

BEFORE THE ARBITRATOR

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

and

MILWAUKEE COUNTY

Case 633
No. 67211
MA-13802

(Scott Enget 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 Scott Enget's suspension. The undersigned was so designated. A hearing was held in Milwaukee, Wisconsin on October 18, 2007. The hearing was not transcribed. The parties filed briefs by December 3, 2007 and the Association filed a reply brief on December 14, 2007. On January 2, 2008, the arbitrator 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 two 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. Scott Enget is a deputy sheriff who has been with the Department for over four years. He works in the Milwaukee County Jail.

On May 20, 2007, Enget had a workplace conflict with a fellow employee at the jail. Enget was disciplined as a result of that incident. This case involves his discipline.

FACTS

On May 20, 2007, Enget was assigned to work in Pod 5-D of the jail. One of his job duties was to help the nurses who work at the jail distribute medication to the jail inmates. This process, which is known internally as "passing meds", occurs twice a day: once in the morning and once in the afternoon. The deputy provides security for the nurse and the med cart (which contains the medication) and ensures that the medication distribution goes smoothly. The nurse gives the inmates their medication (which can be either prescribed drugs or over-the-counter drugs). The actual medication distribution process works as follows: When the nurse arrives with the medications, the deputy verbally announces to all the inmates that it's time for the nurse to pass meds to those inmates that take medication. The inmates then line up and get their medication from the nurse. Inmates can refuse to get/take their medication. If an inmate does not stand in line to get the medication, the nurse can go to the inmate's cell and give it to him/her there. If that happens, the deputy escorts the nurse to the inmate's cell. Nurses differ in how they distribute medication to inmates.

On the day in question, Nurse Terri Goudy was responsible for medication distribution in Deputy Enget's pod. Goudy had just started working at the jail three months before. She had little work experience with Enget, and vice-versa. Enget did not know how Goudy preferred to distribute medication. Insofar as the record shows, the two employees had not previously had workplace conflicts with each other. That changed on May 20, 2007.

At the morning distribution that day, Enget followed the above-noted procedure. Specifically, he made three loud verbal announcements that a nurse was there to pass out medications; he provided security for her; and he ensured that the medication distribution went smoothly. As the inmates came forward to get their medications, Enget crossed their names off a list. After the medications had been distributed to all those who lined up, it was apparent that several inmates were no-shows (meaning they stayed in their cells and did not come out and stand in line to receive their medication). Goudy then asked Enget if he would go to their

cells (i.e. the no-shows) and confirm that they were, in fact, refusing medication. Enget responded in the negative. He indicated that the reason he would not do that was because he had announced the nurse's presence to the inmates and if they did not show up, it was considered a refusal on their part. After Enget said that, Goudy did not ask Enget to escort her to their cells or to make another announcement. Instead, she left the pod.

Goudy then complained to her supervisor that Enget had refused to confirm that the no-show inmates were refusing medication. The supervisor passed Goudy's complaint along to Sgt. Dulan. About noon, Dulan saw Enget and told him that Goudy had filed a complaint against him.

When Goudy showed up in Enget's pod for the afternoon medication distribution, Enget was frustrated with her for filing a complaint against him. While Goudy was dispensing medications to the inmates, Enget started questioning Goudy about the nursing protocols for dispensing medications. Goudy did not answer him or respond to Enget's questions because she was busy passing out medications to inmates. Enget persisted in his questioning about the nursing protocols. He also asked Goudy what the protocol was for giving morning medications in the afternoon. As the questioning from Enget continued, Goudy felt Enget was badgering her, and she told Enget she was not going to argue with him about it. Goudy's response, or lack thereof, caused Enget to become upset. According to Goudy, Enget then hollered and yelled at her in front of the inmates. According to Enget, he did not yell at Goudy or raise his voice. In either event, Enget was intemperate with Goudy. Enget's conduct embarrassed Goudy and she felt Enget had belittled her in front of the inmates.

After Goudy left the pod, she complained to her supervisor again about Enget's conduct toward her. This time, Goudy told her supervisor that during the afternoon medication distribution, Enget had humiliated, belittled and embarrassed her in front of the inmates. The supervisor then called Sgt. Dulan and told him that Goudy had made a second complaint about Enget's conduct. Goudy subsequently told Dulan what she (Goudy) had told her supervisor (namely, that Enget had humiliated, belittled and embarrassed her in front of the inmates). Goudy later filed a written complaint against Enget for his conduct at both the morning and afternoon medication distributions.

The Employer's Internal Affairs Department subsequently conducted an internal investigation into Goudy's allegations against Enget. The investigation was done by Captain Eileen Richards. As part of her investigation, she reviewed the security videotape taken on the date and time in question to see if it showed a dispute/confrontation between Enget and Goudy. In her written "Investigative Summary" dated June 11, 2007, Richards commented as follows on what the videotape showed:

After reviewing the pod video it does not show the area of the med. pass, but the general population did not turn toward the med. pass area or show any outward indication that there was a dispute happening between the deputy and the nurse.

Richards then went on in that same document to find that some charges which Goudy made against Enget were “unfounded” and that some charges were “sustained”. The charges which Richards found “unfounded” were as follows:

1.05.13 Treatment of Citizens/Civil Service Rule VII, (4) (1) (l). “Refusing/Failing to comply with departmental work rules”; and “Offensive conduct or language toward the public or toward county officers or employees”; Deputy Enget did not violate any CJF policies during the medical rounds or by questioning RN Goudy. He did not swear or yell at RN Goudy, however he did question her about medical protocol.

The charges which Richards “sustained” were as follows:

1.05.15 Courtesy and Civility/Civil Service Rule VII, (4) (1) (m), “Threatening, intimidating, coercing or harassing employees or supervision at any time”: Deputy Enget did not show patience or discretion when he had a difference of opinion with RN Goudy. He could have chosen to speak with her on a professional level and not in the pod in front of the inmate population. He should have made his inquiries to his supervisor for follow-up especially after being advised of the earlier complaint.

On July 19, 2007, Sheriff David Clarke issued Order 1024 which suspended Enget for two working days for violating one department rule and one county civil service rule: the department rule was 1.05.15 – Courtesy and Civility and the county civil service rule was Rule VII, Section 4(1)(m). That section prohibits “threatening, intimidating, coercing or harassing employees or supervisors at any time.”

Based on the parties’ collective bargaining agreement, Enget’s suspension was appealed to arbitration.

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The record indicates that prior to the incident involved here, Enget had not been previously suspended. He has been “counseled” several times though. These “counseling sessions” were memorialized in writing via a form known as “Employee Activity Documentation” (EAD).

The record further indicates that Deputy Scott DuCharme was suspended for one day for violating the rule on courtesy and civility. Additionally, the record indicates that Sgt. José Lopez was suspended for two days for violating the same rule. Lopez was also charged with violating some additional rules.

POSITIONS OF THE PARTIES

Association

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

The Association contends that the County did not meet its burden of proving that Enget violated either a department or County rule by his conduct with Goudy on May 20, 2007. Here's why. First, the Association disputes the County's contention that Enget "inhibited" Nurse Goudy from completing her duties during the morning distribution. It cites the following facts to support that assertion. During the morning distribution, some inmates chose to not line up to get their meds after Enget announced Goudy's presence on the pod to pass meds. After that happened, Enget told Goudy that the no-shows were refusals because they chose not to line up. The Association notes that after Enget said that, Goudy did not ask Enget to escort her to the inmates' cells. As the Association sees it, there is nothing in the record evidence that supports the County's suggestion that Enget somehow "inhibited" Nurse Goudy from completing her duties during the morning distribution. Second, the Association argues that Enget was not disrespectful, uncivil or discourteous to Goudy during the afternoon distribution. It acknowledges that Enget made several "inquiries" of Goudy during that distribution about the standard nursing protocols, but it maintains those questions were not meant to belittle or humiliate Goudy. According to the Association, all Enget was trying to do (by asking the questions) was "ascertain Goudy's preferences for future medication distributions" and "facilitate more efficient" distribution. Building on that premise, it's the Association's view that the "inquiries" which Enget made of Goudy during the afternoon distribution should not constitute rule infractions. The Association also disputes the County's assertion that Enget yelled at Goudy and provoked a confrontation with her. To support that contention, it notes that the pod video which was reviewed during the course of the Employer's investigation does not show anyone turning around to see what was going on between Enget and Goudy (who were not shown on the video). The Association submits that if a loud argument occurred between the two, it is reasonable to assume that at least one inmate would turn their attention to see the confrontation. The Association reasons that since the video does not show that happening, there is no evidence which confirms that a loud verbal argument/confrontation occurred between the two. According to the Association, this makes Goudy's credibility and her recollection of what happened, questionable. Third, the Association disputes the County's assertion that Enget was evasive in his testimony. The Association avers that Enget did not avoid answering the questions put to him, although it maintains he was badgered by the County and asked argumentative questions.

Next, the Association argues in the alternative that even if Enget did commit a rule violation by his conduct toward Goudy that day, there was not just cause for the discipline imposed for the following reasons. First, the Association emphasizes that Enget has not been previously suspended or "been charged with violating a rule." The Association argues that

under these circumstances, a two-day suspension is not necessary for Enget's first rule violation. Second, addressing the matter of comparable discipline, the Association argues that the arbitrator should be guided by the discipline imposed on Deputy DuCharne and Sgt. Lopez. The Association notes that supervisors (like Lopez) are commonly held to a higher standard. Building on that premise, it's the Association's view that Enget's discipline should align with that of another deputy – not a supervisor. Since it did not, the Association argues that the length of Enget's suspension was out of line with other discipline, and should therefore be reduced to a level more fitting Enget's behavior on the day in question and his past disciplinary history.

County

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

First, the County contends that Enget engaged in workplace misconduct on May 20, 2007 via two "interactions" he had that day with Nurse Goudy. With regard to that day's morning medication distribution, it notes that several inmates did not appear for their meds. The County avers that when Goudy inquired of Enget about the status of the no-shows, he was "dismissive" and said they refused. According to the Employer, "Enget's conduct prohibited Goudy from personally affirming the inmate's so called refusal." With regard to that day's afternoon distribution, the County asserts that Enget was "evasive" in his testimony about what he did and "appeared to have little recall of the incident." The County submits that while Enget had little recall about what he did during the afternoon distribution, Goudy's recall was better. Here's what she said happened: Enget "cross-examined" her and "yelled at her in the presence of all the inmates." According to the County, Goudy's testimony on this point was more credible than Enget's denial. Building on that premise, the County contends that Enget's conduct undermined Goudy and caused her to feel embarrassed, humiliated and belittled. The County also submits that by provoking a confrontation with a co-worker in front of the inmates, "Enget's conduct could serve to diminish jail institutional security." In sum, the Employer argues that what Enget did wrong was this: he "did not show patience or discretion when he had a difference of opinion with Goudy." According to the County, what he should have done – rather than what he did – was deal with Goudy "on a more professional level and not provoked a confrontation in front of the inmate population." The Employer's view is that by his conduct that day, Enget engaged in intolerable workplace misconduct which warranted discipline.

Second, with regard to the level of discipline which was imposed, the Employer argues that a two-day suspension was reasonable under the circumstances. It avers that the other discipline referenced at the hearing is factually distinguishable and insufficient to prove disparate treatment. The County requests that the arbitrator give deference to the discipline imposed by the Sheriff. It therefore asks that Enget's two-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 two-day suspension imposed on Enget. 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 two-day suspension on Enget. My rationale follows.

The threshold question is what standard or criteria is going to be used to determine just cause. The phrase “just cause” is not defined in the collective bargaining agreement, nor is there contract language therein which identifies what the Employer must show to justify the discipline imposed. Given that contractual silence, those decisions have been left to the arbitrator. Arbitrators differ on their manner of analyzing just cause. While there are many formulations of “just cause”, one commonly accepted approach consists of addressing these two 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.

As just noted, 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.

I’ve decided to begin my discussion on this point by emphasizing that there is a difference between what Goudy alleged Enget did in her verbal and written complaints, and what he was ultimately charged with doing by the Employer. It is the latter, and not the former, that is being reviewed here. The following discussion explains why.

Goudy made two separate verbal complaints to her supervisor about Enget’s conduct on the day in question. The first involved Enget’s conduct at the morning distribution and the second one involved his conduct at the afternoon distribution. Her first complaint alleged that Enget had refused to confirm that the no-show inmates were refusing medication. Her second verbal complaint alleged that Enget had humiliated, belittled and embarrassed her in front of the inmates. When Goudy filed her written complaint, she did not break down her allegations into what occurred in the morning and what occurred in the afternoon. Rather, she lumped them together. When Captain Richards made her written findings and filed her “Investigative Summary”, she broke the allegations down into two categories: the two categories were charges that were “unfounded” and charges that were “sustained”. In the former category, she found as follows:

The following charges are **UNFOUNDED**:

1.05.13 Treatment of Citizens/Civil Service Rule VII, (4) (1) (l).
“Refusing/Failing to comply with departmental work rules”; and “Offensive conduct or language toward the public or toward county officers or employees”;

Deputy Enget did not violate any CJF policies during the medical rounds or by questioning RN Goudy. He did not swear or yell at RN Goudy, however he did question her about medical protocol.

In the latter category, she found as follows:

The following charges are **SUSTAINED**:

1.05.15 Courtesy and Civility/Civil Service Rule VII, (4) (1) (m), "Threatening, intimidating, coercing or harassing employees or supervision at any time": Deputy Enget did not show patience or discretion when he had a difference of opinion with RN Goudy. He could have chosen to speak with her on a professional level and not in the pod in front of the inmate population. He should have made his inquiries to his supervisor for follow-up especially after being advised of the earlier complaint.

Captain Richards' findings were then reviewed by the Sheriff who decided to suspend Enget. On the suspension notice, the section entitled "Reason for Suspension", said "See Attached". What was attached to the suspension notice was a document entitled "Attachment to County of Milwaukee Notice of Suspension". Although it did not say so, that document was a verbatim copy of Captain Richards' "Investigative Summary" in this matter. That means that the Sheriff adopted Captain Richards' findings as his own, and disciplined Enget for the reasons set forth in Richards' findings.

The reason I noted the foregoing in such detail is because that document (i.e. Richards' "Investigative Summary" which was attached to the suspension notice) identified why Enget was disciplined. Specifically, he was disciplined because some of the charges which Goudy made against him were "sustained" (i.e. upheld). Once again, the only charges which were "sustained" were as follows:

1.05.15 Courtesy and Civility/Civil Service Rule VII, (4) (1) (m), "Threatening, intimidating, coercing or harassing employees or supervision at any time": Deputy Enget did not show patience or discretion when he had a difference of opinion with RN Goudy. He could have chosen to speak with her on a professional level and not in the pod in front of the inmate population. He should have made his inquiries to his supervisor for follow-up especially after being advised of the earlier complaint.

While the Sheriff could have charged Enget with doing more than that, he opted not to do so. That was his call to make. Thus, the three sentences referenced above identify the full extent of what Enget was charged with doing wrong on May 20, 2007.

Before I address what Enget was charged with doing, I've decided to comment on what he was not charged with doing. First, Enget was not charged with refusing to confirm that the

no-show inmates refused medication during the morning distribution. Second, Enget was not charged with yelling at Goudy during the afternoon distribution. Third, Enget was not charged with questioning Goudy about medical protocols. These were all matters which Richards dealt with in her "Investigative Summary" and found to be "unfounded". As noted above, the Sheriff adopted that finding as his own, and did not charge Enget with violations concerning those matters (i.e. the three matters just referenced). That being so, the undersigned need not address those matters even though the parties argued about them in their briefs.

The focus now turns to what Enget was charged with doing. He was essentially charged with being disrespectful to Goudy during the afternoon distribution. Here's the context to what happened. At the morning distribution, Goudy and Enget had a disagreement about how to confirm that the no-show inmates were refusing medication. Goudy thought that Enget should have gone to their cells and confirmed that they were, in fact, refusing medication. Enget did not think that was necessary because he had already announced Goudy's presence to the inmates on the pod, and if they did not show up, it was deemed a refusal on their part. Following this disagreement, Goudy filed a complaint against Enget over the matter. When Goudy came back for the afternoon medication distribution, Enget knew that Goudy had filed a complaint against him. He was ticked at her for doing so. In my view, that was understandable. Here's why: he just had a dispute with a brand new employee who he does not know about the procedure that is supposed to be used under the circumstances, and she responds by filing a complaint against him. That's not a way for a new employee to win friends in the workplace. However, for reasons that will be identified later in this discussion, this case is not about Goudy's conduct – it's about Enget's conduct.

Before I address what Enget did though, I'm first going to note that when an employee decides to exercise his/her right to discuss a workplace problem with a co-worker, they are not free to say whatever they want in whatever manner they want. In other words, they are subject, of course, to the normal rules of conduct, behavior and decorum in the workplace. As some examples, an employee can't blow up or go on a tirade, and expect immunity from their bad conduct just because they were discussing a workplace problem with a co-worker. It just doesn't work that way. If an employee engages in that type of bad conduct while discussing a workplace problem with a co-worker, their conduct is not protected and there can still be adverse employment consequences to the employee.

The reason this basic principle of the workplace was noted was because Enget failed to comply with it via his conduct with Goudy during the afternoon distribution. Here's why. Shortly after the distribution began, Enget asked Goudy about the nursing protocol for dispensing medications. In and of itself, there is nothing wrong with his asking that question. However, Enget's timing in asking that question was bad, because Goudy was busy passing out medications at that time. As a result, she chose not to answer him or respond to his question. Enget wouldn't let it end, though, and persisted in asking the same question again even though it was apparent that Goudy did not want to debate the matter right then and there. In fact, Goudy told Enget she was not going to argue with him about it. At that point, Enget should have stopped. He did not. Instead, he became upset and intemperate with Goudy in front of

the inmates. Even if Enget did not intend to embarrass and belittle Goudy by his actions, that's how she felt. Obviously, the Employer does not want employees to be disrespectful and intemperate to other employees in front of the inmates. Such conduct is detrimental in a prison environment because it undercuts the authority that employees have over inmates and can compromise security. That's why the Employer can't tolerate it. It would be one thing if the record evidence showed that during the afternoon distribution, Goudy said or did something that provoked Enget further (beyond what had already ticked him off). If the evidence showed that, then some blame for Enget's intemperate behavior could be placed at Goudy's feet. However, there is no evidence that anything like that occurred. That being so, Enget must bear responsibility for his intemperate behavior during the afternoon distribution. That behavior constituted workplace misconduct.

Having found that Enget committed the workplace misconduct he was charged with, the next question is whether that misconduct constituted a rule violation. I find that it did. One of the Employer's rules requires courtesy and civility to co-workers. During the afternoon medication distribution on May 20, 2007, Enget was discourteous and uncivil to Goudy. As a result, he violated that rule. That, in turn, warranted discipline.

The final question is whether the penalty which the Employer imposed for this misconduct (i.e. a two-day suspension) was appropriate under the circumstances. I find that it was. Here's why. First, it is noted that nothing in the parties' collective bargaining agreement requires that a lesser form of discipline had to be issued in this particular case. Some labor agreements specify a particular sequence that must be followed by the employer when it imposes discipline (for example, a warning must be imposed before a suspension). This collective bargaining agreement does not contain such language. Second, I conclude that Enget was not subjected to disparate treatment in terms of the punishment imposed. While the record indicates that Deputy DuCharme was suspended for one day for violating the rule on courtesy and civility, that is all it shows. No other specifics were provided about the employee, the context to what happened, his length of service, or his disciplinary history. That being so, I find that the fact that DuCharme was suspended for one day while Enget was suspended for two days is insufficient to prove disparate treatment. Under these circumstances, I find that Enget's two-day suspension 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 Enget for two days.

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

AWARD

1. That just cause supports the rule violation as charged; and
2. That just cause supports a two-day suspension. The appeal of the suspension is therefore denied.

Dated at Madison, Wisconsin, this 1st day of April, 2008.

Raleigh Jones /s/

Raleigh Jones, Arbitrator

