

BEFORE THE ARBITRATOR

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

and

**MILWAUKEE COUNTY
(SHERIFF'S DEPARTMENT)**

Case 749
No. 70254
MA-14924

(Ragsdale)

Appearances:

Graham P. Wiemer, Attorney at Law, MacGillis Wiemer, LLC, 2360 N. 134th Street, Suite 200, Wauwatosa, Wisconsin, 53226, appearing on behalf of the Milwaukee Deputy Sheriffs' Association.

Attorney Roy Williams, Office of Milwaukee County Corporation Counsel, 901 North 9th Street, Milwaukee, Wisconsin, 53233, appearing on behalf of Milwaukee County.

ARBITRATION AWARD

The Milwaukee Deputy Sheriffs' Association ("Association") and Milwaukee County ("County") are parties to a collective bargaining agreement ("Agreement") that provides for final and binding arbitration of disputes arising thereunder. On October 18, 2010, the Association filed a request with the Wisconsin Employment Relations Commission to initiate grievance arbitration concerning a disciplinary suspension imposed on the Grievant, Brian Ragsdale. The filing requested that the Commission appoint a commissioner or staff member to serve as sole arbitrator in this matter, and the undersigned was so appointed. A hearing was held on April 6, 2011, in Milwaukee, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, and arguments as were relevant. At the parties' discretion, no transcript of the proceeding was made. Each party submitted an oral argument at the close of the proceeding, whereupon the record was closed.

ISSUE

The parties stipulated to the following as a statement of the issue to be heard:

Was there just cause for the suspension? If not, what is the appropriate remedy?

BACKGROUND

Brian Ragsdale and Shawn Bacich are deputies employed by the Milwaukee County Sheriff's Department. On July 22, 2009, Captain Richard Gellendin of the Sheriff's Department received information from an anonymous source that, on July 21, 2009, Deputies Ragsdale and Bacich had been sleeping and snoring while they were serving as bailiffs in the courtroom of Milwaukee County Circuit Court Judge Timothy Witkowiak. Captain Gellendin referred the information to the Internal Affairs Division for investigation.

In the course of an investigation into the sleeping allegation, Internal Affairs interviewed Donna Richmond, the court reporter in Judge Witkowiak's courtroom. Richmond indicated that she had seen Ragsdale and Bacich sleeping, and that the event had occurred not on July 21, but rather on July 14. In her interview, Richmond also conveyed the following details, which are documented in an investigative summary compiled by Internal Affairs: that Bacich was sitting with his arms crossed and his eyes closed; that both Ragsdale and Bacich were sleeping and that Ragsdale snored and that sound awoke both of the deputies; that Richmond whispered to the court clerk to look at the deputies when they were sleeping; that both of the deputies were out for at least a minute. At the arbitration hearing, Richmond described the event this way: Bacich had his eyes closed and his head tilted to the side; Ragsdale had his eyes closed, but Richmond could not recall if his head was tilted; the deputies were not snoring; she thought the deputies were sleeping for more than a minute because she told the court clerk to look at the deputies and the clerk did so in that time. Richmond also testified that, on the audio recording that she maintains as a court reporter, she could hear herself whispering to the clerk to look at the deputies and that a couple sentences later giggling and saying, "are you kidding me". Richmond also testified that, either on the same day or some day after that, she told Judge Witkowiak that the deputies had been sleeping.

Judge Witkowiak was also interviewed by Internal Affairs. He stated that he neither observed the deputies sleeping nor was aware of any such allegations. The arrangement in the courtroom was such that the judge would have been able to observe the deputies. Bacich sat near the door of the courtroom, which was located in a glass partition between the court area and the gallery of spectators. The Grievant, Ragsdale, sat at a table just adjacent to the inmate appearing as a criminal defendant.

Internal Affairs also interviewed Ann Brickler, the court clerk in Judge Witkowiak's courtroom. Brickler stated during her interview that both of the deputies were sitting with their arms crossed and their eyes closed, that she noticed them because of the snoring. Brickler did not provide testimony at the arbitration hearing.

Both Ragsdale and Bacich were interviewed by Internal Affairs, and both denied having slept in the courtroom. No one said anything to the deputies that day about sleeping in the courtroom. The summary of Bacich's interview includes the following:

Deputy Bacich stated that he had his arms crossed and was looking down towards the prisoner when the judge stated, “everyone hold on”. Deputy Bacich looked up at the Judge to see if he needed anything. Deputy Bacich stated the judge was just staring at him. The defense attorney at the desk turned around and looked at him. Deputy Bacich stated that he thought maybe the Judge thought he was asleep. Deputy Bacich stated he wasn’t sleeping but maybe the Judge thought he was and was giving him a warning, but he stated he did not have his eyes closed nor was he asleep. Deputy Bacich stated he could not remember who the attorney was nor the name of the in custody inmate. Deputy Bacich stated this occurred earlier in the day maybe around 0930 – 1000 hours.

Bacich also indicated during his interview that he is always very careful around the court reporter who was in the courtroom because he has an understanding that she is someone who will make complaints and also that she is friends with the Milwaukee County Sheriff’s wife.

The courtroom audio recording was reviewed during the course of the Internal Affairs investigation, and it is reported in the investigative summary that the recording contained no evidence of snoring.

As a result of the alleged sleeping incident described, Deputy Bacich and Deputy Ragsdale both received disciplinary suspensions. Ragsdale, the grievant in this case, received a three-day suspension for the following rule violations:

MILWAUKEE COUNTY SHERIFF’S OFFICE RULES AND REGULATIONS

202.15 Knowledge of Duties Rules and Regulations
202.20 Efficiency and Competence
202.26 Attention to Duty / Sleeping

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

- (l) Refusing or failing to comply with departmental work rules, policies or procedures.
- (t) Substandard or careless job performance.
- (gg) Sleeping, dozing or lack of attentiveness during working hours.

DISCUSSION

In discipline cases such as this one, it is the employer who bears the burden to prove guilt of wrongdoing. *The Common Law of the Workplace*, Theodore J. St. Antoine, Editor, § 6.9, at p. 177 (2nd Ed. 1999), Elkouri & Elkouri, *How Arbitration Works*, at 949 (6th Ed. 2003). Here, the evidence of wrongdoing is sufficiently weak that the County has failed to meet its burden.

For proof that the alleged sleeping occurred, the County relies on the testimony provided at the arbitration hearing by Richmond. The County argues that her testimony was not impeached and should, therefore, be viewed as a reliable basis for concluding that the sleeping occurred and the County had just cause for disciplining Ragsdale. The record, however, casts serious doubt on Richmond's credibility.

First, the account Richmond provided of the sleeping incident at the arbitration hearing is noticeably different from the one she provided in her Internal Affairs interview and is at odds with other evidence on the record. For example, Richmond stated in her Internal Affairs interview that it was the snoring of one deputy that awoke both of the deputies. At the arbitration hearing, Richmond testified that there was no snoring. The Internal Affairs investigator reviewed the courtroom audio tape and found no evidence of snoring. The record indicates that the deputies were not right next to one another – one was at the door and the other was next to the inmate. It is difficult to believe that one of them could have snored loudly enough to awake the other without that sound being captured by the courtroom audio recording. The fact that snoring was a critical element of the account provided by Richmond in an interview that occurred not long after the alleged incident, but apparently did not actually occur, casts serious doubt on the veracity of her story.

Richmond also testified at hearing that she told Judge Witkowiak about the sleeping incident sometime after it occurred. The Judge, however, stated in the course of the Internal Affairs investigation that he was not aware of any sleeping allegation. Beyond that, and more importantly, Judge Witkowiak also stated that he was not aware of any such incident having occurred. From the bench, Judge Witkowiak would have had a bird's-eye view of Ragsdale and Bacich, and presumably he would have noticed and cared a great deal if both bailiffs in his courtroom were sleeping during a felony sentencing hearing. The fact that he observed nothing creates even more doubt regarding Richmond's claim.

Even in a general sense Richmond's description of what occurred is difficult to believe. Richmond's account indicates that, at the time when she was getting the court clerk's attention, both of the deputies were sleeping at exactly the same time, for a minute or more. It seems unlikely that both deputies would have fallen asleep on the job at exactly the same time. Indeed, it seems unlikely that even one of them would have fallen asleep, given the particular circumstances in the courtroom that day. It was established on the record that deputies know that it is particularly important to be alert at sentencing hearings, because defendants tend to become agitated during such proceedings. Bacich stated in the Internal Affairs investigation that he is also extra careful around Richmond, because she apparently has a reputation for making complaints about people and because Bacich knows that she is friends with the Sheriff's wife. These circumstances do not, of course, rule out the possibility that sleeping could have happened. They simply beg the conclusion that Richmond's oddly isolated observation is not a sufficient basis for concluding that it did.

It is necessary to consider whether either of two other factors constitutes evidence that corroborates Richmond's account. First is the anonymous tip that led Internal Affairs to conduct the investigation in the first place. For two reasons, it is inappropriate to give that

evidence any weight. For one, the tip has the same problem Richmond's account has in that it indicated there was snoring, which the court audio tape and Richmond's testimony at the arbitration hearing suggested was not the case. Furthermore, the tip was called in on July 22 and indicated that the sleeping had occurred one day before, on July 21. Through its interview of Richmond, Internal Affairs concluded that the sleeping incident must have occurred a full week before that, on July 14. A tipster who asserts that something occurred yesterday, when it in fact occurred a full week ago, lacks credibility. These are two periods of time that are so difficult to confuse that one could conclude the tipster did not witness the event at all.

I also do not find the account apparently provided by Brickler during the Internal Affairs investigation sufficient to corroborate Richmond's account. Brickler did not testify at the hearing and, therefore, was not subject to examination. Nor was the account attributed to her in the investigation summary ever mentioned at the arbitration hearing or even alluded to by the County in its arguments. Indeed, the only reason I know about Brickler's statement is through a post-hearing review of the investigative summaries submitted as evidence. I cannot give weight to this kind of evidence.

It is clear from Richmond's audio recording that she was observing something. Perhaps her observations were related to the moment Bacich described when Judge Witkowiak stopped the courtroom proceedings and looked at Bacich. It is simply not clear that she was observing sleeping, and her comments on her recording do not establish that either.

The quantum of proof most often applied in arbitration cases is "preponderance of the evidence". *The Common Law of the Workplace, supra*, at § 6.10, p. 178, *How Arbitration Works, supra*, at 949-951. There are multiple problems with Richmond's account, and it is not bolstered by any reliable corroborating evidence. The County has failed to show that it was more likely than not that the Grievant was sleeping on the job.

AWARD

The County did not have just cause to discipline the Grievant. The Grievant shall be made whole for any loss attributable to the three-day period of suspension.

JURISDICTION

The undersigned will retain jurisdiction over this matter for a period of sixty days following the date of this award for the sole purpose of resolving disputes over the remedy.

Dated at Madison, Wisconsin, this 1st day of July, 2011.

Danielle L. Carne /s/

Danielle L. Carne, Arbitrator