

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

Case # 702
No. 69297
MA-14562

Appearances:

Roy L. Williams, Principal Assistant Corporation Counsel, Milwaukee County Courthouse, 901 North 9th Street, Room 303, Milwaukee, WI 53233, appearing on behalf of Milwaukee County.

Graham P. Wiemer, MacGillis Wiemer, LLC, 2360 N. 124th Street, Suite 200, Wauwatosa, WI 53226, appearing on behalf of Milwaukee Deputy Sheriffs' Association.

ARBITRATION AWARD

According to the terms of the 2007-2008 collective bargaining agreement between Milwaukee County and the Milwaukee Deputy Sheriffs' Association, and pursuant to the parties' request, the undersigned arbitrator was appointed by the Wisconsin Employment Relations Commission to hear and resolve a dispute between them. Resolving the dispute requires the interpretation and application of certain provisions of the Agreement as they pertain to a two-day disciplinary suspension of the Grievant. The latter served the suspension on October 20 and 21, 2009.

A hearing in the matter took place on December 15, 2010, at the Milwaukee County Courthouse, 901 N. 9th Street, Milwaukee, Wisconsin. The parties filed written briefs on January 14, 2011, at which time the record was closed.

ISSUE

At the outset of the hearing, the parties stipulated to the following issue: Was there just cause to suspend the Grievant two days? If not, what should be the remedy?

RELEVANT CONTRACT LANGUAGE

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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.

FACTS

The Grievant has been employed by the County and has been a member of the Association's bargaining unit since May 2002. He worked at the jail for approximately 4½ years before transferring in 2007 to the Courts Division. During his service at the jail, the Grievant received a written reprimand for an occurrence that is not further illuminated in this record.¹ During his first year as a bailiff, the Grievant worked in several different courtrooms to become familiar with bailiff responsibilities, which center upon ensuring order and security in the courtroom. Bailiffs also check in litigants, provide security outside the courtroom when court is not in session, and may perform clerical duties at the request of the presiding judge.

At some point in 2008, the Grievant was assigned to work as a bailiff in the courtroom of Judge Borowski, where the proceedings – primarily misdemeanor cases – were exceptionally fast-paced. Based on complaints from Borowski, the Grievant was transferred at some point to Family Court, located on the 7th floor of the Courthouse. In addition to the courtroom bailiffs, the County assigns a deputy to patrol the hallways on the 7th floor because of the potential for hostility or violence that arises in custody, divorce, and other domestic relations cases. The Grievant worked in various courtrooms on the 7th floor for a period of several months. Based on complaints from unspecified court personnel, the Grievant was counseled on or about June 11, 2008, for lapses in performance generally related to work ethic and non-dependability. The counseling was not disciplinary but was memorialized in his

¹ Joint Exhibit 4 summarizes various charges of misconduct that the Grievant has experienced in his career with the County, as well as the disposition of those charges (“sustained,” “unfounded,” or “Closed.”) The only relevant incidents for purposes of considering progressive discipline and/or prior warning would be those that pre-dated the circumstances giving rise to the instant case. The reprimand referred to in the text above and the “counseling” referred to in the text below are the only such incidents reflected in this record.

record in a Staff Management entry. The record includes a "Memo for Record" from Captain Richard Gellendin, dated April 24, 2009, in which he stated that, in a conversation with the Grievant's direct supervisor, Sergeant Coleman, Coleman had stated that "there was a problem when [the Grievant] was working on the 7th floor, the perception he was spending too much time talking with the Ladies." Either when he was removed from Judge Borowski's courtroom or at the time of the counseling memorandum (the record is inconsistent), the Grievant was told he would receive additional training, which, according to him, did not occur. However, the Grievant acknowledged that he understood the principal duties of bailiff, which were to follow each judge's "personal rules," as well as provide basic security in the courtroom and any necessary assistance to the court clerk. He was aware that he should ensure that people in the gallery did not violate courtroom rules, that they were safe, and that no one should enter a judge's chambers without permission.

In or about January 2009, the Grievant was transferred to the 5th floor Family Courtroom of Judge Bonnie Gordon. The 5th floor has fewer Family Court courtrooms than the 7th floor and no deputy is assigned to patrol the hallways. Judge Gordon has had a reputation among the courthouse deputies of being demanding of her bailiff. During the few months in this assignment, Sergeant Coleman (the Grievant's supervisor) received complaints from Judge Gordon's clerk about the Grievant's alleged inattentiveness to his duties, such as having female visitors in the courtroom. However, Coleman did not apprise his superior, Captain Gellendin, about these complaints, nor did he memorialize any counseling that he may have provided the Grievant in connection with such complaints.

On April 24, 2009, Captain Gellendin prepared a report stating that he had received a call on that date from Judge Gordon in which she had complained about the Grievant allegedly not knowing how to perform his duties to the point that she did not feel secure in her own courtroom. Gellendin's memorandum states that the Judge noted a "constant stream of female visitors to the courtroom to see [the Grievant], his wondering [sic] about when court is in session and not being available when needed." The memo states that Judge Gordon indicated that the Grievant often texted on his cell phone in court and did not "challenge people who approach her when she is in chambers." According to the memo, the Judge asked for a different bailiff. Gellendin immediately reassigned the Grievant to non-bailiff duties. At the time of the hearing, the Grievant had been reassigned to the jail.

By memorandum dated April 30, 2009, Captain Gellendin requested authorization from the County Sheriff's Internal Affairs Division to conduct an investigation into possible policy violations by the Grievant. The investigation was opened on May 1, 2009 and, on July 1, 2009, IAD Investigator Captain Eileen Richards submitted her Investigative Summary. The Summary indicates that Captain Richards interviewed Judge Gordon, who stated that [the Grievant] often left the courtroom while there were still people in the gallery, that he often had visitors while court was in open session, that he texted on his cell phone during court proceedings, that he neglected to enforce courtroom rules about cell phones and food in the gallery, and that, on one occasion, when a woman had fainted in the gallery, the Grievant did

nothing until she (the Judge) asked him to do something. Captain Richards also interviewed Judge Gordon's clerk, who essentially reiterated the information that Judge Gordon had given. Captain Richards' report states that the Grievant explained the fainting incident by stating that protocols required him not to call emergency personnel immediately but to wait briefly to assess the situation. According to Richards' report, the Grievant acknowledged sometimes leaving the courtroom while people were still in the gallery, but only to "check the hallway." Richards' report also stated that the Grievant had acknowledged during his interview that there were two occasions on which he had been distracted and someone had entered the Judge's chambers without permission.

Richards' Investigative Summary concluded that the charge that the Grievant had been inattentive to duty by using his personal cell phone to call or text while court was in session was "not sustained" because neither the Judge nor the clerk had actually seen a cell phone and were speculating as to that issue. However, Richards concluded:

[The Grievant] acknowledges walking out of the courtroom during pauses in the proceedings while there are still civilians in the courtroom gallery. During these times he has no visual observations of the actions of these people in the courtroom. He further acknowledges allowing visitors to come and speak with him while court is in session. [The Grievant] at first claimed that on one occasion, while he was at his desk, an attorney made it past him and into the Judge's chambers unannounced and uninvited. He then acknowledged that this happened a second time while he was at the refrigerator. Both the Judge and clerk state he is inattentive to the goings-on in the courtroom and does not enforce the courtroom rules. They do not feel secure with him as their assigned bailiff.

Based on and reiterating the foregoing charges, Captain Richards "sustained" the charge that the Grievant had violated Rule 202.20, Efficiency and competence and Civil Service Rule VII, (4)(1)(l), (refusing or failing to comply with departmental work rules, policies or procedures and (u) (Substandard or careless job performance). Quoting the above paragraph from Captain Richards' report and citing the same two rules violations, Sheriff Clarke issued a two-day suspension on September 28, 2009.

At the instant hearing, the County submitted Gellendin's April 24, 2009 memorandum, Gellendin's request for investigation dated April 30, 2009, and Captain Richards' Investigative Summary dated July 1, 2009, but it did not present any witnesses who had been involved in investigating the charges. Sergeant Coleman confirmed in his testimony that he had received "valid" complaints from Judge Gordon's clerk about the Grievant's inattentiveness/leaving the courtroom, but opined that both Judge Gordon and her clerk were difficult to please. The Grievant acknowledged that he sometimes had female visitors in the courtroom – in particular, somewhat frequent visits from a woman who worked in the courthouse as a Victim-Witness Coordinator and who did not have business in the Family Court; however, he denied that he spoke with visitors while court was in session. The Grievant also acknowledged one occasion

on which an attorney was able to enter Judge Gordon's chambers without her permission. The Grievant testified that, during a courtroom recess, while helping a "young lady" fill out some paperwork, he had gone to look for the clerk in an area set apart from the courtroom in which a refrigerator was located. While away from his bailiff's desk, an attorney entered the Judge's chambers seeking her signature on an order. The Grievant also acknowledged leaving the courtroom during periods of recess, but explained that he did so to provide a "uniform presence" in the hallways where there occasionally were disputants in cases involving restraining orders. The Grievant testified that he did not leave the courtroom if there were people in the gallery.

DISCUSSION

It is axiomatic in cases of this nature that the County bears the burden of proof as to the existence of just cause to suspend the Grievant. *See e.g.* Frank Elkouri & Edna Asper Elkouri, How Arbitration Works, 949 (Alan Miles Ruben ed., 6th ed. 2003). To meet its burden, the employer must prove: 1) that the Grievant committed the alleged wrongdoing (*i.e.* violated the above-quoted rules and regulations, and 2) that the discipline assessed by the County should be upheld. *Id.* at 948.

I. WHETHER THE GRIEVANT COMMITTED THE ALLEGED MISCONDUCT

Here, the County's evidence at hearing as to the alleged misconduct consisted of documentary reports that summarized statements of Judge Gordon, her clerk, Sergeant Coleman, and the Grievant. Neither Gellendin nor Richards testified at the hearing, nor did Judge Gordon or her clerk. While the investigative reports were admitted as Joint Exhibits and not subject to objection, they are nonetheless hearsay as to what Gellendin and Richards believe was stated to them. As such, these reports are inherently less reliable than first-hand testimony subject to cross-examination would have been. In addition, the statements attributed to Judge Gordon and to her clerk constitute hearsay within hearsay.² Although arbitrators generally are not bound to apply the rules of evidence, whether testimony is hearsay does go to its reliability and to the weight it should be given. The Elkouri treatise goes so far as to opine, "it is exceedingly unlikely that an arbitrator will render a decision supported by hearsay evidence alone," and "hearsay evidence will be given little weight if contradicted by evidence that has been subjected to cross-examination." Elkouri & Elkouri, *supra*, at 367-68 (citations and footnotes omitted). In any event, in a just-cause case, because the County bears the burden of proof, caution is especially warranted regarding its presentation of hearsay testimony. Thus, to the extent testimony at hearing is credible, and especially to the extent credible testimony

² While the Union did not object to the introduction of the exhibits – indeed all of them were offered jointly – the Union did not *stipulate* to the accuracy of the information provided in those exhibits. It is clear from the Union's brief that it contests that the alleged conduct occurred as stated in those exhibits.

contradicts what is contained within the investigative reports, I am inclined to rely on the testimony regarding whether the alleged misconduct occurred.³

As set forth in the County's Notice of Suspension, the following misconduct by the Grievant is alleged as the basis for his two-day suspension: 1) walking out of the courtroom while there were still civilians in the courtroom gallery; 2) allowing visitors to come and speak with him while court was in session; 3) allowing individuals to enter the Judge's chambers unannounced and uninvited on two occasions; 4) being inattentive to the goings-on in the courtroom and not enforcing the courtroom rules.

As to the first charge, the Grievant testified credibly that he sometimes walked to the back of court to look into the hallway but did not leave the room if citizens were in the gallery. There is no evidence other than second-level hearsay to conclude otherwise. Accordingly, I am not satisfied that the County has met its burden on this charge.

Regarding the second charge that the Grievant entertained visitors without official business in the Family Court, the Grievant acknowledged that a female Victim-Witness Coordinator did indeed attend court with some frequency and with at least some intention of visiting with him. It is reasonable to conclude that such visits would be distracting to a bailiff while he is in court and attending duties; accordingly, I conclude that the County has established that this misconduct occurred, albeit perhaps not as routinely as the County implies.

As to whether the Grievant on two occasions negligently allowed individuals to obtain access to the Judge's chambers without permission, the Grievant testified about one such occasion. He explained that he had left his post and entered the refrigerator area looking for the court's clerk in order to assist a "young lady" in filling out some paperwork. While the Grievant was thus distracted and away from his post, an attorney was able to enter the Judge's chambers. The Grievant's testimony evidences only one such incident, and there are insufficient supporting details in the County's investigative reports to support a second incident of unauthorized entry into the Judge's chambers. Accordingly, I conclude that the County has partially established this third element of misconduct.

³ In this case, virtually all of the relevant testimony was provided by the Grievant himself. While the Grievant's immediate supervisor (Sergeant Coleman) testified at the hearing, he disavowed any first-hand knowledge of the Grievant's conduct and pointedly declined to express a view as to whether the misconduct occurred as alleged. Deputy Felber also testified, but only as to Judge Gordon's general reputation for being a difficult person with whom to work. As discussed below, this assessment, while marginally relevant to the amount of discipline, is not material to whether misconduct occurred, given the Grievant's acknowledgement that the Judge's expectations were reasonable as they pertained to the alleged misconduct.

Finally, regarding whether the Grievant has been inattentive to courtroom duties and has failed to enforce courtroom rules, it appears from the investigative reports and the questioning at hearing that the principal example proffered by the County is the Grievant's alleged failure to have promptly assisted a citizen in the gallery when she briefly lost consciousness. The Judge told investigators that the Grievant did not respond at all to the incident until she (the Judge) asked him if he "was going to do anything." The Grievant testified that he had followed protocol, which required him to briefly assess the situation before calling emergency personnel and that, while the Judge may have believed she needed to prompt him, in fact he was appropriately attentive to the situation. According the Judge's out-of-court statement and the investigator's out-of-court summary of the Judge's statement due credence, it still remains possible that the Judge and the Grievant had a difference of opinion as to 1) what the proper protocol was in that situation, and 2) whether the Grievant's time assessing the situation was unreasonably lengthy. The record contains no extrinsic evidence that would clarify these issues. Accordingly, I am reluctant on this record to discount the Grievant's explanation of what occurred, and I conclude that the County has not met its burden of establishing misconduct on this allegation.

In sum, the County has established that the Grievant engaged in two kinds of misconduct: 1) while at his bailiff post in the courtroom, and with some frequency, he allowed himself to be distracted by a female visitor who did not have official business in the court; and 2) he neglected his paramount duty of ensuring the safety and security of the Judge's chambers by allowing an individual to obtain unannounced and uninvited access thereto, in order to perform the lesser duty of assisting a young lady with her paperwork.

II. WHETHER THE TWO-DAY SUSPENSION SHOULD BE UPHELD

I now address whether the discipline that the County imposed – a two day suspension – was commensurate with the proven misconduct, in light of the Grievant's prior record and any other pertinent circumstances. As to his prior record of discipline, he had been reprimanded some four years earlier for unspecified misconduct that had occurred while he had been assigned to the jail. Given the amount of time that had elapsed and the unknown relationship of the past and instant misconduct, that reprimand merits little weight on the scale of progressive discipline. Much more significantly, however, the Grievant had previously and recently been counseled about very similar behavior, i.e., general inattentiveness in the courtroom. As a result of that earlier behavior, he had been involuntarily removed as bailiff from the courtroom of another judge. Even if Judge Gordon was especially demanding of her bailiffs, as two witnesses at hearing attested, both parties concede that Family Court in general is less demanding than the misdemeanor court from which the Grievant had been reassigned. In any event, attentiveness in the courtroom is absolutely essential to maintaining order and security – the primary responsibility of a bailiff.⁴

⁴ Insofar as Judge Gordon may have been demanding on her bailiffs regarding their attentiveness and their conduct relating to maintaining security, she not only had the right but also arguably the responsibility to do so. In Texas, for

Although the Grievant had been adequately placed on notice that he needed to ramp up his focus on his duties, he subsequently allowed himself to become distracted, in one instance to the point of allowing unauthorized personnel into the Judge's chambers. It is beyond cavil that a judge is entitled to expect her bailiff to safeguard the privacy and security of her chambers. While a bailiff's duties may also include assisting litigants in filling out paperwork – the Grievant's explanation for allowing the unauthorized access – he provided no basis to conclude that such assistance in this situation was more urgent than remaining in his post and preventing access to the Judge's chambers. I view this allowance of unauthorized access not merely as an unfortunate and isolated gaffe, but as a serious error – and one symptomatic of the very lack of focus, vigilance, and commitment on which the Grievant previously (and apparently unsuccessfully) had been counseled.

The County thought two days was the appropriate penalty for the alleged misconduct, some of which it did not substantiate at hearing. One plausible inference from the County's failure to prove all of its allegations of misconduct is that the penalty warrants some reduction. Nevertheless, I am not convinced that the County gave equal weight to the various instances of misconduct alleged, and I certainly do not. Had the Grievant's misconduct solely consisted of casual inattentiveness, as reflected in entertaining his friend, the Victim-Witness Coordinator, I might be inclined to reduce the discipline to a one-day suspension or even a reprimand, depending on the duration and frequency of his albeit distracting interaction. Here, however, the Grievant's ongoing inattentiveness eventually resulted in a serious breach of security. That breach, moreover, could have led to dire consequences, had a disgruntled litigant rather than an attorney entered the judge's chambers without authorization. Given that the Grievant had been previously warned about, and transferred for, similar misconduct (inattentiveness), and given that his disregard for his primary responsibility of ensuring safety had at least one serious and potentially disastrous result, I conclude that the discipline imposed was appropriate.

AWARD

For the foregoing reasons, the County had just cause to suspend the Grievant for two days. Accordingly, the grievance is denied.

Dated at Madison, Wisconsin, this 5th day of July, 2012.

John C. Carlson, Jr. /s/

John C. Carlson, Jr., Arbitrator

example, a judge was publically reprimanded in part for “allow[ing] bailiffs to read magazines during court proceedings, jeopardizing the court's security and placing persons in the courtroom at risk.” State Commission on Judicial Conduct, 2000 Annual Report, 64 Tex. B.J. 298, 305 (2001).

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