

BEFORE THE ARBITRATOR

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

Case 755
No. 70381
MA-14954

(Graber)

Appearances:

Attorney Graham Wiemer, 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 December 6, 2010, the Association filed a request with the Wisconsin Employment Relations Commission to initiate grievance arbitration concerning disciplinary action taken against the Grievant, Richard P. Graber. 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 May 11, 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. On June 3, 2011, the Association and County each submitted an initial brief; on June 10, 2011, the Association submitted a reply brief; and on July 5, 2011, the County indicated to the undersigned that it would not file a reply brief, at which time the record in this matter was closed.

ISSUE

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

Was there just cause to suspend Sergeant Richard Graber for seven days? If not, what is the appropriate remedy?

BACKGROUND

The Grievant in this case, Richard Graber, works for the Milwaukee County Sheriff's Department ("Department"). He became employed as a deputy with the Department in 1992 and was promoted to the rank of sergeant in 1999. At all relevant times, Graber also has served as the vice-president of the Association. In that role, he participates in bargaining, oversees grievances, and represents Association members at internal affairs interviews, discipline hearings, and appeals hearings.

Graber works at the County's downtown jail. In the jail, sergeants are assigned to serve as mentors to deputies who work there. One responsibility of a mentor is to inspect memorandum books, which are the daily activity logs that must be maintained by deputies. A deputy's "memo book" can be used as a basis for drafting reports. Memo books also are sometimes subpoenaed for use in judicial proceedings. A mistake or gap in a memo book can create credibility problems, and it is therefore important that they are maintained adequately by the County's deputies. When a sergeant is not available to review the memo books for his or her mentees, for example because of a lengthy absence, other sergeants in the Department are to do so on a fill-in basis, to ensure that regular inspections are occurring.

In May of 2009, the County Sheriff issued the following memorandum, which contains the version of the Department rule relating to memo books that is pertinent to this case:

RE: 202.00 RULES AND REGULATIONS

**Revision to Directive 21-07 (dated 11/20/07), noted in *italics*:

202.66 OFFICER MEMORANDUM BOOK

An Officer/Deputy shall at all times, when on duty, have with him/her an official memorandum book in which he/she shall enter the names of persons taken into custody by him/her and such particulars in each case as may be important in trial thereof; and also all other transactions, information, and matters of importance relative to the discharge of his/her official duties. Such memorandum book *shall be inspected, at minimum, weekly by his/her*

supervisory officers. This inspection shall be noted in the memorandum book including, at minimum, the date and name of the inspecting officer. In addition the memorandum book may be inspected at any time considered necessary.

At a minimum, daily entries shall included: [sic]

- Day, Date, Month, Year.
- Tour of duty hours.
- Assigned supervisor.
- Area of responsibility

This list is not all-inclusive. Individual entries regarding issues that arise during a tour of duty would supplement this information.

Supervisors will denote in the employee's agency-issued memorandum book the date and reviewing officer's identifying data.

Employees are reminded that the record is considered a discoverable item that can be introduced in a judicial proceeding.

Also, in the autumn of 2009 and again in early 2010, the Department offered a Powerpoint presentation to officers, which thoroughly outlined the memo book requirements set forth in Rule 202.66, with some additional detail not specified in that rule. That presentation provided, among other things, that supervisors are to determine the scope of documentation necessary for a memo book based on an officer's division, that a memo book should document each day of an officer's career, including days off, that pages should not be torn out of a memo book, and that a supervisor should denote having inspected a memo book with entry of the date and the supervisor's "identifying data". Graber viewed this presentation at least once.

On December 14, 2009, Graber inspected the memo book maintained by Deputy Richard Albidress. Albidress, at that time, normally was supervised by one of Graber's peers, Sergeant Carlson, but Carlson was not available to inspect Albidress' memo book. As was Graber's routine, he inspected the entries in Albidress' memo book starting with the most recent one, which had been entered on that same day, going back to the date on which the last supervisor who inspected the book had signed off, which was October 30, 2009.

At that time if Graber noticed a problem with a memo book he was inspecting, it was his routine to counsel the officer verbally regarding the deficiency. After reviewing Albidress' memo book, Graber advised Albidress that he needed to include more detail in his memo book regarding matters discussed at roll call. He also questioned Albidress about dates that had been skipped in the book. When Albidress told Graber that he did not include dates on which he had not worked, Graber counseled Albidress to log every date, including days off.

Later that day, Graber was directed to attend a meeting with two of his superiors, Inspector Schmidt and Deputy Inspector Nyklewicz. At the meeting, Schmidt told Graber that the County Sheriff had found Graber's inspection of Albidress' memo book inadequate and wanted the issue addressed. Schmidt then raised a number of specific problems with the memo book: a page had been torn from the back of Albidress' book; there were personal names and phone numbers in the last few pages of Albidress' memo book; Graber should have inspected Albidress' entire memo book, not just the entries going back to the last sergeant's signature; Graber should have annotated in the margins of the memo book any errors he had observed; and Graber should have signed his badge number, in addition to his name, to note that he had inspected the book. The meeting lasted for approximately ten minutes. At its conclusion, Schmidt stated to Graber that he was not making a big deal out of the memo book issue and that Graber should consider himself "spoken to".

Then, on December 23, 2009, Captain McCabe of the Department's Internal Affairs Division initiated an investigation into Graber's inspection of Albidress' memo book. In conjunction with this investigation, Graber was interviewed by McCabe on January 21, 2010. Subsequently, the investigation was turned over to Sergeant Rutter of the Internal Affairs Division for completion. Between the January, 2010 interview of Graber and September of 2010, the record does not show that any events occurred with regard to the investigation. On September 30, 2010, Rutter interviewed Albidress as part of the investigation into Graber's conduct. On that same day, Rutter issued an investigative summary regarding the investigation, proposing that the allegations against Graber be sustained.¹ Graber was found to have violated the following rules: Milwaukee County Sheriff's Office Rule 202.20, which generally requires officers to adequately perform their duties; Milwaukee County Sheriff's Office Rule 202.66, relating specifically to officer memorandum books; a Milwaukee County civil service rule that prohibits refusing or failing to comply with departmental work rules, policies or procedures; and a Milwaukee County civil service rule that prohibits substandard or careless job performance. For having done so, Graber was suspended without pay for seven days. There was no prior disciplinary suspension on Graber's employment record.

The first entry in Albidress' memo book that is the focus of this case is dated January 22, 2009. The first inspection by a supervisor is notated in May of 2009 with the following: "Keep day book up-to-date 5-8 Sgt TM Carlson". The second inspection by a supervisor is notated between entries dated July 22, 2009, and July 23, 2009, with the following: "Sgt TM Carlson". A third inspection by a supervisor is notated between entries dated September 28, 2009, and September 29, 2009, with the following: "Sgt [P.]² 5021". A fourth inspection is notated between entries dated October 23, 2009, and October 24, 2009, with the following: "Sgt TM Carlson S-82". A fifth inspection is notated between entries dated

¹ Inexplicably, the investigative brief which was also issued by Rutter and which also proposes that the alleged violations against Graber be sustained, is dated September 24, 2010, but refers to the September 31, 2010 interview of Albidress.

² The name is illegible.

October 30, 2009, and October 31, 2009, with the following: "Sgt TM Carlson S-82". The final inspection is the one at issue here, after the December 14, 2009 entry, which is notated with "Sgt R Graber".

The record does not show that Carlson ever was investigated or disciplined for any activities related to Albidress' memo book. The record does not show that "Sgt P" ever was investigated or disciplined for any activities related to Albidress' memo book. The record does not show that Albidress ever was investigated or disciplined for his performance with regard to his maintenance of his memo book.

DISCUSSION

The specific question before me is relatively narrow: whether the County had just cause to suspend Graber for seven days for his inspection of Albidress' memo book. The clear answer, based on a multitude of factors, is that it did not.

The undisputed evidence on the record shows that, prior to the Internal Affairs investigation and the suspension that followed it, Graber already had received a verbal counseling for the perceived deficiencies related to his review of Albidress' memo book. Schmidt and Nyclewicz summoned Graber into a meeting on December 14, 2009, in which Schmidt discussed in detail the errors he believed Graber had committed with regard to his review of Albidress' book. Schmidt reportedly told Graber he was doing so because the Sheriff was unhappy and he wanted the issue addressed. At the end of the meeting Schmidt indicated to Graber that he should consider himself "spoken to". Graber testified that he walked out of the meeting with Schmidt and Nyclewicz understanding that he had just received a verbal counseling regarding the inspection of memo books. The County has not argued that this meeting somehow did not constitute a verbal counseling, it has not challenged the Association's contention that imposing a suspension after such counseling session was unorthodox, and it has not set out to justify its decision in this situation to impose a suspension as an additional form of discipline.

Even without the occurrence of the verbal counseling session, suspension would have been inappropriate under the circumstances of this case. Graber's discipline allegedly resulted from several deficiencies related to his inspection of Albidress' book: Graber failed to notice a torn page and notes of a personal nature; Graber failed to inspect the entire book rather than just the dates going back to the last supervisor entry; Graber failed to counsel Albidress regarding what was viewed as a general lack of detail in entries in the book; Graber apparently counseled Albidress on the fact that there were dates missing from the book, but he failed to denote this observed error in the margin of the book; and Graber failed to include his badge number with his signature. It was not appropriate to discipline Graber for these alleged deficiencies for two basic reasons. First, the expectations that are the basis for these criticisms – this includes the asserted need to review an entire memo book at each inspection, the prohibition against having personal information in the book, and the requirement regarding

margin notes and the use of a badge number – simply are not clearly set forth in the Department rule or Powerpoint presentation regard the keeping of memo books. Admittedly, the rule and the Powerpoint presentation set out what are identified as minimum expectations in many areas and give supervisors the discretion and responsibility to establish when more is required, but the deficiencies for which Graber was disciplined were not so patently in violation of a rule that they warranted a suspension.

The record also shows, with regard to every one of the perceived deficiencies, that they either would have been present when the other two supervisors signed off on Albidress' book (in the case of errors Albidress allegedly made) or they were repeated by these other supervisors when they signed off on Albidress' book (in the case of errors Graber allegedly made). The record does not establish, for example, that the torn page and personal notes at the back of the book only appeared between the time when Carlson performed her last inspection of Albidress' book at the end of October of 2009 and Graber performed his inspection. Further, an inspection of the book reveals that there are approximately ninety days missing from portions reviewed by Carlson and "Sgt. P", but the fact of those missing days is not noted in the margins or anywhere else in the book. Also four out of the five sergeant signatures preceding Graber's is not accompanied by a date, although a date is plainly required by the Department guidelines. Despite all of these issues, the record shows that neither Carlson nor "Sgt. P" ever has been disciplined or even investigated for their handling of Albidress' book. In fact, the Sheriff never has disciplined any sergeant for deficient review of a memo book.

Moreover, the same observation can be made with regard to Albidress. There is no evidence on the record showing that Albidress ever was disciplined for any deficiency in his memo book, even after the investigation and discipline of Graber occurred. Indeed, Albidress apparently never was interviewed with regard to the issue of the memo book until September 30, 2010, a full nine months after the Internal Affairs investigation into Graber's alleged misconduct was initiated and on the very same day that the investigative summary recommending Graber's discipline was issued.

The County suggested in its opening statement at hearing that Graber's suspension is justified because he admitted at some point to having committed wrongdoing. The source of this contention appears to be the written investigative summary, in which Sergeant Rutter wrote:

Sergeant Graber stated that since his meeting with Inspector Schmidt on December 14, 2009, he believes he does a more thorough inspection of officers' memorandum books, and that when he inspected Deputy Albidress' memorandum book on that date, *he now realized that Deputy Albidress' memorandum book did not meet the minimums required by policy and that he could have done a better job inspecting it*, since he has already changed the way he inspects officers' memorandum books. [Emphasis added.]

This paragraph is repeated in the notice of suspension issued to Graber on November 15, 2010. Also at hearing, Rutter testified that when Graber was interviewed by Internal Affairs he admitted that he could have done a better job in inspecting Albidress' memo book. The problem with the County's reliance on this admission of wrongdoing to justify Graber's suspension is that it apparently never occurred. The digital recording of the January 21, 2009 Internal Affairs interview is part of the record in this case. Graber does say during that interview that his method for reviewing memo books changed after his December 14, 2009 meeting with Schmidt and Nycelwicz, but he emphasizes that he does not believe the expectations set forth by Schmidt at that meeting are reflected in Rule 202.66 or the Powerpoint presentation. Graber did not, at any point during the interview, indicate that his inspection of Albidress' memo book was deficient. Nor did he ever make such a statement at the arbitration hearing. On the contrary, he testified at hearing that he believes the portion of Albidress' memo book he inspected complied with the minimum department requirements and that, based on those requirements, he acted competently in inspecting it.

The suspension certainly cannot be said to have been justified by Graber's disciplinary history. Rutter testified at hearing that he believed Graber had been suspended on four previous occasions. The reality, however, appears to be that in his eighteen year history with the Department Graber has had disciplinary suspensions imposed, but that every one of them has been overturned and purged from his personnel file.

The County lacked just cause to suspend Graber. Indeed, it is difficult to imagine a good faith basis for the issuance of this discipline. Nevertheless, the Association's request for attorney fees is denied. Attorney fees are an extraordinary remedy, Elkouri & Elkouri, *How Arbitration Works*, at 592 (5th Ed. 1997), and one which the Association has not shown I possess the authority to craft.

Now, having considered the record as a whole, the undersigned makes and issues the following award.

AWARD

1. The County lacked just cause to discipline the Grievant.
2. The appropriate remedy is to make the Grievant whole for any loss attributable to the seven-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 13th day of September, 2011.

Danielle L. Carne /s/

Danielle L. Carne, Arbitrator