BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION

and

MILWAUKEE COUNTY

Case 791
No. 71661
MA-15188

(Mark Spottek Suspension Appeal)

Appearances:

Ryan MacGillis, MacGillis Wiemer, Attorneys at Law, 2360 North 124th Street, Suite 200, Wauwatosa, Wisconsin 53226, appearing on behalf of Milwaukee Deputy Sheriffs' Association.

Roy Williams, Principal Assistant Corporation Counsel, Milwaukee County, Room 303, 901 North Ninth Street, Milwaukee, Wisconsin 53233, appearing on behalf of Milwaukee County.

ARBITRATION AWARD

The Milwaukee Deputy Sheriffs' Association, hereinafter referred to as the Association, and Milwaukee County, hereinafter referred to as the County or the Employer, are parties to a collective bargaining agreement which provides for final and binding arbitration of all disputes arising thereunder. The Association made a request, with the concurrence of the County, that the Wisconsin Employment Relations Commission designate a member of its staff to hear and decide the appeal of Deputy Mark Spottek's suspension. The undersigned was so designated. A hearing was held in Milwaukee, Wisconsin on September 11, 2012. The hearing was not transcribed. The parties filed briefs, and the Association filed a reply brief, whereupon the record was closed on October 26, 2012. Having considered the evidence, the arguments of the parties and the record as a whole, the undersigned issues the following Award.

ISSUE

The parties stipulated to the following issue:

Was there just cause to suspend Deputy Mark Spottek for five days? If not, what is the appropriate remedy?

BACKGROUND

The County operates a Sheriff's Department and a jail. The jail is officially known as the County Correctional Facility-Central (CCF–C). The Association is the exclusive collective bargaining representative for the Department's deputy sheriffs. The Association does not represent the corrections officers (known as COs) who work at the jail.

Mark Spottek is a deputy sheriff who has been with the Department for 19 years. Prior to the incident involved herein, Spottek had never been disciplined for any reason. Thus, he had a spotless discipline record.

At the time of the incident involved herein, Spottek had been assigned to the Courts Division as a bailiff for 13 years. During that time period, he was never counseled about poor work performance. Instead, his work performance was considered exemplary, and he trained new bailiffs.

Also, at the time of the incident involved herein, there was no department policy concerning where "forthwith" - sentenced defendants were to be taken for processing. Sometimes, these defendants were taken by bailiffs to the EMU (the Electronic Monitoring Unit) which is located in the Safety Building. Other times, these defendants were taken to the jail and booked there.

FACTS

On December 13, 2011, Spottek was working as a bailiff in Judge Jeffrey Wagner's courtroom. That morning, Alvin Henard appeared before Judge Wagner for sentencing. Judge Wagner sentenced Henard to 12 months incarceration for two counts of burglary. The judge ordered that Henard's sentence begin "forthwith" (meaning it was to begin immediately).

After Henard was sentenced, Spottek took Henard into custody. Spottek walked Henard to the nearest courtroom bullpen and searched him for contraband. When he did so, Spottek found keys and a cellular telephone in Henard's possession. Spottek let Henard keep those items (i.e. his cellular telephone and keys). The reason Spottek did not confiscate those items from Henard was because Spottek planned to take Henard to the EMU where Spottek knew that Henard would be searched again and his personal property (i.e. his keys and telephone) would be placed in a plastic property bag.

As was his regular practice, Spottek then took the inmate to the EMU (as opposed to taking the inmate to the CCF–C).

When he did that (i.e. take Henard to the EMU), Spottek did not put Henard in handcuffs. Spottek testified that at the time, it was common practice among bailiffs to forego handcuffing defendants if the defendant was cooperative. Spottek described Henard as being cooperative, so he escorted Henard to the EMU uncuffed.

When Spottek arrived at the EMU with Henard, no one was at the front desk, so Spottek walked further into the EMU office. Spottek testified that he saw two correction officers talking in the hallway and he told them (i.e. the two correction officers) that he had a defendant that was sentenced "forthwith" who needed to be processed. Spottek testified that in response, one of the COs said have Henard sign in and that one of them would be with him in a minute. Spottek then handed Henard his paperwork, told him to sign in at the front desk, and wait in the waiting area until someone came to process him. Spottek did not handcuff Henard to a chair in the EMU office. Spottek then left Henard unattended in the EMU office.

Sometime after Spottek left the EMU office, Henard also left. Henard just walked out of the EMU waiting area and the Safety Building. Henard did not report to the jail either.

About a month later, Henard was apprehended during a traffic stop and taken back into custody. Henard is currently serving his 12-month sentence.

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The Employer then opened an internal investigation. The investigation was conducted by Lieutenant Douglas Holton of the Employer's Internal Affairs Division. As part of his investigation, he interviewed five people: Spottek, Inmate Henard and Correction Officers Sheronda Fenceroy, Martin Peña and Ramona Colon. Afterward Holton wrote a report known as an "Investigative Brief". In that report, he reached the following conclusions:

> Deputy Spottek failed to properly process a "forthwith" sentenced defendant according to policy. Henard should've been taken to the CCF-C for booking as a standard procedure. Instead, Henard was escorted without being handcuffed to an unsecure room and told to sit without being handcuffed in the chair. Although Dep. Spottek stated he advised a correction officer working in EMU that he was bringing in a "forthwith" sentenced defendant, none of the three correction officers working that day could recall that happening. Deputy Spottek could not recall specifically who he turned Henard over to, nor did he write the information down in his daybook.
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> Deputy Spottek also stated that he had Henard check in by signing the "sign-in" sheet located on the intake desk. However, his name is not on the "sign-in" sheet from that day.

> Deputy Spottek's lack of thoroughness and judgment allowed Henard to leave EMU prior to being booked in to begin serving his sentence as ordered by Judge Wagner.
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> . . .

Based on those conclusions, Holton found that Spottek committed three departmental rule violations and two county civil service rule violations. The department rules he was accused of violating were: 202.14 (Violation of Policy, to wit 301.06.3 Returning Prisoners – Remanding New Prisoners to Sheriff); 202.15 (Knowledge of Duties, Rules and Regulations) and 202.20 (Efficiency and Competence). Rule 202.14 provides thus:

> Members shall not commit any act, or omit any act, which is contrary to their training or constitutes a violation of any Milwaukee County Sheriff's Office policy, procedure, rule, regulation, order, or directive, whether stated in this section or elsewhere.

Rule 202.15 provides thus:

> Members shall be accountable for their knowledge of, performance of, and familiarization with all duties, policies, procedures, rules, and regulations of the Milwaukee County Sheriff's Office.

Rule 202.20 provides thus:

> 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.

The County civil service rules he was accused of violating are part of Rule VII, Section 4(1). He allegedly violated subparagraph (l) which prohibits "Refusing or failing to comply with departmental work, policies or procedures" and subparagraph (u) which prohibits "Substandard or careless job performance."

Lieutenant Holton's findings were subsequently reviewed by Inspector Richard Schmidt. On June 1, 2012, Inspector Schmidt issued Order No. 2572 which indicated that Deputy Spottek was suspended for five days for violating the five rules just referenced. Since the five rule violations referenced in Order No. 2572 are the same five rules referenced in Lt. Holton's "Investigative Brief", it is apparent that the Inspector adopted Lt. Holton's findings as his own and disciplined Spottek for the reasons set forth in Holton's "Investigative Brief".

Based on the parties' collective bargaining agreement, Spottek's suspension was appealed to arbitration.

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After the incident referenced above occurred, the Employer acknowledged that there were inconsistencies in the Department concerning how "forthwith" – sentenced defendants were processed. To address that, the Employer established a new policy concerning how "forthwith" – sentenced defendants were to be processed. Under the new policy, those defendants are now to be booked directly into the jail (i.e. the CCF–C), and not taken to the EMU.

POSITIONS OF THE PARTIES

Association

The Association's position is that just cause did not exist for Spottek's five-day suspension. The Association contends that Spottek's work performance on the day in question was not deficient (as the Employer alleges). Building on the premise that Spottek did not commit workplace misconduct, the Association maintains that the discipline which was imposed on Spottek was not warranted and therefore the discipline should be rescinded or reduced. It elaborates as follows.

For the purpose of context, the Association acknowledges that on the day in question, Spottek was working as a bailiff in a judge's courtroom. It submits that after a judge sentences someone to jail "forthwith", the bailiff is supposed to search them and escort them to where they are processed. The Association contends that in his interaction with inmate Henard, Spottek followed the proper department procedure and thus committed no workplace misconduct.

First, the Association addresses the search that Spottek conducted on Henard after Spottek took Henard into custody. It acknowledges that following that search, Spottek did not confiscate the cell phone and keys that Henard had in his possession. It asserts there is a legitimate reason for that, namely that those items are not on the Department's list of contraband. Even if those items are considered contraband, the Association emphasizes that Spottek knew he was taking Henard to the EMU, and that the COs there would search Henard again (before taking him to the jail), and put his personal property in property bags. Aside from that, the Association also notes that Spottek testified that the reason he allowed Henard to keep those items was because the COs at the EMU might ask Henard for phone numbers that were listed in Henard's cell phone. Based on the above, the Association maintains that Spottek should not have been disciplined for an improper search of Henard.

Second, the Association acknowledges that when Spottek escorted Henard from the courtroom to the EMU, Henard was not handcuffed. According to the Association, there is a

simple explanation for that. It's this: the Employer's policy does not require defendants who are going to the EMU to be handcuffed while they are walking in the hallways to the EMU. Thus, the Association disputes the Employer's contention that Spottek violated procedure by not handcuffing Henard for the walk to the EMU. The Association avers that at the time, it was common practice for bailiffs not to handcuff defendants that are cooperative. In that regard, it cites Spottek's testimony that Henard was cooperative and followed his (Spottek's) orders.

Third, the Association addresses the fact that Spottek took Henard to the EMU rather than the jail. According to the Association, it was common practice at the time for bailiffs to take "forthwith" sentenced defendants to the EMU. It acknowledges that after this incident occurred, the Employer created a new policy whereby "forthwith" sentenced defendants are now to be booked in the jail (and not the EMU). However, that was not the policy when this matter occurred. The Association also points out that the Employer does not even mention this alleged violation in their brief.

Fourth, the Association addresses the Employer's claim that when Spottek took Henard to the EMU, he did not handcuff Henard to a chair or take any steps to ensure that someone supervised Henard after he (Spottek) left the room. According to the Association, Spottek properly turned Henard over to the COs working in the EMU. The Association maintains that this occurred when Spottek told the COs who were working in the EMU that day that he had a prisoner to be processed "forthwith", and one of the COs responded that they would be with Henard in a minute. Thus, the Association relies exclusively on Spottek's testimony for their proposition that Spottek "did make contact" with a CO at the EMU before he left Henard there. With regard to the three COs who later told Lt. Holton that they did not see or make contact with Spottek, the Association opines that it is "not surprising" that they said that, because "none of the COs want to get in trouble for letting Henard sit in the waiting area for 20-30 minutes without anyone helping him." According to the Association, all the COs are trying to do is "shift blame for their actions onto Spottek." The Association therefore maintains that it is not Spottek's fault that the COs in the EMU failed to process Henard in a timely manner and, as a result, he walked out of the EMU waiting room.

Putting all the foregoing together, it's the Association's position that Spottek was not remiss in performing his work duties on the day in question. Said another way, he committed no workplace misconduct for which he could be disciplined.

The Association argues in the alternative that if Spottek did commit workplace misconduct and violate one or more of the Employer's rules, there still was not just cause for the level of discipline imposed on him. Here's why. The Association first addresses Spottek's disciplinary history. It emphasizes that before this incident occurred, he had never been previously suspended. The Association sees that as significant. It also points out that Spottek had never been counseled about anything related to performing his bailiff job duties. Thus, he served as a bailiff for 13 years without incident. It also points out that Spottek has received numerous accolades for his service to the County. The Association contends that under these

circumstances, a five-day suspension for whatever mistake he made on the day in question was excessive. The Association therefore asks the arbitrator to either rescind the five day suspension or reduce Spottek's punishment to a level more fitting his past disciplinary history. According to the Association, a written reprimand or a counseling would likely eliminate any further problems in this area, especially given that Spottek has since been transferred to the patrol division and is no longer performing duties as a bailiff.

County

The County's position is that just cause existed for Spottek's five-day suspension. In its view, Spottek's work performance on December 13, 2011 relative to Inmate Henard was deficient in four ways. Building on the premise that those four deficiencies constituted workplace misconduct, the County maintains that the discipline which was imposed on Spottek for that misconduct was warranted under the circumstances. It elaborates as follows.

For the purpose of context, the Employer notes that on the day in question, Spottek was working as a bailiff in a judge's courtroom. It submits that after a judge sentences someone to jail "forthwith", the bailiff is supposed to search them, put them in handcuffs and take them to the jail. The Employer contends that in his interaction with inmate Henard, Spottek was deficient in all those areas.

First, the Employer addresses the search that Spottek conducted on Henard after Spottek took Henard into custody. It contends that the search was inadequate because Spottek failed to confiscate the cell phone and keys that Henard had in his possession. According to the Employer, Spottek should have confiscated those items.

Second, the Employer notes that when Spottek escorted Henard from the courtroom to the EMU, Henard was not handcuffed. According to the Employer, he should have been handcuffed. To support that premise, the Employer emphasizes that Henard had just been sentenced to jail for two counts of burglary. The Employer opines that it was a "violation of all common sense" for Spottek to choose "to escort this convicted felon through public hallways without handcuffs." The Employer also opines that it is of no significance that the EMU (where Spottek took Henard) was just one floor below Judge Wagner's courtroom.

Third, the Employer addresses the fact that Spottek took Henard to the EMU. According to the Employer's "Notice of Suspension" document, Spottek should have taken Henard to the jail, and not the EMU, because that is "standard procedure".

Fourth, the Employer addresses the fact that when Spottek arrived at the EMU, he did not handcuff Henard to a chair or take any steps to ensure that someone supervised Henard after he (Spottek) left the room. According to the Employer, Spottek should have done so. The Employer argues that had he done so, that would have prevented Henard from walking out of the room and the building.

As part of this matter, the Employer addresses Spottek's contention that when he got to the EMU, he told the COs who were working in the EMU that day that he had a prisoner to be processed "forthwith". It notes in this regard that when Lt. Holton interviewed the three COs who worked that day in the EMU, none of them "could recall that happening". Specifically, none of them recalled either seeing or speaking to Spottek or Henard on the day in question. The Employer sees that as significant.

Putting all the foregoing points together, it's the Employer's view that Spottek was remiss in performing his work duties in four ways on the day in question. That, in turn, constituted workplace misconduct for which he could be disciplined.

With regard to the level of discipline which was imposed, the Employer argues that a five-day suspension was reasonable under the circumstances. It acknowledges that prior to this case, Spottek had not been previously suspended. Be that as it may, the Inspector nonetheless decided that a five-day suspension was warranted. The County requests that the arbitrator give deference to the discipline imposed by the Inspector, and uphold Spottek's five-day suspension.

DISCUSSION

The parties stipulated that the issue to be decided here is whether there was just cause to suspend Deputy Spottek for five days. My answer to that question is split as follows. I find that the Employer did have just cause to discipline Spottek for leaving Henard unattended at the EMU. That should not have occurred. However, I further find that a five-day suspension was not warranted under the circumstances because the Employer did not prove that Spottek committed the other three charges of alleged misconduct. Accordingly, I reduce Spottek's discipline to a written warning. My rationale follows.

The threshold question is what standard or criteria is going to be used to determine just cause. The phrase "just cause" is not defined in the collective bargaining agreement, nor is there contract language therein which identifies what the Employer must show to justify the discipline imposed. Given that contractual silence, those decisions have been left to the arbitrator. Arbitrators differ on their manner of analyzing just cause. While there are many formulations of "just cause", one commonly accepted approach consists of addressing these two elements: first, did the employer prove the employee's misconduct, and second, assuming the showing of wrongdoing is made, did the employer establish that the discipline which it imposed was justified under all the relevant facts and circumstances. That's the approach I'm going to apply here.

As just noted, the first part of the just cause analysis being used here requires a determination of whether the employer proved the employee's misconduct. Attention is now turned to making that call.

While the Employer's "Notice of Discipline" did not explicitly say so, that document essentially charged Spottek with four deficiencies in his work conduct on December 13, 2011

relative to Inmate Henard. These alleged deficiencies will be identified and addressed in the discussion which follows.

First, the Employer contends that when Spottek searched Henard after he (Henard) was sentenced, Spottek's search was deficient because Spottek failed to confiscate Henard's cell phone and keys. It's true that Spottek did not confiscate those two items from Henard when he found them during his search. In and of itself though, that doesn't make the search deficient. Here's why. The two items in question (i.e. a cell phone and keys) are not on the Department's list of contraband. If the Department wants deputies to confiscate all cell phones and keys, it can put those items on the contraband list. However, it hasn't done that. Even if those items are considered contraband though, Spottek offered a legitimate reason why he did not confiscate them. It was this: Spottek knew he was taking Henard to the EMU, and that the COs there would search Henard again (before taking him to jail), and put his personal property in property bags. That meant that if Spottek had confiscated those items from Henard, Spottek would have had to later give them back to Henard when he got to the EMU, so that those items could be put in property bags. As Spottek saw it, that made little sense. I concur, and find that Spottek's search of Henard was not deficient. Building on that premise, I further find that the Employer did not prove that Spottek either violated department procedure or committed workplace misconduct relative to his search of Inmate Henard.

Second, the Employer objects to the fact that Spottek did not put Henard in handcuffs for the walk to the EMU. According to the Employer, he should have. While one would think that this particular matter would be covered by an existing department policy, the fact of the matter is that there is no policy which requires defendants going to the EMU to be handcuffed. That's why the Employer does not cite a particular policy to support its contention that Henard should have been handcuffed. Instead, the Employer simply relies on what it calls "common sense" to support the proposition that Spottek should have put Henard in handcuffs for the walk to the EMU. I could accept the Employer's proposed "common sense" proposition were it not for the fact that the record shows that it was common practice at the time for bailiffs not to handcuff defendants that were cooperative. Spottek testified that Henard was cooperative and followed his (Spottek's) orders. Given the fact that there was not an existing department policy that required defendants going to the EMU to be handcuffed, while at the time there was a practice of bailiffs not handcuffing defendants that were cooperating, I conclude that it was acceptable conduct for Spottek to take Henard to the EMU without handcuffs. Building on that premise, I further find that the Employer did not prove that Spottek either violated department procedure or committed workplace misconduct by not handcuffing Henard for the walk to the EMU.

Third, the Employer objects to the fact that Spottek took Henard to the EMU for processing rather than the jail. While the Employer contends it was "standard procedure" for "forthwith" sentenced defendants to be taken to the jail, the record facts show otherwise. What the record shows is that at the time, sometimes these defendants were taken to the EMU and sometimes they were taken to the jail and booked there. After the incident involved here occurred (meaning after Inmate Henard walked away from custody), the Employer created a

new policy concerning how "forthwith" sentenced defendants are to be processed. Under this new policy, those defendants are now to be booked directly into the jail, and not taken to the EMU. While the Employer certainly has the right to create a policy like the new one just noted, changes in policy have to be applied prospectively. They cannot fairly be applied retroactively. What the Employer is trying to do in this case is apply its new procedure retroactively so as to hold Spottek at fault for taking Henard to the EMU rather than the jail. Simply put, it can't do that. Said another way, the Employer can't fairly hold Spottek to a policy that was not in effect on December 13, 2011. On that date, it was acceptable conduct for bailiffs to take "forthwith" sentenced defendants to the EMU. Building on that premise, I find that the Employer did not prove that Spottek either violated department procedure or committed workplace misconduct by taking Henard to the EMU for processing.

Fourth, the Employer faults Spottek for leaving Henard unattended in the EMU and not handcuffing him to a chair. While the Association contends that this charge is unfounded (just like the other three charges), I disagree and find that this charge contains a valid criticism. Here's why. When Spottek took Henard to the EMU, it was his responsibility to properly turn Henard over to the COs who were manning the EMU. As Spottek sees it, he did that because he told the COs that he had a "forthwith" defendant who needed to be processed, and one of the COs responded that they'd be with him in a minute. While none of the COs who worked that day in the EMU recalled either seeing or speaking to Spottek, I've decided not to base my finding herein on a credibility call. Instead, I've decided to simply assume that even if Spottek said what he testified he said, and he got a "be with you in a minute" response from one CO, that was an insufficient basis for him (Spottek) to conclude that he had just turned over control of Henard to the COs. There were at least two things that Spottek could have done next. First, he could have waited in the EMU for longer than he did and ensured that a CO came out from the back and actually took possession/control of Henard. Second, if he didn't want to wait in the EMU anymore, Spottek could have handcuffed Henard to a chair in the EMU. Had Spottek done either of the foregoing, and Henard later walked away from custody, the proverbial finger of blame for that could not fairly be pointed at Spottek. However, Spottek did neither of the foregoing, and instead just left Henard unattended in the EMU. That turned out to be the wrong choice though, because Henard just walked away from custody after Spottek left him there unattended. Obviously, the Employer doesn't want inmates to be able to walk away from custody. However, since that is what happened here, the question is whether fault can fairly be attributed to Spottek for that occurring. I find that fault can indeed be fairly attributed to Spottek for leaving Henard unattended at the EMU. Simply put, that should not have occurred. I therefore find that Spottek committed workplace misconduct by leaving Henard unattended at the EMU. That misconduct, in turn, warranted discipline.

Putting all the foregoing together, I have found that the Employer did not prove three of the misconduct charges it made against Spottek. It did prove the fourth misconduct charge.

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Having so found, the focus now turns to the second part of the just cause analysis being used here (namely, that the employer establish that the penalty imposed was appropriate under all the relevant facts and circumstances).

When employers decide that an employee's misconduct warrants a suspension of some sort, they usually start with a relatively short suspension of, say, one or two days. That didn't happen here. Instead, the Inspector decided that a suspension of that length was not long enough, and he imposed a five-day suspension. At issue here is whether that decision passes muster.

In addressing that point, I've decided to begin by noting that the undersigned has arbitrated many suspension appeal cases with these parties over the years. In those hearings, what usually happened was that one side or the other offered some evidence to support their position that the discipline which the Employer imposed on the employee involved was either consistent with, or inconsistent with, the discipline imposed on similarly situated employees.

Here, though, neither side offered any evidence whatsoever concerning prior disciplinary cases involving similarly situated employees.

In this case, that lack of evidence cuts against the Employer. Here's why. When the Employer imposes a multi-day suspension, it has to base the length of the suspension on some objective factors which can withstand arbitral scrutiny. Said another way, the Employer has the burden of showing that the punishment it meted out was not excessive. I find it did not meet that burden for the following reasons. First, the objective facts in the record show that Spottek is a long term employee with no prior discipline (either written warnings or suspensions). Thus, he had a clean disciplinary work record prior to this incident. Additionally, he was never counseled about poor work performance. Instead, prior to this incident, his work performance as a bailiff was considered exemplary. These objective facts militate against a five day suspension for the single act of misconduct which was proven. Second, as previously noted, the Employer did not show that Spottek's misconduct was similar to other serious misconduct cases where a multi-day suspension was imposed. Third, it would be patently unfair to leave the discipline imposed on Spottek unchanged when three of the four charges against him were not proven. Given the foregoing, I find that a five day suspension was excessive under the circumstances. Accordingly, the five day suspension is overturned. The Employer can give Spottek a written warning for leaving Henard unattended in the EMU. The Employer shall make Spottek whole for the five days he was suspended.

Based on the foregoing and the record as a whole, the undersigned enters the following

AWARD

1. That there was just cause to discipline Deputy Spottek for leaving an inmate unattended in the EMU; and

2. That just cause does not support a five day suspension for that misconduct. That punishment was excessive because the Employer did not prove that Spottek committed the other three charges of alleged misconduct. The five day suspension is therefore overturned. The Employer can give Spottek a written warning for leaving an inmate unattended in the EMU. The County is directed to make Spottek whole for the five days he was suspended.

Dated at Madison, Wisconsin, this 18th day of December, 2012.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

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