

BEFORE THE ARBITRATOR

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

and

MILWAUKEE COUNTY

Case 655
No. 67811
MA-14030

(Mark Gaudynski Suspension Appeal)

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 Mark Gaudynski's suspension. The undersigned was so designated. A hearing was held in Milwaukee, Wisconsin on May 13, 2008. The hearing was not transcribed. The parties filed briefs and reply briefs whereupon the record was closed June 30, 2008. Having considered the evidence, the arguments of the parties and the record as a whole, the undersigned issues the following Award.

ISSUES

The parties stipulated to the following issues:

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

BACKGROUND

The County operates a Sheriff's Department. The Association is the exclusive collective bargaining representative for the Department's deputy sheriffs. Mark Gaudynski is a deputy sheriff who has been with the Department for over eleven years. He is currently assigned to the patrol division.

In that capacity, he drives a squad car. He is familiar with the state laws and department procedures relative to operating an emergency vehicle.

In November, 2006, Gaudynski was involved in a one-car accident with his squad car. What happened there was that he lost control of his car and slid off an interstate exit ramp into a ditch when he was responding to an emergency call. Afterwards, he received an "Employee Activity Document" (EAD) about the matter which was denominated as a "counseling session". As part of that EAD, he was directed to take two hours of remedial training at the Sheriff's Department Training Academy on the EVOC (Emergency Vehicle Operating Course) Simulator. He did.

In July, 2007, Gaudynski attended a 15-minute in-service refresher course on "patrol vehicle operation". As part of that course, he took and passed a written test.

On September 5, 2007, Gaudynski had an accident with his squad car. He was disciplined as a result of that accident. This case involves his discipline.

Prior to the discipline imposed here, Gaudynski had not been previously disciplined.

FACTS

On the afternoon of September 5, 2007, Gaudynski was on duty patrolling in his marked squad car. He was westbound on O'Connor Street which is a one-way street going westbound. While he was driving, he observed a vehicle heading eastbound toward him. In other words, the vehicle coming toward Gaudynski was going the wrong way on a one-way street. After that vehicle passed him on the left, Gaudynski turned right at the next street. His plan was to circle the block, go the opposite direction, and try to find and stop the vehicle. He did not go into "emergency mode", nor was he in "hot pursuit". He activated his squad's emergency lights to the first setting (which is the lowest setting). That setting turns on the lights which face the rear (known as "poppers"). He did not turn on his front or side emergency lights. Additionally, he did not activate his siren. He continued to drive at close to the posted speed which is 25 mph. Before Gaudynski entered the intersection of North 73rd

and West Dixon Streets (which is a residential neighborhood), he turned on his right turn signal (because he planned to turn right onto Dixon Street) and slowed down to make the turn safely. The intersection he was approaching was an uncontrolled intersection meaning there was no stop sign or street light for either street entering the intersection. Gaudynski entered the intersection first, so he had the right of way. While Gaudynski was in the intersection trying to make his right turn, another vehicle – a minivan – entered the intersection from a different street. Gaudynski saw the minivan bearing down upon him, so he accelerated and attempted to go straight through the intersection rather than turn right on Dixon Street. In other words, he sped up and attempted to get through the intersection to avoid a collision. He did not make it. The minivan hit the rear portion of the squad car on the driver's side. The impact caused the squad car to spin around through the intersection and, in doing so, hit a vehicle that was parked on the street. That vehicle, in turn, was pushed into another vehicle that was parked on the street. Thus, a total of four vehicles were involved in the accident. No one was injured.

After the accident occurred, Gaudynski called dispatch and reported both the accident and the wrong way driver. He also called his supervisor who came to the accident scene.

The Milwaukee Police Department investigated the accident and completed the standard report for a vehicular accident known as the MV4000. No citations were issued to anyone as a result of the accident.

Of all the vehicles involved in the accident, the one which was damaged the most was the squad car. It sustained about \$8000 in damages.

In the aftermath of the accident, the Employer's Internal Affairs Department conducted an internal investigation into the matter. The investigation was done by Captain Eileen Richards. As part of her investigation, she interviewed all the witnesses and wrote an "Investigative Summary". In same, she included a statement which the minivan driver made to her. The statement was that after the accident, Gaudynski told her that it (i.e. the accident) was his fault.

On January 22, 2008, Sheriff David Clarke issued Order 1110 which suspended Gaudynski for one working day for his involvement in the accident referenced above. The official "Notice of Suspension" stated that "based on the aforementioned facts in this case. . ." Gaudynski violated two department rules and two county civil service rules. The two department rules he was accused of violating were 1.07.43 and 1.05.72. The former is entitled "Safety Policy" and the latter entitled "Safely Operating Police Vehicles". The two civil service rules he was accused of violating were Rule VII, Section 4, (1)(b) and (l). Subsection (b) prohibits "unauthorized use, misuse, destruction of or damage to any property including vehicles, said damage occurring because of neglect while on county business." Subsection (l) prohibits "refusing or failing to comply with departmental work rules, policies or procedures." Additionally, the Sheriff ordered Gaudynski to write a written report detailing "the costs

associated with putting a squad car into service.” Gaudynski completed this report at home. It took about five or six hours to do so. He was not paid for his time.

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

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At the hearing, Gaudynski testified he did not tell the minivan driver that the accident was his fault. The minivan driver did not testify.

Additionally, at the hearing, Association President Roy Felber testified that five other department employees besides Gaudynski have been involved in accidents with squad cars. He identified the five as Inspector Kevin Carr, Sergeant Sylvia Rodriguez, Deputy Jim Villwalt, Deputy Wayne Griffin and Deputy Roy Felber. Two of the five are management employees (Carr and Rodriguez) and three are bargaining unit employees (Villwalt, Griffin and Felber). Felber averred that all their accidents happened in the last several years, and in each instance, the employee was considered to be at fault. Felber further averred that none of the five employees was disciplined as a result of their accident.

Other than the instant case, the record does not contain any instances where employees who were involved in accidents with squad cars were disciplined as a result.

POSITIONS OF THE PARTIES

Association

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

The Association begins by disputing the County’s suggestion that Gaudynski was at fault for the accident. It notes in this regard that at the hearing, Gaudynski denied making the statement which Captain Richards included in her report that the minivan driver attributed to him regarding fault (namely, that he supposedly admitted to her following the accident that he was at fault). According to the Association, it was the minivan driver – not Gaudynski – who was responsible for (i.e. caused) the accident. The Association’s position is based on the premise that Gaudynski entered the uncontrolled intersection first, and therefore had the right of way. To support its contention that Gaudynski entered the intersection first, it cites both Gaudynski’s testimony in that regard and the statement which witness Carrillo gave to Captain Richards that the squad car entered the intersection before the minivan. The Association also calls attention to the fact that the damage to the squad car was on the driver’s side rear quarter panel, while the minivan had damage to its front. As the Association sees it, the location of the damage is “dispositive”, because “if Gaudynski entered the intersection after the minivan, the squad car would have damage to the front and the minivan would have damage to its side.”

Next, the Association addresses the fact that Gaudynski was charged with violating four rules (two departmental and two county-wide). It argues that “the record in this case does not sufficiently link Gaudynski’s conduct to any of the charged rules.” It contends that the employee is not responsible for disproving the charges levied against him; instead, the Employer must substantiate the charges. According to the Association, the County did not meet its burden of proving that Gaudynski violated the four rules as charged. Here’s why. With regard to the two departmental rules Gaudynski was charged with violating (i.e. Rule 1.07.43 “Safety Policy” and 1.05.72 “Safely Operating Police Vehicles”), the Association characterizes those rules as requiring officers to operate their vehicles in a safe manner. The Association submits that Gaudynski did. In support thereof, it avers that Gaudynski was travelling at the posted rate of speed upon entering the intersection. It also repeats that he had the right of way in the intersection. Building on the foregoing, it’s the Association’s view that Gaudynski complied with the “rules of the road” and did not violate either departmental rule. The Association also contends that Gaudynski did not violate either of the civil service rules he was accused of violating. It argues that Gaudynski “can only be found to have violated the [two] civil service rule[s] if the county property damage occurred as a result of his neglect.” As the Association sees it, the County’s allegation that Gaudynski neglected his duties is unfounded. The Association contends that Gaudynski complied with all departmental protocols and training.

Next, the Association argues in the alternative that even if Gaudynski did commit a rule violation by being involved in the accident, there still was not just cause for the level of discipline imposed. Here’s why. First, the Association emphasizes that Gaudynski has not been previously suspended, received a written reprimand, or “been charged with violating a rule.” The Association argues that under these circumstances, where Gaudynski has “an unblemished record of service”, a one-day suspension is not appropriate for a first rule violation. Second, addressing the matter of comparable discipline, the Association argues that the arbitrator should be guided by the fact that Association President Felber testified about five previous on-duty accidents in which the individual was not disciplined. It particularly emphasizes that two of the accidents involved supervisors. The Association avers that supervisors are commonly held to a higher standard. It’s the Association’s view that here, though, Gaudynski was held to a higher standard than either supervisor was because he was disciplined for being in an accident whereas they were not. According to the Association, that’s disparate treatment. Third, the Association submits that one more reason Gaudynski’s suspension should be overturned is that there was another component to his discipline (namely, the written report which he had to prepare for the Sheriff detailing the cost associated with assembling a new squad car). The Association notes that it took Gaudynski about five or six hours to prepare this report, on his own time, so the Association views it as the equivalent of almost another day of suspension. As the Association sees it, that report constitutes “sufficient punishment” for what happened here. Accordingly, the Association asks the arbitrator to reduce Gaudynski’s punishment to a level more fitting his behavior on the day in question.

County

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

The County notes at the outset that law enforcement officers are given certain driving privileges with respect to the "rules of the road". It avers that with these privileges come responsibilities.

The Employer contends that Gaudynski "caused" the accident in question. In other words, the County maintains that Gaudynski was at fault for the accident. Building on that premise, it's the Employer's view that by doing so, Gaudynski committed intolerable misconduct which warranted discipline. According to the Employer, Gaudynski "did not act in a fashion envisioned by the statutes to grant him the statutory privileges regarding rules of the road." It's also the Employer's view that Gaudynski did not act with "due regard" on the day in question (referring to the degree of care that a reasonably careful person, performing similar duties, and acting under similar circumstances, would show). Here's why. First, it notes that when Gaudynski saw the driver going the wrong way toward him on a one-way street, he took no immediate action to impede or stop the wrong way driver. Specifically, he did not flash his lights, activate his siren or emergency signals. Additionally, he did not call dispatch to alert them to the wrong way driver. Instead, he simply attempted to circle the block and catch the violator. The Employer characterizes Gaudynski's actions in doing so as a deviation from departmental procedure. Building on that premise, it alleges that he failed to follow his departmental training. Second, the County avers that as Gaudynski was pursuing the wrong way driver, he exceeded the posted speed limit. To support that premise, it cites the statements which several witnesses gave to Captain Richards. Third, the County asserts that Gaudynski knew that when he entered an (uncontrolled) intersection, it was his responsibility to be sure he could "clear the intersection before going through." According to the Employer, he failed to do that (i.e. made sure the intersection was clear), and as a result, the accident occurred. The Employer goes on to opine that "by (improperly) exceeding the speed limit, driving too fast for conditions, and not responding per his training, Gaudynski forfeited any claim to the right of way under Wisconsin's rules of the road."

Next, the Employer calls attention to the fact that the damages to all four vehicles involved in the crash exceeded \$10,000. Aside from that property damage, it's the Employer's view that Gaudynski's driving "put both himself and members of the public at risk", so he needs to be held accountable and responsible for the accident. According to the Employer, Gaudynski's misconduct violated two civil service rules and two departmental rules.

Finally, with regard to the level of discipline which was imposed, the Employer argues that a one-day suspension was reasonable under the circumstances. Here's why. First, it emphasizes that Gaudynski had a previous at-fault accident in November, 2006. It notes that following that accident, he was warned about his driving and underwent retraining regarding vehicle pursuits. The Employer also points out that the second accident (i.e. the one involved

here) followed “close[ly] in time.” Second, with regard to the other accidents referenced at the hearing (which the Association cited to prove disparate treatment), the Employer notes that no (written) documentation regarding them was offered into the record. As the Employer sees it, the (oral) testimony offered at the hearing regarding same is insufficient to prove disparate treatment. Additionally, it’s the Employer’s view that all those cases are factually distinguishable and involved employees with employment histories that differed from Gaudynski’s. Third, it believes a suspension was needed to get Gaudynski’s attention because he “refuses to take responsibility for his conduct.” The County therefore requests that the arbitrator give deference to the discipline imposed by the Sheriff and uphold the one-day suspension. In the alternative, the Employer asks the arbitrator to impose a sanction even greater than that imposed by the Sheriff.

DISCUSSION

The parties stipulated that the issues to be decided herein are whether just cause supported the rule violation and the one-day suspension imposed on Gaudynski. I answer those questions in the negative, meaning that I find the Employer did not have just cause to find a rule violation and impose a one-day suspension on Gaudynski. 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’m going to begin my discussion about Gaudynski’s conduct by addressing the following Employer contentions. First, the Employer notes that when Gaudynski saw the driver going the wrong way towards him on a one-way street, he took no immediate action to impede or stop the wrong way driver in that he did not flash his lights, or activate his siren and/or emergency signals. That’s true. However, notwithstanding the Employer’s contention to the contrary, nothing in the record establishes that Gaudynski was required by department policy to respond to the wrong way driver by doing any or all of the foregoing. Gaudynski decided to not go into “emergency mode” or engage in “hot pursuit”. Instead, he opted for the low-key response of circling the block and attempting to catch up with the wrong way driver that way. Insofar as the record shows, that was his call to make. Second, the Employer

notes that Gaudynski did not call dispatch immediately after he saw the wrong way driver to alert them to same. Once again, that's true. However, notwithstanding the Employer's contention to the contrary, nothing in the record establishes that Gaudynski was required by department policy to call dispatch and report a wrong way driver before the officer responds to same. Third, the Employer contends that as Gaudynski pursued the wrong way driver, he exceeded the posted speed limit. That assertion lacks a basis in the record because, insofar as the record shows, Gaudynski drove at the posted speed limit up until he entered the intersection. While he did speed up when he was in the intersection, he took that action because he was trying to avoid the minivan bearing down on him. Aside from these comments though, I find that these Employer contentions miss the mark, so to speak, because they all involve Gaudynski's conduct prior to the accident itself. The reason that is significant is because Gaudynski was not specifically disciplined for the conduct just noted. Instead, he was disciplined for being involved in the accident. That being so, the focus turns to an examination of the accident itself.

The Employer contends that Gaudynski was at fault for the accident and that he caused it to occur. I find otherwise for the following reasons. First, the record conclusively establishes that Gaudynski entered the uncontrolled intersection first (i.e. before the minivan did). Since Gaudynski entered the intersection first, he had the right of way and the minivan driver should have yielded to Gaudynski. Obviously, the minivan driver did not do so and the collision ensued. As for the Employer's contention that Gaudynski "forfeited" the right of way because he "(improperly) exceed[ed] the speed limit and [drove] too fast for conditions", it suffices to say that I find that contention unpersuasive. Second, at the hearing, Gaudynski denied making the statement which Captain Richards included in her report that the minivan driver attributed to him regarding fault (namely, that Gaudynski supposedly told her after the accident that he was at fault). The minivan driver did not testify at the hearing. Since she did not testify, that means that the only witness with first-hand knowledge of the accident who testified was Gaudynski. That being the case, what the County essentially asks me to do here is credit what the minivan driver told Captain Richards (about who was at fault) over what Gaudynski testified to at the hearing. I decline to do that. Instead, I credit Gaudynski's testimony that he did not tell the minivan driver that the accident was his fault. Third, if Gaudynski was at fault for causing the accident as alleged by the County, one would think that the police officer who investigated the accident would have issued Gaudynski a citation. That did not happen. Given all the foregoing, I find that the Employer did not prove that Gaudynski was at fault for the accident.

The focus now turns to whether Gaudynski committed a rule violation for being involved in the accident. It would be one thing if there was a departmental or county-wide rule that said that an employee's involvement in an accident with a county vehicle is per-se misconduct warranting discipline. However, insofar as the record shows, there is no such rule.

Set against that backdrop, the Sheriff decided to charge Gaudynski with violating two departmental rules and two county-wide rules for being involved in the accident. The two

departmental rules essentially require officers to operate their vehicles in a safe manner, and the two county-wide rules prohibit damaging county vehicles due to “neglect”. However, other than make the bald assertion that Gaudynski violated those rules by being involved in the accident, the County did not prove the rule violations. In so finding, it is specifically noted that the employee does not have to “disprove” the charges levied against him. Instead, the Employer must substantiate the charges. I find that in this case, the Employer did not prove that Gaudynski violated the four rules as charged.

Since the Employer failed to prove that Gaudynski violated the four rules as charged, the first element of just cause has not been met. Technically, that makes it unnecessary to address the second element of just cause (i.e. whether the County established that the one-day suspension was justified under all the relevant facts and circumstances). However, I’ve decided to do so in order to complete the record.

Even if Gaudynski did commit a rule violation by being involved in the accident, I find there was not just cause to impose a one-day suspension under the circumstances. My rationale follows. First, the record indicates that until this discipline was imposed, Gaudynski had a clean disciplinary record with no prior rule violations, written reprimands or suspensions. In making that statement, I am well aware that Gaudynski had an accident with his squad car just 10 months prior to the one involved here. After that (first) accident, he underwent retraining regarding vehicle pursuits. When the Employer decided on a response to that accident (i.e. his first), it decided to give Gaudynski an “Employee Activity Document” (EAD) for the accident. The record indicates that the parties do not consider EADs to constitute formal discipline. Lest there be any question about it, it is specifically noted that the Employer denominated the EAD for that accident as a “counseling session”. “Counseling sessions” are not generally considered to constitute formal discipline. Second, with regard to the matter of comparable discipline, the record does not contain any other instances where employees who were involved in accidents with squad cars were disciplined for same. In fact, the only evidence in the record is to the contrary. I’m referring, of course, to Association President Felber’s testimony that five other department employees have had accidents in recent years with squad cars where they were considered to be at fault, and none of the five employees was disciplined as a result of their accident. The Employer essentially asks the arbitrator to overlook Felber’s testimony on the grounds that it was not buttressed with any written documentation. While oral testimony concerning alleged disparate treatment is often buttressed with written documentation at arbitration hearings, it is not always necessary. That is the case here because Felber’s (oral) testimony about those other five instances was not rebutted. Since it was not rebutted, it establishes that in five other instances (two of which involved management employees), the employees were not disciplined for being involved in an accident with a squad car, whereas Gaudynski was. That’s classic disparate treatment, meaning that Gaudynski was treated differently than five other department employees who also had accidents with squad cars. Specifically, his punishment was harsher and more excessive than what was meted out to those five employees. Based on the foregoing, I find that the Employer did not have just cause to suspend Gaudynski for one day for being involved in the accident. Accordingly, his suspension is overturned.

Those arguments not addressed in my discussion were considered, but were deemed unnecessary to decide this matter.

In light of the above, it is my

AWARD

1. That just cause does not support the rule violation as charged; and
2. That just cause does not support a one-day suspension. Gaudynski's one-day suspension is therefore rescinded. The County is directed to make Gaudynski whole for the one day he was suspended.

Dated at Madison, Wisconsin, this 22nd day of July, 2008.

Raleigh Jones /s/

Raleigh Jones, Arbitrator

