

BEFORE THE ARBITRATOR

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

and

MILWAUKEE COUNTY

Case 704
No. 69344
MA-14573

Appearances:

Christopher J. MacGillis, Attorney, MacGillis Wiemer, LLC, 2360 North 124th Street, Suite 200, Milwaukee, Wisconsin 53226, appearing on behalf of the Milwaukee Deputy Sheriffs' Association.

Roy Williams, Milwaukee County Corporation Counsel, 901 North 9th Street, Suite 303, Milwaukee, Wisconsin 53233.

ARBITRATION AWARD

Pursuant to the terms of the collective bargaining agreement (CBA) between the Milwaukee Deputy Sheriffs' Association and Milwaukee County, the parties selected me from a panel of arbitrators provided by the Wisconsin Employment Relations Commission to hear and resolve a dispute between them. The dispute involves the County's suspension of the Grievant for one day without pay, based on his interaction with a citizen who subsequently filed a complaint with the Milwaukee County Sheriff's Department. The incident occasioning both the citizen's complaint and the County's discipline occurred while the Grievant was on duty at the Mitchell International Airport on March 29, 2009.

I arbitrated the grievance on September 2, 2010, at the Milwaukee County Courthouse in Milwaukee, Wisconsin. There is no stenographic or other transcript of the proceedings. A briefing schedule was set that the parties subsequently stipulated to extend, pursuant to which the last (reply) brief was due on November 15, 2010. The parties filed initial post-hearing briefs, and, on November 15, 2010, the Association's counsel informed me via email that the parties had decided not to file reply briefs.

ISSUE

The parties stipulated to the following statement of the issues:¹

1. Was there just cause to suspend [the Grievant] for one day?
2. If not, what is the appropriate remedy?

BACKGROUND

Grievant's Employment History and Work-Performance Commendations

The Grievant has been employed by the Milwaukee County Sheriff's Office for over 13 years. For part of that tenure, including on March 29, 2009, he has been assigned to the Patrol Bureau, Airports Division. In that capacity, he has primarily worked at Mitchell International Airport. His experience also includes nearly three years of freeway patrol duty and work at the Milwaukee Criminal Justice Facility.

On at least three occasions, the Grievant has received written commendations for his work performance. In a letter to an Inspector of the Milwaukee Criminal Justice Facility in 2004, for example, a probation/parole agent commended the Grievant for processing visitors "in a very quick, professional, safe and courteous manner." On January 2, 2006, moreover, the Grievant's supervisor documented in a "Performance Recognition" narrative the Grievant's "attention to detail and care in his work [which] led to an arrest of a person who has been preying on others by stealing their identities." And an email sent in 2008 from the head coach of the Marquette University soccer team to the Milwaukee County Sheriff's Office expressed gratitude for the Grievant's efforts in working with others to help him retrieve his wallet, which he had left on an airplane.

Events of March 29, 2009, Giving Rise to One-Day Suspension

On March 29, 2009, the complaining citizen and his wife returned to Mitchell International Airport from a trip they had taken and attempted to coordinate efforts to pick up their luggage and car. The citizen went to get their car while his wife waited inside to retrieve their luggage. After getting their vehicle from the parking lot and circling past the outdoor pickup area two or three times, the citizen received a call on his cell phone from his wife. Due to issues delaying the retrieval of their luggage, she wished to contact her husband to verify their flight number. To facilitate his search for their flight information while talking to his wife, the citizen pulled the car over to the right edge of the one-way road just past the outdoor pickup area.

¹ The parties stipulated to these issues prior to the arbitration. The version on which they agreed expressly referenced the Grievant's name, which I have omitted herein for the purpose of confidentiality. Other than the omission of the Grievant's name, my statement of the issues mirrors the written version to which the parties agreed prior to the hearing.

The area where the citizen pulled over his car was within a no-parking zone, as indicated by signs on both sides of the road.² After the citizen had pulled over, the Grievant approached the citizen's vehicle while driving his squad car on a road parallel to that on which the citizen had stopped and in a direction opposite to that in which the citizen had been driving. The two roads on which the citizen and Grievant were travelling in opposite directions were separated by a grassy median covered by snow and possibly ice. The Grievant stopped his squad car across from the citizen's car, and motioned to the citizen by waiving his arm to move his car. When the citizen failed to move his car, the Grievant rolled down his driver's side window and yelled across the median to the citizen to move his car, while continuing to waive his arm to emphasize the directive. In response, the citizen rolled down his window and yelled, "thank you, but I don't appreciate the discourtesy!" (or words to that effect), and began to drive away.

At that point, the Grievant did a Y-turn or U-turn and rapidly pursued the citizen's vehicle while flashing his squad-car lights. As the Grievant's squad car approached the citizen's vehicle, the latter pulled over. The Grievant then stopped his squad car, exited it, and began to walk toward the citizen's car. After rolling down his window, the citizen, pen and paper in hand, began to demand emphatically that the Grievant provide his name and badge number. In response, the Grievant demanded to see the citizen's license. After repeating their respective demands for the same information one or more times, the Grievant finally informed the citizen that if he did not provide his license, he (the Grievant) would take the citizen out of the car and arrest him.³ The citizen then gave the Grievant his license. As these events unfolded, both the Grievant and the citizen showed anger and agitation.

At some time during or shortly after the events described above, the Grievant called for backup. After he had obtained the citizen's license, moreover, the Grievant informed the citizen of his name and badge number, did an electronic check on the citizen, and found his record to be clean. When backup arrived, both Deputy Theep and Sergeant Sajdowitz spoke with the citizen, who recounted his version of the events and described his displeasure with the Grievant's conduct. Among other things, the citizen told Sergeant Sajdowitz that he (the citizen) was going to file a formal complaint and that he did not have to put up with "this kind of crap" from a Milwaukee law enforcement officer.

² The greater weight of the testimony by law enforcement personnel supports this conclusion. It is less clear, however, whether the citizen was aware that he had pulled over in a no-parking zone. He had already passed the no-parking sign on the right side of the road prior to stopping, and it is uncertain from the photos of the scene introduced into evidence whether he could have seen the sign on the other side of the road from where he stopped. He testified that he thought he had pulled over on a shoulder of the road, but the evidence suggests no such shoulder existed. In any event, his awareness or unawareness regarding whether he was parked in a no-parking area is ultimately not dispositive of the result I reach.

³ The citizen testified that the Grievant threatened to "yank" him out of the car, while the Grievant testified that he used the word "take." I assume the truth of the Grievant's version without making a credibility determination, because the precise diction here would not change my result. While "yank" connotes a more violent removal, "take" nevertheless suggests the Grievant's removal of a noncompliant citizen from the car, rather than a compliant citizen's voluntary exit from it.

Subsequent Investigation and Related Internal Affairs Memorandum

Following the March 29 incident, the citizen filed a complaint, which was processed by Internal Affairs. The Sergeant assigned to the case, John Nelson, interviewed the citizen via telephone on April 16, 2009, and the Grievant in the Sergeant's office on April 18, 2009. Also on April 18th, Sergeant Nelson interviewed Deputy William Theep, who had provided backup assistance. Based on those interviews, Sergeant Nelson issued a written "Memorandum" dated April 18, 2009, which concluded in part:

I asked [the Grievant] what if there was anything . . . would he do different regarding this traffic stop? [The Grievant] responded that he would not have pulled [the citizen] over after he was initially told to move and was driving off. I asked [the Grievant] if he had anything else to add in reference to this complaint? He stated that he has learned from this incident and realizes the importance of Tactical Communication. . . .

In conclusion, [the citizen] was initially stopped illegally in traffic. . . . [The citizen] was wrong in not complying with [the Grievant's] initial request for his driver's license. However when I stated that to him his response was that he should have been told immediately for the reason of the traffic stop, taking no responsibility for his actions.

[The Grievant's] actions and verbalization were less than professional at times. [The Grievant's] initial encounter with [the citizen] was sufficient, [the citizen] was leaving when told to do so, and that's where this incident **should have** ended. Unfortunately [the Grievant] felt it was his duty to stop [the citizen] and inform him again of his infraction. When [the Grievant] observed [the citizen's] highly agitated and aggressive state he should have called for back up prior to approaching the vehicle. I believe that [the Grievant] should have slowed down, and calmly and directly informed [the citizen] that he would provide all the information he requests after he receives his drivers license. [The Grievant] then escalated the incident by referencing the fact he could "take him out of the vehicle" if he needed to. This verbiage accomplishes nothing and only adds fuel to an out of control fire. It is evident that [the Grievant] used poor judgment in this incident. [The Grievant] openly admits this and states that he has learned from this experience.

(Emphasis in original.)

Rules and Regulations Allegedly Violated as Grounds for Discipline

As the basis for the one-day suspension, the County maintains that the Grievant violated the following rules and regulations:

Milwaukee County Sheriff's Office Rules and Regulations

202.19 Treatment of Citizens and Employees

Members shall perform all duties impartially; without favor, affection or ill will; and without regard to status, sex, race religion, political belief, or aspiration. All citizens and employees shall be treated equally; *with courtesy, consideration, and dignity.*

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

(1) Refusing or failing to comply with departmental work rules, policy, or procedures

(ff) *Offensive conduct toward the public*

(Emphasis added.)

Additional facts and references to the evidence presented are set forth below where appropriate.

ANALYSIS

The first issue is whether the County had just cause to suspend the Grievant for one day. Resolving it requires me 1) to determine an appropriate construction of just cause; and 2) to apply that construction to the facts herein.

I. THE APPROPRIATE CONSTRUCTION OF “JUST CAUSE”

The Union maintains that to decide this issue, I should apply the construction of “just cause” set forth in Frank Elkouri & Edna Asper Elkouri, *How Arbitration Works* 948 (Alan Miles Ruben ed., 6th ed. 2003):

There are two “proof” issues in the arbitration of discipline and discharge cases. The first involves proof of wrongdoing; the second, assuming that guilt of wrongdoing is established and that the arbitrator is empowered to modify penalties, concerns the question of whether the punishment assessed by management should be upheld or modified. . . .

The County does not expressly address the construction of just cause. However, its argument focuses almost exclusively on proof of wrongdoing – more specifically, on the Grievant’s alleged violation of the above-cited rules and regulations of Milwaukee County and the Milwaukee County Sheriff’s Department. Following its analysis of wrongdoing, moreover, the County acknowledges the Union’s presentation of letters and documents commending the

Grievant's work performance but nevertheless concludes that the one-day suspension is "appropriate in light of his behavior." In short, while not expressly citing Elkouri, the County's argument incorporates Elkouri's two-part analysis of just cause, as quoted above. I find it appropriate to apply a construction of just cause espoused by a reputable authority that both parties have adopted.

II. APPLICATION OF JUST-CAUSE STANDARD

I thus consider 1) whether the Grievant violated the above-quoted rules and regulations, and 2) whether the punishment assessed by the County should be upheld.

A. Whether the Grievant Violated the Rules and Regulations at Issue

The key language in the applicable rules and regulations (highlighted above) requires me to consider whether the Grievant treated the citizen "with courtesy, consideration, and dignity" and whether the Grievant exhibited "offensive conduct toward [him]." These inquiries, in turn, are to be resolved with reference to the Grievant's treatment of the citizen in two categories of events: 1) the Grievant's first encounter with the citizen when both were seated in their cars, and 2) the Grievant's subsequent pursuit of, and face-to face encounter with, the citizen.

1. Grievant's First Encounter with the Citizen

Although the Grievant had every right to direct the citizen to move his illegally parked car and the citizen had no right to ignore him, the manner in which the Grievant chose to communicate his directive lacked "courtesy, consideration, and dignity." First, the Grievant could and should have approached the vehicle and spoken with the citizen, rather than yelling and waving his arms repeatedly to signify the necessity to move the citizen's car. Had the Grievant done so, he could have employed the Tactical 8-Steps that he had been taught in training to prevent the mutually offensive exchange that was to occur later.⁴ While I cannot portend just how the subsequent events would have unfolded had the Grievant followed these steps, implementing them at least would have fulfilled a standard of conduct expected of deputies and may have minimized the likelihood of the citizen becoming more agitated. The Tactical 8-Steps would have allowed the Grievant, among other things, to explain that he was making a traffic stop because the citizen was parked illegally. Moreover, this approach at least would have afforded the opportunity for 1) the citizen to explain his reason for pulling over (the need to assist his wife with flight information) and 2) the officer to be empathetic while notifying him of the need to move his car. Instead, the Grievant yelled a directive and waived his arm repeatedly, which aggravated the citizen and incited him to yell in response, "thank you, but I don't appreciate the discourtesy!" as a prelude to driving away.

⁴ These steps are 1. Greeting; 2. ID Self/Dept.; 3. Reason for Stop; 4. Justification (Service Tone); 5. Driver's License; 6. Registration and Insurance; 7. Decision; 8. Close. While the order of these steps is not necessarily invariable and the steps are not formalized in a work rule, they do represent an accepted practice taught in training seminars.

The Grievant's explanations for his manner of communication in this initial encounter with the citizen do not disturb my conclusion that it lacked courtesy, consideration, and dignity. He first suggested that had he exited his vehicle, he would have been parked in traffic. However, there is no evidence that traffic, if there was any where he had parked, could not have passed his squad car. Moreover, he could have turned his squad car around (as he ultimately did) and driven his car nearer to the citizen's vehicle. In any event, the Grievant offered no evidence to suggest that the risk of interrupting traffic flow somehow precludes an officer from exiting his vehicle to effectuate a traffic stop, and I find no persuasive basis to conclude as much. Second, the Grievant suggested that he did not exit his squad car and walk across the median to the citizen's vehicle, because the median was covered with snow and ice. This paper-thin explanation merits only brief rebuttal: walking across snow and ice is a winter-season task that the *citizenry* of Wisconsin routinely must undertake and ranks modestly on the spectrum of hazards that law enforcement officers are expected to confront, if necessary. In sum, the Grievant's explanations are insufficient to alter my conclusion that the way in which the Grievant chose to convey his order to the citizen to move his car lacked "courtesy, consideration, and dignity."

2. Grievant's Subsequent Pursuit and Face-to Face Encounter with the Citizen

Some of the evidence presented suggests that the citizen's behavior was disrespectful and antagonizing. He appeared to ignore the Grievant's first attempts to direct him to move his car. When the citizen did decide to move it, moreover, he didn't simply turn the wheel (and the other cheek) and go about his way. Instead, the citizen first yelled, as the Union fairly characterizes it, "a disrespectful quip." (Union Br. 2). In addition, the Union calls attention to other behavior by the citizen during the ensuing events that could be characterized as disrespectful: "[the citizen's] upper torso was outside of his window demanding [the Grievant's] name and badge [I.D.] number"; "[the citizen] was enraged and yelling at [Deputy Theep]"; and "[the citizen's] actions suggest he believes that he is entitled to some additional consideration because he is an acquaintance with Milwaukee County District Attorney John Chisolm." Other than the citizen's admitted remark ("thank you, but I don't appreciate the discourtesy"), I need not determine whether the citizen indeed did engage in the additional conduct noted above, but simply assume such behavior occurred for the sake of argument. Notwithstanding my assumption, the Grievant, not the citizen, is subject to the Milwaukee County and Milwaukee County Sheriff's Department rules and regulations at issue; therefore, the Grievant must exhibit "courtesy, consideration, and dignity", even if the citizen does not.

Nevertheless, the Grievant's vehicular pursuit of, and subsequent face-to-face interaction with, the citizen failed to meet these standards. The Grievant's most egregious error was his decision to turn around and rapidly pursue the citizen's vehicle while flashing his squad-car lights – after the citizen already had complied with the Grievant's request to move his vehicle. The Grievant's denial at hearing that the citizen's remark prior to driving away prompted the subsequent traffic stop lacks credibility, especially given the dubiousness of the Grievant's explanations for the stop. The Grievant testified that he pursued the citizen, because

he thought that the citizen may have been intoxicated, or, alternatively, may have had issues with his mental state or health. However, the Grievant offered no persuasive reason for drawing these conclusions and was unable to explain why, if he truly had these concerns about the citizen's inability to drive safely, he initially signaled him to move his car.

The Grievant also emphasized, unpersuasively, the general importance of follow-up on interactions with anyone in the airport to prevent subsequent complaints. I concur that in some cases, follow-up may indeed be productive, such as the Grievant's own commendable follow-up with others to help the Marquette University soccer coach find his wallet, which he had left on an airplane. By contrast, following the citizen's car after he had complied with the Grievant's order to move it constituted needless escalation of an otherwise resolved situation, not helpful follow-up on an unresolved problem. Nothing could be gained by rapidly pursuing an agitated citizen who, despite some initial recalcitrance, nevertheless had complied with the Grievant's command. Supporting such want of good judgment is the Grievant's own admission to Sergeant Nelson regarding what, if anything, he would have done differently. As memorialized in the Sergeant's "Memorandum", the Grievant admitted that "he would not have pulled [the citizen] over after he was initially told to move and was driving off."

The Grievant's pointless escalation of an already resolved situation represents not only a lack of "courtesy, consideration, and dignity" but also arguably "offensive" conduct toward the citizen and the public at large. On cross-examination, the Grievant was asked whether he had probable cause to stop the citizen. Responding affirmatively, the Grievant explained that the citizen was a "violinist". The difficulty I have with this response is that initially, the Grievant had chosen simply to waive the citizen on. So even assuming the citizen initially was a "violinist", he ceased to be one after he had complied with the Grievant's order. Yet only after such compliance did the vehicular pursuit and traffic stop take place. While I need not, and do not attempt to, resolve whether the Grievant had constitutional probable cause to stop the citizen, the policies underlying the prohibition against unreasonable searches and seizures under our federal and state constitutions underscore the gravity of the concerns that the Grievant's unnecessary traffic stop herein implicate. As the Chief Justice of the Wisconsin Supreme Court has observed:

Part of the constitutional compromise between freedom and order is found in the prohibitions against unreasonable searches and seizures. U.S. Const. Amend. IV; Wis. Const. art. I, sec. 11. These constitutional prohibitions establish a delicate balance between citizens' ability to walk [or drive] in our neighborhoods, free from the fear that our everyday actions will subject us to police stops and searches, and the necessity for the state, through its police force, to keep our streets and neighborhoods safe so that we can walk and live freely and safely.

The framers of the constitutions, recognizing the dangers of criminal conduct and attempting to stop it, could have allowed stops and searches of all citizens looking or acting in a manner other than the manner in which the state

believed we should act. Our constitutions do not allow such state action, however. Rather, the constitutions recognize that all persons and property need protection against the power of the state, even when such protection may result in less efficient law enforcement.

STATE V. WILLIAMSON, 113 Wis. 2D 389, 405-406, 335 N.W.2D 814, 821-822 (1983) (Abrahamson dissenting).

Escalating the situation still more, the Grievant threatened to take the citizen out of his car and arrest him if he (the citizen) did not produce his license. I concur with Sergeant Nelson's conclusion that "[t]his verbiage accomplishe[d] nothing and only add[ed] fuel to an out of control fire." As such, this remark, too, lacked "courtesy, consideration, and dignity." More than that, it exemplifies why unnecessary traffic stops are to be avoided, and, if necessary, conducted so as to diffuse – not escalate – the fear that inevitably attends them. In his written statement to the Milwaukee County Police Department, the citizen described what went through his mind after the Grievant threatened to remove him from his car:

"I could see myself next being physically abused by [the Grievant] who, in my mind, was visibly agitated. I gave him the license."

Regardless of what the citizen actually imagined, I find credible his having been afraid.⁵

In sum, I find that the Grievant violated the above-quoted rules and regulations of Milwaukee County and the Milwaukee County Sheriff's Office.

B. Whether the Punishment Assessed by the County Should Be Upheld

Having found the requisite wrongdoing by the Grievant, I must determine whether the one-day suspension should be upheld. The Union suggests that if I were to find just cause for any discipline, less severe discipline (*e.g.* a verbal counseling session, verbal warning, written

⁵ The effects of traffic stops have been described to include fear, anxiety, humiliation, inconvenience, and time-consumption. *See, e.g.*, 14 Lewis & Clark L. Rev. 1481, 1507 (Winter 2010) ("it is common knowledge that even a routine traffic stop raises the pulse rate of many."); 100 Nw. U. L. Rev. 655, 717 (Winter 2006) *citing Prouse*, 440 U.S. at 656-57 (characterizing random license and registration checks as "unsettling show[s] of authority" that "interfere with freedom of movement, are inconvenient, and consume time" and that "may create substantial anxiety"); 69 Temp. L. Rev. 1007-1008 (Fall 1996) ("all indications are that individuals increasingly fear pretextual police conduct."); 1985 Duke L.J. 849, 944 (1985) (noting that even in the traffic stop context, there is significant doubt that a citizen who fears blatant abuse by the officers could reasonably expect assistance from occasional passersby or that officers would generally be affected by the risk that such passersby would intervene or otherwise take action.); 78 Geo. L.J. 718, 787 (1990), *citing U.S. v. SERNA-BARRETO*, 842 F.2D 965, 967 (7th Cir. 1988) (reasonableness of stop is balance of individual's interest in being left alone and community's interest in effective law enforcement; individual's interest measured not only by length of stop but also by "fear and humiliation" it engenders); 69 Temp. L. Rev. 1007, 1040, n. 7 (Fall 1996), *citing Mark Baker, Cops: Their Lives in Their Own Words* 205-06 (1985) (describing citizens' fear as result of being at mercy of police in traffic stops); Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 402-08 (1974) (describing negative effect on citizenry of police surveillance, investigative stops, and undercover agents).

warning, or submitting an employee activity documentation) would be just. (Union Br. 7). I disagree.

In deciding there was just cause for the discipline actually imposed, I am mindful of the Grievant's positive work history and commendations. However, the seriousness of the Grievant's errors resulting in rule violations persuades me that a one-day suspension was just. Most troubling is the Grievant's decision to pursue and stop the citizen's vehicle after the citizen already had complied with the order to move his car, and the Grievant's threat to take the citizen out of his car and arrest him if he did not produce his license. These decisions needlessly continued and even escalated a confrontation that the Grievant could and should have diffused and ended by exercising better judgment.

The citizen's behavior appears to have been less than exemplary at times, if not disrespectful; however, as an armed peace officer, the Grievant is appropriately held to higher standards of "courtesy, consideration, and dignity." Unlike the Grievant's past conduct for which he was commended, his behavior on March 29, 2009, fell considerably short of those standards.

CONCLUSION

For the foregoing reasons, I conclude that the County had just cause to suspend the Grievant for one day. Accordingly, the Union's grievance is hereby dismissed.

Dated at Madison, Wisconsin, this 14th day of February, 2011.

John C. Carlson, Jr. /s/

John C. Carlson, Jr., Arbitrator