BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION

and

MILWAUKEE COUNTY

Case 785
No. 71580
MA-15170

(Kraig Kveen Suspension Appeal)

Appearances:

Graham Wiemer, MacGillis Wiemer, Attorneys at Law, 11040 West Bluemound Road, Suite 100, 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, were parties to a collective bargaining agreement which provided 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 Kraig Kveen's suspension. The undersigned was so designated. A hearing was held in Milwaukee, Wisconsin on November 5, 2012. The hearing was not transcribed. The parties filed briefs, whereupon the record was closed on December 7, 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 Kraig Kveen for seven days? If not, what is the appropriate remedy?

BACKGROUND

The County operates a Sheriff's Department and a jail. The Association is the exclusive collective bargaining representative for the Department's deputy sheriffs. The County also employs corrections officers (known as COs). The COs work at the jail. The Association does not represent the COs.

Kraig Kveen is a deputy sheriff who has been with the Department for 17 years. The record reflects that prior to receiving the seven-day suspension involved herein, Kveen had the following disciplinary history: he received a one-day suspension in 2006 and another one-day suspension in 2011.

At the time of the incident involved herein, Kveen was assigned to the Courts Division as a bailiff. The record does not indicate how long he had been a bailiff.

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Bailiffs perform numerous job duties. They secure the courtroom, process paperwork and communicate with the public. In addition to the foregoing tasks, they also search people who are taken into custody. The last task referenced is involved in this case.

The Department conducts searches on inmates for several reasons. One reason is that an inmate's personal property has to be safeguarded. Another reason is to protect the security of inmates and jail staff. Still another reason is to keep contraband out of the jail. To effectuate these ends, people are searched before they get into the jail.

The Department's rules identify four different types of searches that officers may be required to perform: (1) pat-downs; (2) custodial; (3) strip; and (4) body cavity. In terms of intrusiveness, the fourth is considered the most intrusive with the first being the least intrusive. In this case, just the first two types of searches were used. The Department's rules describe a pat-down search as a "search of a person/outer clothing, focusing primarily on the lunge areas. In most cases, it is a limited search for weapons or other forms of contraband." Said another way, a pat-down search generally consists of an officer feeling the outside of a person's outer clothing, checking for the feel of a potential weapon and/or contraband. A custodial search is more thorough than a pat-down search. The Department's rules describe a custodial search thus: "Any person arrested and taken into custody may lawfully be searched by the jailer, in addition to the search, which may have been done incident to arrest by the officer in the field."

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Here's an overview of what happened in this case. Two different Department employees searched a person and did not find any contraband in his possession. Unbeknownst to the two employees, though, the person had contraband in his possession (namely, pills). The employees just didn't find the pills on the person when they searched him. As a result, the person took the pills into the jail. Another jail employee subsequently discovered the pills.

FACTS

On August 12, 2011, Deputy Kveen was working as a bailiff in the Out of Custody Intake Court. While he was working there, a judge ordered defendant Michael O'Brien to be taken into custody for bail jumping. Per the judge's order, Kveen arrested O'Brien and handcuffed him. Kveen then took O'Brien to a hallway and handcuffed him to a bench. There, Kveen performed a pat-down search on O'Brien. The search which Kveen performed on O'Brien was similar to what he had done hundreds of times before. Specifically, he searched O'Brien's outer clothing, including the front pocket area. When he did so, Kveen found no contraband in O'Brien's possession. As already noted at the end of the **BACKGROUND** section though, O'Brien actually had a bunch of pills in his possession. Kveen just didn't find them. O'Brien was wearing pants that had deep front pockets. The pills were in one (or more) of the front pockets. The pills were not in a typical pill container. Instead, they were loose.

Following his search, Kveen left O'Brien handcuffed to a bench and returned to his courtroom. After the court session ended, Kveen took O'Brien to the jail (officially known as the CCF-C, the County Correctional Facility – Central). There, Kveen turned O'Brien over to a corrections officer (CO). That ended Kveen's involvement with O'Brien.

The CO that took possession of O'Brien was Kyle Peters. Peters was a relatively new employee who had just been working as a CO for five months. That day, Peters was the jail's search officer. As the name implies, a search officer is specifically tasked with performing the custodial search. Peters then performed a custodial search on O'Brien. When he did so, Peters found no contraband in O'Brien's possession. As already noted at the end of the **BACKGROUND** section though, O'Brien actually had a bunch of pills in his possession. Peters just didn't find them.

After Peters processed O'Brien's personal property, O'Brien put on jail clothes. When O'Brien did so, he transferred the pills in his possession from his street clothes to his jail clothes. He subsequently took the pills into the jail with him.

The next day, O'Brien posted bail, so jail personnel began the procedure for releasing him. When the release officer processed the paperwork, he discovered that $25 of O'Brien's money was missing from (O'Brien's) money envelope. This discrepancy caused the release officer's supervisor to order an additional search of O'Brien. When this search was performed, 39.5 blue pills were discovered in one of O'Brien's jail-issued socks. An

additional pill was found in the pocket of O'Brien's pants. O'Brien subsequently identified the pills as oxycodone.

After the pills were discovered, Department investigators learned that O'Brien had a valid prescription for the pills. O'Brien told the investigators that he had brought the pills with him to court, and had them loose in his front pants pocket. O'Brien further told investigators that his pants pockets were unusually large and deep, and because of that, the officers simply did not find the pills when they searched him. Since O'Brien had a valid prescription for the pills, he was not charged with a crime for taking the pills into the jail.

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Kveen, Peters and O'Brien were subsequently interviewed about the above-referenced matter by Lt. Rugaber of the Department's Internal Affairs Division.

Rugaber subsequently wrote a report known as an "Investigative Brief". In that report, he concluded that both Kveen and Peters performed an incomplete search on O'Brien because both failed to find the pills that O'Brien had in his possession. Based on that conclusion, Rugaber found that both Kveen and Peters committed two departmental rule violations and three county civil service violations. The departmental rules both were accused of violating were 202.14 (Violation of Policy) and 202.20 (Efficiency and Competence). The former provides thus:

> 202.14 Violation of Policy
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> 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.

The latter provides thus:

> 202.20 Efficiency and Competence
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> 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 they were accused of violating were subparagraphs (l), (u) and (t) of Rule VII, Section 4(1). Subparagraph (l) prohibits "Refusing or failing to comply with departmental work rules, policies, procedures"; subparagraph (u) prohibits "Substandard or careless job performance" and Subparagraph (t) prohibits "Failure or inability to perform the duties of assigned position."

Lt. Rugaber's findings were subsequently reviewed by the Sheriff. Sheriff David Clarke subsequently decided to discipline both Peters and Kveen for not finding the pills during their searches of O'Brien. The discipline which Clarke imposed on Peters was a written warning and remedial training on searches. Clarke told Rugaber that he was imposing that (mild) discipline because Peters was a new employee. The discipline which Clarke imposed on Kveen was a seven-day suspension. Clarke told Rugaber that the reason he was giving Kveen more discipline than Peters was because he (Clarke) was holding Kveen to a higher standard than Peters because Kveen was a 17 year veteran of the department.

Clarke subsequently issued a Notice of Suspension which indicated that Kveen was suspended for seven days for violating the five rules just referenced. The wording in the "Notice of Suspension" was verbatim to that contained in Lt. Rugaber's "Investigative Brief". As a result, it is apparent that the Sheriff adopted Lt. Rugaber's findings as his own and disciplined Kveen for the reason set forth in Rugaber's "Investigative Brief".

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

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At the hearing, Kveen offered two theories about how the pills ended up in O'Brien's possession inside the jail. One theory was that O'Brien acquired the pills in the jail. The other theory was that O'Brien smuggled the pills into the jail in a body cavity.

POSITIONS OF THE PARTIES

Association

The Association's position is that just cause did not exist for Deputy Kveen's seven-day suspension. The Association asks that the discipline be either rescinded or reduced to a written warning. It elaborates as follows.

The Association begins by acknowledging these basic facts. First, it acknowledges that pills were found in the jail in O'Brien's possession. Second, it admits that pills are contraband and should not have been allowed to enter the jail. Third, it acknowledges that two people were responsible for searching O'Brien before he went into the jail: Deputy Kveen was the first and CO Peters was the second.

Having made those admissions, the Association contends that Kveen did nothing wrong and violated none of the Employer's rules. Here's why. For background purposes, the Association notes that two types of searches are relevant to this case: pat-down and custodial. The latter is more thorough than the former. The Association points out that a bailiff is tasked with performing a pat-down search and the search officer at the jail is tasked with performing a custodial search. The Association contends that Kveen performed a head-to-toe pat-down

search on O'Brien (as he was tasked with doing). According to the Association, Kveen's search of O'Brien "met and likely exceeded the standards required by Milwaukee County's own policy." Putting it conversely, the Association argues that the County "provided no evidence showing that Kveen's search in this case was not consistent with the searches of equivalently trained officers." Building on that, the Association submits that just because pills later turned up in O'Brien's possession in the jail doesn't mean that Kveen missed them in his pat-down search of O'Brien. The Association posits the possibility that O'Brien could have "had the pills in his shoes or possibly hidden in another part of his body" when Kveen performed his pat-down search on O'Brien. If that was the case, then Kveen could not possibly have found the pills in a pat-down search. The Association argues that by holding Kveen responsible for the pills that later turned up in the jail, the County "apparently expects" bailiffs to perform custodial searches of defendants. Building on that premise, the Association calls that expectation "impractical and unrealistic" given all the other tasks that bailiffs are performing (such as securing the courtroom, processing paperwork and communicating with the public). The Association further emphasizes that it was the search officer (in this case, Peters) who was tasked with performing the more thorough custodial search on O'Brien. The Association maintains that if O'Brien took pills into the jail, it should be Peters – and not Kveen – that "shoulders the majority of the blame" for that occurring. Building on all the foregoing, the Association maintains that Kveen committed no misconduct for which he could be disciplined.

Next, the Association argues in the alternative that even if Kveen did commit workplace misconduct via his search of O'Brien, there still was not just cause for the level of discipline imposed on him. Here's why. First, the Association acknowledges that Kveen had been previously disciplined with two one-day suspensions. However, in its view, going from that disciplinary history to a seven-day suspension was simply excessive. Second, addressing the matter of comparable discipline, the Association points out that CO Peters was not given a seven-day suspension, but rather was given a written warning. The Association asks rhetorically "where's the fairness in that?" In its view, it wasn't fair and the Employer didn't prove that it was. Building on that, the Association opines that since the two employees did the same thing but received different levels of discipline, Kveen was subject to disparate (disciplinary) treatment. The Association asks the arbitrator to remedy that inequity. According to the Association, the arbitrator should rescind the seven-day suspension and reduce Kveen's punishment to a written reprimand (i.e. the same punishment which was imposed on CO Peters).

County

The County's position is that just cause existed for Kveen's seven-day suspension. In its view, Kveen committed workplace misconduct when he failed to find the pills that O'Brien had in his pants pockets during his search. According to the County, he should have found the pills. Next, building on the premise that Kveen committed workplace misconduct, the County maintains that the discipline which was imposed on Kveen for that misconduct was warranted under the circumstances. It elaborates as follows.

For purposes of background, the County notes that bailiffs and COs have to search people before they enter the jail. The point of the search is to keep contraband out of the jail. In this case, O'Brien had contraband (i.e. pills) in his possession. When Deputy Kveen searched O'Brien, he did not find the pills. Later, CO Peters searched O'Brien, and he too did not find the pills that O'Brien had in his possession. As a result, O'Brien took the pills into the jail with him. The pills were discovered when O'Brien was in the process of leaving the jail.

The Employer first addresses the theories that Kveen posited at the hearing about how the pills ended up in O'Brien's possession inside the jail. One of Kveen's theories was that O'Brien acquired the pills inside the jail. The Employer dismisses that possibility by pointing out that O'Brien had a valid prescription for the pills. The other theory which Kveen posited was that O'Brien smuggled them into the jail in a body cavity. It dismisses that possibility for two reasons. First, it notes that no evidence was presented that showed that "O'Brien had some reason to cause problems for the deputy." Second, it points out that O'Brien told several department officials afterwards that he had the pills in his pants pockets. They (meaning the department officials) found him credible on that point.

Building on that premise, the Employer maintains that O'Brien had the pills in his front pants pockets when he was searched. The Employer contends that Kveen should have found the pills when he searched O'Brien. However, since Kveen didn't find the pills, it's the Employer's view that Kveen's search was inadequate. Said another way, Kveen was remiss in searching O'Brien because he failed to find the pills that O'Brien had in his front pants pockets.

The County contends that Kveen's inadequate search violated five department and civil service rules which govern employee conduct. According to the Employer, Kveen violated Department Rules 202.14 and 202.20 and Civil Service Rule VII, 4(l), subparagraphs (l), (t) and (u).

Turning now to the level of discipline which was imposed, the Employer argues that a seven-day suspension was reasonable under the circumstances. Here's why. First, Kveen did not have a clean disciplinary record. It notes that Kveen had already received two prior one-day suspensions. According to the Employer, it took that into account when it decided on the appropriate level of discipline here. Second, the County asserts that while the Association made a disparate treatment argument, it failed to prove that contention. To support that premise, the Employer acknowledges that Peters did not get the same discipline that Kveen got (i.e. a seven-day suspension); instead, Peters got a written warning and remedial training. However, as the Employer sees it, there was a logical non-discriminatory reason for that, namely that Peters – as a new employee – had no prior discipline. Also, the Sheriff felt that he could hold Kveen to a higher standard than Peters because Kveen was a 17-year veteran of the department (and Peters, by contrast, had only been with the Department for five months). The County also notes that Peters wrote a statement to Sheriff Clarke wherein he said he could not believe he would miss the pills in his search (as he did). In contrast, the County notes that Kveen made no such admission and acceptance of responsibility. The County therefore

requests that the arbitrator give deference to the discipline imposed by the Sheriff, and uphold Kveen's seven-day suspension.

DISCUSSION

The parties stipulated that the issue to be decided here is whether there was just cause to suspend Deputy Kveen for seven days. My answer to that question is split as follows. I find that the Employer did have just cause to discipline Kveen for failing to find the pills that were in O'Brien's front pockets when he searched him. Simply put, he should have found the pills. However, I further find that the discipline which the Employer imposed on Kveen for that misconduct (i.e. a seven-day suspension) is excessive for the reasons noted later. Accordingly, I reduce Kveen's discipline from a seven-day suspension to a two-day suspension. 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 it imposed on the employee 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.

In this case, I'm just reviewing the discipline imposed on Kveen. To properly do that, I find it necessary to comment, in the discussion which follows, on Peters' role in this matter and on the discipline he received.

I'm going to start by reviewing the proverbial big picture. What happened, of course, is that pills were found in an inmate's possession in the jail. That's not supposed to happen. Both sides acknowledged that pills are considered contraband and, as such, aren't supposed to get into the jail. Obviously, though, there was a breakdown somewhere, because pills got inside the jail.

The first question to be answered is how did that happen (meaning how did the pills get inside the jail)? At the hearing, Kveen offered two theories concerning how the pills came to be in O'Brien's possession inside the jail. His first theory was that O'Brien acquired the pills inside the jail. That theory doesn't hold water for the following reason. After the pills were discovered, O'Brien told the department's investigators that he had a prescription for the pills.

The department's investigators then checked out his claim and learned that he did indeed have a valid prescription for the pills. That's why O'Brien was not subsequently charged with a crime for having the pills in his possession inside the jail.

The second theory which Kveen proffered was that O'Brien smuggled the pills into the jail in a body cavity. I've decided to note at the outset that if that's what actually happened (meaning that's how Kveen got the pills into the jail), then I could accept the premise that Kveen was not responsible for finding the pills. That's because it was not Kveen's job to perform a body cavity search on O'Brien. If the Employer wanted a body cavity search performed, it certainly was not going to be performed by a bailiff who had numerous other tasks to attend to in the courtroom. However, I can't accept the proffered body cavity theory for the following reason. After the pills were discovered, O'Brien told the department's investigators that he had the pills in the front pockets of his pants. They (meaning the department's investigators) found him credible on that point. Given that finding of credibility by the department's investigators, it was incumbent upon the Association to give me a factual basis for reaching a different conclusion than they did concerning O'Brien's credibility on this point. That did not happen. That being so, I accept the Employer's premise that O'Brien had the pills in his front pockets (as opposed to some other place inside his body).

What happened next in our story was that two employees searched O'Brien. First, Kveen searched him. Then, Peters searched him. Neither of them found the pills which were in O'Brien's front pockets. One reason why neither officer found the pills is because they were not in a typical pill container. Rather, they were loose. Another reason was that O'Brien was wearing pants that had large deep front pockets. No doubt the foregoing made it hard to detect the pills.

Management officials were aware of the foregoing, but it didn't mollify them. Not surprisingly, they thought that the employees should nonetheless have found the pills in their search. I'm hard pressed to disagree with them on that point. Accordingly, I concur with the Employer on that point, and find that both employees should have found the pills in O'Brien's front pockets when they searched him.

In reaching that conclusion, I'm not saying that Kveen, as a bailiff, had to perform a custodial search on O'Brien. The Association's contention in that regard misses the mark. Bailiffs still just need to perform a pat-down search. However, even doing a pat-down search, Kveen should have found the pills in O'Brien's pockets. Similarly, Peters should have found the pills in O'Brien's pockets when he performed a custodial search. I therefore find that fault for not finding the pills in O'Brien's pockets can fairly be attributed to both employees.

The reason I addressed the conduct of both Kveen and Peters above is that it shows that they both committed the same misconduct. The misconduct was that each performed an inadequate search on O'Brien. That constituted misconduct for which they could be disciplined.

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The second part of the just cause analysis being used here requires a determination of whether the penalty which the Employer imposed for this misconduct was appropriate under all the relevant facts and circumstances.

While it's already been noted that Kveen and Peters committed the same misconduct, they were not given the same discipline. Peters received a written warning while Kveen received a seven-day suspension. Obviously, that's disparate treatment. However, in certain circumstances, disparate treatment can still pass arbitral scrutiny. The focus now turns to making that call.

When the Sheriff imposed a harsher discipline on Kveen than on Peters, his stated rationale for doing so was that he was holding Kveen to a higher standard than Peters because Kveen was a 17 year veteran of the department and Peters was a new employee. While there are no doubt situations where length of service can be a basis for disparate disciplinary treatment, I'm not going to use that factor (i.e. length of service) as a basis for my decision. Instead, I'm going to base my decision on factors other than length of service.

What I'm going to examine is the employee's disciplinary record. Arbitrators routinely review the employee's disciplinary record when assessing the punishment which an employer has meted out to an employee.

First, let's look at Peters. The record shows that at the time of this incident, he had only worked for the Employer for five months. While there's nothing in the record concerning his disciplinary history, the inference which I draw from that is that he had a clean disciplinary record up until this matter occurred. Were it otherwise, it no doubt would have been referenced at the hearing.

That's not the case with Kveen. He did not have a clean disciplinary record when this matter occurred.

When an employer decides that an employee's misconduct warrants advancing him/her to the suspension part of the progressive disciplinary sequence, they usually start with a one-day suspension. The record shows that the Employer had already done that for Kveen. Specifically, he received a one-day suspension in 2006 and another one-day suspension in 2011. Thus, he had already received two one-day suspensions. When an employee has already been suspended – as was the case with Kveen – the Employer can obviously take that into account when it decides on the appropriate level of discipline for subsequent misconduct. The rationale for this is that an employee who has already been suspended for misconduct is rightly exposed to more severe consequences for his action than, say, an employee with a clean record.

It follows from the disciplinary principles just noted that Kveen did not have to receive the same discipline as Peters. The Employer could rightly impose more discipline on Kveen

than Peters because the two had different disciplinary histories. Specifically, Peters had a clean disciplinary history while Kveen did not. As a result, the arbitrator expressly rejects the Association's contention that Kveen should receive the same discipline as Peters did (i.e. a written warning).

That finding still leaves the question open of what discipline is appropriate for Kveen. As already noted, the Employer decided that Kveen's misconduct warranted a seven-day suspension. It had the burden of showing that that level of punishment was not excessive. I find that it did not meet that burden for the following reasons. First, the Employer offered no evidence to show that Kveen's misconduct and disciplinary history was similar to other cases where a lengthy suspension was imposed. Second, even taking into account that Kveen was at the suspension level of the progressive disciplinary sequence, the Employer offered no explanation regarding why it selected the number it selected (i.e. seven days). That being so, the number selected gives the appearance of being selected at random. That's problematic. Third, it can't be overlooked that while Kveen and Peters committed the same misconduct, Kveen's discipline was so much harsher than Peters' was. The foregoing points militate against a seven-day suspension. I therefore conclude that a seven-day suspension was excessive. In so finding, I've decided to note that had the Employer imposed a suspension that was more in line with the length of suspensions that usually follow a one-day suspension, I would not have overturned it. However, the Employer didn't do that, and instead selected a number that simply doesn't pass arbitral muster. I find that given Kveen's prior disciplinary history of two one-day suspensions, the discipline warranted for the misconduct here is a two-day suspension. Accordingly, the seven-day suspension is reduced to a two-day suspension. The Employer shall make Kveen whole for the five-day difference between these two levels (i.e. seven days and two days).

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 Kveen for failing to find the pills that were in a person's pockets when Kveen searched the person; and

2. That just cause does not support a seven-day suspension for that misconduct. That punishment was excessive for the reasons noted. The seven-day suspension is therefore reduced to a two-day suspension. The County is directed to make Kveen whole for the difference (i.e. five days' pay).

Dated at Madison, Wisconsin, this 15th day of January, 2013.

Raleigh Jones /s/

Raleigh Jones, Arbitrator

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