

BEFORE THE ARBITRATOR

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

and

MILWAUKEE COUNTY

Case 675
No. 68354
MA-14205

(Michael Krznarich Suspension Appeal)

Appearances:

Graham Wiemer, Vanden Heuvel and Dineen, Attorneys at Law, W175 N11086 Stonewood Drive, P.O. Box 550, Germantown, Wisconsin 53022-0550, appearing on behalf of 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 Michael Krznarich's suspension. The undersigned was so designated. A hearing was held in Milwaukee, Wisconsin on May 21, 2009. The hearing was not transcribed. The parties filed briefs whereupon the record was closed July 1, 2009. Having considered the evidence, the arguments of the parties and the record as a whole, the undersigned issues the following Award.

ISSUE

The parties stipulated to the following issue:

Was there just cause to suspend Deputy Krznarich for one day? If not, what is the remedy?

BACKGROUND

The County operates a Sheriff's Department. The Association is the exclusive collective bargaining representative for the Department's deputy sheriffs. Michael Krznarich is a deputy sheriff who has been with the Department for 15 years. He is currently a bailiff assigned to the Courts Division.

Deputy Krznarich has two close friends – Wes and Ronny – who are disc jockeys (DJ's) on a Milwaukee radio station. Wes and Ronny have a program which is on daily between 6 and 10 a.m. While it will be elaborated on in more detail below, Krznarich frequently had phone conversations with Wes and Ronny. Wes and Ronny recorded these telephone conversations and later played them on their radio show. This had been occurring for several years.

Several years ago, Wes requested a "ride-along" with a deputy sheriff. Krznarich spoke with Sheriff's Department Public Information Officer Kim Brooks about Wes' request. The request for a "ride-along" was denied. In that conversation, Krznarich told Brooks that Wes was a radio disc jockey and friend of his, but Krznarich did not ask Brooks for permission to appear on Wes' radio show. As a result, Brooks did not give Krznarich permission to do so. Additionally, Brooks did not authorize Krznarich to speak on Wes' radio show on the department's behalf about either his work with the department or law enforcement matters. Following his conversation with Brooks, Krznarich told Wes and Ronny that henceforth he could not speak to them about department issues, but could answer what he called "general information" questions.

Wes routinely called Krznarich and spoke to him about a variety of matters. Additionally, Krznarich sometimes called Wes and Ronny at the radio station and left messages for them. Insofar as the record shows, Wes did not normally call Krznarich while Krznarich was at work, and Krznarich did not call the radio station while he was working. As previously noted, Wes taped these calls. Afterwards, Wes and Ronny played them on their radio program. Krznarich knew from past experience that his phone conversations with them would be played on the radio. When Wes and Ronny played these tapes of Krznarich, they did not identify Krznarich by name, or identify his employer, but did refer to Krznarich on the air as "Deputy Mike". Wes and Ronny played these tapes of Krznarich several times a week. Krznarich did not listen to Wes and Ronny's radio program while he was at work. While he did not hear the show, he was apprised by Wes and Ronny via phone messages what taped material they had used on their show. Inasmuch as this had been occurring for years, Wes and Ronny had a lot of conversations with Krznarich on tape. One of the phrases that they had on tape was Krznarich saying "my sergeant is calling." By editing the tapes, Wes and Ronny could make a taped conversation sound like it was live, when in fact, it was recorded.

Prior to the incident involved here, Krznarich had never been disciplined for any reason.

FACTS

On June 17, 2008, Wes called Krznarich at home about 6:15 a.m. Wes had called Krznarich at this time of the day before. Krznarich was off duty at the time. Their conversation went as follows. First, Wes asked Krznarich what he would be doing if he was at work. Krznarich replied that he would be moving inmates from detention to the courtroom. Second, Wes asked what would happen if he ran onto the field at Miller Park during a Milwaukee Brewers baseball game. While the crux of his response was “don’t do it” because if you do you’ll face penalties, Krznarich elaborated on the topic in some detail. Like many prior phone calls, Wes taped this one.

Krznarich works the first shift. That day between 8:15 and 8:45 a.m., he was working as a bailiff in Judge Amato’s courtroom. During that time frame, Krznarich did not have his cell phone with him. Additionally, he did not call or speak to Wes or Ronny during that time frame. Additionally, he did not listen to Wes and Ronny’s radio program that morning.

That day, Wes and Ronny played a tape of the phone call referenced above on their radio show. One of the listeners who heard it being broadcast was Sgt. Gary Coleman of the Milwaukee County Sheriff’s Department. Coleman is Krznarich’s supervisor.

Here’s Coleman’s account of what happened. Between 8:15 and 9:00 a.m., Coleman was in a courthouse office doing paperwork. A radio was on in the background. As Coleman did his paperwork, he heard a voice on the radio that he recognized as Krznarich’s voice. That peaked his interest, so he listened more closely. As he did, he heard the voice, which was identified as “Deputy Mike”, say that he had just finished moving inmates. Upon hearing that, Coleman thought that Krznarich was live on the radio, so he immediately tried to call Krznarich (who he knew was working in Judge Amato’s courtroom). Initially, Coleman was not successful in reaching Krznarich. As Coleman tried unsuccessfully to reach Krznarich by phone, he heard the voice on the radio say “my sergeant is calling”. In Coleman’s view, that statement buttressed his original conclusion that Krznarich was live on the radio because he was trying to call Krznarich at the very same time that he heard the voice on the radio say “my sergeant is calling.” Coleman eventually contacted the judge’s clerk, and asked to speak with Krznarich. The clerk told Coleman that Krznarich was in the judge’s chambers, but she went and got Krznarich so he could talk with Coleman. After Krznarich answered the phone, Coleman asked him if he had just been live on the radio. Krznarich replied in the negative. Coleman then told Krznarich what he had just heard on the radio, whereupon Krznarich told Coleman that what he had just heard on the radio was not live, but was taped earlier that day.

The Employer’s Internal Affairs Department subsequently investigated the matter referenced above. The investigation was done by Captain Eileen Richards. As part of her

investigation, she interviewed Krznarich, Coleman and Brooks and wrote a report known as an "Investigative Summary". In that report, she found that Krznarich: 1) was not on the radio live during his work hours; 2) did not use his cell phone while on duty; and 3) did not violate the Employer's confidentiality policy. Thus, she found those three charges to be unfounded. She then went on to make the following findings:

Deputy Krznarich did speak about general law enforcement issues knowing that his comments may be broadcast at a later date on the radio. He further, along with the DJ's, allowed the content of the conversations to be such that it appeared that he was on duty at the time of the conversation. Whereas he never stated his full name or the agency he worked for during these conversations, based on his statements, it could be easy to determine his employer. These actions are contrary to the agency mission and overall professional image that this Administration has strongly been working at creating.

Captain Richards' findings were then reviewed by the Sheriff who decided to suspend Krznarich for one day. On the suspension notice, the section entitled "Reason for Suspension", said "See Attachment". 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 Krznarich for the reasons set forth in Richards' findings.

Krznarich was charged with violating a department rule and a county civil service rule. The department rule he was accused of violating was 202.17 (Conduct of Members). It provides thus:

Members shall not engage in any conduct or activity, on or off duty, which discredits or impairs the efficient and effective operations of the Milwaukee County Sheriff's Office or its members.

The county civil service rule Krznarich was accused of violating was Rule VII, Section 4(l). It provides thus:

Refusing or failing to comply with departmental work rules, policies, or procedures.

Based on the parties' collective bargaining agreement, Krznarich's suspension was appealed to arbitration.

...

At the hearing, Krznarich testified that following his suspension, he told Wes and Ronny to not play his voice on their radio program anymore.

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 Krznarich. The Association asks that the discipline be rescinded. It elaborates as follows.

The Association first addresses the facts. It acknowledges that on June 17, 2008, Krznarich had a phone conversation with his friend Wes who taped the call. Wes later played that call on his radio program during the hours when Krznarich was working.

As the Association sees it, the facts just noted need to be considered in the following context. Several years ago, Krznarich told PIO Brooks that he was friends with a morning radio DJ, Wes. According to the Association, neither Brooks nor anyone else in the department ordered him to not talk to Wes. Building on that premise, the Association believes it is significant that when Krznarich did talk to Wes, he (Krznarich) did not mention his full name or where he worked, and limited his comments to only those items that could be discussed with the general public. The Association also emphasizes that prior to what happened here, no one in the department had previously expressed concerns over Krznarich's voice being played on Wes' radio program.

Having given that context, the Association next addresses the Employer's contention that by allowing his voice to be played on the radio, Krznarich violated two rules (one department and one county-wide). According to the Association, the County did not sufficiently link Krznarich's conduct on that day to either of those rules. Instead, all the Employer did was make the bald assertion that Krznarich's actions that day brought "discredit" to the department. The Association disputes that assertion, and contends that Krznarich's actions did not bring "discredit" to the department. Aside from that, the Association emphasizes 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 Krznarich violated the two rules as charged. Consequently, as the Association sees it, the County's allegation of two rule violations was not substantiated.

Next, the Association addresses one particular part of what Krznarich told Wes in that phone call (namely the part where Wes asked what would happen if he ran onto the field at Miller Park during a Milwaukee Brewers baseball game). The Association notes that Krznarich responded that he should not do that because if he did, he would face penalties and ruin the game for the other people there. According to the Association, Krznarich's comment to Wes on this matter "potentially prevent[ed] a significant disruption at Miller Park", so Krznarich "should be commended, not suspended" for his comments on that matter.

Next, the Association contends that Krznarich should not be disciplined for Wes' actions. It emphasizes that it was Wes who recorded the phone conversation and Wes who decided to play that recording on the radio. The Association avers that Krznarich cannot and does not control what Wes plays on the radio during his morning radio program.

Finally, the Association argues in the alternative that even if Krznarich did violate a rule by his conduct, there still was not just cause for the level of discipline imposed on him. Here's why. The Association emphasizes that Krznarich has not been previously disciplined or been charged with violating a rule as a result of "his voice being played on the radio." The Association contends that under these circumstances, a one-day suspension was not necessary for Krznarich's first rule violation. As the Association sees it, the Department's objective could have been satisfied, and this situation remedied, via the following: a verbal counseling session, verbal warning, written warning, submitting any other employee activity documentation, or in any other way that conveyed to Krznarich that the Department did not want his voice being played on the radio. According to the Association, any of the foregoing would have given Krznarich guidance as to appropriate conduct in the future and given him a chance to correct his ways. Here, though, that did not happen and the Employer instead suspended Krznarich for his actions. The Association argues that a suspension runs counter to the basic principle of discipline that employees are entitled to know in advance what is expected of them. Accordingly, the Association asks the arbitrator to reduce Krznarich's punishment to a level more fitting his behavior and past disciplinary history.

County

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

First, for the purposes of context, the Employer notes that Krznarich never asked for, nor got, permission from the Department's public information officer to be on his friend's radio show. It also notes that Krznarich knew from prior experience that his comments to the DJ's (i.e. his friends) would be broadcast on the radio. According to the County, his antics with the DJ's had gone on for several years.

Having given that context, the Employer next reviews what was broadcast on the radio. First, Sgt. Coleman heard a DJ refer to the person talking as "Deputy Mike". Sgt. Coleman recognized the voice of "Deputy Mike" as Deputy Krznarich. Second, Sgt. Coleman heard the DJ inquire into what "Deputy Mike" was doing at the moment, to which he responded that he was moving inmates. Third, "Deputy Mike" then commented on the ramifications, from the perspective of his agency, of fans running onto the field during a Milwaukee Brewers baseball game. Fourth, "Deputy Mike" closed the conversation by saying that his sergeant was calling him. The Employer notes that Krznarich made this comment at the very moment that Sgt. Coleman was attempting to call him in Judge Amato's courtroom.

The County maintains that the foregoing statements and conduct constituted misconduct for the following reasons. First, it's the County's view that even though "Deputy Mike's" agency was not identified in the conversation, any listener would deduce from the foregoing that "Deputy Mike" (who was Krznarich) was a deputy employed by the Milwaukee County Sheriff's Department. Second, the Employer contends that even though Krznarich was not talking with the DJ's live, his comments gave listeners the appearance or left the impression that he (aka "Deputy Mike") was talking to the DJ's live and was on duty at the time of the conversation. Third, with regard to Krznarich's prisoner movement remarks, the County avers that releasing any details about prisoner movement in the courts constitutes a breach in security. Fourth, it's the Employer's view that when "Deputy Mike" opined on the ramifications of a theoretical incident of a fan running onto the field at a Milwaukee Brewers baseball game, that left the impression he was speaking for the Department. According to the Employer, the problem with that is that he is not authorized to speak for the Department on such matters. Simply put, he is not authorized to do that.

Putting all the foregoing together, it's the Employer's view that by his conduct on June 17, 2008, Krznarich failed to exercise discretion in his comments which were broadcast on the radio. As the Employer sees it, his lack of discretion violated the department and civil service rules which govern employee conduct. The Employer avers that these rules are of longstanding existence.

Finally, with regard to the level of discipline which was imposed, the Employer argues that a one-day suspension was reasonable under the circumstances. The County requests that the arbitrator give deference to the discipline imposed by the Sheriff. It therefore asks that Krznarich's one-day suspension be upheld.

DISCUSSION

The parties stipulated that the issue to be decided here is whether there was just cause to suspend Deputy Krznarich for one day. I answer that question in the affirmative, meaning that I find the Employer had just cause to impose a one-day suspension on Krznarich. 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.

Before I address what Krznarich was charged with doing, I've decided to comment on what he was not charged with doing. First, Krznarich was not charged with using his cell phone during work hours to call Wes and Ronny's radio program or to be called by them. Second, he was not charged with being on the radio live during his work hours. Third, he was not charged with violating the Employer's confidentiality policy. These were all matters which Richards dealt with in her "Investigative Summary" and found to be "unfounded". As noted above, the Sheriff adopted those findings as his own, and did not charge Krznarich with violations concerning those matters (i.e. the three matters just referenced). That being so, the undersigned need not address those matters any further.

The focus now turns to what Krznarich was charged with doing. Essentially, two charges were made against him. The first charge was that Krznarich allowed his phone conversation with Wes "to be such that it appeared he was on duty at the time of the conversation." The second charge was that in his phone conversation with Wes, Krznarich spoke "about general law enforcement issues knowing that his comments may be broadcast at a later date on the radio."

The Employer substantiated both charges. The following discussion explains why.

With regard to the first charge, the record evidence shows that when Sgt. Coleman was listening to the radio and heard Krznarich's voice, he initially thought "Deputy Mike" was appearing live. Coleman's assumption was certainly reasonable because as he listened to the radio, he heard "Deputy Mike" say "my sergeant is calling me" just when he (i.e. Sgt. Coleman) was trying to call Krznarich on the phone. While it ultimately turned out that what Coleman heard on the radio was not live, but rather was taped, what's important is that Sgt. Coleman thought that Krznarich was live on the radio. If Sgt. Coleman thought that Krznarich was on the air live on a morning radio program during his regular work hours, then other people who were listening to the radio no doubt drew the same assumption. From a public relations perspective, that was problematic. While Krznarich did not give his name, or identify his employer, it could easily be deduced from the conversation that "Deputy Mike" was a deputy with the Milwaukee County Sheriff's Department. Additionally, it also appeared that "Deputy Mike" had enough free time while on duty to call a radio program and talk live to a DJ. While the record indicates that Krznarich was busy performing his bailiff job duties in a courtroom when the tape of his phone call was played on the radio, the listening audience certainly could not tell that from the conversation.

With regard to the second charge, it is noted that in his phone conversation with Wes, Krznarich responded to Wes' hypothetical question about the law enforcement ramifications of someone running onto the field during a Milwaukee Brewers baseball game. It would be one thing if Krznarich's answer to this hypothetical question was intended solely for Wes to hear.

If it was purely a private conversation between Krznarich and Wes, then Krznarich could say whatever he wanted about the topic. However, while this phone conversation appeared to be private in that just the two of them were on the line, Krznarich knew the call would not remain a private call. As previously noted, Krznarich knew that Wes taped their phone calls and later played them on his radio program. Under these circumstances, when Krznarich opined about the law enforcement ramifications of someone running onto the field during a Milwaukee Brewers baseball game, he became a de facto public spokesman for the Department. The problem with that is that Krznarich is not authorized to speak for the Department on such matters. Simply put, that's not his job. The Department has a public information officer who speaks for the Department on such matters. No one in the Department ever authorized Krznarich to do that (i.e. speak on its behalf regarding law enforcement issues). That being so, he should not have done so.

Not surprisingly, the Association tries to shift the focus away from Krznarich and onto Wes by pointing out that Wes was the one who taped the phone conversation and decided to play it on the radio. That's true. However, I find that contention misses the mark for the following reason. Krznarich set the wheels in motion for what happened here by deciding to talk on the phone with Wes and answer his questions. Krznarich knew full well that Wes would tape the phone call and later play the tape on his radio program. Under these circumstances, Krznarich cannot duck responsibility for the words that he spoke, or pass the buck onto Wes. In this case, it's Krznarich's actions, and his alone, that are being reviewed.

The next question to be answered is whether Krznarich's conduct warranted discipline. I find that it did for the following reasons. Public employers have a legitimate and justifiable public relations interest in ensuring that their employees give their full attention to their job duties or, at a minimum, give that appearance to the general public. The reason this basic common sense principle is noted is because Krznarich seemed oblivious to the way his conduct would be perceived by the general public, and the stereotype it perpetuated about public employees. Krznarich's actions made it appear to radio listeners that he was on the radio live while he was on duty. That, in turn, gave the appearance that he was not attending to his job duties as a deputy. Department Rule 202.17 specifies that deputies are not to engage in any conduct, on or off duty, which "discredits" the Department. The Employer charged Krznarich with violating that rule. In this case, the parties limited their arguments concerning that rule to just the narrow question of whether Krznarich violated that rule, so the undersigned will do likewise and limit his response to just that question. I find, as did the Employer, that Krznarich brought "discredit" to the Department when his June 17, 2008 phone call with Wes was played on the radio. Thus, he violated Rule 202.17. Since he committed a rule violation, he committed misconduct for which he could be disciplined.

The final question is whether the penalty which the Employer imposed (i.e. a one-day suspension) was appropriate under the circumstances. I find that it was. Here's why. First, the arbitrator is well aware that up until this matter arose, Krznarich had a clean work record (meaning no prior disciplinary actions). The Association correctly notes that the normal progressive disciplinary sequence is for an employee to receive other formal discipline such as

a written warning before a suspension is imposed. As the Association sees it, since that did not happen here, the discipline should be reduced. However, that “normal” progressive disciplinary sequence is not incorporated into the parties’ collective bargaining agreement, and there’s nothing therein that requires that a lesser form of discipline had to be issued in this particular case. While some labor agreements specify a particular sequence that must be followed by the employer when it imposes discipline (for example, a written warning must be imposed before a suspension), this collective bargaining agreement does not contain such language. Since there is nothing in this labor agreement which required that a lesser form of discipline – other than a one-day suspension – had to be imposed in this particular case, the Employer could contractually impose a one-day suspension on Krznarich. Second, in many disciplinary cases, the Union makes a disparate treatment argument that attempts to show that similarly-situated employees received lesser discipline than was imposed here. In this case though, no such evidence was offered. Consequently, since there is nothing in the record showing that other similarly-situated employees were treated differently, it is held that Krznarich was not subjected to disparate treatment in terms of the punishment imposed. Accordingly, then, it is held that Krznarich’s one-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 Krznarich for one day.

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

AWARD

That there was just cause to suspend Deputy Krznarich for one day. Therefore, the appeal is denied.

Dated at Madison, Wisconsin, this 30th day of September, 2009.

Raleigh Jones /s/

Raleigh Jones, Arbitrator