

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MILWAUKEE COUNTY

and

MILWAUKEE DEPUTY SHERIFF'S ASSOCIATION

Case 672
No. 68290
MA-14183

(Graber Grievance)

Appearances:

Timothy R. Schoewe, Deputy Corporation Counsel, 901 North 9th Street, Room 303, Milwaukee, Wisconsin, 53233, appeared on behalf of Milwaukee County.

Mathew L. Granitz, Attorney, Cermele & Associates, S. C., 6310 West Bluemound Road, Suite 200, Milwaukee, Wisconsin, 53213, appeared on behalf of Milwaukee Deputy Sheriff's Association.

ARBITRATION AWARD

Milwaukee County (herein the County) and the Milwaukee County Deputy Sheriff's Association (herein the Association) are parties to a collective bargaining agreement which provides for final and binding arbitration of certain disputes. The Association filed a request to initiate grievance arbitration with the Wisconsin Employment Relations Commission regarding a grievance over the discipline of a bargaining unit member, Richard Graber (herein Graber or the Grievant). The Commission designated Michael O'Callaghan to serve as arbitrator. Hearing was held on November 20, 2008 in Milwaukee, Wisconsin. Briefs were submitted on or before January 26, 2009 at which time the record was closed.

ISSUES

At hearing, the parties stipulated to the following issues:

Was there just cause, as defined by Sec. 59.52(8), Stats, to support a one day suspension for the rule violation? If not, what is the appropriate remedy?

CONTRACT LANGUAGE

The Collective Bargaining Agreement (CBA) between the parties includes a Management Rights Section which states as the employer's right:

The right, subject to civil service procedures and 63.01 to 63.17, Stats., and the terms of this Agreement related thereto, to suspend, discharge, demote or take other disciplinary action;¹

The Collective bargaining Agreement also states the following with respect to a mutually agreed upon arbitration process:

(3) **INTERPRETATION OF AGREEMENT**

Any disputes arising between the parties out of the interpretation of the provisions of this Agreement shall be discussed by the Association with the Department of Labor Relations. If such dispute cannot be resolved between the parties in his manner, either party shall have the right to refer the dispute to arbitration in the manner prescribed in Par. (2)(a) above, except as hereinafter provided. The parties may stipulate to the issues submitted to such Arbitrator either orally or in writing, their respective positions with regard to the issue in dispute. The Arbitrator shall be limited in his deliberations and decision to the issues so defined. The decision of the Arbitrator shall be filed with the Department of Labor Relations and the Association.

(4) **ARBITRATOR'S AUTHORITY**

The Arbitrator in all proceedings outlined above shall neither add to, detract from nor modify the language of any civil service rule or resolution or ordinance of the Milwaukee County Board of Supervisors, nor revise any language of this agreement. The Arbitrator shall confine himself to the precise issue submitted. [Emphasis added.]

FACTS

The Grievant has been employed by the County in the Sheriff's Department for approximately 17 years and has held the rank of sergeant for approximately 10 years. As a sergeant, the Grievant directs subordinate deputies and civilian department employees. At all relevant times herein, the Grievant was assigned to the Communications Division which is located on the third floor of the Milwaukee County Safety Building. The Grievant's duties

¹ Sections 63.01 to 63.17, Stats outline the procedures for the County Civil Service Commission to review disciplinary actions.

require him to be in the Safety Building for a significant amount of his work time. As a sergeant, he is responsible for properly addressing security related concerns reported to him by his subordinates.

This grievance arises from the events that took place at the Milwaukee County Safety Building during the week of April 6 -12, 2008. At some point prior to April 9, County employees working on a re-carpeting project removed filing cabinets and storage boxes from the Fiscal Affairs Bureau offices on the second floor of the Safety Building and placed them in the public hallway just outside those offices. At least some of these cabinets or boxes contained sensitive records. The parties dispute whether the Grievant took timely and appropriate action to secure these materials when he was notified of their presence in a public area of the building.

The County argues that the Grievant was first informed by his subordinate, Deputy Gaodish, on Wednesday, April 9, 2008 that file cabinets were being stored in a public hallway and the Grievant took no action. Deputy Gaidosh again informed the Grievant on Friday, April 11 that files were still in the public hallway and that some contained employee names and social security numbers. Not until Saturday did the Grievant examine the items in the hallway about which he had first been informed on Wednesday, according to the County. At this point, instead of directly and discretely alerting the shift commander, the County asserts that the Grievant went upstairs to the Communications offices to show the civilian dispatcher on duty that employee files—including the dispatcher’s—were being stored in the public hallway. The Grievant left without taking any action beyond what the County characterizes as “gossiping” with the dispatcher. The civilian dispatcher contacted the shift commander and it was the shift commander who took action to secure the files. The County’s view is that, as a supervisor, it was the Grievant’s responsibility to directly secure the files and he failed to do so.

The Association argues, contrary to the County, that the Grievant was only made aware of any sensitive files when Deputy Gaidosh left a phone message late Friday night. According to the Grievant, on the prior Wednesday Deputy Gaidosh only told him that there were file cabinets in the hallway and did not mention any files. The Association contends it is not unusual for desks or filing cabinets to be temporarily stored in the hallways of the County Courthouse and Safety Building, and therefore no immediate action on the part of the Grievant was warranted. Upon listening to Deputy Gaidosh’s voicemail early Saturday morning, the Grievant went to the Safety Building, taking his children with him because it was his day off. He examined the file cabinets and their contents and discovered files containing sensitive employee information. According to the Association, he brought this to the attention of the dispatcher working upstairs and told her to call the on-duty shift commander and alert him to the problem. Having addressed the situation in this manner, the Grievant left the building with his children. The shift commander called the Grievant shortly thereafter to request that he stay by the files until they were moved. The Grievant informed him that he was no longer in the building, it was his day off, and he had his children with him. According to the Association, the shift commander stated that he thought the Grievant was on duty and after the Grievant declined overtime if he would return to the building, the Shift Commander told the Grievant he

would call on-duty personnel to supervise the removal of the files from the public area of the building. The Shift Commander called back later in the day and ordered the Grievant to write a report of the incident, which the Grievant completed as ordered.

An Internal Affairs investigation was initiated during which the Grievant was notified that he was the subject of the investigation. He was interviewed by Internal Affairs on May 30, 2008. At the investigation's conclusion, the Grievant received a one day unpaid suspension for failing to take appropriate action to secure important files. The following was attached to the Notice of Suspension dated September 8, 2008:

ATTACHMENT TO COUNTY OF MILWAUKEE
NOTICE OF SUSPENSION

Internal Affairs Division Case #08-152 was initiated based on information received from Inspector Kevin Carr regarding the actions of Milwaukee County Sheriff's Office Communications Sergeant Richard P. Graber in regarding his possible failure to act on knowledge given to him by a deputy sheriff that sensitive documents were stored in the hallway outside of the Sheriff's Office Fiscal Affairs Office on Wednesday, April 8, 2008.

The Internal Affairs Division conducted this investigation and factually established that:

MCSO Deputy Sheriff Jeffrey Gaidosh was interviewed at the IAD Office regarding his observations on April 22, 2008. Gaidosh stated that he observed file cabinets outside the Sheriff's Fiscal Affairs Office as well as boxes marked inmate accounts and inmate medical. Gaidosh stated that the filing cabinet was marked docket or docket numbers. Gaidosh observed the documents around 21:15 hours on Wednesday, April 9, 2008. Gaidosh was unable to contact anyone in Fiscal Affairs and notified Sergeant Richard Graber of his observation in person.

Gaidosh stated that on Friday, April 11, 2008, at approximately 21:30 hours, he observed two black filing cabinets that were marked labor distribution. Gaidosh stated that he opened the cabinet and observed that the documents contained Social Security Numbers of employees working for the Sheriff's Office. Gaidosh stated that he called Sergeant Graber on his cell phone around 22:00 hours and left a voice mail on his phone. Gaidosh stated that the following morning he received a telephone call from Graber stating that Graber was going to go to the Safety Building to check on the situation. Gaidosh stated that the filing cabinets he observed where [sic] in the same exact place on Friday as they were on Wednesday. Gaidosh stated that he made his observations while checking for empty cardboard boxes.

MCSO Detention Services Bureau Captain Kevin Nyklewicz was interviewed on April 18, 2008, regarding a telephone conversation he had with Communications on Saturday, April 12, 2008, regarding files found in the Safety Building. Nyklewicz was the on-call Shift Commander. Nyklewicz stated that at approximately 12:30 in the afternoon he received a telephone call from Claire (Stelloh) in Communications informing him that their [sic] was boxes with employees personal information on the 2nd floor. Stelloh informed Nyklewicz that Graber was there and that he was taking pictures. Nyklewicz directed Stelloh to have Graber contact him. Graber telephoned Nyklewicz and informed him of the information contained in the boxes/file cabinets at which time Nyklewicz directed Graber to stand by and that Nyklewicz wanted Graber to get hold of CID detectives to move the documents up to CID. Graber informed Nyklewicz that he was not working. Nyklewicz stated that he would pay Graber overtime. Nyklewicz informed Inspector Kevin Carr of Graber's actions and was directed to contact Graber to have him complete an Incident report by Monday morning. Graber stated that he would be submitting an overtime card for the report writing. Nyklewicz directed Sergeant Michael Babich to report to the scene and secure the documents in the Fiscal Office.

MCSO Communications Dispatcher Claire Stelloh was interviewed in the IAD Office regarding her knowledge of the incident of Saturday, April 12, 2008. Stelloh stated that she became aware documents were being stored in the hallway of the Safety Building on that date when Sergeant Graber stopped into Communications and showed her the documents that contained her name and Social Security Number. Stelloh stated that she was advised by Graber that he found them in the hallway on the second floor. Stelloh stated that she called Facilities Management on her own initiative and was told that the documents were moved due to carpeting being installed. Stelloh then telephoned Captain Nyklewicz to see if someone could move the documents.

Stelloh stated that Graber informed her that he had heard that they were out there for a couple of days.

MCSO Communications Bureau Sergeant Richard Graber was interviewed in the IAD Office regarding the incident. Graber was advised that he was the subject of the investigation. Graber stated that he was advised that there were file cabinets in the hallway outside of Fiscal Affairs on Wednesday, April 9, 2008 and of documents on Saturday, April 12, 2008, by Deputy Jeffrey Gaidosh. Graber stated that he did not take any action regarding Gaidosh's notification as he did not view cabinets as [sic] being in the hallway as being unusual. Graber stated that he received a second notification regarding the cabinets on 04/12/08, from Gaidosh when he checked his telephone messages that morning informing him of the documents inside the cabinets.

Graber advised that he went to the Safety Building to go to the Deputy Sheriff's Association Office on 04/12/08, on his off-time and he decided to view the area. Graber stated that he examined the documents and took some of them up to Communications to show others. Graber stated that he took photographs of the scene with his cell phone to prove that the documents were there. Graber advised that he no longer has copies of the photographs and was unable to provide a copy to IAD. Graber admits showing the documents to Stelloh.

Graber stated that the Safety Building was secure and not accessible to the public on Saturday. Graber stated that he looked inside the filing cabinets to see if they were empty. Graber completed an Incident Report regarding the event per the order of Nyklewicz.

Graber was asked if the situation could have been dealt with better and advised that if he was aware of what was there that he would respond right away, but that the items should not have been there. A check with Facilities Management, John Kursz, revealed that George Brotz was responsible for overseeing the carpeting project for Fiscal Affairs. Brotz has since retired from service with Milwaukee County.

Based on the aforementioned facts in this case, Sergeant Richard Graber is in violation of the following rules:

MILWAUKEE COUNTY CIVIL SERVICE RULE VII, SECTION 4 ii):
(I) Refusing or failing to comply with departmental work rules, policies or procedures.

MILWAUKEE COUNTY SHERIFF'S OFFICE RULES:

1.05.14 Efficiency and Competence.

It is uncontested that on Wednesday, April 9, 2008, Deputy Jeffrey Gaidosh, who was assigned to the Safety Building, informed the Grievant that filing cabinets were being stored outside the Fiscal Affairs Bureau. Nor is it contended that on Friday evening, April 11, Deputy Gaidosh left the Grievant a voicemail saying the filing cabinets were still there and a number of potentially sensitive or important documents were present. However, the parties dispute whether Gaidosh told the Grievant about the nature of the files in the hallway on Wednesday.

No evidence presented by the County contradicted the Grievant's credible testimony at hearing that, as of Wednesday, Deputy Gaidosh told him about filing cabinets in the hallway but not about their contents. The Notice of Suspension indicates that, when interviewed on April 22, 2008, Deputy Gaidosh recalled that filing cabinets in the public hallway were marked "docket" or "docket numbers" and that boxes in or around the cabinets were labeled "inmate

accounts” and “inmate medical.” The Notice does not clarify what information Gaidosh communicated to Graber on each of those two days. Deputy Gaidosh did not testify at the hearing. Therefore I find that on Wednesday, Graber knew only that filing cabinets were being stored in a public area and he was not made aware of any sensitive records until Deputy Gaidosh left him a voicemail message on Friday evening.

Most of the facts of Saturday, April 12, are also uncontested. It was a scheduled day off for the Grievant. Early that morning, the Grievant listened to Gaidosh’s voicemail message. He visited the Safety Building later that morning and confirmed that some of the documents present contained sensitive information, including employee social security numbers. The Grievant went upstairs to the Communications Office on the third floor and told the civilian dispatcher that employee files with personal information were in the unsecured second floor hallway. The Grievant displayed an example of those files to the dispatcher.

At this point the parties depart in their characterizations. The County states that the Grievant did essentially nothing beyond “gossiping” with the civilian dispatcher about the exposure of personal information. However, the Grievant testified at hearing that he left the Communications office once the staff there informed him they would call the Shift Commander. While I find no evidence in the record supporting the Association’s statement in its brief that the Grievant actually ordered the dispatcher to call the Shift Commander, neither the Notice of Suspension nor any of the evidence presented by the County contradicts the Grievant’s credible testimony that he left only after being told that the Shift Commander would be timely notified of the problem.²

The Grievant left the building with his children, whom he had brought with him. Shortly thereafter, Captain Kevin Nyklewicz, the on-duty Shift Commander, contacted the Grievant on his cell phone and told him he wanted the Grievant to personally secure the files. The Grievant informed Nyklewicz that he (the Grievant) was not actually on duty. Nyklewicz told the Grievant that he (Nyklewicz) would have on-duty personnel secure the files. The Grievant did not return to the building that day.

The Notice of Suspension refers to Nyklewicz “directing” the Grievant to stand by the files. Nyklewicz did not testify at the hearing. I find the Grievant’s uncontested testimony credible that Nyklewicz was mistaken about the Grievant’s location and duty status when he gave that instruction. Nothing in the record indicates that when he subsequently offered the Grievant overtime to stand by the files he ordered the Grievant to do so

The Association filed a grievance which was denied by the County. This arbitration followed.

² Although the Notice of Suspension indicates that the Dispatcher called Maintenance on her own volition, it is vague as to when exactly she called the Shift Commander. It appears that she called the Maintenance Department first, then called the Shift Commander. However the Dispatcher did not testify at the hearing.

DISCUSSION

The nature of the dispute between the parties is twofold: (1) When did the grievant become aware that sensitive files needed to be removed from the public hallway and (2) once he was aware, were his actions sufficient? The standard against which the Grievant's actions must be measured is "just cause" as stipulated to the arbitrator by the parties.

Just Cause Standard

At hearing and in briefs, the parties stipulated that the arbitrator should apply Sec. 59.52 (8), Stats., which defines just cause for discipline as follows:

"(b) A law enforcement employee of the county may not be suspended, demoted, dismissed or suspended and demoted by the civil service commission or by the board, based either on its own investigation or on charges filed by the sheriff unless the commission or board determines whether there is just cause, as described in this paragraph, to sustain the charges. In making its determination, the commission or the board shall apply the following standards, to the extent applicable:

1. Whether the employee could reasonably be expected to have had knowledge of the probable consequences of his or her alleged conduct.
2. Whether the rule or order that the employee allegedly violated is reasonable.
3. Whether the sheriff, before filing a charge against the employee, made a reasonable effort to discover whether the employee did in fact violate a rule or order.
4. Whether the effort described under subd. 3. was fair and objective.
5. Whether the sheriff discovered substantial evidence that the employee violated the rule or order as described in the charges filed against the employee.
6. Whether the sheriff is applying the rule or order fairly and without discrimination to the employee.
7. Whether the proposed discipline reasonably relates to the seriousness of the alleged violation and to the employee's record of service with the sheriff's department."

The Grievant's conduct on three separate days gave rise to this dispute. Therefore I apply the elements of just cause to the Grievant's actions as of each day to determine at what point, if any, discipline was warranted under the standard

Wednesday, April 9, 2008

Although the Association and the County characterize the exchange differently, neither disputes that the Grievant was first alerted to the presence of filing cabinets in the public area of the second floor hallway by Deputy Jeffrey Gaidosh on Wednesday, April 9, 2008. The County argues in its brief that this constituted the Grievant's first notice that he needed to take action to secure the files. However as noted in the findings of fact above, Deputy Gaidosh did not tell the Grievant about any particular files at that time. At hearing, the Association elicited testimony on cross examination from Lieutenant McCabe of the Internal Affairs Bureau that it is commonplace for furniture, including desks and filing cabinets, to be temporarily stored in public areas of the Courthouse and Safety Building. McCabe further testified that she was not aware of any officer ever having been warned or otherwise disciplined for failing to secure filing cabinets stored in public areas.

Based on the forgoing, I conclude that elements one and five of the just cause standard were not satisfied as of Wednesday. There is a lack of substantial evidence that the Grievant knew about sensitive files in a public area and the Grievant could not reasonably have known that failing to investigate filing cabinets stored in a public hallway could lead to discipline.

Just cause for discipline did not exist as of Wednesday, April 9, 2008. Any discipline would have to be based on the Grievant's actions later in the week.³

Friday, April 11, 2008

Neither party disputes that Deputy Gaidosh left the Grievant a voicemail on his personal phone Friday reiterating that the filing cabinets were still in the hallway. Nor is there a dispute that Gaidosh's message indicated he had observed files in or around those cabinets with employee names and social security numbers. The County presented no evidence to contradict the Grievant's testimony that this message was left late Friday night, when the Grievant was off duty. Nor did the County present evidence that the Grievant was on call or otherwise under an obligation to monitor his personal cell phone for work-related messages. I attach no importance to the fact that the message was left Friday night and the Grievant did not respond to it until Saturday. Therefore, I conclude that the first and fifth elements of just cause had still not been satisfied as of Friday, April 11, 2008.⁴

³ Because all of the elements of just cause must be satisfied in order to impose discipline, I do not reach a conclusion as to the existence of the other elements as of Wednesday, April 8, 2009.

Saturday, April 12, 2008

Both parties seek to emphasize the Grievant's motivation for visiting the Safety Building on Saturday morning. The Association describes the Grievant's trip as going above and beyond what was required because, even though he was off duty, he investigated anyway, taking his children along with him. The County argues that the Grievant only bothered to do anything because he was already planning on being at the Safety Building that morning for Union business. Neither contention is relevant to whether the grievant took sufficient action upon learning of sensitive files stored in a public area of the Safety Building. The facts as I find them are that the Grievant listened to a message early Saturday morning alerting him to potentially sensitive records stored in the public hallway, and that he visited the site later in the morning.⁵

Turning to the Grievant's conduct once he encountered the files on Saturday morning, again the parties agree on the basic facts. The Grievant located the filing cabinets, opened one or more drawers, and removed one or more binders to inspect them. Upon observing that they did indeed contain personal employee information, the Grievant took a binder up to the Communications office where he displayed it to the dispatcher on duty. I have also found that the Grievant left once the dispatcher told him that the Shift Commander would be notified.

As I see it, the Grievant was disciplined because he was present in the building and he could have secured the files himself, but he did not to do so directly. Therefore, the relevant question is what obligation the Grievant incurred upon opening the filing cabinet on Saturday morning and observing the nature of the documents inside. The Association argues that he satisfied whatever obligation he had by alerting on-duty personnel to the problem and ensuring that the Shift Commander would be notified, while the County argues that his obligation was to take direct action to secure the files.

What happened after the Grievant left the Communications office clarifies whether the Grievant should reasonably have perceived an obligation to do more. The Shift Commander called the Grievant on his cell phone only minutes after he left the Communications offices and exited the building. During this phone call, the Shift Commander was in a position to order the Grievant if he felt it was necessary. Because the facts as I have found them are that he did not, and instead told the Grievant that he would have on-duty personnel remove the files, the Grievant could not reasonably have known that, by not returning to the Safety Building, he would be subject to discipline.

⁵ The County has not argued that it was improper for the Grievant to travel to the Safety Building instead of immediately calling a supervisor. Furthermore, because the Grievant's uncontested testimony was that the Safety Building is accessible only by electronic security card on Saturday, I have not attached any importance to the Grievant's delay from approximately 8:00 am when he listened to the message to approximately 11:45 am when he actually investigated the hallway.

The County's arguments indicate that the Sheriff's Department believed the Grievant exercised poor judgment in alerting subordinates to the improper storage of their personal information. However, the stated reason for the imposed discipline was a failure to take sufficient action to secure the files. I have concluded that the Grievant could not reasonably have been aware that his actions would have exposed him to discipline and therefore the first element of just cause did not exist.

Accordingly, based upon the evidence and arguments of the Parties, I issue the following:

AWARD

The grievance is upheld. The one day suspension is to be removed from the Grievant's file and he is to be made whole for lost wages and benefits attributable to the suspension.

Dated at Madison, Wisconsin, this 23rd day of June, 2009.

Michael O'Callaghan /s/

Michael O'Callaghan, Arbitrator