

BEFORE THE ARBITRATOR

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

and

MILWAUKEE COUNTY DEPUTY SHERIFFS' ASSOCIATION

Case 750
No. 70255
MA-14925

Appearances:

MacGillis, Wiemer, LLC, by **Graham P. Weimer**, 2360 North 124th Street, Suite 200, Wauwatosa, Wisconsin, appeared on behalf of the Association.

Roy L. Williams, Assistant Corporation Counsel, Milwaukee County Courthouse, 901 North 9th Street, Milwaukee, Wisconsin, appeared on behalf of the Employer.

ARBITRATION AWARD

Milwaukee County Deputy Sheriffs' Association, herein referred to as the "Association," and Milwaukee County (Sheriff's Department), herein referred to as the "Employer," jointly selected the undersigned from a panel of arbitrators from the staff of the Wisconsin Employment Relations Commission to serve as the impartial arbitrator to hear and decide the dispute specified below. The arbitrator held a hearing in Milwaukee, Wisconsin, on January 17, 2011. Each party submitted a written argument, the last of which was received on February 15, 2011.

ISSUES

The parties stipulated to the following statement of the issues:

1. Was there just cause to suspend Deputy Lamothe for seven days?
2. If not, what is the appropriate remedy?

FACTS

The Employer is a Wisconsin municipality which operates a Sheriff's department. The Association represents various sworn officers of the Department. Deputy Thomas Lamothe has been a sworn deputy with the Sheriff's Department for 13 years. He was first assigned to the jail where he worked most of his career. He has never been in the patrol division and, therefore, has little experience with traffic accident reports. In the last two years, he has been assigned at the Milwaukee airport as a third shift deputy normally working 11 p.m. to 7 a.m. Two of the airport deputies are normally assigned to operate squads, one of which is in the secure area and the other of which is in the non-secure area at the airport and its vicinity.

Shortly before 4:00 a.m. on July 19, 2009, Deputy Lamothe was on patrol in the squad operating outside of the airport. It had been a particularly busy evening and all squads of the patrol division were busy with other accidents on the highways. Downtown dispatch called airport dispatch and requested that Deputy Lamothe deal with an accident which occurred at I-43 and Capitol Drive. Mr. R. was a passenger in a car involved in that accident which was struck by another car driven by an uninsured motorist. Mr. R. was injured slightly in the accident. Department policy and state statute require that the officer at the scene to file a detailed accident report using a standard state form. Prior to the events in this matter, no accident report was filed.

Mr. R contacted the Employer's traffic desk on numerous occasions seeking the report. On each time he was told that the report did not exist, but was not given any further assistance. Ultimately, another sergeant dealing with the citizen's complaint contacted Sgt. Douglas Holton, Jr, Deputy Lamothe's current supervisor, about this matter in early December, 2009.

Sergeant Holton spoke to Deputy Lamothe who initially told him that he thought he did the report, but had left it in his squad car, or possibly in his personal vehicle. When Deputy Lamothe could not find the report, Sgt. Holton asked him if he had the "cheat sheet" for the report. The "cheat sheet" is a form used by accident investigators to gather complete information at the scene of an accident which is then used to fill out the formal accident reports. Sergeant Holton testified that Deputy Lamothe reported that he did not have the "cheat sheets." [Deputy Lamothe did have them.] Deputy Lamothe told him that he started the report but because they were moving offices and his upcoming vacation, he forgot to complete the report. Sergeant Holton forthrightly acknowledged that at that time he questioned whether Deputy Lamothe had ever even started the report. Sergeant Holton testified that these reports should be done right away, but at least within five days because those involved in accidents are told that the reports will be available within seven days by open records request. He further testified that in situations when a deputy cannot complete a report promptly or goes on vacation, he or she should speak to his supervisor about the situation before the end of the five days. The supervisor could then have arranged to have time for the deputy to complete the report or have another deputy complete it.

Sergeant Holton's report states that Deputy Lamothe made the following statement:

. . . . Deputy Lamothe states that remembers taking the accident report and that he believes he wrote the MV400 but that it must've gotten lost before he handed it in due to the fact that we relocated our office around the time of the incident and that he was also on vacation starting the day after the he (sic) started the crash report. Deputy Lamothe also admitted that he simply did not do the PI supplemental report at all. Deputy Lamothe was honest when answering my questions, and felt very bad for not completing the report. I advised Deputy Lamothe to follow up on the call and finish all pertaining reports before the end of his first shift on 12/12/09 when I counseled him. I advised Lamothe that the subject was very upset and was going to contact the Sheriff personally unless he was helped. Deputy Lamothe finished all reports regarding this call by the time his shift was complete on 12/12/09

Even though Mr. R. received the report in December, he chose to complain directly to Sheriff Clarke. In response to that complaint, Captain Sylvia Rodriguez, Sergeant Holton's immediate supervisor, directed him to request an investigation by the Internal Affairs Division. He made that request January 21, 2010, which was ultimately submitted to that division on March 8, 2010. The Internal Affairs Division conducted an investigation in March, 2010.

Deputy Lamothe was given a notice of suspension dated September 22, 2010, for seven days. He served the suspension and filed the grievance in dispute. The grievance was properly processed through all of the steps of the grievance procedure to arbitration.

Deputy Lamothe's only prior disciplinary history was a written reprimand with respect to absenteeism in 1999. He was suspended for one day for another incident. This suspension was imposed on the same day as this suspension for an issue with respect to the "care of county equipment."

RELEVANT AGREEMENT PROVISIONS

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1.02 MANAGEMENT RIGHTS

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

- The right to determine the number, structure and location of departments and divisions; the kinds and number of services to be performed;
- The right to determine the number of positions and the classifications thereof to perform such service;
- The right to direct the work force;

- The right to establish qualifications for hire, to test and to hire, promote and retain employees;
- The right to assign employees, subject to existing practices and the terms of this Agreement;
- The right, subject to civil service procedures and s. 63.01 to 63.17, Stats., and the terms of this Agreement related thereto, to suspend, discharge, demote or take other disciplinary action;
- The right to maintain efficiency of operations by determining the method, the means and the personnel by which such operations are conducted and to take whatever actions are reasonable and necessary to carry out the duties of the various departments and divisions.

In addition to the foregoing, the County reserves the right to make reasonable rules and regulations relating to personnel policy, procedures and practices and matters relating to working conditions giving due regard to the obligations imposed by this Agreement. However, the County reserves total discretion with respect to the function or mission of the various departments and divisions, the budget, organization, or the technology of performing the work. These rights shall not be abridged or modified except as specifically provided for by the terms of this Agreement, nor shall they be exercised for the purpose of frustrating or modifying the terms of this Agreement. But these rights shall not be used for the purpose of discriminating against any employee or for the purpose of discrediting or weakening the Association. By the inclusion of the foregoing managements rights clause, the Milwaukee County Deputy Sheriffs' Association does not waive any rights set forth in S. 111.70, Stats., created by Chapter 124, Laws of 1971, relating to bargaining the impact upon wages, hours or other conditions of employment of employees affected by the elimination of jobs within the Sheriff's Department by reason of the exercise of the powers herein reserved to management.

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5.04 DISCIPLINARY SUSPENSIONS NOT APPEALABLE UNDER WISCONSIN STATE STATUTE 63.10

In cases where an employee is suspended for a period of ten (10) days or less by his department head, pursuant to the provisions of s. 63.10, Stats., the Association shall have the right to refer such disciplinary suspension to arbitration. Such reference shall in all cases be made within 10 working days from the effective date of such suspension. The decision of the Arbitrator shall be served upon the Department of Labor Relations and the Association. In such proceedings, the provisions of s. 5.02(2)(c) shall apply.

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RELEVANT DEPARTMENTAL RULES

Milwaukee County Sheriff's Office Rules and Regulations

202.20 Efficiency and Competence

Members shall adequately perform the duties of their assigned position. 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.

RELEVANT COUNTY CIVIL SERVICE RULES

Rule VII, Section 4

CAUSES FOR DISCHARGE, SUSPENSION OR DEMOTION AND/OR REEVALUATION

- (l) The following are declared to be cause for discharge, suspension or demotion
- (l) Refusing or failing to comply with departmental work, policies or procedures.
 . . .
- (u) Substandard or careless job performance.

POSITIONS OF THE PARTIES

Employer

The Employer had just cause to suspend Deputy Lamothe for failing to complete an auto accident report for an accident on July 19, 2011. This violates both Departmental Rule 202.20 (efficiency and Competence) and Civil Service Rule VII, Section 4(l) and (u), (failing to comply with departmental rules and careless job performance). Reports are due seven days after the accident. He did not file one until December of 2009, and then did so only because he was prompted to do so because of complaints from one of the people who was involved in the collision. Deputy Lamothe's excuse is essentially that he lost track of the report for several reasons. First, he alleges that he was called away from the airport where he was normally assigned because of a big work load that day. The only accident, however, that is relevant is the one he handled. Deputy Felber testified that he is unable to complete reports when due on occasions because of unusual work volume. He did admit that he had never entirely failed to complete one. This testimony is irrelevant because Deputy Lamothe never testified that he could not complete this report because of work volume. Deputy Lamothe attempted to argue

that he had done a draft report which was lost when the mail boxes were moved while he was on vacation. Deputy Lamothe did have his notes and, therefore, had he remembered to complete this work he could have done so irrespective of any lost draft report. Deputy Lamothe's vacation started on July 24, 2009, five days after the accident in question. He failed to complete the report in question in the five days before he left for vacation or to discuss the matter with his supervisor. The level of discipline is appropriate because Deputy Lamothe has a disciplinary history already including a one-day suspension.

Association

The Employer has failed to meet its burden to show just cause for the seven day suspension of Deputy Lamothe. Sergeant Holton testified that accident reports are due within five days of the date of the accident. Both Deputy Lamothe and Deputy Felber testified that there was no hard and fast rule and that seven days was sufficient. Deputy Lamothe testified that he made several attempts to complete the report in the three days following the accident, but was unable to get it done because of the work load at the airport. He testified that he had gotten three quarters of it done. He then went on vacation. Lamothe intended to complete the report when he returned from vacation, but was unable to do so because of the office move. All of relevant papers were packed away when he returned from vacation. The department lost his partially completed report. Once he was notified that a citizen has complained, he completed the report. Other deputies have not been disciplined for not completing reports. Accordingly, he did not violate any of the policies as charged.

Alternatively, just cause did not support the level of discipline imposed. Lamothe has never been suspended before and he has never been disciplined for failure to complete a report or any other policy relating to reports. Seven days is extreme in light of his record and the nature of the violation

Deputy Felber testified that other deputies have been treated more leniently. There was one deputy who had three unfinished reports and was not disciplined at all. The high level of discipline may have been imposed as a result of the department's own mishandling of the citizen's attempt to obtain an accident report with the subsequent result that he complained directly to Sheriff Clarke. The Employer has failed to demonstrate that it gave any consideration to the appropriate level of discipline other than its reaction.

DISCUSSION

The first question is whether the Employer had just cause to discipline Deputy Lamothe. It did. Irrespective of anything else in this record, the evidence establishes that Deputy Lamothe did not complete the report in any timely fashion. It was his responsibility to do so. The excuses advanced on Deputy Lamothe's behalf do not justify a conclusion that he failed to perform the report-writing function at the level of a deputy with his training. The following factors did interfere with his completing the report:

1. His relative inexperience at writing reports of this type,
2. The fact that this occurred under very unusual circumstances in that he was required to pack all of his papers and other items for an office move during the period between the accident and his vacation,
3. He was scheduled to go on vacation,
4. The partial report was lost in the move; and
5. Others delayed the discovery of the failure.

However, the responsibility to complete it was his and to report any difficulty in doing so to his immediate supervisor. Accordingly, the Employer had just cause to impose discipline under the rules listed above.

The gravamen of this case is whether the level of discipline imposed violated the just cause doctrine. The testimony of Sergeant Holton and Captain Cox indicate that discipline is premised on the assumption that Deputy Lamothe willfully chose to ignore doing the report or, at the very least, made no effort to do so.

Deputy Lamothe testified that he did respond to the accident. He took notes on the "cheat sheet" used by deputies to gather the extensive information needed for accident reports. He returned to the airport about 6:30 a.m. and did not have time to prepare the report before his shift ended at 7:00 a.m. He started to prepare the report the following day. He did not finish it because of interruptions at work. He put it in his mail slot where he routinely receives departmental mail and keeps unfinished reports.

He did not work on it further and went on vacation, the first day of which was July 24 (4 days later). He did not tell his supervisor about the unfinished report. He was gone three weeks. The Sheriff's airport office was moved while he was gone, including the mailbox. For some reason, the report was lost and Deputy Lamothe forgot about it until reminded of this as noted above.

I find the testimony of Deputy Lamothe credible that he did start writing the report on his next shift, but set it aside. It is more likely, however, that he forgot about the report sometime before he left on vacation. Otherwise, it is more likely he would have discussed the matter with his supervisor before going on vacation. Thus, the situation is one of error and not willful avoidance of the report-writing duty.

Deputy Felber credibly testified that the level of discipline imposed in this case is entirely out of character of that imposed for other situations in which reports have been delayed. However, it does not appear that there is any significant disciplinary history of other closely similar situations. As noted, I conclude this is not a situation in which Deputy Lamothe willfully ignored his duty to write a report, but it is one in which no report was written within a useful time frame.

There are some major factors which mitigate the conduct of Deputy Lamothe. First, it is clear that he has been trained to write traffic reports, but it has never been a part of his ordinary duties. Second, this occurred under some highly unusual circumstances. In the short period between the accident and his scheduled vacation he was required to pack all of his office materials for a rare situation in which the airport office was being relocated. While it was not the Employer's responsibility to monitor the completion of each report, it was its responsibility to structure the move in a way in which employees can stay organized. Thus, to a significant extent, the Employer did contribute to the situation which led to Deputy Lamothe's losing track of his responsibility to write this report. Similarly, issues related to the move reasonably interfered with the circumstances which might have led Deputy Lamothe to recall this duty when he returned from vacation. These were mitigating factors rather excused to avoid discipline entirely because it was still Deputy Lamothe's duty to keep track of this responsibility.

It appears that part of the choice of the level of discipline was the fact that Deputy Lamothe was given a one-day suspension on the same day as that imposed herein for other, unrelated conduct. If this is true, it would violate the principle of progressive discipline because the purpose of using increasing discipline is to let employees learn from past disciplinary situations.

In any event, the record reveals that prior to this incident, Deputy Lamothe's disciplinary record has been clear for many years and prior discipline was entirely unrelated. The Employer should have considered this good record, but did not.

The primary aggravating factors in this case are that the accident involved a minor personal injury and the failure to write the report led to substantial frustration and delay for the citizen involved. The resulting harm from negligent performance of one's duty is an important factor in determining discipline. Personal injury accidents involve more sophisticated claims evaluation than property damage accidents. This report was significantly more important to write than a property damage only accident. There were many factors which resulted in the delay in the citizen receiving his report which were beyond Deputy Lamothe's control. However, it was his responsibility and the delays would not have occurred had he met that responsibility. I conclude that a three day suspension is appropriate. Accordingly, the Employer had cause to discipline Deputy Lamothe, but the evidence does not support the level of discipline imposed.

AWARD

The grievance is sustained in part. The Employer did have just cause to discipline Deputy Lamothe, but the length of suspension is unreasonable. The same is reduced to a three-day suspension. It shall make him whole for all lost wages and benefits relating to the

six days of excessive suspension. Pursuant to the agreement of the parties, the Undersigned reserves jurisdiction over the calculation of back pay, if either party requests in writing, copy to opposing party, within sixty (60) days of the date of this award that I do so.

Dated at Madison, Wisconsin, this 11th day of May, 2011.

Stanley H. Michelstetter II /s/

Stanley H. Michelstetter II, Arbitrator

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