

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between
MILWAUKEE DEPUTY SHERIFF'S ASSOCIATION
and
MILWAUKEE COUNTY (SHERIFF'S DEPARTMENT)

Case # 694
No. 69136
MA-14494

Appearances:

Graham P. Wiemer, Vanden Heuvel & Dineen, S.C., W175 N11086 Stonewood Dr., P.O. Box 550, Germantown, WI 53022-0550, appearing on behalf of Milwaukee Deputy Sheriff's Association.

Timothy R. Schoewe, Deputy Corporation Counsel, Office of Corporation Counsel, Room 303, Courthouse, 901 North 9th Street, Milwaukee, WI 53233, appearing on behalf of Milwaukee County.

ARBITRATION AWARD

Milwaukee County, hereinafter County or Employer, and the Milwaukee Deputy Sheriff's Association, hereinafter Association, are parties to a collective bargaining agreement that provides for the final and binding arbitration of grievances. The Association, with the concurrence of the Employer, requested the Wisconsin Employment Relations Commission to assign a Commissioner or staff member to resolve a dispute between them regarding a five-day disciplinary suspension of CMB, hereinafter CMB or Deputy B[]. Commissioner Susan J.M. Bauman was so appointed. Hearing was held on February 10, 2010, in Milwaukee, Wisconsin. The hearing was not recorded. The record was closed on March 26, 2010, upon receipt of all post-hearing written argument and the undersigned being advised that no reply briefs were to be filed.

Having considered the evidence, the arguments of the parties, the relevant contract language, and the record as a whole, the Undersigned makes the following Award.

ISSUE

There are no procedural issues. The parties stipulated to the substantive issue as:

Was there just cause to suspend the Grievant for five days? If not, what is the appropriate remedy?

BACKGROUND and FACTS

CMB has worked as a deputy sheriff in the Milwaukee County Sheriff's Department for 13½ years. On February 22, 2009¹ she was assigned to Police Services – Patrol Division. At approximately 2:30 p.m. she was dispatched to Currie² Park in response to a call from a person who had been cross country skiing and had discovered upon her return to her vehicle that a window had been broken and her purse and coat had been stolen. The Grievant wrote an incident report with the following narrative:

On Sunday, February 22, 2009 at 1436 hours, I, deputy C[] M B[] #832, while assigned to squad 24, in full duty uniform to Police Service Bureau, Patrol Division, I was involved in the following incident:

At approximately 1436 hours, I was dispatched to Curry Park for a theft from vehicle complaint. Upon my arrival, I met with a subject, later identified as Breihan, Christy E (F/W 9-28-52) standing with her vehicle, a 2005 Pontiac Montana van, tan in color, with WI plate of 655-BYG. She stated to me that her vehicle was locked when she left it to go skiing. She stated that her vehicle was broken into, and her purse was stolen from her vehicle. I observed that the passenger side front window of Ms. Breihan's vehicle was smashed. Ms. Breihan stated that her purse and coat was stolen from the vehicle. She stated that she parked her vehicle in the parking lot of Curry Park at approximately 1245 hours. She stated that she returned to her vehicle at approximately 1340 hours, and stated that the window was smashed. She stated that there was a citizen, who was at her vehicle at the time of her arrival back to the vehicle whom stated the window was smashed as early as 1330 hours. The citizen was not on the scene upon my arrival, nor did Ms. Breihan know whom the citizen was. She also stated that she did

¹ All dates are 2009 unless otherwise indicated.

² Various documents spell Currie in different ways. When used in quoted material, the spelling in the original document is utilized.

not know of any suspects.

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Ms. Breihan stated that in her purse was in the vehicle. Her purse was described as a black canvas bag. She stated that in her purse there were various credit cards. The credit cards included a Bank of America, Target, L.L. Bean, Chase AARP, Wells Fargo, Boston Store, Kohl's, and check cards for Wells Fargo and Chase banks. She stated that she may have had more credit cards in her purse, but she was unsure. Also in her purse, were a pair of reading glasses valued at \$300.00. She also stated that there was approximately \$50.00 in cash in her purse. Also stolen was her coat, valued at \$50.00. In her coat was approximately \$40.00 in cash. The value of the smashed window is approximately \$200.00.

Ms. Breihan stated that her vehicle insurance company is AMCO/Allied Insurance.

There are no suspects at this time.

Ms. Breihan was given victim/ witness information and advised on how to get a copy of the report.

Approximately one month after this incident occurred, Ms. Breihan wrote a letter to Sheriff Clarke:

I am writing at the urging of a number of people with whom I have shared this story because we believe in your commitment to keeping our community safe from crime.

On Sunday, February 22, 2009, I decided to go cross-country skiing. I also had a few errands to run, so I took my purse along although that was not my usual practice.

When I was ready to ski, I parked in the Currie Park golf dome lot. The lot was almost full, with many people out sledding and skiing in addition to the golfers.

I admit that I made a stupid mistake when I decided that with all the people around, my purse would be safe in the car if I covered it up with my two best winter jackets. (I just wear a light top for skiing, but put one of the warmer jackets on when I'm finished.)

I skied for about an hour. When I returned to my car the front passenger window had been broken out, and my purse, camera, glasses, and both

jackets were gone.

I had my cell phone in my pocket, and dialed 911 to report the incident. Then I called home to tell my husband and he was already on the phone with my credit card company which had called to report suspicious activity. My credit card had been used at two neighboring gas stations on Fond du Lac Ave. A third attempt was in progress as they spoke.

I thought that this information might make it possible to catch the robbers. I had another credit card, and a call to them also revealed a spending spree down Fond du Lac Ave. So I called the Sheriff's Department again to tell them I had this information. They told me they couldn't do anything - I should just wait for the deputy.

That wait took almost an hour. (By this time I was almost hypothermic, being sweaty, dressed in thin clothing, and unable to leave my car. The deputy, seeing I was shivering, told me I could wait in my car, but since it had sat for two hours and had no front window, it wasn't any warmer than the parking lot.)

I told the deputy about the continuing attempts to use my credit cards at a row of stations on FDL Ave., to which she responded that that was Milwaukee, and by the time they could get *them* involved the robbers would be long gone. So I stood there absorbing the thought that I knew where the people were who had stolen my stuff, but they were going to get away and there was nothing I could do. I do not think the Milwaukee Police were ever notified of the event or the repeated use of my cards at those stations.

My impressions (and I admit they are no more than that) are these:

- The deputy saw her role as filing a report solely so it would be documented for insurance.
- If thieves know that law enforcement won't pursue them, aren't they emboldened to keep doing more of the same?
- My credit cards were being used to buy gasoline, and one car couldn't use that much. Therefore, there must have been some transactions going on, I would guess at the stations where they were being used. Doesn't that hint at some degree on complicity on the part of their managers? Couldn't they be watched to try to discourage such activity?

Two other cars had also been broken into in the same lot, and another visitor there told me there had been a rash of such break-ins in that lot. Couldn't security be beefed up in response, either by law enforcement or

the parks department? Couldn't a warning at least be posted?

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I know it sounds like I'm spouting off out of frustration. This is my third victimization in less than four years. First my son was held up while walking, then my house was broken into while we were at school/work, and now this. Only the guys who held up my son were apprehended, and in both the other cases it seems there really wasn't any effort made to catch the crooks. I am a lifelong Milwaukeean, but now I'm not sure if I want to stay and that breaks my heart.

I hope these sorts of experiences and the perceptions they created are taken into consideration by leaders like you whom we trust to protect us. Thank you for your consideration.

An Internal Affairs case was initiated on April 1, in response to Ms. Breihan's complaint letter. The investigation was directed at the Grievant as well as her supervisory sergeant. The case was dismissed as to the sergeant, on the basis that he was on vacation on the day in question and had no knowledge that CMB did not, allegedly, comport herself in accordance with the rules of Milwaukee County and the Sheriff's Department. The Internal Affairs case was assigned to Sgt. Scott Stiff.³ Stiff interviewed the Grievant, the supervising sergeant, and a Wauwatosa Police Department officer who also reported to Currie Park in response to theft from a different vehicle. Stiff also reviewed Ms. Breihan's letter, the incident report CMB filed, and the CAD report. Stiff concluded that CMB has violated Milwaukee County Sheriff's Office Rule 202.20 Efficiency and Competency and Milwaukee County Civil Service Rule VII, Section 4(1)(l) Refusing or failing to comply with agency rules, policies or procedures; (t) Failure or inability to perform the duties of assigned position and (u) substandard or careless job performance. The investigation was completed on April 30.

Sheriff Clarke responded to Ms. Breihan by letter dated May 8, 2009:

Let me start by saying that I am disgusted by the action of the Deputy that responded to investigate the crime that occurred against you. Deputy B's substandard performance lacked empathy for the predicament you were in. She did not live up to the standard that I have set for every member of this organization; and that is a standard of excellence. Deputy B[] did not get anywhere close to my expectation. People are held accountable when that does not happen. You did a better job at addressing this police related incident and what should have followed than Deputy B[] did.

³ Sgt. Stiff has subsequently been promoted to Lieutenant and will be referenced hereinafter as Stiff or Lt. Stiff.

I'm responsible for the conduct of the people in this organization who serve the public. Citizens depend on our personnel to provide quick, accurate and helpful service during their time of crisis. I again apologize for the lack of action taken by Deputy B[].

An internal investigation has been initiated regarding your complaint. This case has been assigned to Sergeant Scott Stiff of our Internal Affairs Division. Sergeant Stiff will investigate your complaint and keep you informed as to the outcome of his investigation.

Thank you for bringing this to my attention.

After the administrative review of the investigative information and a hearing, on July 30, Sheriff Clarke issued a five (5) day unpaid suspension to CMB for violation of the above-stated rules. The Attachment to the County of Milwaukee Notice of Suspension reads as follows:

On Friday, March 20, 2009, citizen Christy Breihan filed a Customer Satisfaction Complaint with the Office of the Sheriff. Ms. Breihan indicated that on Sunday, February 22, 2009, she was the victim of a crime that occurred at Currie Park Golf Dome parking lot. Ms. Breihan indicated that her parked vehicle had the passenger side window smashed and a number of items, including her purse and credit cards, had been stolen. Ms. Breihan further describes a series of events including the following components:

1. She contacted MCSO Dispatch via cellular 9-1-1 and requested a squad to respond to her location.
2. She contacted her husband, who advised her that her credit card company had already contacted their household to advised them that their card had already been used at two (2) gas stations on Fond Du Lac Avenue.
3. She independently called the credit card company, who confirmed to her that the card(s) were actively being used.
4. She again contacted MCSO dispatch and informed them of this information. They informed her that they would forward the information to the responding deputy sheriff.
5. After an approximately 1-hour wait, the responding deputy (unnamed) arrived and:

“...I told the deputy about the continuing attempts to use my credit cards at a row of stations on FDL Ave., to which she responded that that was Milwaukee, and by the time they could get *them* involved the robbers would be long gone. So, I stood there absorbing the thought that I knew where the people were who had stolen my stuff, but they were going to

get away and there was nothing I could do. I do not think that the Milwaukee Police were ever notified of the event or the repeated use of my cards at those stations.”

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On Sunday, February 22, 2009, at approximately 1357 hours, Mrs. Christy Breihan call “911” to report that her vehicle had been broken into and that items were stolen from her vehicle. At approximately 1431 hours, Mrs. Breihan had called “911” again and informed the dispatcher that she received information that her credit cards were already being used at gas stations on FDL Ave.

Deputy C[] B[] was assigned to Sq. 24 on Sunday, February 22, 2009. At approximately 1435 hours, Deputy B[] was dispatched to take a “Break in/ Theft From Auto” complaint at Currie Park. As Deputy B[] was responding to the incident, the dispatcher informed Deputy B[] that the victim reported that her credit cards were being used and Deputy B[] acknowledged receiving the information. Deputy B[] stated that it took approximately 10-15 minutes to arrive on the scene.

Once on the scene, Deputy B[] met Mrs. Breihan who told Deputy B[] that her credit cards were being used at gas stations on FDL: Ave. Per Mrs. Breihan, Deputy B[] responded, “That is Milwaukee and by the time they could get them involved the robbers would be long gone.” Deputy B[] disputes that she made that statement to Mrs. Breihan. During her interview, Deputy B[] stated that she offered Mrs. Breihan an opportunity to sit in her squad car in order to warm up and Ms. Breihan declined. Deputy B[] stated that Mrs. Breihan did inform her that her credit cards were being used, but did not know the exact locations. Deputy B[] stated that Mrs. Breihan attempted to call her husband several times in order to obtain that information, but was not able to contact him. Deputy B[] stated that she was on the scene for over an hour. This time is disputed per the CAD report. The CAD report has the call dispatched to Deputy B[] at 1435 hours and had Deputy B[] going back into service at 1506 hours.

Deputy B[] stated that she gathered all of the necessary information from Mrs. Breihan for her report. Deputy B[] stated that while she was on the scene she looked for Mrs. Breihan’s glasses, but could not find them. Deputy B[] stated that she offered to call for a tow truck for Mrs. Breihan, but she refused. Deputy B[] stated that she helped clean the glass out of her vehicle.

Wauwatosa Police Officer Steve Schoofs was in the Currie park parking

lot taking a separate "Theft From Auto" call at the time Deputy B[] arrived. P.O. Schoofs was approximately 15-20 feet away from Deputy B[]'s call and did not recall hearing the conversation between Deputy B[] and Mrs. Breihan. Once he had completed his assignment, P.O. Schoofs

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stood by as Deputy B[] took the information for her complaint. P.O. Schoofs remembered that Mrs. Breihan was upset over the length of time it took a squad to respond. P.O. Schoofs stated that Deputy B[] was professional and not rude in any way.

Deputy B[] authored incident Report 09-00979 regarding the incident. Deputy B[] did not document any information in her report regarding having knowledge that Mrs. Breihan's credit cards had been used. When asked why she did not put that information in her report Deputy B[] replied, "I made a mistake by not putting that in my report." Deputy B[] stated that because Mrs. Breihan had not called her back she did not put that information in her report. Deputy B[] stated that it looked like Mrs. Breihan gave her a story that she could not confirm and that she thought that it would make Mrs. Breihan look bad. Deputy B[] stated that she should have put that information in her report.

Sergeant Stowers is Deputy B[]'s immediate supervisor, but was not on duty when this incident occurred. Once Sgt. Stowers returned from vacation he had an opportunity to review Deputy B[]'s report. Sgt. Stowers returned the report to her because she failed to complete the property section of the report. Sgt. Stowers did approve Deputy B[]'s report once it was resubmitted. Sgt. Stowers stated that there was nothing in the report to indicate that the credit cards had been used or that there were any elements that would have helped to the solvability of the incident. Sgt. Stowers state that because of the lack of information in Deputy B[]'s report he did not forward the report to CID for further investigation. Sgt. Stowers stated that based on what he know now, Deputy B[] was inefficient and should have done more. Sgt. Stowers stated that feels mislead by Deputy B[]'s report. Sgt. Stowers stated that Deputy B[]'s report was inaccurate.

Based on the aforementioned all charges are **SUSTAINED** for the following :

MILWAUKEE COUNTY SHERIFF'S OFFICE RULES:

202.20 Efficiency and Competency

Members shall adequately perform the duties of their assigned positions. In addition, sworn members shall adequately perform reasonable aspects of police work. "Adequately perform" shall mean performance consistent with the ability of equivalently trained members.

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MILWAUKEE COUNTY CIVIL SERVICE RULE VII, SECTION 4

(1):

- (l) Refusing or failing to comply with departmental work rules, policy or procedures.
- (t) Failure or inability to perform the duties of assigned position.
- (u) Substandard or careless job performance.

In accordance with the provisions of the collective bargaining agreement, the imposition of the five (5) day suspension was challenged and the matter is before the undersigned.

Additional facts are included in the **Discussion**, below.

DISCUSSION

At issue herein is the question of whether Milwaukee County had just cause to suspend CMB for five days for events occurring on and in connection with the February 22, 2009 incident.

Although there is general agreement as to the facts of this case, the parties are not in agreement as to the standard of review to be utilized by the arbitrator and the collective bargaining agreement does not provide guidance. The County argues that the legal standard to be applied is as found in Sec. 59.52(8), Wis. Stats., which delineates the seven just cause standards. The Union relies on the traditional arbitral standard for determining just cause that consists of a two-prong analysis: proof of wrongdoing and a determination whether the punishment assessed is appropriate under the circumstances.

The discipline at issue herein came about as a result of a letter sent to Sheriff Clarke by crime victim Christy Breihan. An Internal Affairs investigation was performed by interviewing the Grievant, Deputy B[], her supervising sergeant and a police officer from another jurisdiction who was also on the scene. Significantly Ms. Breihan was not interviewed and it was, apparently, assumed by the Department that everything stated in her letter was the truth, even in the face of contradictory information from Deputy B[]. Any errors of commission or omission in Ms. Breihan's

letter were resolved in favor of the member of the public, and Deputy B[] was assumed to have acted improperly.

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The actual facts in this matter are essentially uncontested, although many of them are not contained in Ms. Breihan's letter.⁴ At issue is whether the conduct of Deputy B[] did, in fact, violate any Department or County rules and, if so, whether the discipline imposed was appropriate under the circumstances.

Deputy CMB admits that she made an error in failing to include information in her incident report regarding the usage of Ms. Breihan's credit cards. After waiting a number of days for a call back from the victim with additional information that was never provided, CMB consciously decided not to include this information in the report because she thought that Ms. Breihan would look bad to the credit card company if the report showed that she had failed to cooperate and failed to follow up with additional information regarding the credit card usage. There is no doubt that the Grievant failed to complete the report in the manner that she should have.⁵ She has acknowledged this fact and has indicated that she would include such information should she be faced with a similar situation in the future. The Employer contends that had Deputy B[] included the information regarding the usage of the credit cards in her report and/or conveyed this information to dispatch at the time it was reported to her, the crime might have been solved.⁶

It is undisputed that Deputy B[] did not produce the report from the incident that she should have. She was found to have violated rules regarding efficiency and competency, and to have refused or failed to comply with departmental work rules, policy or procedures, failure or inability to perform the duties of assigned position, and

⁴ Of particular note is the fact that Ms. Breihan complained of many things in her letter, not only about Deputy B[]. Breihan had general concerns about safety and living in Milwaukee.

⁵ In his investigative interview, Sgt. Stowers (who was on vacation at the time of the incident) stated that had this information been included in the incident report, he would have sent the report to CID for investigation. Inasmuch as CMB held the report for a number of days while she waited to hear from Breihan, it is obvious that the cards were no longer in use when Stowers reviewed the report. Furthermore, knowledge that the cards were being utilized somewhere along a ten mile street, Fond du Lac Avenue, is most likely insufficient information to result in a successful investigation.

⁶ Breihan had provided the information regarding the then-current usage of her credit cards on Fond du Lac Avenue to the dispatcher prior to Deputy B[]'s arrival. Dispatch told Breihan to report this fact to the deputy when she arrived, about an hour after the break-in had occurred. The delay was not, in any way, attributable to Deputy B[], nor did the Sheriff find her at fault for the delay. Perhaps another officer should have been dispatched to Fond du Lac Avenue (where on the 10 mile long street?) at the time the cards were being used rather than fault Deputy B[] for failing to deal with a crime in progress.

substandard or careless job performance.

A review of the efficiency and competence rule reveals that a member of the Sheriff's department must perform consistent with the ability of equivalently trained members. The Employer did not produce any testimony from an equivalently trained

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member to indicate that they would act or file a report significantly different than the one the Grievant filed. In fact, Association President Deputy Felber testified that he would not have done anything differently.

The allegation that the Grievant refused or failed to comply with departmental work rules arises from the allegation that she violated the rule regarding efficiency and competence. Inasmuch as she did not violate that work rule, she did not fail to comply with the departmental work rule. (There is no question that she did not refuse to follow any rules.)

The Department also contends that Deputy B[] failed to, or was unable to, perform the duties of the assigned position. Again, the Employer failed to establish that there was a violation of this County rule. There was no testimony regarding any duty that she failed to perform or was unable to perform.

Finally the Department found that CMB's performance was substandard or careless. There is no question that CMB was not careless in her performance of her duty. It was a conscious decision on her part to omit the information regarding the concurrent use of the stolen credit cards. While not careless, such an omission was substandard and therefore a violation of the rule.

Having found that Deputy B[]'s performance was substandard, the analysis must turn to the question of whether a five (5) day unpaid suspension is appropriate discipline for this action. First we note that Deputy B[] has never previously been disciplined for any wrong doing during her 13 plus years as a Milwaukee County Deputy Sheriff. Her most recent employee evaluation, dated August 26, 2009 (which covered the time period that includes the incident of February 22), contains the following pertinent information:

Attitude – Positive, remains calm and acts rationally

Performance – Goes above and beyond when handling situations. Handles extra assignments without complaint and in an efficient manner.

Deputy B[] exemplifies teamwork whole training newly assigned deputies. Deputy B[] has been utilized as a field-training officer on numerous occasions, resulting in producing a well-rounded officer. She take upon herself to mentor others on her own making sure the individual

has a clear understanding of what is expected when performing their duties.

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Deputy B[] requires little or no supervision when performing her day-to-day activities. Deputy B[] has proven to be a well-rounded officer in all facets of the Patrol Division.

Deputy Felber testified that in his capacity as Association President he has reviewed other disciplinary actions taken against deputies for similar rule violations. These have mainly been between a written reprimand and a one-day suspension; he has never seen a five (5) day suspension for an alleged violation of the efficiency rule. No testimony or evidence was educed that contradicts Deputy Felber's statements.

In the opinion of the undersigned, the purpose of disciplinary action is to correct employees when they behave inappropriately. That is the reason behind the concept of progressive discipline. When an employee violates rules for the first time, unless it is a major offense, the appropriate response is an oral or written reprimand. If there is further action warranting discipline, suspensions of increasing length are appropriate. In the case at bar, Deputy B[] not only has a "clean" record, she is also thought of highly by her supervising sergeant. Her substandard incident report would warrant an oral or written reprimand under normal circumstances.

This case is not "normal" in that the Sheriff, on May 8, more than two months before the completion of the investigative process and hearings on the July 30 notice of suspension, wrote to Ms. Breihan and proclaimed that Deputy B[] had performed in a substandard manner and that she lacked empathy for Ms. Breihan's predicament. Part of Ms. Breihan's complaint had to do with the amount of time it took for a deputy to respond to the scene. There is no question that Deputy B[] was not responsible for the delay. The Sheriff's letter makes it appear that the delay, and any and everything else, was the responding Deputy's fault.

Ms. Breihan's letter indicated that she had discussed the incident at Currie Park with many people. In all likelihood, she also shared the Sheriff's letter that criticizes Deputy B[] with many of the same people. Although Deputy B[] should have included the information about the use of credit cards in her report, the investigation did not reveal that she had done anything else wrong. In particular, there is no indication that she should have behaved differently at the scene, except perhaps to have called in the credit card usage about which Dispatch had already been advised. CBM should not be a victim of the Sheriff's attempt to placate a citizen who had to wait too long in the cold to get service from the Milwaukee County Sheriff's Department. Having been publically maligned by the Sheriff, Deputy B[] should not suffer additional discipline.

Accordingly, based upon the above and foregoing and the record as a whole, the undersigned issues the following

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AWARD

The grievance is sustained. The Employer did not have just cause to suspend Deputy B[] for five (5) days. The Employer is directed to make the Grievant whole as to lost wages and benefits for the five days and all reference to this discipline is to be expunged from Deputy B[]'s file.

Dated at Madison, Wisconsin, this 26th day of April, 2010.

Susan J.M. Bauman /s/

Susan J.M. Bauman, Arbitrator

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