

BEFORE THE ARBITRATOR

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

and

**MILWAUKEE COUNTY
(SHERIFF'S DEPARTMENT)**

Case 684
No. 68836
MA-14360

Appearances:

Vanden Heuvel & Dineen, S.C. Attorneys at Law, by **Mr. Graham P. Wiemer**, W175N11086 Stonewood Dr., P.O. Box 550, Germantown, Wisconsin 53022-0550, appearing on behalf of the Milwaukee Deputy Sheriffs' Association.

Mr. Timothy R. Schoewe, Deputy Corporation Counsel, Room 303, Courthouse, 901 North Ninth Street, Milwaukee, Wisconsin 53233, appearing on behalf of Milwaukee County (Sheriff's Department).

ARBITRATION AWARD

Milwaukee Deputy Sheriffs' Association, hereafter the Association, and Milwaukee County (Sheriff's Department), hereafter Employer or County, are parties to a collective bargaining agreement that provides for final and binding arbitration of grievances. On April 27, 2009, the Association filed a request to initiate grievance arbitration requesting the Commission to appoint a WERC Commissioner or staff member to arbitrate a grievance. Pursuant to this request, the Commission appointed Coleen A. Burns, a member of its staff, as Arbitrator. An arbitration hearing was held on July 13, 2009 in Milwaukee, Wisconsin. The hearing was not transcribed and the record was closed on August 18, 2009, following receipt of post-hearing written argument.

ISSUES

At hearing, the parties stipulated to the following statement of the issues:

Was there just cause to suspend Deputy Mason for one day?

If not, what is the appropriate remedy?

APPLICABLE RULE PROVISIONS

MILWAUKEE COUNTY SHERIFF'S OFFICE
RULES AND REGULATIONS

200.00 Code of Conduct:

A police officer acts as an official representative of government who is required and trusted to work within the law. The officer's powers and duties are conferred by statute. The fundamental duties of a police officer include serving the community, safeguarding lives and property, protecting the innocent, keeping the peace and ensuring the rights of all to liberty, equality and justice

200.31 Profane/Insolent Language

Members shall refrain from using profane, discourteous, or insolent language while on duty.

MILWAUKEE COUNTY CIVIL SERVICE RULE VII, SECTION 4(1)

...

- (u) Substandard or careless job performance.

RELEVANT BACKGROUND

Deputy Gary Mason (hereafter Grievant) has been employed by the County as a Deputy Sheriff for over ten years. On March 11, 2009, Sheriff Clarke issued a "Notice of Suspension" which notified the Grievant that he was being suspended for one day without pay on March 26, 2009. This suspension was based upon the Sheriff's conclusion that the Grievant had violated Milwaukee County Sheriff's Office Rules 200.00 Code of Conduct, 200.31 Profane/Insolent Language and Milwaukee County Civil Service Rule VII Section 4(1) (u) - Substandard or careless job performance.

POSITIONS OF THE PARTIES

County

The legal standard to be applied in the instant case is found in Sec. 59.52(8), Stats. The Association and the Grievant have never contested the issue of whether the statutory standards set forth in Sec. 59.52(8), Stats., have been appropriately applied.

There is no dispute that the Grievant used the “N” word. According to the Grievant, he had not used such a term before and had not been trained to use racial epithets. Union President Felber conceded that the use of the term was inappropriate.

Sgt. Myers, a sixteen year veteran and a supervisor for eight years, testified that the Grievant has been trained in communication and is not to employ racial epithets. Sgt. Myers further testified that no matter who used the racial epithet first, there was no excuse for the Grievant to use the “N” word and the use of a racial epithet raises significant safety issues in that it not only agitates the inmate who is a party to the conversation, but also causes other inmates to act up; which has the potential to trigger inmate misconduct and an institutional security breach. For pod security and the Grievant’s safety, Sgt. Myers had to move the Grievant out of the pod for the balance of the shift.

Sgt. Stiff is a twenty year veteran assigned to conduct the internal investigation. Sgt. Stiff confirmed that there was no excuse for the Grievant to use such a term; equated the use of such profanity to being unprofessional; and stated that the term was the most provocative that a Caucasian Deputy could have employed toward a black inmate.

In summary, the Grievant has been trained. By all accounts, this training did not include employing racial epithets. To use the “N” word in a correctional setting is deplorable and the Grievant’s conduct required the summoning of a supervisor to calm the situation and remove the Grievant from the scene.

Based upon the investigation, the Sheriff determined that discipline needed to be imposed for rules violations. The imposition of the discipline should be affirmed.

Association

The standard to be applied is just cause for discipline. This standard requires (a) proof of wrongdoing and (b) determination of whether the punishment assessed should be upheld or modified under all relevant facts and circumstances.

Under the County’s interpretation, any use of profanity is a rules violation. Deputy Felber testified that, at times, use of profanity at the jail is beneficial to maintaining discipline and control. At the very least, Deputies should be given the discretion to repeat profanity used by inmates and to report what an inmate said to a supervisor.

The Grievant does not have a prior record of discipline. This is the first time that the Grievant has heard that it was a problem to repeat an inmate statement containing profanity for the purpose of confirming what had been said by the inmate.

Sergeant Myers confirmed that he used the “N” word while attempting to handle the situation. Sgt. Myers use of profanity was also directed at the inmate; was also in the jail and was minutes after this situation had started. Sgt. Myers did not receive any discipline for his action.

The County has not established that the Grievant has violated the rules charged. Inasmuch as the County does not have just cause to discipline the Grievant, the suspension should be rescinded.

If the Grievant has engaged in misconduct, the relevant facts and circumstances do not support a one-day suspension. The situation could have been remedied by a verbal counseling session, verbal warning, written warning, or submitting an Employee Activity Documentation.

DISCUSSION

Just Cause Standard

In the present case, the parties have agreed that the County's right to discipline the Grievant is subject to "just cause." Neither the language of the parties' collective bargaining agreement, nor any other record evidence, establishes that the parties have agreed that, in determining "just cause," the Arbitrator is to apply the legal standard set forth in Sec. 59.52(8), Stats. In fact, the record is devoid of any evidence that the parties have agreed upon a definition of "just cause."

Given the absence of any agreed upon definition of "just cause," it is reasonable to conclude that the parties have entrusted the Arbitrator to define the elements of "just cause." The Arbitrator agrees with the Association's argument that one of these elements is that the Employer prove that the Grievant has engaged in misconduct as charged by the Sheriff.

Merits

On November 28, 2008, the Grievant was the only Deputy assigned to work the third shift in Pod 4-D of the County Jail. The inmate population in Pod 4-D includes those who are in protective custody, maximum security and have committed violations of County Jail rules.

The Grievant recalls that, at approximately 0425 hours, Inmate "E" used the emergency intercom to request his inhaler; the inmate did not appear to be having a breathing problem and, therefore, the Grievant responded that he would bring the inhaler in a few minutes when he started inspection; the inmate responded that he wanted the inhaler right away; when the Grievant reiterated that he would bring the inhaler in a few minutes, the inmate, using profanity, yelled that he needed his inhaler now and began to bang on his cell door; concerned that the inmate would wake-up the whole pod, the Grievant gave the inmate his inhaler; after the inmate had used the inhaler, the inmate refused the Grievant's request to return the inhaler and also refused the Grievant's request to move his hands so that the Grievant could close the chute; the inmate continued to yell profanities at the Grievant; in response to Inmate (E)'s request to see a Sergeant and to resolve the issues with the inhaler and chute, the Grievant called Sgt. Myers to Pod 4-D ; as the Grievant walked down the stairs, the inmate made a statement to the Grievant; and in response to this statement, the Grievant turned around and asked the inmate if the inmate had called the Grievant "a bitch ass nigger" because the Grievant wanted to confirm what had been said for his report.

The "Attachment to County of Milwaukee Notice of Suspension" concludes with the following:

I respectfully recommend the proposed disposition of SUSTAINED for the following:

Deputy Mason did admit to saying, "Are you calling me a bitch ass nigger" to Inmate (E). Deputy Mason stated that his intent was not to use a racial slur, but was to confirm that Inmate (E) was directing the comment at him for the purpose of documentation for his report.

The "Attachment to County of Milwaukee Notice of Suspension" contains the following sentence: "Deputy Mason did author an incident report regarding the incident."

It is not evident that the Sheriff sustained the discipline based upon any reasons other than those set forth above. Given the evident basis for the Sheriff's disciplinary decision, the undersigned is satisfied that the Employer has accepted Deputy Mason's statement that he did not intend to use a racial slur and that Deputy Mason's intent was to confirm that Inmate (E) was directing the comment at him for the purpose of documentation for his report.

According to Sgt. Myers, who has been a Jail Sergeant for seven years, the Grievant repeated a racial epithet that is particularly offensive to black inmates and that the use of this racial epithet is likely to provoke inmates; which creates safety issues for the inmates and staff. Inmate (E) is a black inmate. Sgt. Myers states that the Grievant's rationale for repeating the racial epithet does not lessen the impact of the epithet.

Sgt. Myers recalls that, when he reported to Pod 4-D, several of the inmates were screaming; asking Sgt. Myers what he was going to do and that Inmate (E) complained that the Grievant had called him a "nigger." Sgt. Myers states that inmates in Pod 4-D are often unruly and that, for the benefit of the Grievant, as well as the inmates in Pod 4-D, he removed the Grievant from Pod 4-D.

Sgt. Stiff, who conducted the internal affairs investigation, states that, in repeating the statement back to Inmate (E), the Grievant used a word that is the most provocative to black inmates. Sgt. Stiff, who has been with the Department for twenty years, states that, in his experience and training, he has never heard another officer use the "N" word to an inmate; Deputies should never use the "N" word; and to use this word in the presence of black inmates has the potential for disruption and, in fact, did cause disruption. According to Sgt. Stiff, the Grievant could have confirmed Inmate (E)'s statement by asking the Inmate (E) to repeat what he had said.

When Sgt. Myers arrived at Pod 4-D, inmate (E), as well as other inmates, were agitated and disruptive. Sgt. Myers statements, at hearing and during the investigation, reasonably indicate that this agitation and disruption was due to a belief that the Grievant had

called Inmate (E) a “nigger;” as well as Inmate (E)’s belief that the Grievant did not provide the inhaler in a timely manner. As reflected in the “Attachment to County of Milwaukee Notice of Suspension,” the Sheriff’s Department did not conclude that the Grievant had called Inmate (E) a “nigger” or that the Grievant did not provide the inhaler in a timely manner.

According to Association witness Deputy Felber, he has worked in the County Jail and, on a few occasions, has used profanity towards inmates as a control mechanism and/or to defuse a situation. Deputy Felber’s testimony indicates that, in using the term “profanity,” he is referring to “swear words,” rather than to racial epithets such as the “N” word.

Neither Deputy Felber’s testimony, nor any other record evidence, establishes that Jail Deputies, by training or practice, use racial epithets, including the “N” word, as a control mechanism and/or to defuse a situation. The Grievant states that he has not previously used the “N” word.

In his “Investigative Brief,” Sgt. Stiff reports upon an interview of Sgt. Myers. This interview report includes the following:

Sergeant Myers stated that Inmate (E) told him “I admit I called him a nigger because I was pissed, but then he called me a nigger.” Sergeant Myers stated that he didn’t know what to say. He stated to Inmate (E), “Well you called him a nigger first.” . . .

Summary

As the County argues, the “N” word is a provocative racial epithet. All of the witnesses agree that this word is not commonly used by employees in the Department when performing work duties. This record, however, does not establish that Department employees, including the Grievant, in training or otherwise, have received a work directive that expressly prohibits all use of the “N” word in the workplace.

As discussed above, Sgt. Myers used the “N” word in a statement to Inmate (E) and reported this use to Sgt. Stiff, without any apparent disciplinary result. According to Sgt. Stiff, who is an internal affairs investigator, a Sergeant who is investigating an incident needs to have an accurate report of what is said and, that if a Sergeant would say the “N” word to an inmate in the course of verifying what had been said, there would be no rules violation. One may reasonably conclude, therefore, that workplace use of the “N” word, *per se*, is not employee misconduct for which the Employer imposes discipline.

The record provides no reasonable basis to conclude that Employer interests are served by Deputies preparing reports that are less accurate than those prepared by Sergeants. It follows, therefore, that, the right to use the “N” word in the workplace is not a function of rank, but rather, is a function of context. If, as in the present case, the context is that the “N”

word is used in a statement to verify what the inmate had said for the purpose of preparing an accurate report, then there is no rules violation.

Conclusion

Within context, the Grievant's statement to Inmate (E), including the Grievant's use of the "N" word, was not profane, discourteous or insolent; was not a failure to serve the community, safeguard lives and property, protect the innocent, keep the peace or ensure the rights of all to liberty, equality and justice; and was not substandard or careless job performance. Assuming *arguendo*, that the County is correct when it argues that the relevant legal standard is set forth in Sec. 59.52(8), Stats., this record does not establish that the Sheriff has uncovered substantial evidence that the Grievant has violated Milwaukee County Sheriff's Office Rules and Regulations 200.00 and 200.31 and Milwaukee County Civil Service Rule VII, Section 4(1)(u) as charged by the Sheriff.

As the Association argues, the Grievant has not engaged in misconduct as alleged by the Sheriff and the Employer does not have just cause to discipline the Grievant. Accordingly, the grievance has been sustained. The appropriate remedy for the Employer's unjust discipline of the Grievant is set forth below.

Based upon the foregoing, and the record as a whole, the undersigned makes and issues the following

AWARD

1. There was not just cause to suspend Deputy Mason for one day.
2. The appropriate remedy for Deputy Mason's unjust discipline is for the County and the Office of the Sheriff to immediately:
 - a) Rescind "The County of Milwaukee Notice of Suspension" dated March 11, 2009 and the one day suspension referenced therein;
 - b) Expunge from Deputy Mason's personnel files all references to the one day suspension that is the subject of "The County of Milwaukee Notice of Suspension" dated March 11, 2009.

c) Make Deputy Mason whole by restoring to Deputy Mason all wages and benefits lost as a result of his unjust suspension of one day that is referenced in "The County of Milwaukee Notice of Suspension" dated March 11, 2009."

Dated at Madison, Wisconsin, this 13th day of October, 2009.

Coleen A. Burns /s/

Coleen A. Burns, Arbitrator

CAB/gjc
7490