

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

ROCK COUNTY

and

LOCAL 2489, AFSCME, AFL-CIO

Case 375
No. 66787
MA-13637

Appearances:

Mr. Tom Larsen, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1734 Arrowhead Drive, Beloit, Wisconsin 53511, appeared on behalf of the Union

Mr. Jerome A. Long, Assistant Corporation Counsel, Rock County, Rock County Courthouse, 51 South Main Street, Janesville, Wisconsin 53545, appeared on behalf of the County

ARBITRATION AWARD

On March 2, 2007 Local 2489, AFSCME, AFL-CIO and Rock County filed a request with the Wisconsin Employment Relations Commission seeking to have the Commission appoint William C. Houlihan, a member of its staff, to hear and decide a grievance pending between the parties. Following appointment, a hearing was conducted on April 19, 2007 in Janesville, Wisconsin. No formal record of the proceedings was made. The parties submitted post-hearing briefs, the last of which was received and exchanged by March 31, 2008.

This matter involves the one-day suspension of employee D.S.

BACKGROUND AND FACTS

D.S., the grievant, has been employed as a Corrections Officer by Rock County for a period of approximately seven and one half years, as of the date of this hearing. On or before February 13, 2006 D.S. was advised by two Corrections Officers co-workers that they had been ordered into a potentially dangerous situation involving prisoners, and directed not to use tactical gear. The two Officers worked a different shift than did the grievant. The Order allegedly came from Lieutenant Russ Steeber.

In response, on February 13 the grievant prepared the following report;

Officer not allowed to use equipment

02-13-2006

Sgt. Burdick

. . .

On 02-13-2006 I was informed that officers were ordered into a hostile situation without being able to use tactical equipment.

The situation of several inmates presenting weapons and refusing to follow orders in a dayroom, has always been handled with verbal reasoning, use of oleoresin capsicum spray and officers entering with tactical gear to regaining control. This order, not to use the proper equipment, was suppose to have been given by Lt. Steeber. I was not present during this situation, but I am very concerned that such an order would be given. I am requesting an investigation be conducted to find the reasoning into these orders if they were given. Officers ordered into a potentially deadly situation without tactical equipment and restriction of commonly used items for situations like the one that occurred could make Rock County liable.

The grievant discussed the content of his report with his Sergeant, Aaron Burdick. At the time Burdick had been a supervisor for about one month. The grievant was inquiring as to whether he should commence an investigation or simply file his report. Burdick advised the grievant that he had no authority to conduct an investigation and received the report.

The report was passed along to Sgt. Lalor, and then on to Lt. Steeber. Steeber regarded the report as inaccurate and directed Burdick to bring the grievant to his office for a meeting, concerning report claims that Steeber believed to be wrong. Burdick was advised the meeting was non-disciplinary. Burdick advised the grievant that the meeting was non-disciplinary.

Upon the grievant's arrival in Steeber's office, Steeber advised that the meeting was non-disciplinary. The men talked about the merits of the claim asserted in the report. Steeber indicated that the report was untrue; that there was no directive issued not to use tactical equipment. The grievant accepted the answer, and expressed concern that his co-workers had misrepresented the facts to him. Steeber asked who the officers were. The grievant refused to say, replying instead that he could ask them to prepare and file a report. Steeber repeated his request for the names of the co-workers, and the grievant declared the meeting over, stood and headed for the door. Steeber ordered the grievant to "get back in here, the meeting is not over." The grievant testified that he asked for a Union representative. Steeber denies that the

request for a Union representative was made. The grievant indicated that he was not going to answer any more questions, and according to his testimony again requested a Union representative. The grievant stepped into the hallway.

Steeber directed the grievant not to leave his office and told him to get back (into the office). Steeber denies that a request for a Union representative was made.

The grievant was in the hallway and was yelling. He testified that he wanted a Union representative, and that the meeting was over. Steeber again denies that there was a request for a Union representative. Steeber indicated to the grievant that his behavior was insubordinate and that if it continued he would be escorted to the Sheriff's office. The grievant replied "Let's go, I want a Union Rep." The grievant was sent to the break room, and a Union representative was secured.

The meeting reconvened with the Union representative present. Steeber asked for and was given the names of the co-workers.

Steeber contacted Robert Spoden, who was at the time the Chief Deputy, and reported the grievant's behavior at the meeting. Steeber, Lalor and Burdick were directed to prepare reports on the incident. Steeber's report contained the following;

At approximately 2:40 PM, Sergeant Burdick and Correctional Officer --- arrived in my office. I explained my concern to Correctional Officer --- and informed him that the information he had placed in the report was incorrect and not factual. I also informed him that once a report is submitted it becomes subject to the open records law and inaccurate reports could have an adverse effect if they were used in litigation.

Correctional Officer --- responded by saying that the information in his report was only what he had obtained from other correctional officers that were present at the time. I then informed Correctional Officer --- that if he had any questions on the incident he could have asked me directly rather than placing inaccurate information on an Administrative Report. Correctional Officer --- then made a statement to the effect that the last time he wrote something that was not on department letterhead or in report form he was called in by the Sheriff and Chief Deputy and they had threaten to fire him. When I inquired as to the circumstances surrounding the incident he had mentioned, Correctional Officer --- informed me that he had been called in after he had put out a memo instructing his fellow correctional officers on the importance of following sound tactical practices and following established procedures. I reminded Correctional Officer --- that what had caused him problems was that he is not in a position to have disseminated any information as he is not in a supervisory position.

At this point I attempted to explain the need to report things in a factual manner at which time Correctional Officer --- stated that he was going to conduct an investigation into the matter and had offered to do so when he submitted the report. Again I reminded Correctional Officer --- that he was not in a position of authority to conduct internal investigations or any type of investigation without supervisory approval.

At this point I then asked Correctional Officer --- what incident he was referring to in his report. Correctional Officer --- stated that according to the information that he had obtained the incident had taken place in B-Unit. When I inquired as to whom he had obtained the information from, Correctional Officer --- responded by saying "I'll have them do a report." His response to my inquiry caught me somewhat off guard and then I asked the question again and received no response. I then informed Correctional Officer --- that by policy he was required to answer the question that I had posed to him. At this point Correctional Officer --- made a statement to the effect of "I'm done talking." He then stood up and stormed out of the office. As Correctional Officer --- was leaving the office I ordered him back in to the office and he refused to comply. I then ordered Correctional Officer --- to stop and proceeded toward the hall where was now walking toward the Sergeant's office. Once again I told Correctional Officer --- that the meeting was not over and he responded by saying something to the effect that he was through answering questions. I informed Correctional Officer --- that he was very close to being taken to the Sheriff's office, then sent home based on his actions. He responded by saying, "Lets go!" He stated that he wanted a union representative as he felt that the meeting was disciplinary. I instructed Correctional Officer --- to go to the break room, that he could contact his union steward, and that I would meet with him shortly. I then informed the Sheriff of the situation and that I was dealing with an insubordinate correctional officer. It should be noted that the confrontation in the hallway with Correctional Officer --- occurred with several other employees in the immediate area including at least one supervisor, Sergeant Lalor.

A short time later I again met with Correctional Officer --- in my office and he was accompanied by Correctional Officer Techmeier, a union steward, and Sergeant Burdick. I informed Correctional Officer --- that our prior meeting was not disciplinary in nature, however, given his actions and his insubordination, that the outcome now could have disciplinary ramifications. I then asked Correctional Officer --- again whom he had obtained the information from, at which time he responded by saying Correctional Officers K. and W. Correctional Officer --- stated that his actions were because he felt threatened during the meeting and he wanted to have a union representative present prior to answering any further questions. I then told Correctional Officer --- that had he asked for a union representative during the meeting I would have allowed him to

make the arrangements, but his actions were insubordinate and I would be forwarding a report detailing the incident.

The meeting was concluded at approximately 3:15 PM.

In checking Correctional Officer ---'s work history file I found no other disciplinary actions or negative Employee Performance Reports, however, given the magnitude of the insubordination, disrespect, and Correctional Officer --- 's cavalier attitude, I feel that any disciplinary action should include suspension without pay.

Lalor's report consisted of the following:

On February 15, 2006 at approximately 2:00 PM, I was seated at my desk in the jail sergeants. I was aware that Lt. Steeber and Sgt. Burdick were meeting with C.O. ---- in Lt. Steeber's office regarding an administrative report C.O. --- had authored.

A short time later I heard someone east of my office yell "I am done talking" or words to that effect. I stood up to respond to the yelling as I was not sure who yelled or what the disturbance was.

As I stepped out of my office and looked east I observed C.O. --- standing outside Lt. Steeber's office. I heard Lt. Steeber order C.O. --- return to his office stating the meeting was not over. C.O. --- again replied "I am all done talking to you" or words to that effect. Lt. Steeber told C.O. --- he was being insubordinate and if he continued this behavior he would be escorted to the Sheriff's office. C.O. --- said "Lets go!" C.O. --- said he wanted a union representative with him. I was shocked and mortified by the insubordination displayed by C.O. ---. The fact it was in the administrative hallway in close proximity many staff and inmates only magnified the severity.

Burdick's report consisted of the following:

On 2-15-06 at approximately 2:30pm, Lt. Steeber asked me to bring C.O. --- to his office. Lt. Steeber advised that he wanted to speak with C.O. --- reference to an Administrative Report he submitted to me on 2/14/06. Lt. Steeber stated that this wasn't for disciplinary action.

After 2nd Shift briefing, I explained to C.O. --- that Lt. Steeber wished to speak with him. C.O. --- and I met with Lt. Steeber in his office. Lt. Steeber explained to C.O. --- that the substance of the report that he submitted was not only second hand information, but also false. C.O. --- admitted that the content in his report was information he received from other Correctional Officers that were involved.

Lt. Steeber asked C.O. --- the names of the Correctional Officers that gave him this information. C.O. --- then replied, "I can ask them to do a report." Lt. Steeber asked this question again and C.O. --- became upset and stood up from his chair and said he wasn't going to answer any more questions. Lt. Steeber advised C.O. --- that he gave him a direct order to answer his question. C.O. --- then walked out of the office. Lt. Steeber and I stopped C.O. --- in the Administrative hallway. C.O. --- then stated he wasn't going to answer the question until he spoke with a union representative. Lt. Steeber told C.O. --- to go to the break room and call for a union representative.

C.O. ---, C.O. Techmeier and I went back to Lt. Steeber's office. Lt. Steeber asked for the names of the Correctional Officers. C.O. --- then told Lt. Steeber the names of the officers who gave him the information that he used to submit his report.

Lt. Steeber advised C.O. --- that if he wanted a union representative before he answered the question, he would have allowed it. Lt. Steeber told C.O. --- that his defiant behavior was insubordinate and he would be submitting a report to Cmdr. Tillman for review. --- EOR

Spoden reviewed the reports, and met with the grievant where he handed the grievant a letter indicating that discipline involving time off without pay was being considered. The letter requests the grievant to submit statements or mitigating information. It appears there were none. Following the meeting Spoden issued a one-day suspension for insubordination. A grievance was filed on March 13, 2006 seeking to overturn the discipline. That grievance was denied, and the dispute has led to this proceeding.

ISSUE

The parties stipulated to the following:

Did the County have proper cause to suspend the grievant for one day?

If not, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE I – MANAGEMENT RIGHTS

1.01 The management of Rock County and the direction of the workforce is vested exclusively in the employer to be exercised through the Department Head, including, but not limited to the right to hire, promote, demote, suspend, discipline and discharge for proper cause;. . .

...

ARTICLE XVII – DISCHARGE, SUSPENSION

- 17.01 The Employer may discharge, suspend or otherwise discipline any employee for proper cause. An employee discharged or suspended will be informed of the reasons in writing, within two working days of the discharge or suspension and a copy of such letter shall be sent to the Union.
- 17.02 A steward or officer will be present when an employee is suspended or discharged if requested by the employee or the Employer.

POSITIONS OF THE PARTIES

It is the view of the Union that the grievant was put in an untenable situation when he was ambushed by the Lieutenant. The grievant was advised that the meeting would be non-disciplinary, but quickly turned into an investigatory interview. The grievant was accused of filing an untruthful report, and had a concern for his own wellbeing, since he had previously been similarly accused. Once the grievant was allowed to have Union representation, he provided the requested information.

The Union believes that it was inappropriate and inconsistent with Departmental policy to have Steeber, the person complained of, conducting this meeting. The union regards Steeber's involvement as compromising the fairness of the investigation. It is the view of the Union that the act of filing a report on the safety of the working conditions is a protected activity. The grievant cannot be disciplined for having engaged in protected concerted activity.

It is the view of the County that proper cause existed for the discipline. The County has rules of conduct, applicable to the grievant, which requires appropriate behavior. Those rules of conduct are appropriate to a law enforcement setting in that it is subject to a high degree of public scrutiny. Correction Officers are a part of a quasi-military environment, where the very nature of the work requires a certain workplace discipline. A thorough investigation was conducted before discipline was issued. The investigation was fair. The meeting which led to the issuance of discipline began as a non-disciplinary meeting. The County asserts that there was no need, nor any purpose for Union representation at that meeting.

The discipline imposed was done by Chief Deputy Spoden, a neutral third person, following an investigation into the occurrence. It is the view of the County that the reports of the witnesses to the incident provide a description of behavior that warrants discipline. It is the view of the County that there is no evidence of disparate treatment, and that the penalty is proper under the circumstances.

DISCUSSION

The letter of discipline references two actions. The first is that the grievant “submitted an accusatory report that was incorrect and not factual.” The second is that “... you were insubordinate in your actions to supervisors.” These are the stated reasons for the discipline, and the propriety of the discipline must be measured against the conduct cited. From the record, it appears that the core accusation in the grievant’s February 13, 2006 report was inaccurate. Steeber denied that such an order had been issued. The grievant backed away from its content at the February 15 meeting. No one testified that there was any truth to the report during the evidentiary hearing. The employers conclusion that the report was inaccurate appears warranted.

I do not understand why the grievant would file a report and seek an investigation. He was not an official of the Union at the time. It is unclear that he held any status or position that would call for such an action. It is the view of the Union that his report constituted protected concerted activity. I generally agree that an individual who comes forward with a concern over the safety and well being of co-workers is acting in concert with those co-workers. I think the act of bringing that concern to the employer’s attention and pursuing it is protected. That said, I do not understand the initiation of an investigation without a less formal inquiry as to the accuracy of the report. Similarly, I don’t understand the grievants inclination to conduct an investigation. If this were the sole charge, this would be a much different case.

The report is not the sole charge here. Upon receipt of the report, Steeber called for a meeting to discuss its contents. He provided assurances that the meeting would not be disciplinary. At that point in time there is no evidence that discipline was being considered for the report. The report is the catalyst that led to the February 15 meeting. The grievant’s behavior in the February 15 meeting was inappropriate and insubordinate.

During the course of that meeting, Steeber indicated that the content of the report was inaccurate. That appeared to satisfy the grievant. Steeber asked for the identity of the co-workers, and the grievant refused to supply the names. It was that exchange that prompted the escalation in the conversation and caused the grievant to walk out. If I assume that everyone in the room was acting in good faith, the question was a natural and appropriate extension of this conversation. At that point, Steeber had been informed that some number of Corrections Officers had expressed the view that they were under orders, from Steeber, not to use tactical equipment under circumstances “The situation of several inmates presenting weapons and refusing to follow orders...” It was incumbent on him to correct that misperception. Addressing the matter with the Corrections Officers who believed this was the case was one approach to the situation. The grievant was reluctant to divulge the names. He suggested that perhaps those individuals could file reports. This is not much of a response if you regard the underlying misunderstanding as serious. Under the circumstances I think it was incumbent upon Steeber to correct the misinformation that was being described. This was not something the grievant or a Sergeant could do.

There is a dispute as to whether the grievant made multiple requests for a union representative during the course of the February 15 meeting. The testimony of the grievant cannot be reconciled with that of Steeber. I credit the testimony of Steeber. There is no support in the record for the grievant's testimony. Lalor and Burdick's reports and testimony support Steeber. At the pre-discipline stage, Spoden invited a statement or evidence of mitigation. It appears nothing was submitted. If this was really all about a refused request for union representation under threatening circumstances, it would have been an appropriate response.

The grievant called for an investigation of Steeber. I agree that it was not optimal for Steeber to conduct the interview. However, the interview was not designed to be disciplinary. It had an operations purpose. It was Steeber who was alleged to have directed the jail staff not to use tactical equipment. Steeber determined to set the record straight. In that context, the fact that he convened the meeting is understandable. Steeber did not conduct the investigation or the discipline meeting; Spoden did.

Under the circumstances the grievant was insubordinate when he refused to identify the Corrections Officers who had informed him of the alleged order. This was a serious situation, and one Steeber had to correct. He was further insubordinate when he got up and terminated the meeting. He was told the meeting was not over and ordered to return to his seat. He refused. He took the meeting out into the hallway, and continued in a loud manner disrupting those in proximity and in continued defiance. This would be insubordination in an entirely civilian situation. In a para-military operation it is all the more so.

The Union contends that the grievant was unnerved or intimidated, thus explaining his actions. That may have been the case. However, it was the grievant's report that initiated the meeting. The fact that he was unnerved may explain, but does not excuse, the behavior.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin, this 24th day of September, 2008.

William C. Houlihan /s/

William C. Houlihan, Arbitrator

WCH/gjc
7346

