

BEFORE THE ARBITRATOR

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

and

MILWAUKEE COUNTY

Case 696
No. 69178
MA-14514

(Richard Graber Grievance)

Appearances:

Vanden Heuvel & Dineen, S.C., by **Attorney Graham P. Wiemer**, W175 N11086 Stonewood Drive, Germantown, Wisconsin 53022-0550, on behalf of the Union.

Attorney Timothy R. Schoewe, Milwaukee County Deputy Corporation Counsel, Milwaukee County Courthouse, 901 North Ninth Street, Room 303, Milwaukee, Wisconsin 53233 on behalf of the County.

ARBITRATION AWARD

The principals herein, the Milwaukee Deputy Sheriffs' Association (herein the Union) and Milwaukee County (herein the County) have been parties to a collective bargaining relationship for many years. At the time of the events pertinent hereto, the agreement covering the period January 1, 2007 to December 31, 2008, which provided for binding arbitration of certain disputes between the parties, had expired and the parties were in a contract hiatus while negotiating a successor agreement. On September 16, 2009, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over a two day suspension imposed upon Sergeant Richard Graber, and requested the appointment of a member of the WERC staff to arbitrate the issue. The undersigned was designated to hear the dispute and a hearing was conducted on December 8, 2009. The proceedings were not transcribed. The parties filed briefs by February 1, 2010, whereupon the record was closed.

ISSUES

The parties stipulate to the following framing of the issues:

Was there just cause to suspend Sergeant Graber for two days, as recommended by the Sheriff?

If not, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

1.02 MANAGEMENT RIGHTS

The County of Milwaukee retains and reserves the sole right to manage its affairs in accordance with all applicable laws, ordinances, regulations and executive orders. Included in this responsibility, but not limited thereto, is:

...

- 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;

...

In addition to the foregoing, the County reserves the right to make reasonable rules and regulations relating to personnel policy, procedures and practices and matters relating to working conditions giving due regard to the obligations imposed by this Agreement. However, the County reserves total discretion with respect to the function or mission of the various departments or divisions, the budget, organization, or the technology of performing the work. These rights shall not be abridged or modified except as specifically provided for by the terms of this Agreement, nor shall they be exercised for the purpose of frustrating or modifying the terms of this Agreement. But these rights shall not be used for the purpose of discriminating against any employee or for the purpose of discrediting or weakening the Association.

By the inclusion of the foregoing management rights clause, the Milwaukee Deputy Sheriffs' Association does not waive any rights set forth in S. 111.70, Stats., created by Chapter 124, Laws of 1971, relating to bargaining the impact upon wages, hours or other conditions of employment of employees affected by the elimination of jobs within the Sheriff's Department by reason of the exercise of powers herein reserved to management.

5.04 DISCIPLINARY SUSPENSIONS NOT APPEALABLE UNDER WISCONSIN STATE STATUTE 63.10

In cases where an employee is suspended for a period of ten (10) days or less by his department head, pursuant to the provisions of s. 63.10, Stats., the Association shall have the right to refer such disciplinary suspension to arbitration. Such reference shall in all cases be made within 10 working days

from the effective date of such suspension. The decision of the Arbitrator shall be served upon the Department of Labor Relations and the Association. In such proceedings, the provisions of s 5.02(2)(c) shall apply.

OTHER RELEVANT LANGUAGE

MILWAUKEE SHERIFF'S DEPARTMENT RULES

202.29 Care of County Equipment/Property

Members shall be responsible for proper care and safekeeping of all Sheriff's Office and County equipment, vehicles, and property assigned for their use. Members shall immediately report to their supervisor any loss, damage, or unserviceable condition of said items.

MILWAUKEE COUNTY CIVIL SERVICE RULE VII, SECTION 4

- (1) Refusing or failing to comply with departmental work rules, policies, or procedures.

BACKGROUND

Sergeant Richard Graber has been employed by the Milwaukee County Sheriff's Department since 1992 and, at all times pertinent hereto, held a position in the Communications Division and was vice president of the union. He worked the 12:00 a.m. – 8:00 a.m. shift and his duties consisted of supervising dispatchers, maintaining schedules, handling public records requests for 911 calls and having responsibility for the cell phone and radio inventory. Occasionally, Graber would take a portable radio home after his shift so that he could contact the department in case he observed an emergency or if he would be delayed getting to work on days he rode the bus. It is not required that Department personnel have a portable radio in their possession when off duty, but neither is it forbidden by County or Department rules.

On the evening of March 3, 2009, Graber took his sons to a UW-Milwaukee basketball game at the U.S. Cellular Arena in downtown Milwaukee. Graber was driving his personal pickup truck and parked it in an attended public parking lot adjacent to the arena. Graber had a portable Department radio in the truck at the time because he was intending to drop his sons off and continue on to work after the game. Before going to the game, Graber placed the radio under the truck seat so that it would be out of view and locked the truck. After the game, Graber discovered that the truck had been stolen. He immediately notified the Milwaukee Police Department of the theft. He also called his Division Captain, Matthew Paradise, and informed him of the theft and the fact that the truck contained the radio, as well as a number of Graber's personal items. Paradise made arrangements to have the radio disabled for use. The next evening the truck was discovered in another part of Milwaukee, where it had been in an

accident and was not in drivable condition. The truck had been ransacked and a number of Graber's personal items were strewn around the area, but the radio was missing and was never recovered.

Subsequent to the theft, Paradise requested that the Internal Affairs Division conduct an investigation of the incident, which was performed by Captain Lorraine McCabe. McCabe interviewed Graber and reviewed the reports filed regarding the stolen vehicle and radio. Upon conclusion of her investigation, she issued an Investigative Brief on April 17, 2009 in which she concluded that Graber had committed potential violations of Milwaukee County Sheriff's Office Rule 202.29, regarding care of County property, and Milwaukee County Civil Service Rule VII, Section 4(1), regarding refusal or failure to comply with departmental work rules, policies., or procedures. On April 24, McCabe filed an Investigative Summary in which she sustained the findings of violations of the aforementioned rules. Her recommendation was reviewed and sustained by Inspector Kevin Carr on May 8, 2009 and by Sheriff David Clarke on July 30, 2009, who thereupon issued Graber a two-day suspension. Graber filed a grievance challenging the suspension, which was denied, and the matter proceeded to arbitration. There are no allegations that the grievance is not arbitrable. Additional facts will be referenced, as necessary, in the DISCUSSION section of this award.

PARTIES' POSITIONS

The County

The County states that the Sheriff's Department has a rule making Department employees responsible for the proper care and safekeeping of all County and Sheriff's Department equipment assigned for their use. The Union and Graber were aware of the rule and neither objected to its reasonableness. When Graber exercised an option to take the radio while off duty, which he had a right to do, he also assumed responsibility for the care and safekeeping of the radio. He did not have insurance coverage for the loss and took no steps to indemnify the Department personally.

Graber did not dispute the essential facts of the case. He apparently believes that by concealing the radio under his front seat he is absolved from further responsibility. He did not claim that he was ever on duty while in possession of the radio, or how he would have communicated an emergency to the Department while the radio was locked in his truck. He acknowledged that he also carried a cell phone for communication purposes and stated that since the incident he no longer carries a radio while off duty. Graber declined an opportunity to discuss the matter with the Sheriff. Lt. Stiff testified that the obligation of care for County property means more than just sticking the radio under the seat of an unattended vehicle. Further, Graber has had discipline issued in the past which was sustained, and has the further responsibility to oversee compliance with the rules by his subordinates and to set a good example for them himself. In this he failed.

The Union

The Union argues that the discipline issued to Graber does not meet the just cause standard. It is axiomatic that a finding of just cause requires both proofs of wrongdoing and a finding that the penalty was justified. The County bears the burden on both points and has failed to meet it.

Department rule 202.29 requires all personnel to be responsible for the care and safekeeping of County equipment. If equipment is lost, stolen, or becomes unserviceable, the employee is to report the fact immediately. The rule does not insure against, or prevent, the loss theft, or damage of County property, but in fact anticipates it. Graber had a portable radio off duty, which was permitted. He locked it in his truck in a parking lot that was lit, gated and attended, which he believed was safe, since he also left personal property in the truck. He also concealed the radio under his seat. There is no allegation that he violated any Department rule by having the radio with him in his personal vehicle. Graber could have done nothing else to have prevented the theft of his truck. All his actions were reasonable. Nevertheless, he was issued a two-day suspension. Lt. Scott Stiff testified that Graber could have safeguarded the radio better by locking it in the glove box, but he failed to explain how that would have prevented the theft when the thieves already had broken into the truck. Graber exercised due care by locking the radio in his truck in a monitored parking lot and concealing it under his seat. Once the theft was discovered, he notified his supervisor in compliance with rule 202.29. His actions did not warrant a suspension.

Even if the Arbitrator determines that there was a work rule violation, however, the wrongdoing did not warrant a two-day suspension. An employee's work record should be considered when considering the appropriate level of discipline. Here, Graber has never been previously suspended, and certainly not for having County equipment stolen. On the other hand, Deputy Roy Felber testified that other employees have had radios, and even weapons, stolen and have not received discipline. The Department could have handled the situation in a variety of ways, including counseling or some lower level of discipline to impress upon Graber that his actions were unacceptable, but did not. A two-day suspension for behavior that has resulted in no discipline for others violates the principle that an employee should know in advance the employees expectations and consequences of failure. The County has not proven that Graber's conduct warranted a two-day suspension.

DISCUSSION

In this case, the Grievant, Sgt. Richard Graber, received a two day suspension when a County owned portable radio was stolen from his personal vehicle. It is the County's position that Graber violated a Department work rule imposing upon him a duty to exercise proper care for County property in his possession. The Union argues that Graber exercised appropriate care and that discipline was not justified. In the alternative, the Union argues that, in light of Graber's good work record and the fact that other employees have not been disciplined under similar circumstances, the discipline was not justified.

A determination of just cause for discipline generally involves two elements – a determination in the first instance of whether the employee committed an act for which discipline is warranted and, if so, a corollary determination of whether the penalty imposed was appropriate in degree to the offense. WOOD COUNTY, WERC Case 162, No. 63666, MA-12663 (Emery, 5/10/05). This involves a two step analysis. First, a determination must be made as to whether the Grievant's conduct was such that the employer was justified in disciplining him. If it was, it is then necessary to inquire as to whether the degree of discipline was commensurate to the misconduct.

It should first be noted that in the Management Rights clause set forth in Sec. 1.02 of the contract "...the County reserves the right to make reasonable rules and regulations relating to personnel policy, procedures and practices and matters relating to working conditions." The making and enforcement of work rules, therefore, is a County prerogative as long as the rules themselves, and their application are reasonable. Here, the County had imposed a work rule on Department employees requiring them to "...be responsible for proper care and safekeeping of all Sheriff's Office and County equipment, vehicles, and property assigned for their use." This would include such things as patrol cars, service weapons, or, as in this case, portable radios. On its face, there is nothing inherently unreasonable about such a rule. The equipment used by Department employees is often costly and furthermore, could cause problems if it fell into the wrong hands. For both these reasons, and probably others, the County has a right to expect Department employees to use due care with assigned County property to prevent loss by damage, destruction, or theft.

It is also necessary to inquire, however, as to whether the way that the rule was applied in this case was reasonable. I find that it was not. In the first place, it appears that the County's interpretation of the rule is almost tantamount to an imposition of strict liability on Graber. The testimony of Lt. Stiff was to the effect that there was nothing wrong with Graber taking the radio home from work for the stated purpose of using it, if necessary, to communicate with the Department on the way to and from work. Rather, he stated that Graber violated the rule by not properly safeguarding the equipment. The Investigative Summary prepared by Captain McCabe is no more illuminating. She recites the facts of the incident, acknowledged that Graber was not prohibited from having the radio in his possession, acknowledged that Graber had no reason to believe that the radio was not secure in his locked vehicle, but then concluded that Graber was, nevertheless, responsible for the safekeeping of the radio and, therefore, had violated Rule 202.29 when it was stolen.

When asked on cross-examination what Graber could have done that would have constituted proper care, Lt. Stiff testified that he could have left the radio at home or locked it in the glove box of his truck. Had he left the radio at home, it certainly would not have been stolen out of the truck, but would have defeated the purpose of having the radio, since Graber testified that he had the radio with him because he was going to drop his children off at their mother's home after the game and then was immediately going on to work. Further, since the radio was concealed under the truck seat it is clear that the truck, not the radio, was the object of the theft. What is more, if the thieves were willing and able to break into and steal a locked

truck in a lighted and attended parking lot, it is doubtful that locking the radio in the glove box would have deterred them from taking it, as well, any more than concealing it under the truck seat. Thus, it appears that in application, the effect of the rule is that if any mishap occurs to County property while in an employee's possession, the employee is responsible for the loss and is subject to discipline under Department Rule 202.29. I find this to be an unreasonable application of the rule. If it was reasonable for Graber to take the radio to and from work, then while he was at the game his alternatives were to take the radio into the game with him, or to leave it in his truck. He chose the latter alternative, concealing the radio under the truck seat and locking the truck in a lighted, attended, public parking lot. After the theft was discovered, Graber immediately contacted his supervisor and reported the loss, as the rule also requires. Lt. Stiff did not suggest that he needed to take the radio into the game, but that he did not act reasonably in securing the radio in the truck. The test, however, is not whether Graber took every possible measure to prevent the loss of the radio, but whether he acted responsibly under the circumstances. I find that the measures he took in securing the radio were reasonable and that the additional steps suggested by the County would likely not have prevented the loss.

I note further the uncontradicted testimony of Deputy Roy Felber, who is also the Union President, that he is aware of other instances in which employees have had Department property, including radios and sidearms, stolen without discipline having been issued. It would appear, therefore, that the enforcement of this rule has been uneven over the course of time, which also calls into question the reasonableness of its application, for if a work rule is applied in an arbitrary, capricious, or discriminatory manner, any resulting discipline may also be overturned. Under the circumstances, therefore, I find that there was not just cause to discipline Graber for the theft of the portable radio from his personal vehicle. Having so found, I do not reach the question of whether the degree of discipline was appropriate.

For the reasons set forth above, therefore, and based upon the record as a whole, I hereby issue the following

AWARD

There was not just cause to suspend Sergeant Graber. As and for a remedy, the County shall expunge the discipline from his personnel record and shall make him whole by paying two days' back pay at his rate of pay at the time of the suspension.

Dated at Fond du Lac, Wisconsin, this 31st day of March, 2010.

John R. Emery /s/

John R. Emery, Arbitrator

JRE/gjc
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