

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 # 701
No. 69296
MA-14561

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 SDD, hereinafter SDD or Deputy D. Commissioner Susan J.M. Bauman was so appointed. Hearing was held on April 8, 2010, in Milwaukee, Wisconsin. The hearing was not transcribed. The record was closed on June 28, 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

SDD has been employed by the Milwaukee County Sheriff's Department as a Deputy Sheriff since 1995. He has been an employee of Milwaukee County since 1991 when he served as a Correctional Officer at the House of Corrections (HOC). Approximately nine months prior to the hearing in this matter, SDD was transferred back to the HOC which is now known as the County Criminal Justice Facility-South (CCJF-S). Until recently, no Deputies worked at the CCJF-S. Prior to transferring any Deputies to the facility, the Department asked for volunteers. Despite his having not requested a transfer to the CCJF-S, the Grievant was transferred there in June 2009. There is no question that SDD was not happy about his new assignment.

On September 28, 2009, Sheriff David A. Clarke, Jr. issued a five (5) day suspension to SDD for alleged violations of Milwaukee County Sheriff's Office Rules and Regulations 202.17 – Conduct of Members and Milwaukee County Civil Service Rules VII, Section 4(1) (l) – Refusing or failing to comply with departmental work rules, policies or procedures and (ff) – Offensive conduct of language toward the public or toward county officers or employees. The reason for the suspension attached to the Notice of Suspension sets forth the pertinent facts of this case and reads as follows:

On Wednesday, June 10, 2009, an Internal Affairs investigation was initiated regarding Deputy Sheriff SDD at the request of Captain Kevin Nyklewicz. Deputy SDD, while off duty, posted on his "Facebook" account photographs of himself in a Milwaukee County Sheriff's Office uniform and comments regarding the MCSO Administration. The comments compared the agency to "Jonestown" stating, "Don't drink the Kool-aide."

On May 28, 2009, while browsing the Facebook website, Lieutenant Gregory Bacon observed a photograph of Deputy D along with derogatory comments directed at the Milwaukee County Sheriff's Office (MCSO) and the MCSO Administration. During his interview, Lt. Bacon stated that he was offended by the comments so he copied the comments and reported the incident to both Captain Evans and Captain Nyklewicz. Lt. Bacon indicated that Facebook has security features that

could be set to allow only persons on your “friends” list to view your pictures and comments and that Deputy D did not use these security features. Lt. Bacon stated that Deputy D’s photograph and comments were not blocked, utilizing the security features, and that anyone could view them.

Deputy D posted the following comments on his Facebook account:

S[] D[] *I really enjoy being a police officer and protecting the public and doing the job that cops do...I just HATE my department and the people helping run it into the ground... You can't just do your job anymore...you must jump on the propaganda bandwagon and drink the kool-aid... It's a cult mentality... punishing and segregating those that are non compliant and rewarding those who follow the party line...*

On June 3, 2009, Sergeant Thomas Liebenthal (Criminal Investigations Division) conducted a search on Facebook for Deputy D. Sgt. Liebenthal was able to locate Deputy D’s profile along with a photograph of Deputy D in a Milwaukee County Sheriff’s Office uniform. Sgt. Liebenthal was unable to view Deputy D’s profile and comments due to a security setting only allowing members of the “friends” list access.

The comments and photograph has since been removed from Deputy D’s Facebook account. Since the incident no public access can be made to his account. During his interview, Deputy D acknowledged having an active Facebook account and that his picture wearing a Milwaukee County Sheriff’s Office uniform was posted on his Facebook account. He stated that the picture was taken at the Milwaukee County Zoo. He indicated that his child put the picture on his site.

Deputy D acknowledged that he posted the aforementioned comments on his Facebook account. Deputy D indicated that the comments were meant to be humorous and that he was referring to the statement, “don’t drink the kool-aide” as to the “Jonestown” incident. He stated that it means, “Don’t believe everything that you hear.” He stated that there is times that he hates the agency and the way things are run. He also stated that there are things that could be regarded as a “cult” mentality. He believed that this is a “good old boy” system.

Deputy D indicated that this was done on his own time and that it is his First Amendment right to express himself.

Based on the aforementioned, all charges are SUSTAINED for the following. Deputy D did post a picture of himself wearing a Milwaukee County Sheriff’s Office uniform and comments on his Facebook account that criticizes the Milwaukee County Sheriff’s Office. By posting the aforementioned comments and photograph, Deputy D brought discredit upon the Milwaukee County Sheriff’s Office.

MILWAUKEE COUNTY SHERIFF'S OFFICE RULES:

202.17 Conduct of Members

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

- (l) Refusing or failing to comply with departmental work rules, policies or procedures.
- (ff) Offensive conduct or language toward the public or toward county officers or employees.

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

APPLICABLE RULES

Milwaukee County Sheriff's Office Rule 202.17 Conduct of Members

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

Milwaukee County Civil Service Rule VII, Section 4(1):

- (l) Refusing or failing to comply with departmental work rules, policies or procedures.
- (ff) Offensive conduct or language toward the public or toward county officers of employees.

DISCUSSION

The attachment to the Notice of Suspension, quoted in full above, is an accurate account of the events giving rise to the discipline in dispute herein, as far as it goes. Deputy D contends that, contrary to the assertions in the Notice, he did have security settings on his Facebook account such that only persons he had "friended" could review the contents of his account. Lt. Bacon, the individual who initially complained about the comments on the Facebook page, was not one of SDD's friends. Rather, it is the Grievant's contention that Lt. Bacon obtained access to SDD's page through that of another Deputy's facebook profile, Deputy ML, an individual who is a "friend" of SDD's. The Grievant does not know if Lt. Bacon is a "friend" of Deputy ML or whether he had permission to access Deputy ML's Facebook account.

The Grievant's Facebook account and profile was initially created by the Grievant's son who posted a number of pictures of the Grievant, including the one at issue herein. The account was established so that SDD could keep in contact with his friends and families. The initial security provisions were set so that one had to be a "friend" in order to access the photographs. Although the profile includes information about his education and work category, Deputy D did not include information about his employer, and never makes specific reference to his employer by name, although he commented on his work and his employer on occasion. SDD admits that he has frustrations, from time to time, with his job and the Department and posting comments on his Facebook page is how he relieves that frustration.

At hearing, the Employer acknowledged that absent the photograph of Deputy D in a MCSO uniform, the comments Lt. Bacon allegedly found offensive would not be violative of any Department or County rules. The Employer contends that, in combination with the picture of the Grievant dressed in a MCSO uniform, the comments violate the Department rule regarding conduct of members and, therefore, the Milwaukee County Civil Service rule regarding the failure to comply with departmental rules and offensive conduct or language toward the public or county officers or employees. In other words, the Employer contends that the comments in conjunction with the picture that, it believes, identifies Deputy D as an employee of the MCSO, constitutes three separate violations.

Deputy D acknowledges that he was wearing a MCSO uniform when the picture in question was taken and that it was posted on his Facebook page. According to the Grievant, his son posted the picture on the Facebook page, along with many other photographs. The County does not contend that the picture, by itself, is violative of any rules or regulations, although it prefers that deputies not appear in public in any manner, including public pictures, while they are in uniform.

At hearing, the Employer's witness testified that Deputy D discredited the agency by his attack on the department. The combination of picture and comments impair his effectiveness as an officer – his ability to make arrests, present cases, appear in front of a jury. If a potential juror had seen the picture and comments, it would be detrimental to the County's position in the trial. Officers have to reflect sound morals and support the agency that they represent in uniform. In essence, the testimony was clear that a person wearing the MCSO uniform cannot make negative statements about the agency, cannot discredit the agency.

Fundamental to the argument of the Employer is the ability of a member of the public to make the connection between the picture, the comments, and the Milwaukee County Sheriff's Department. It is established that the picture posted on the Facebook page shows Deputy D in uniform by the fact that he admitted it. The evidence presented at hearing shows a picture of Deputy D wearing a uniform. The copies of the

photograph¹ presented at hearing clearly show a person in uniform. However, it is not clear to the undersigned that the person in uniform is employed by the Milwaukee County Sheriff's Department.² It may be that the image on the website was clearer, and the association with the MSCO was obvious. However, that image was not produced. From the evidence presented at hearing, there is no clearly discernible connection between the Grievant and the Employer herein.

Although the Grievant acknowledged that he is wearing the MCSO uniform, the fact that it is not recognizable is important because the Employer's allegations of rule violations rest upon the combination of the comments and the photograph. As stated above, the testimony at hearing was very clear that neither standing alone violated the policies of the Department. It is only when a reader can connect the negative comments with the MSCO, by recognition of the uniform, that the rules are violated.³

Deputy D was charged with a violation of MCSO rule 202.17 – Conduct of Members which states that

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.

Given that there was nothing posted on SDD's Facebook account that associated him with the MSCO, the Employer has failed to establish that Deputy D's off duty conduct discredited or impaired the efficiency or effectiveness of the MSCO or its members. There is no violation of MCSO rule 202.17.

The Grievant was also charged with violation of Milwaukee County Civil Service Rule VII, Section 4(1) (l): Refusing or failing to comply with departmental work rules, policies or procedures. A condition precedent to finding a violation of this rule is a finding of a violation of an MCSO rule. Inasmuch as I have found no violation of any MCSO rule, there is no violation of this County Civil Service Rule.

¹ Two copies of photographs were admitted as evidence. The County was uncertain if these were two different pictures or two copies of the same picture. The Grievant contends that they are two copies of the same picture. There is nothing in the record to convince the undersigned that these were not two copies of the same photograph.

² There is no question, to a member of the Department, or to someone who knows the Grievant and knows who he works for, the MSCO would be identified. However, neither the undersigned nor the people to whom she showed the picture could identify the MSCO from the photograph.

³ It is true that many of the "friends" of Deputy D know that he works for MSCO, and can connect the comments to the Department. However, these individuals, family and friends of the Grievant, would never be members of a jury at which the Grievant's testimony was utilized by the County.

Finally, the Grievant was charged with violating Milwaukee County Civil Service Rule VII, Section 4(1) (ff): Offensive conduct or language toward the public or toward county officers or employees. The internal investigation into Deputy D began as a result of Lt. Bacon's reading SDD's Facebook page. Lt. Bacon, according to various documents and reports, found the Grievant's comment to be offensive. However, Lt. Bacon did not testify at the arbitration hearing in this matter. Although the rules of evidence are not strictly applied in arbitration proceedings, an ultimate fact such as whether Lt. Bacon found the comments to be offensive cannot be decided based upon uncorroborated hearsay testimony. While the transcripts of investigative interviews and the investigative brief and investigative summary prepared by the Internal Affairs Bureau are not hearsay in that they are the official records of the Department, the person who did the investigation, Sgt. (now Lt.) Stiff was unavailable for hearing and Lt. Bacon was not called to testify as a witness.

It is well established that the Employer has the burden of proof in a discipline or discharge case. In the case at bar, the Employer failed to meet that burden with respect to the first two rule violations alleged inasmuch as it was unable to establish that the comments made by the Grievant could be connected to his employment by the MCSO. With regard to its third allegation, it appears that the Employer's contention is that Deputy D's conduct or language was offensive toward the public or toward county officers or employees. The Employer has not met its burden to demonstrate that the conduct or language was offensive to the public. Had there been direct testimony by Lt. Bacon to the effect that he found SDD's comments offensive, the Employer would have sustained its burden that the Grievant's language was offensive to a county employee. However, the Employer failed to provide substantial evidence that Lt. Bacon was, indeed, offended by the language.

As the Court of Appeals for the Eleventh Circuit stated:

Hearsay is admissible in administrative hearings and may constitute substantial evidence if found reliable and credible. *Williams v. Dep't of Transp.*, 781 F.2d 1573, 1578 n.7 (11th Cir. 1986). We have identified several factors that demonstrate hearsay's probative value and reliability for purposes of its admissibility in an administrative proceeding: whether (1) the out-of-court declarant was not biased and had no interest in the result of the case; (2) the opposing party could have obtained the information contained in the hearsay before the hearing and could have subpoenaed the declarant; (3) the information was not inconsistent on its face; and (4) the information has been recognized by the courts as inherently reliable. *See U.S. Pipe & Foundry Co. v. Webb*, 505 F.2d 264, 270 (5th Cir. 1979) (citing *Richardson v. Perales*, 402 U.S. 389, 402-06, 91 S.Ct. 1420, 1428-30, 28 L.Ed.2d 842 (1971) (Footnote omitted))⁴

⁴ See ELKOURI & ELKOURI, HOW ARBITRATION WORKS, P. 347, (6TH ED., 2003)

Although there is no question that the Grievant knew Lt. Bacon reported the Facebook comments to Captain Nyklewicz and that action resulted in the Internal Affairs investigation, there is no additional information in the record regarding Lt. Bacon. The relationship between the Grievant and Lt. Bacon is not established; prior interactions between the two are unknown; and the reason and manner in which Lt. Bacon accessed the Grievant's Facebook page is unclear. The undersigned cannot establish that Lt. Bacon was not biased, or that he had no interest in the outcome of the investigation. While the Grievant could have subpoenaed Lt. Bacon, the burden was on the Employer, not Deputy D, to establish that Lt. Bacon was offended. The Employer did not meet its burden. Thus, no violation of Milwaukee County Civil Service Rule VII, Section 4(1) (ff) has been established.

The Employer has failed to meet its burden of proof to establish that the Grievant has violated the rules as alleged by the County. This would be a very different, and difficult, question if the Employer had been able to establish the connections required. That is, if Deputy D had obviously been dressed in a Milwaukee County Sheriff's Office uniform and the same remarks were on a website that was accessible to persons other than Deputy D's friends, there might be constitutional implications to the imposition of discipline. However, given the record in this matter, all that is established is that an individual, dressed in a uniform that could be that of many police and/or private security agencies, has posted comments on a Facebook page that question the authority and manner in which the Administration of a police department operates. Since there is nothing that connects the words or pictures to the MSCO, there is no manner in which the actions of Deputy D could affect the public perception of the agency. Although Lt. Bacon was allegedly offended by the comments, this record fails to establish how he was able to access the Facebook account or that he was, in fact, offended by the comments.

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

AWARD

The grievance is sustained. The Employer did not have just cause to suspend Deputy D 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 D's file.

Dated at Madison, Wisconsin, this 19th day of July, 2010.

Susan J.M. Bauman /s/
Susan J.M. Bauman, Arbitrator

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