

BEFORE THE ARBITRATOR

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

and

MILWAUKEE COUNTY (SHERIFF'S DEPARTMENT)

Case 681
No. 68697
MA-14313

Appearances:

Graham P. Wiemer, Attorney at Law, Vanden Heuvel & Dineen, S.C., W175 N11086 Stonewood Drive, Post Office Box 550, Germantown, Wisconsin, 53022-0550, appearing on behalf of the Milwaukee Deputy Sheriffs' Association.

Timothy R. Schoewe, Attorney at Law, Office of Corporation Counsel, 901 North 9th Street, Milwaukee, Wisconsin, 53233, appearing on behalf of Milwaukee County.

ARBITRATION AWARD

The Milwaukee Deputy Sheriffs' Association ("Association") and Milwaukee County ("County") are parties to a collective bargaining agreement ("Agreement") that provides for final and binding arbitration of disputes arising thereunder. On February 27, 2009, the Association filed a request with the Wisconsin Employment Relations Commission to initiate grievance arbitration concerning disciplinary action taken against the Grievant, S.D. The filing requested that the Commission appoint a commissioner or staff member to serve as sole arbitrator in this matter, and the undersigned was so appointed. A hearing was held on June 4, 2009, in Milwaukee, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, and arguments as were relevant. At the parties' discretion, no transcript of the proceeding was made. Each party filed an initial post-hearing brief and a reply brief, the last of which was received on July 30, 2009, whereupon the record was closed.

Now, having considered the record as a whole, the undersigned makes and issues the following award.

ISSUE

The parties stipulated to the following as a statement of the issue to be heard:

Was there just cause for the Sheriff to suspend [S.D.] for five days? If not, what is the appropriate remedy?

RELEVANT PROVISIONS

The following are the relevant Milwaukee County Sheriff's Department rules:

1.05.02 Conduct of Members

Members of the department shall not commit any action or conduct which impedes the department's efforts or efficiency to achieve its policies and procedures or brings discredit upon the department

1.05.03 Violation of Policy (Milwaukee County use of Technologies Policy)

Members shall not commit any acts or omit any acts which constitute a violation of any of the policies, rules, procedures or orders of the department whether stated in this section or elsewhere.

1.05.04 Attention to Duty

Members shall devote their whole time and attention to the service of the department, and they are expressly prohibited from engaging in any other business or occupation while on duty.

1.05.11 Insubordination

Members of this department shall exhibit respect and courtesy toward all supervisory personnel.

The following are the relevant Milwaukee County Civil Service rules:

Rule VII, Section 4(1):

- (l) Refusing or failing to comply with departmental work rules, policies, or procedures
- (kk) Engaging in personal activities during working hours

The following are the relevant portions of the Milwaukee County technology policy:

**MILWAUKEE COUNTY
USE OF TECHNOLOGIES POLICY**

December 16, 1999

ATTENTION

Failure on the part of a Milwaukee County employee/user to follow any part of this policy may result in the employee/user being subject to progressive steps of discipline, which may include discharge from Milwaukee County service. An employee/user may also be subject to civil and/or criminal prosecution.

. . .

Definition of Technologies

For the purpose of this policy, technologies in the work environment shall refer to a wide array of equipment and/or software, including, but not limited to: . . . shared and standalone computers (both fixed and portable) and their peripherals. ...

Electronic Mail

. . .

Right of Privacy. Users have no right of privacy in anything they create, store, send or receive using the County's technologies, either via the Internet or other means. Anything created using technologies is likely to be reviewed by others. All e-mail transmissions sent or received using the County's technologies are County property.

. . .

Personal Use of Technologies

Users may be permitted, at management's discretion and with prior approval, to use the County's technologies for personal activities. Nonetheless, users are reminded that use of technologies may directly reflect on the County, and must be used with sound judgement [*sic*] so as not to embarrass the County. Prior to engaging in personal activities, users must ascertain which equipment, if any, may be used for personal activities, as designated by management.

. . .

Prohibited Uses of Technologies

. . .

- Engaging in activities during working hours for personal gain, solicitation or commercial purposes, including commercial advertising, unless specific to the charter, mission or duties of the department or agency.
- Engaging in personal activities without prior approval or engaging in personal activities that may embarrass the County.

. . .

- Disseminating information that is known to misrepresent the County or be false, inaccurate or misleading.

. . .

BACKGROUND

The Grievant, S.D., has been employed as a deputy by the Milwaukee County Sheriff's Department ("Department") since 1995. At all times relevant to this case, he was assigned to provide security for the three courtrooms on the seventh floor of the County courthouse where cases related to family matters are heard. S.D. enjoyed working on the seventh floor, and he understood that he was regarded as a good employee by those who worked with him there.

On Friday, October 12, 2007, S.D. learned, from an order of the County Sheriff that had been issued the day before, that he was being transferred, permanently, from his courthouse assignment to the County jail.¹ After receiving the news of his transfer, and during a period of time when he was on duty at the courthouse later that day, S.D. used a computer in one of the seventh floor courtrooms to access his personal e-mail account on the internet and send the following message:

To all of you who are wondering,
I'm sending this out to dispel other rumors on why I'm being transferredd [sic]
back to the jail

As far as I know – for Doing my JOB !

¹ The same Sheriff's order also provided for the reassignment of sixteen other Department employees.

This past summer I ticketed Common Council President Willie Hines' Brother. And no not the pastor hine, [sic] the other one. The ticket was for the move over law.

During the stop this person's wife stated
"YOU DON'T KNOW WHO YOU ARE MESSING WITH, WE ARE GOOD FRIENDS WITH DAVID CLARKE !"

I had a partner on this stop and did nothing wrong. She who was a passenger in the vehicle filed a complaint with Internal Affairs claiming racial profiling and rudeness.

I was cleared by internal affairs who **CLOSED** the case was **UNFOUNDED** .

Depending on what you believe Clarke RE-opened the case on his own or after a call from this complainant. He then sustained the charges and ended up suspending me for a day.

EVEN THOUGH I did **nothing** wrong.

Now a week or so later after giving me my suspension, He has thrown me on a transfer list back to the jail. Which of course is punishment even though he would deny it.

I was warned prior to the suspension hearing to be careful how I act during the hearing because **"HE may punish you, even though we can't call it punishment!"**

So here I stand being "punished" for doing my job.

Nepotism for political gain. The Hines' Family are allegedly Huge Clarke supporters, verbally and financially from what I'm told.

So this is where I stand.

"Pod 3B – DuCharme"

F-d up ain't it?????

Scott

S.D. sent this e-mail message to people he considered friends – sixty-seven recipients in all. Most of the recipients were current or former members of the Department, including rank-

and-file employees as well as command staff. The list of recipients also included some County judges, some County court commissioners, and a bailiff, most of whom S.D. had come to know through his assignment in the courthouse. The e-mail also went to some of S.D.'s personal acquaintances, who were not associated with the County in any professional sense.

The previous disciplinary action to which S.D.'s e-mail message refers relates to an incident that occurred in June of 2007. S.D. had stopped a vehicle for a traffic violation, and the passenger in the car had registered a complaint with the Department regarding the manner in which S.D. handled the stop. The Internal Affairs investigation into the matter, which was conducted by Captain Eileen Richards, resulted in an initial determination that S.D. had not behaved inappropriately. The Internal Affairs investigation summary, which recommended that the file be closed without disciplinary action, was then forwarded, as is standard procedure, to the Department administration for review. After the matter was reviewed by the Sheriff, the final disposition of the case was different from what had been recommended by Internal Affairs: the complaint was sustained, and S.D. was suspended for one day without pay. S.D. had attended the disciplinary hearing in which he received the one-day suspension in late September of 2007, approximately two weeks prior to learning, on October 12, 2007, that he was being transferred from the courthouse to the jail.

Not surprisingly, the Department supervisory staff learned about S.D.'s e-mail message, and a disciplinary inquiry was initiated into the matter. Captain Richards also handled this Internal Affairs investigation. Ultimately, S.D. was suspended for five days, without pay. The basis for the discipline, as described in the investigative summary submitted by Captain Richards and signed by the Sheriff, reads as follows:

On Wednesday, 24 [sic], 2007, Internal Affairs received an Authorization for Investigation request from Deputy Inspector Edward Bailey relative to an e-mail sent by Deputy [S.D.]. It is alleged that Deputy [S.D.] sent this e-mail during his working hours and that its' [sic] contents violated the Milwaukee County Technologies Policy.

Deputy [S.D.] was assigned to the 7th floor of the courthouse on Friday, October 12, 2007. He was on duty from the hours of 0748 to noon and then from 1300 to 1648. He took an hour for lunch. Using a Milwaukee County computer in room 707, he sent a personal e-mail to numerous recipients to include, Deputies, Command Staff, Court Commissioners and Judges. He sent the e-mail at 15:35:21 hours, while on duty. He accessed his personal Yahoo mail account via the county Internet services.

The e-mail contained inaccuracies relative to a closed Internal Investigation conducted on Deputy [S.D.] and the subsequent discipline rendered to him by Sheriff Clarke. It also misrepresented the reason that the Sheriff transferred him to the jail. He further made statements relative to citizen involvement in Sheriff Clarke's political campaign; which were not verified.

Deputy [S.D.] admits to sending the e-mail however denies that it was sent to embarrass or discredit the agency. Deputy [S.D.] admitted receiving a copy of the County Technologies policy in 2000, however he stated he was not familiar with the contents at this date.

It should be noted that Deputy [S.D.] also informed this officer during the course of the investigation of numerous personal issue occurring in his life that he believes may have contributed to his sending of the e-mail. At the conclusion of the interview I personally handed Deputy [S.D.] an Employee Assistance Program brochure for his to use for possible assistance.

MCSO Rules 1.05.02, Conduct of Members; 1.05.03, Violation of Policy (Milwaukee County use of Technologies Policy); 1.05.04, Attention to Duty; 1.05.11, Insubordination and Civil Service rule VII (4) (1) (l), "Refusing or failing to comply with departmental work rules, policies, or procedures and (kk), Engaging in personal activities during working hours" are **SUSTAINED**.

Civil Service rule VII (4) (1) (aa), "Unauthorized obtaining or disclosure of confidential or privileged information" is **UNFOUNDED**.

At hearing, Captain Richards clarified that it was the County's position that S.D. had violated the Use of Technologies Policy by engaging in the following prohibited uses: engaging in activities during working hours for personal gain, solicitation or commercial purposes, including commercial advertising, unless specific to the charter, mission or duties of the department or agency; engaging in personal activities without prior approval or engaging in personal activities that may embarrass the County; disseminating information that is known to misrepresent the County or be false, inaccurate or misleading.

It is S.D.'s five-day suspension that is being challenged in the present case.²

DISCUSSION

Just Cause Standard

At the outset of the hearing, the parties stipulated that the question to be decided is whether there was "just cause" for the disciplinary action taken against S.D. In its post-hearing brief, the County asserts that the definition for just cause that should be applied here is that set

² As the second suspension in a period of six months, S.D.'s five-day suspension initially was subject to challenge before the County's Personnel Review Board, pursuant to Section 63.12 of the Wisconsin Statutes. The matter was held in abeyance, however, by the Personnel Review Board, with the understanding that S.D.'s first suspension, relating to the traffic stop, was being challenged in arbitration. When that first suspension was overturned in MILWAUKEE COUNTY, MA-13866 (11/08, Gordon), the discipline at issue in the present case became a first suspension and, thus, subject to grievance arbitration.

forth in Section 59.52(8)(b) of the Wisconsin Statutes. There is nothing in the record, however, indicating that the parties have stipulated to this or any other specific definition of just cause. That being the case, it is reasonable to conclude that it has been left to the undersigned to determine the definition to be applied. The two-pronged approach proposed by the Association represents the definition of just cause traditionally applied, *The Common Law of the Workplace*, Theodore J. St. Antoine, Editor, §§ 6.5, at 164-168, and 6.7 at 171-175 (2nd Ed. 1999), Elkouri & Elkouri, *How Arbitration Works*, at 948 (6th Ed. 2003), and it is the one that will be utilized here. It places the burden on the County to establish the existence of conduct by a grievant in which the employer has a disciplinary interest and then to establish that the discipline imposed is consistent with its interest.

Merits

The basic facts are not in dispute. S.D. sent the e-mail message set forth above, while on County time, using a County computer. The fact that these matters are undisputed, however, does not persuade me that the County had just cause for discipline.

The first matter to be addressed is the County's contention that S.D.'s discipline was justified because he neglected his duties by attending to personal matters while on the job. It is beyond debate that S.D. spent some amount of time while he was on duty on October 12, 2007, composing and sending his e-mail message. The Department and Civil Service rules under which S.D. was disciplined require employees to devote their whole time and attention to their work and prohibit employees from engaging in any personal activity while on the job. Further, the technology policy prohibits the use of County computers for any personal use, without prior approval. I am not persuaded by the Association's contention that S.D.'s e-mail was work-related and therefore should not be considered to have violated these rules. Although the subject of the message certainly was S.D.'s job, his act of composing and sending it was not undertaken in furtherance of his duties. Thus, a strict reading of the rules would suggest that discipline is warranted in this situation.

These rules, however, apparently have not been applied by the Department so rigorously in the past. The record before me contains a handful of messages sent by Captain Richards, during work hours and from her County e-mail account, to her sister, pertaining to the decidedly non-work-related subject of golf. Though Captain Richards testified at hearing that she has instructed her sister not to send personal messages to her work, the reality is that the messages in evidence were sent *from* the Captain *to* her sister. Further, rather than being able to testify that the handful of messages on the record represent the full extent of her activities in this area, Captain Richards acknowledged that there are other, similar messages that could have become part of the record. Captain Richards could not even assert, therefore, that these messages represented a deviation from her normal behavior. Moreover, one of the golf messages had been forwarded from the Department e-mail account of another County deputy, not only to Captain Richards, but also to the work e-mail accounts of several other Milwaukee County deputies. While it is fair to assume that all Department

employees are subject to the same rules under which S.D. is being disciplined, there is no evidence that these or any other employees ever have been disciplined for sending personal e-mails using County computers while on the job. Nor has the County claimed ignorance, asserting that employees would have been disciplined had it been known that they were engaging in such conduct. On the contrary, it appears that Department employees understand that it is permissible, to some degree, to send e-mail messages related to personal matters using County computers during work time.

The County has not asserted that this case is different from those others based on any alleged failure on S.D.'s part to perform a specific function of his job in a way that actually impeded the Department's efforts or efficiency. The County's conclusion that S.D. neglected his duties was based not on any complaint in that regard, but solely on the County's observation of the date and time when the e-mail was sent. In this sense, there is nothing that sets S.D.'s conduct in the present case apart from the other, passing instances in which Department employees have turned their attention away from their duties momentarily to send personal e-mail messages. Thus, this reason, standing alone, does not support discipline.

The County also contends that S.D.'s discipline was warranted because his e-mail message disseminated information that was false, inaccurate, or misleading, as prohibited by the County technology policy. At hearing, Captain Richards identified the specific comments in the e-mail message that were believed to violate this policy. First, the County asserts that S.D.'s message inaccurately represents the course the Internal Affairs investigation took into S.D.'s traffic-related discipline. Specifically, S.D.'s message describes the status of the investigation as "closed and unfounded" before it reached the Sheriff's desk, when it really had been "reviewed as closed". His message further indicates that the Sheriff had to "reopen" the traffic stop investigation to issue S.D.'s one-day suspension, when, in fact, it did not need to be reopened because it had not been closed but only passed along with a recommended disposition to the Department administration, as is standard procedure. I am not persuaded that these careless terminology errors on S.D.'s part warrant discipline. Beyond that, I see nothing misleading in the substance of S.D.'s message in this area. The essence of what S.D.'s message was trying to convey – that is, that the Sheriff arrived at a different conclusion regarding the appropriate outcome for the investigation than what initially had been recommended by Internal Affairs – is an accurate reflection of what occurred.

The County also asserts that S.D.'s e-mail message should be deemed false, inaccurate, or misleading for suggesting that the Sheriff transferred S.D. to the jail because of the traffic stop and the subsequent disciplinary investigation into that incident. Although it was established that S.D. did not know the reason for his transfer – indeed, Department employees apparently are usually not given reasons for the many transfers that occur – I do not read S.D.'s message to be problematic on this point. His message does not suggest that he had affirmatively established that his transfer was related to the traffic incident. On the contrary, his comments make it clear that he had developed and was articulating his own opinion as to why he had been transferred. It even goes so far as to outline the bases for his conclusion,

namely, the timing of the transfer relative to the suspension hearing, as well as a warning by some other Department member that there could be fall-out from the suspension meeting with the Sheriff. The message also acknowledges that the Sheriff would deny that there was any validity to S.D.'s assertion. Because S.D.'s conclusion was so clearly framed as opinion rather than fact, I disagree that it was false, misleading, or inaccurate in such a way as to justify disciplinary action.

Finally, the County asserts that the comment in S.D.'s message regarding citizen involvement in the Sheriff's campaign provided just cause for his discipline under the same theory. I also am not persuaded that this comment – which, again, comes across in the e-mail message as nothing more than an opinion based on what limited information S.D. could gather – rises to the level of a false, inaccurate, or misleading statement. Indeed, the County is only willing to assert, in both its investigatory summary as well as the post-hearing brief, that this statement is problematic because it was not “verified”. By the very nature of this claim, the County fails to meet its burden to show that S.D.'s statement was false, misleading, or inaccurate such that it provided just cause for discipline.

It is clear that the County's disciplinary action against S.D. is also based on the general theory that his actions were disrespectful toward the Sheriff and brought discredit on the Department in a way that was embarrassing for the County. Three of the provisions under which S.D. was disciplined relate to this theme: the Conduct of Members rule prohibits any conduct that will bring discredit on the Department; the Insubordination rule mandates that Department employees are to exhibit respect and courtesy toward all supervisory personnel; and the Use of Technologies policy prohibits employees from engaging in any personal activity that would embarrass the County. I find that S.D.'s conduct ran afoul of these expectations in such a way as to warrant some level of discipline. S.D.'s e-mail message suggested malfeasance in the Sheriff's handling of S.D.'s discipline and subsequent transfer. Moreover, it did so in a very public manner, in the form of a widely circulated, written statement. S.D.'s concerns and his right to articulate them may very well have been legitimate. Under the established work rules, however, and in a setting where proper deference to the chain of command is particularly important, S.D.'s manner of broadcasting his concerns went beyond the bounds of what was acceptable. This conclusion is one S.D. should have been able to anticipate before he clicked “send”.

My conclusion in this area is not affected, as the Association suggests it should be, by the fact that S.D. technically obeyed the Sheriff's transfer order. As discussed, and as is common in the setting of a paramilitary organization, the rules that apply here require more than technical compliance with orders, and S.D.'s conduct did not satisfy their mandates. Nor am I persuaded by the Association's suggestion that S.D.'s message was not harmful because it was not actually directed at the Sheriff. The message at issue in this case was sufficiently pointed at the Sheriff's actions that it does not matter that the Sheriff (not surprisingly) was left off the original list of recipients.

Finally, the Association argues that S.D.'s e-mail should be viewed as the kind of complaint regarding the terms and conditions of his employment that is protected by Section 111.70(2), Wis. Stats., and that to deem his conduct insubordinate would render the protections set forth therein "meaningless". This passing, somewhat vague reference by the Association to the Municipal Employment Relations Act, however, is simply not sufficient to constitute a defense. Further, to the extent that the Association's argument intends to allege a violation of the statute, this is not the appropriate forum for doing so.

Based on the rule violations discussed above, the County did have just cause to discipline the Grievant. A five-day suspension, however, was not consistent with the County's disciplinary interest. S.D.'s conduct violated only one of the three general categories of misconduct relied on by the County. Given that S.D. did engage in misconduct here, but a kind in which he has never engaged in the past – and noting that the record before me provides no formula for how disciplines are to be calculated, other than to indicate that S.D.'s previous, overturned discipline was handled through a one-day suspension – I have concluded that a one-day disciplinary suspension is appropriate.

On the basis of the foregoing, I make the following

AWARD

1. The County had just cause to discipline the Grievant.
2. The County did not have just cause to suspend the Grievant for five days without pay.
3. The appropriate remedy is to suspend the Grievant for one day, without pay, and to make the Grievant whole for any loss attributable to the five-day period of suspension, less one day.

JURISDICTION

The undersigned will retain jurisdiction over this matter for a period of sixty days following the date of this Award for the sole purpose of resolving disputes over the remedy.

Dated at Madison, Wisconsin, this 4th day of November, 2009.

Danielle L. Carne /s/

Danielle L. Carne, Arbitrator

DLC/gjc
7501