

BEFORE THE ARBITRATOR

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

and

MILWAUKEE COUNTY

Case 730
No. 69764
MA-14730

Appearances:

Graham P. Wiemer, MacGillis Wiemer, LLC, Attorneys at Law, 2360 North 124th Street, Suite 200, Wauwatosa, Wisconsin 53226, for the labor organization.

Roy L. Williams, Principal Assistant Corporation Counsel, Milwaukee County, Milwaukee County Courthouse, Room 303, 901 North Ninth Street, Milwaukee, Wisconsin 53233, for the municipal employer.

ARBITRATION AWARD

The Milwaukee Deputy Sheriffs' Association and Milwaukee County are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising there-under. The Association made a request, in which the County concurred, for the Wisconsin Employment Relations Commission to designate a member of its staff to hear and decide a grievance concerning the meaning and application of the terms of the agreement relating to the imposition of discipline. The Commission appointed Stuart D. Levitan to serve as the impartial arbitrator. Hearing in the matter was held in Milwaukee, Wisconsin, on August 26, 2010. The parties filed written arguments by November 2, 2010, and waived their right to file replies.

ISSUE

The parties stipulated the issue as:

“Was there just cause to suspend Sgt. Martin Ewert for ten days? If not, what is the appropriate remedy?”

MILWAUKEE COUNTY SHERIFF'S OFFICE RULES AND REGULATIONS

202.20 Efficiency and Competence

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.

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

- (l) Refusing or failing to comply with departmental work rules, policies, procedures
- (u) Substandard or careless job performance

BACKGROUND

Martin J. Ewert joined the Milwaukee County Sheriff's Office (MCSO) as a Deputy on February 25, 1994. On January 4, 2009, he was given a temporary assignment to the higher classification of Sergeant. In January 2010, he was formally promoted to Sergeant, assigned to the third shift. This grievance challenges discipline he received for actions he took shortly after his promotion, by which he helped another MCSO Sergeant harvest a large deer from a roadway within the City of Milwaukee. Pursuant to Milwaukee County Sheriff's Office Rules, deer hit within Milwaukee city limits are the responsibility of the Milwaukee Police Department (MPD), not the MCSO.

On February 9, 2010, MCSO Internal Affairs Division Lieutenant James Cox submitted the following Investigative Summary:

On January 20, 2010, Airport Division Captain Sylvia Rodriguez submitted an Investigation Authorization Request into the alleged workplace violations of Sergeant Philip Wenzel. After initial investigation by the Internal Affairs Division, Communications Dispatcher Mark DeStefanis and Sergeant Martin Ewert were included as subjects in the case. It is alleged that on-duty Sergeant Wenzel obtained a deer carcass for his personal use. Sgt. Ewert and Dispatcher Mark DeStefanis assisted in the acquisition of the deer and coordinated the incident utilizing agency resources. The Transportation Security Administration also leveled a complaint relative to Wenzel's handling of a "suspicious person" report at the time of the deer incident. Inspector Kevin Carr authorized an Internal Affairs Division investigation into the matter.

Internal Affairs Division Lieutenant James Cox conducted this investigation and factually established the following:

On January 12, 2010, at approximately 0424 hours, the MCSO Communications Division began receiving 911 emergency calls relative to a “huge deer” struck by a vehicle near 107th and Bradley Road in the city of Milwaukee. The 911 call of the driver of the vehicle that struck the deer was transferred to the Milwaukee Police Department Communications Center for handling as a “property damage only” call.

At approximately 0500 hours, MCSO Dispatcher Mark DeStefanis noted that the Milwaukee Police Department had not yet responded to the scene and the Sheriff’s Office was still receiving 911 calls regarding the large “ten point” deer. According to a Communications Division recorded call, DeStefanis proceeded to contact his brother, an off-duty MPD officer, and tell him about the large animal and the potential for deer meat. DeStefanis offered to dispatch an MCSO squad to standby until his brother arrived. The brother refused the offer.

At 0504 hours, DeStefanis contacted Patrol Division Sergeant Martin Ewert and he asked, “Anyone looking for venison?” DeStefanis informed Ewert that the call was “not ours (MCSO) it’s Milwaukee’s (MPD).” Ewert suggested that DeStefanis contact on-duty Airport Sergeant Wentzel, who is known throughout the agency as an avid outdoorsman. During the discussion, there is no reference to traffic-related concerns or exigent safety-related issues.

Dispatcher DeStefanis did not contact Milwaukee Police Department Communications Center for the purpose of expediting their response to the 911 deer calls.

At 0506 hours, DeStefanis contact Airport Division Sergeant Philip Wentzel and he also offered the suggestion of obtaining deer meat. Wentzel is initially hesitant due to the logistical problem of him not bringing his personal truck to work. He decided to utilize an Airport Division sport utility vehicle to obtain the deer. Wentzel directed DeStefanis, “if you have a squad that could at least go and sit with it until I get there.” After authorization from Patrol Division Sergeant Ewert, DeStefanis dispatched an Institutions Division squad (Deputy Sarah Michalski – Squad 451) to 107th and Bradley Road to “sit” with the deer until the arrival of Sergeant Wentzel from the airport. At approximately 0532 hours, Institutions Squad 451 arrived on the scene.

At 0517 hours, DeStefanis contacted the MPD Communications Center. The MPD Dispatcher told DeStefanis that they have assigned a squad to respond for the deer. DeStefanis told the dispatcher, “we would like to take” the deer carcass and he informed them that a MCSO sergeant is en route. DeStefanis stated, “we can tag it and take it.” DeStefanis informed the MPD Dispatcher that Wentzel can dispatch the deer if necessary. MPD Dispatcher informed

DeStefanis that she will relay the information to their responding squad. At 0522 hours, according to MPD call records, prior to the arrival of the Institutions Division squad, MPD Squad #4320 arrived on the scene.

At approximately 0540 hours, Sgt. Wentzel left the airport in an agency unmarked squad (Ford Expedition) for the purpose of dispatching and retrieving the deer carcass for his own personal gain.

Shortly thereafter, Sgt. Wentzel arrived at the Patrol Division Substation where he was greeted by Sgt. Ewert. Dispatcher DeStefanis assisted in the coordination of the collection of agency emergency blankets. Ewert provided Wentzel with agency-issued emergency blankets (Patrol Division stock) for the purpose of protecting his squad from the remnants of the deer carcass. Ewert had information to believe that Wentzel was utilizing the blankets for his personal acquisition of the deer. During his Internal Affairs Division interview, Ewert stated, in retrospect he should not have provided the emergency blankets to Sergeant Wentzel and he should have pulled Deputy Michalski from the scene.

At approximately 0625 hours, Sgt. Wentzel and Deputy Michalski loaded the deer carcass into the agency SUV. Wentzel "tagged" the deer with an Airport Division-supplied Department of Natural Resources permit. At this time, Michalski went back to her Institutions assignment and Sergeant Wentzel drove to his Franklin home residence to unload the deer. At approximately 0655 hours, he returned to the Airport Division to complete his shift.

During his Internal Affairs Division interview, Ewert stated he did not completely monitor the radio transmissions relative to the deer response of Deputy Michalski or the Communications Division calls. He asserted if it were necessary for Michalski to dispatch the deer, per policy, he would have expected a cell phone call or direct radio contact for his approval. He did not note that the Milwaukee Police Department, with primary jurisdictional responsibility, had arrived on the scene. Ewert proclaimed that if he would have heard the radio transmission indicating MPD had arrived on the scene he would have pulled Michalski and returned her to her regular Institutions assignment. Ewert never gave direction to Dispatcher DeStefanis to "have MPD step it up" when he was initially told of their slow response.

Ewert remarked that in hindsight he would have "asked more questions" and get more information before he authorized the use of Patrol Division resources. He stated he understood the conflict of interest concerns relative to an on-duty sergeant obtaining a deer carcass in an agency vehicle. Ewert concluded his Internal Affairs interview by stating, "There were definitely some errors on my part."

Based on the aforementioned, I respectfully propose a disposition of **SUSTAINED** for the following Milwaukee County Sheriff's Office and Milwaukee County Civil Service rule violations:

MILWAUKEE COUNTY SHERIFF'S OFFICE RULES AND REGULATIONS

202.20 Efficiency and Competence

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.

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

- (l) Refusing or failing to comply with departmental work rules, policies, procedures
- (u) Substandard or careless job performance

On February 22, 2010, Sheriff David A. Clarke approved a ten-day disciplinary suspension for Ewert, which he ordered to be read at roll calls. Sgt. Ewert served his suspension March 30-April 8, 2010.

In August 1994 Ewert was issued a written reprimand for violating policy regarding firearms and credentials. That action was sustained. In October 1995, then-Sheriff Richard Artison brought a complaint against him concerning domestic violence. That complaint was reviewed and closed. In December 1995, a complaint was brought that Ewert violated policy and Civil Service Rule VII (4)(l) regarding use of force. That charge was not sustained. In February 1997, a complaint was brought about an unspecified violation of policy. That charge was not sustained.

The Association filed a timely grievance, which it subsequently advanced to arbitration.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the Association asserts and avers as follows:

Because Ewert's actions were neither inefficient nor incompetent, the Sheriff did not have just cause to suspend him. DeStefanis requested Ewert to send a squad to the scene at around 0515-0520 hours because Milwaukee Police had not yet responded to the 911 calls, and Ewert had safety concerns about the deer

remaining in the roadway. When Ewert gave DeStefanis authorization to dispatch Michalski to the scene, he was unaware that MPD had also dispatched a squad. Ewert did not hear the radio transmission dispatching the MPD squad because it happened around 0600, when shifts were changing and he was very busy. The other sergeant did not hear the transmission either.

The fact that Michalski was at the scene and assisted Wentzel did not make the department any less efficient or competent. Deputies are frequently pulled from Institutions to assist with highway accidents and arrests, almost on a daily basis. The county offered absolutely no evidence that Institutions was inefficient because Michalski was not there.

The county is wrong to content Ewert should have somehow stopped Wentzel from harvesting the deer. First, he did not know Wentzel was on duty; he arrived at the substation about 0600, and was only there for 10-30 seconds. It was dark, and Wentzel was in an unmarked undercover Ford Expedition, which is not a vehicle typically used for undercover work. It had no lights on top or inside the vehicle, and no markings that Ewert noticed that would make him think the vehicle was a Department vehicle. Also, as both Ewert and Wentzel are sergeants, Ewert did not have authority over what Wentzel does on duty. Also, he thought Wentzel was off duty, on personal time.

In addition to there being no evidence the Department was inefficient as a result of Ewert's actions, Ewert complied with all departmental rules, policies and procedures. He performed his duties as a temporary sergeant at or above the necessary standard. None of the deputies in his bureau complained about his performance.

Even if it is determined that just cause supports one or more rule violations, just cause does not support the level of discipline imposed. Ewert has an impeccable discipline record, having never been disciplined since joining the department in 1994. He is a good worker, as evidenced by his promotion to temporary sergeant in January 2009. he did not assist Wentzel in obtaining the deer, he did not leave his patrol assignment or lend Wentzel his squad vehicle. He simply gave Wentzel two disposable blankets worth about \$8 each. Association president Felber testified he had never seen anyone suspended for ten days for giving another sergeant \$16 in disposable blankets. Further demonstrating the lack of just cause, the investigating lieutenant could not answer the question whether the Sheriff would have doubled the punishment if Ewert had given Wentzel four blankets instead of two. The discipline is simply not just.

The department could have addressed this incident through a verbal counseling session, verbal warning, written warning or any other way that was just. To suspend Ewert for his actions in this incident runs counter to the basic principle that employees are entitled to know in advance what is expected of them.

The county submitted no evidence that proves the Sheriff's discipline was appropriate given Ewert's previous discipline history and the facts of this incident. The discipline should be rescinded in its entirety, or in the alternative reduced to an appropriate level given Ewert's history and limited involvement in this incident.

In support of its position that the grievance should be denied, the County asserts and avers as follows:

Sgt. Ewert assisted in contacting Sgt. Wentzel, used Sheriff's personnel to secure the deer inside Milwaukee city limits, and facilitated the misappropriation of county property to help Sgt. Wentzel obtain and transport the deer. The taking of the deer violated office policy and all notions of professionalism, especially Ewert's improper and unprofessional dispatching of a deputy to secure the deer. He violated rules and procedures when he allowed office personnel to participate in the recovery of the deer while on duty. Withdrawing Michalski from her assignment at Institutions was clear evidence of a lack of efficiency and competence and a substandard or careless job performance because he should have returned her to her assigned sector once MPD arrived.

Sgt. Ewert further violated VII sec 4(1)(l) when he allowed Michalski to have jurisdiction over an MPD accident scene. He admitted he did not monitor the situation closely enough to discern MPD had arrived on the scene; sending a deputy to secure a city accident scene is not a violation until the deputy fails to relinquish control to city police, but Sgt. Ewert dispatched Michalski without orders to so relinquish. Then he failed to monitor the situation knowing it potentially violated jurisdiction. His actions and inattention led to a violation of jurisdiction. His failure to monitor the situation is also evidence of lack of efficiency and competence and a substandard job performance, and his failure to recall Michalski was both inefficient and careless.

DISCUSSION

The basic facts of what occurred on the early morning of January 12, 2010 are not in dispute. Sgt. Martin Ewert directed Communications Dispatcher Mark DeStefanis to dispatch Deputy Sarah Michalski from her Institutions Division post to a location within the City of Milwaukee, to safeguard a large deer that had been hit by a car, until Sergeant Philip Wentzel could arrive to harvest it. Ewert also provided Wentzel with Sheriff's Office property, namely two emergency blankets, to assist in the transportation of the carcass.

The Association asserts that in so doing, Ewert did nothing wrong. I emphatically reject this notion. Indeed, according to the investigative report and the sworn testimony of Internal Affairs Lt. James Cox, Ewert himself acknowledged during the investigation that he had made several errors. He was right.

Ewert should not have suggested that DeStefanis contact Wentzel about the deer. He should have directed DeStefanis to contact MPD about expediting their handling of the deer. He should not have authorized DeStefanis to dispatch Michalski to watch over the deer until Wentzel arrived. Having authorized DeStefanis to do so, Ewert should have directed Michalski to relinquish jurisdiction upon the arrival of the Milwaukee Police Department. Having failed to do that, Ewert should have monitored the radio, so he was aware when MPD arrived.¹

The Association defends the dispatching of Michalski on two grounds – that deputies at Institutions are routinely assigned to help with matters off-site and that nothing untoward happened in the time she was away. Both these defenses fail.

First, deputies at Institutions are frequently assigned off-site to handle traffic accidents or other matters *within county jurisdiction*. But Michalski was not assigned for a legitimate public safety need within county jurisdiction – she was assigned to watch over an injured deer on a street within the City of Milwaukee until Wentzel could come to harvest it. As Ewert fully knew, official protocols establish that deer struck within city limits are the city’s responsibility, not the county’s. Although DeStefanis first brought the issue to Ewert’s attention because a half-hour had passed with no response by MPD, the record evidence and testimony establishes that Ewert’s motivation in sending Michalski was to watch over the deer until Wentzel’s arrival, not to advance public safety. In that regard, it is noteworthy that when Ewert gave Wentzel the departmental blankets to help transport the carcass, he did not say, “thanks for going out of your way to protect highway safety,” but rather, “save me some meat.”

Second, I do not subscribe to the notion, “no harm, no foul.” It is indeed fortunate that Michalski was not needed at Institutions during the time she was away; but forgiving the improper assignment because nothing bad happened is akin to not ticketing a drunk driver who makes it home safely.

Ewert should also not have provided Wentzel with departmental property, the two emergency blankets, to assist in transporting the carcass. The fact that they were only valued at \$8.00 each is not the critical consideration. What is more important is that they were the property of the Sheriff’s Office, to be used only for official business. Lt. Cox’s inability to answer definitively whether misappropriating four blankets would have led the Sheriff to double the punishment that he imposed on Ewert for misappropriating two blankets does not bear on the propriety of Ewert’s actions.

I do not understand the Association’s argument that Ewert should be excused for providing the emergency blankets because he didn’t know that Wentzel was driving a department vehicle. Ewert maintains he was unaware that Wentzel was driving a department vehicle, a purple Ford Expedition, because it did not have police lights on top or inside.

¹ The Association’s explanation for why Ewert was not aware of MPD’s arrival was that it happened “about 6:00 am,” when Ewert would have been busy with tasks related to the shift change. However, according to the Investigative Summary, an MPD squad actually arrived at 0522 hours – ten minutes before Michalski even arrived.

However, as the photographs that comprise Joint Exhibit 6 clearly show, the vehicle Wentzel was driving bore an "Official" license plate featuring a five-point star. Ewert says he didn't notice this because it was dark, and his encounter with Wentzel lasted only a few seconds.

Ewert testified that Wentzel called ahead and asked for blankets to assist in transporting the carcass, and Ewert assumed Wentzel would be off duty and in a personal vehicle. "If he had come in a squad car," Ewert testified, "that would have raised a red flag, and I would not have just handed him the blankets and turned around." I do not understand this testimony at all. How could it have been improper for Ewert to give Wentzel the blankets if Wentzel were driving a department vehicle, but not improper if he were driving a personal car?

Directing a deputy be dispatched from her assignment to watch over an injured deer within the city limits is inefficient. Failing to take any steps to ensure that the deputy relinquish jurisdiction upon the arrival of MPD betrays a lack of competence and is a substandard and/or careless job performance. Providing departmental resources for an unofficial, private purpose is clearly wrong. A properly trained Milwaukee Deputy Sheriff should have known all this.

Having established that there was just cause to discipline Ewert, I turn to the question of whether the Sheriff had just cause to suspend him for ten days.

Unless specifically barred by the collective bargaining agreement, an arbitrator may consider the level of discipline in determining just cause. *INLAND CONTAINER CORP.*, 91 LA 544, 548 (Howell, 1988). Discipline may be found to be excessive "if it is disproportionate to the degree of the offense, if it is out of step with the principles of progressive discipline, if it is punitive rather than corrective, or if mitigating circumstances were ignored." *DISCIPLINE AND DISCHARGE IN ARBITRATION*, Brand, ed., BNA Books, 1998, p. 85.

An employee's prior disciplinary record can be an important consideration in evaluating the level of discipline. *How Arbitration Works*, Ruben, ed., BNA Books 2003, p. 983. Here, Ewert has a good record; he had been with the Sheriff's Office for a month shy of 16 years when this incident occurred. In that time, although several complaints had been raised, the only one sustained was a written reprimand regarding firearms and credentials; the county has not challenged the association's assertion that written reprimands "are not considered discipline." While I think the association overstates matters when it describes Ewert as having "an impeccable discipline record," his record certainly is a positive one, and of fairly long tenure.

An employee's attitude is also important in evaluating the level of discipline. A sincere acknowledgement by the employee that s/he had done something wrong may lead to leniency, while a refusal to accept responsibility would not. *WILL-SON CORP.*, 108 LA 920, 924 (Nadlebach, 1997) Ewert acknowledged to IAD Investigator Lt. Cox that he should not have provided Wentzel with the emergency blankets, and should have pulled Michalski from the scene. "There were definitely some errors on my part," he concluded. I agree.

Another important factor in assessing the appropriateness of a particular discipline is its comparison to other situations. Here, the record does not contain information on what, if any, discipline Wentzel received, or what other ten-day suspensions the Sheriff has imposed. It is the employer's burden to establish all the elements of just cause being present for discipline.

At the time of the incident, Ewert was a 16-year employee with one written reprimand on his record. He acknowledged to Internal Affairs that he had done things wrong. There is nothing in the record against which to evaluate this degree of discipline.

The purpose of discipline is to correct employee behavior. Discipline which is punitive rather than corrective may be found to be excessive. Given Ewert's record, his acknowledgement of error, and the lack of any record evidence regarding other ten-day suspensions, I believe a ten-day suspension crossed the line from corrective to punitive.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

AWARD

That the grievance is denied in part and sustained in part. There was just cause to suspend Sgt. Ewert for five days. The ten-day suspension is modified to a five-day suspension. The grievant shall be made whole for lost wages and benefits.

Dated at Madison, Wisconsin, this 28th day of January, 2011.

Stuart D. Levitan /s/

Stuart D. Levitan, Arbitrator