they should have and, that if they had called him, he would have rejected their request. If they were laboring under the impression that supervisory authority was not needed to make the switch, why even *consider* calling him? More importantly, the officers knew, or should have known, that they were not operating in a vacuum and that the chain of command had not been dissolved simply because it was early in the morning. I conclude that they deliberately decided to defy the necessity of following the chain of command in order to achieve their own personal agenda. Based upon the foregoing I believe that insubordination is the appropriate definition for the actions of the Grievant. As for the dereliction of duty charge, to the extent that dereliction of duty may be defined as the abandonment of one's post or the negligent execution of one's assigned duties, the facts of this case seem to apply to that definition, too. Here, both officers failed to report to their assigned duty stations and failed to carry out their assignments. The fact that they found someone else to do it for them is irrelevant. The issue here is confined to the fact that they were assigned by management to a specific duty and they failed to carry out that duty. As we have seen, management has the responsibility and the right to assign its employees to specific duties and it is not the function nor the right of the individual employee to modify those assignments at will. To do so undermines the ability of management to fulfill its responsibility to efficiently direct the operations of the County and hinders the intent of the parties as set for the in the "preamble." For the foregoing reasons I find that the County has established employee misconduct in which it has a disciplinary interest, thus satisfying the first element of the just cause analysis.

The second element, i.e. that the discipline imposed reasonably reflects the disciplinary interest of management, has also been satisfied. The actions of the Grievant in concert with Deputy Isaacson are egregious enough to merit the discipline imposed. I would view the level of discipline here differently if I were persuaded that the Grievant was truly unaware that supervisory authority was not needed in order to trade assignments, but I am not persuaded that this is the case. The Union argues that two past duty trades set the precedent for the level of discipline in this case. I do not agree with this argument because the two past incidences are distinguishable from the present one. In the Mabie incident, the two deputies traded desk duties with road duties. The record supports the conclusion that the transport involved in the instant case required management to select the personnel to be used because of the circumstances surrounding the arrest of the party to be transported and because of certain affiliations of the parties involved. The details causing this transport to be somewhat more “sensitive” than the run-of-the-mill transport need not be set forth herein. Suffice it to say that I am convinced that this transport was a unique situation which called for, in the opinion of management, certain personnel. The details upon which management relied in making its decision were unknown to the deputies. For this reason management’s input was crucial before making any decision to switch assignments. This was not the case in the Mabrie incident. There, the two officers simply traded positions. Each was subsequently reminded that supervisory authority was needed to trade positions and the matter was closed. In the Stibs incident, a senior officer “pulled” what he referred to as “seniority” over a new officer who didn’t know any better. Both were “chewed out” and the record supports the conclusion that it never happened again. The transport in that case was not a “sensitive” one, like the transport here, and so was not treated as severely.

The Union also argues, correctly so, that one of the primary principles of just cause is whether the employer has applied its rules, orders and penalties evenhandedly and without discrimination to all employees. In the instant case both deputies involved were given exactly the same discipline for the same offense. As I have observed above, the past incidents are dissimilar to the instant one and Lt. Greenwood testified that he is not aware of any other incidents similar to this one. Consequently, I believe the Employer has applied its rules, orders and penalties evenhandedly in this case.

The Union argues that employees cannot be expected to follow the “rules of the game” if the employer has not communicated those rules to them. I do not believe this to be the case here. As stated above, these two deputies knew, or should have known, that they were subject to the chain of command and I am convinced that they knew supervisory authority was required in order to make the switch they made.

Regarding the Union’s argument that an order be both explicit and clearly given so that the employee understands it, the Union seems to be arguing that the “order” in this matter refers to the lack of a specific order to obtain supervisory authority before switching duty assignments. I disagree. The “order” in this case was the order given to each officer by management *to stand a specific post* on October 6, 2006. This order derives from management’s right and responsibilities as described above and from the chain of command

structure of the Department. I do not believe that the Grievant was unclear about the order to stand his post at the jail. I believe he simply wanted to do something else on that day. If each officer were able to pick and chose which duty assignments he or she wanted to perform on any given day there would be no need for management and I suspect chaos would follow resulting in the frustration of the intent of the parties as set forth in the "preamble" to this Agreement.

In light of the above, it is my

AWARD

The Employer had just cause to issue a reprimand to Deputy Joe Lillie for insubordination and dereliction of duty for the events of October 6, 2006.

The grievance is dismissed.

Dated at Wausau, Wisconsin, this 22nd day of January, 2008.

Steve Morrison /s/

Steve Morrison, Arbitrator

