BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION

and

MILWAUKEE COUNTY

Case 797
No. 71789
MA-15210

(Gary Mason 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.

James Carroll, Deputy 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 Gary Mason's suspension. The undersigned was so designated. A hearing was held in Milwaukee, Wisconsin on December 11, 2012. The hearing was not transcribed. The parties filed briefs, and the Association filed a reply brief, whereupon the record was closed on January 25, 2013. 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 discipline Deputy Gary Mason? 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.

Gary Mason is a deputy sheriff who has been with the Department for 14 years. At all relevant times herein, Mason was assigned to the Patrol Division. The Patrol Division oversees highways in Milwaukee County. The deputies assigned the Patrol Division enforce traffic laws, respond to accidents or other emergencies, direct traffic, and perform those duties necessary to ensure the safety of those who utilize the highways in Milwaukee County.

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The Department uses a document known as an "Employee Activity Documentation" (EAD) to memorialize both "performance recognition" and "counseling sessions". The same document is used for each category. Broadly speaking, "performance recognitions" are favorable to the employee, while "counseling sessions" are unfavorable to the employee. Even if the EAD memorializes a "counseling session" that is unfavorable to an employee, it is not considered formal discipline. Thus, for the purpose of progressive discipline, EADs are not part of the formal disciplinary process.

The record reflects that in 2011 and 2012, Mason received two EADs that were denominated as "counseling sessions". One was for failing to perform a certain duty, namely failing to drop the "hold" that had been placed on an impounded vehicle. The other was an admonition "to improve his productivity."

The record further reflects that in 2009, Mason was suspended for one day. The Association appealed that suspension to arbitration, and an arbitrator overturned it. The arbitrator ordered that the one-day suspension be expunged from Mason's personnel file.

Other than the matters just referenced, Mason has no disciplinary history with the Employer. Specifically, he has no prior rule violations, written warnings, or suspensions in his personnel file.

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Deputy Mason's father was terminally ill in 2011 and spent much of that year in and out of the hospital. Over the course of that year, Deputy Mason used up all of his accumulated sick leave caring for and helping his dying father. He also used up all of his other leaves, including vacation. Deputy Mason's father passed away on December 13, 2011.

FACTS

About a month later, Deputy Mason became sick himself. He exhibited the following symptoms: he had chills and trouble sleeping; he could not keep food down; and he had overwhelming flu-like symptoms. Mason was scheduled to work the third shift on January 13, 2012 (all dates hereinafter refer to 2012). Specifically, he was scheduled to work from 10:00 p.m. on January 13 until 6:00 a.m. on January 14. Because he was sick, he decided to not report to work. He called into work before his shift started and reported he would be absent due to his sickness. Consistent with his phone call, Mason missed the shift he was scheduled to work because he was sick.

Deputies are responsible for completing a time card for each pay period. The completed time cards are then submitted to their supervisor for approval. After the time cards are approved, they are submitted to payroll for payment.

On January 19, Mason completed his time sheet for the January 8 through January 21 pay period. For the shift that he missed on January 13 and 14, Mason made an entry that he was AWOP (i.e. absent without pay). The reason Mason made that entry was because he knew he had no accumulated sick leave left. Additionally, Mason knew he had no other type of leave remaining either, such as vacation. As previously noted, Mason had used up all of his accumulated leave - including sick leave - caring for and helping his dying father. Mason did not have prior approval to be AWOP for the shift that he missed on January 13 and 14.

On January 23, Mason's supervisor, Sgt. Philip Wentzel, reviewed Mason's weekly time card and approved it.

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On April 25, Lt. Tricia Carlson ordered Sgt. Wentzel to submit an Investigation Authorization Request to the Sheriff's Office Internal Affairs division concerning Mason's use of AWOP for the shift that he missed on January 13 and 14. Sgt. Wentzel complied with the order and submitted the request to Internal Affairs. Neither Sgt. Wentzel nor Lt. Carlson spoke with Deputy Mason about the matter prior to submitting this request to Internal Affairs.

For reasons not identified in the record, the person who requested the investigation (Lt. Carlson) concerning Mason's use of AWOP on January 13 and 14 was also the person who performed the investigation into that same matter.

Lt. Carlson then conducted an investigation into Mason's use of AWOP on January 13 and 14. In the course of doing her investigation, she never spoke to or interviewed Deputy Mason about his use of AWOP on January 13 and 14.

On May 1, Lt. Carlson submitted a report known internally as an "Investigative Summary". In that report, she concluded that Mason did not have prior approval to use

AWOP on January 13 and 14. Carlson therefore proposed that the "disposition" of the "complaint" against Mason be "sustained". That is the jargon used in the Department which means that the employee has been charged with a rule violation. In her report, Carlson contended that by his action, Mason committed one department rule violation and two county civil service rule violations. The department rule Mason was accused of violating was 202.21. It provides thus:

> 202.21 Reporting for/Absence from Duty
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> . . .
>
> Members shall report for duty, properly equipped and in proper uniform, at the time and place specified by their commanding officer/supervisor. Members shall not be absent from duty without proper authorization.
>
> An absence from duty without proper authorization will include when an employee does not report for duty and takes time off from work when they do not possess the time accumulated to cover the absence (i.e. Absence without pay AWOP)
>
> Such an action is an independent cause for disciplinary action, apart from Rule 202.04 Sick Leave/Absenteeism.
>
> Other than provisions contained in the Family Medical Leave Act and approved voluntary time off, there are no provisions for an unexcused absence without penalty.

The County civil service rules Mason was accused of violating were subparagraphs (l) and (o) of Rule VII, Section 4(l). Subparagraph (l) prohibits "Refusing or failing to comply with departmental work rules, policies, procedures" and subparagraph (o) prohibits "Unexcused, unauthorized or excessive absence."

Lt. Carlson's findings were subsequently reviewed by Captain Dan Hughes and Deputy Inspector Tobey Weberg. They approved Lt. Carlson's findings. Neither Captain Hughes nor Deputy Inspector Weberg spoke with Deputy Mason prior to signing off on Lt. Carlson's "Investigative Summary".

On August 22, Deputy Mason was notified that Internal Affairs had opened a case against him and that it had been "sustained". This is the first time he heard that an IA case had been opened against him. That same day, Mason submitted the following written response:

> I was not notified until now about my AWOP on 01-14-12. I used all my accrued time off during my father's long illness in 2011. On December 13,

> 2011, my father passed away. I was sick on 01-14-12, so I called in sick. I used only one day, so I did not think I had to apply for FMLA.

Lt. Carlson's findings were subsequently reviewed by Inspector Richard Schmidt. On September 12, Inspector Schmidt issued a Notice of Suspension which indicated that Mason was suspended for three days. Although the Notice of Suspension did not say so, it can fairly be surmised that Inspector Schmidt disciplined Mason for the reason set forth in Carlson's "Investigative Summary". Inspector Schmidt also ordered Mason to write a 10-page essay on absenteeism. Mason wrote the report as ordered.

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

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At the hearing, no one from Internal Affairs knew why no one spoke to Deputy Mason about this case before the charges against him were "sustained".

Additionally, at the hearing, Association President Roy Felber testified that in prior department discipline cases, the only situations where an employee was not interviewed by Internal Affairs (as part of their investigation) was where the employee had previously written a report (about the underlying facts).

About the same time that the Department took the disciplinary action toward Mason noted above, it also disciplined a CO for being absent without having any accrued sick time to cover his absence. The Department considered that employee's absence without pay (AWOP) to be violative of Department Rule 202.21 and suspended him for five days.

POSITIONS OF THE PARTIES

Association

The Association's position is that just cause did not exist for Deputy Mason's three-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 two basic facts. First, it acknowledges that Mason missed a single shift of work on January 13-14, 2012. It emphasizes that the reason he missed work is because he was extremely sick. According to the Association, Mason simply did "what any of us would do" (meaning, not come into work when we are sick). Second, the Association points out that when Mason subsequently filled out his leave paperwork for the week in question, he had no accrued sick leave left which he could use, so he put down on his time card that he was AWOP on that date. According to the Association, that type of situation is why AWOP exists.

Having made those admissions, the Association contends that Mason did not engage in workplace misconduct when he used AWOP to cover his absence on January 13-14, 2012. Said another way, he did not do anything wrong by doing that. Here's why. First, the Association points out that when Mason's supervisor – Sgt. Wentzel – subsequently reviewed Mason's time card, he (Wentzel) approved the time card in its entirety. The Association sees that as significant. Additionally, it extrapolates from Wentzel's approval that he (Wentzel) "did not believe Mason to have violated any departmental rule" by taking AWOP (as he did). Second, the Association submits that when Mason took AWOP for his absence, he did not have any other options. According to the Association, the existence of Department Rule 202.21 creates a "false choice" for a deputy who has no sick time accumulated because if they stay home while sick, they will still get disciplined for violating Rule 202.21. The Association argues that a deputy should not be automatically disciplined for calling in sick – when legitimately sick – just because he does not have any sick time left. The Association asserts that under these circumstances, the deputy should stay home, but not be paid, just as Mason did here. Thus, it believes that absent without pay is the appropriate payroll designation in these circumstances. Building on the foregoing, the Association maintains that Mason committed no misconduct for which he could be disciplined.

Next, the Association argues in the alternative that even if Mason did commit workplace misconduct by using AWOP for his absence, and thus violate a work rule, there still was not just cause for the level of discipline imposed on him. Here's why. First, the Association points out that Mason had a clean disciplinary record with no prior suspensions. In its view, going from that clean disciplinary history to a three-day suspension was simply excessive. Second, the Association points out that as part of the discipline imposed in this case, Mason was required to write a ten-page essay on absenteeism. The Association asserts that this "double discipline" is unprecedented in that it has not been "successfully imposed on any previous MDSA Deputy Sheriff." It also contends that this "double dipping" on discipline serves no relevant purpose, and was merely piling on. The Association therefore asks the arbitrator to rescind the three-day suspension and reduce Mason's punishment to a written reprimand.

As part of its argument over why the discipline should be expunged, the Association raises some due process arguments. First, it emphasizes that Mason was not interviewed as part of the investigation in this case. According to the Association, that is not right. The Association maintains that the subject of discipline has the right to be notified that he is facing discipline and certainly has the right to participate in the investigation as to whether rules violations had occurred. That didn't happen here. The Association asks rhetorically how would this case be different if Mason had been interviewed? It answers that by saying we do not know because no one spoke with him: not Lt. Carlson, Captain Hughes, Deputy Inspector Weberg, or Inspector Schmidt. According to the Association, they all simply reviewed the Investigative Summary and approved it without batting an eye. Second, the Association cries foul over the length of time it took those individuals to sign off on Lt. Carlson's Investigative Summary. It asks rhetorically, "why the delay?" Putting the two points together, the Association opines that "this case reeks of the Sheriff's Office first determining someone has

violated rules, then filling in the details." The Association submits that this "shoot first, ask questions later" methodology for discipline should not be sustained.

County

The County's position is that just cause existed for Mason's three-day suspension. In its view, Mason committed workplace misconduct on the date in question when he was absent from work and had no accrued sick time to cover his absence. Building on the premise that that constituted workplace misconduct, the County maintains that the discipline which was imposed on Mason for that misconduct was warranted under the circumstances. It elaborates as follows.

The County sees this case as a clear cut rule violation case. The rule which the County relies on is Dept. Rule 202.21. It provides in pertinent part:

> An absence from duty without proper authorization will include when an employee does not report for duty and takes time off from work when they do not possess the time accumulated to cover the absence (i.e. Absence without pay AWOP)
>
> Such an action is an independent cause for disciplinary action, apart from Rule 202.04 Sick Leave/Absenteeism.

The County avers that Mason violated this rule when he called in sick on the day in question, "despite lacking the accrued sick time to cover his absence." The Employer contends that Mason's violation of this work rule, in turn, constituted workplace misconduct for which he could be disciplined.

With regard to the due process arguments that Mason raises, it's the Employer's view that these arguments are merely "peripheral points" that should not distract from the simple, undisputed facts. Here's why. First, with regard to Mason's contention that he was not notified of the Employer's investigation for several months, the Employer cites the date that Mason submitted his electronic time card. That date was January 19, 2012. According to the County, when Mason submitted his time card, he was "well aware that his January 14, 2012 absence constituted a rule violation." Second, with regard to Mason's contention that he was not interviewed, the Employer avers that an interview was "unnecessary" in this case because the nature of the rule violation was "straightforward". Additionally, the Employer cites Lt. Hodel's testimony at the hearing for the proposition that employees are routinely not interviewed in attendance cases, and that what happened in this case is the way attendance investigations are conducted in the Department. Third, with regard to the fact that Mason's supervisor approved Mason's timecard, the Employer does not see that as significant. According to the County, when the supervisor approved Mason's time card, he was simply affirming that the information on it was accurate; he was not affirming that Mason "was immune from possible discipline for being AWOP. To suggest otherwise defies logic."

Turning now to the level of discipline which was imposed, the Employer argues that a three-day suspension was reasonable under the circumstances. Here's why. First, it relies on Mason's "prior disciplinary record". It notes in this regard that Mason had previously received two EADs (Employee Activity Documentation) which were denominated as "counseling sessions." One was for failing to drop a "hold" on a vehicle and the other was for lack of productivity. Second, the Employer relies on the case where a corrections officer (CO) was absent from work and did not have any accrued sick time to cover his absence. The Employer points out that that employee was also disciplined for violating Dept. Rule 202.21 and his punishment was a five-day suspension. The Employer believes it is significant that the duration of Mason's suspension was less severe than that issued to the CO. The County therefore requests that the arbitrator give deference to the discipline imposed by the Inspector, and uphold Mason's three-day suspension.

DISCUSSION

The parties stipulated that the issue to be decided here is whether there was just cause to discipline Deputy Mason. My answer to that question is split as follows. I find that the Employer did have just cause to discipline Mason for violating Rule 202.21. I'll explain why later. However, I further find that the discipline which the Employer imposed on Mason for that rule violation (i.e. a three-day suspension) is excessive for the reasons noted later. Accordingly, I reduce Mason's discipline from a three-day suspension 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 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.

I'm going to start by reviewing these pertinent facts. On January 13, 2012, Deputy Mason did not report to work for a scheduled shift. The reason he did not report for his shift was because he was sick. Later, when he filled out his weekly time sheet, he knew that he had no leave time left – including sick leave - which he could use to cover the shift in question, so he entered that he was AWOP (absent without pay) for that shift. He did not have prior approval to do that (i.e. be AWOP for that shift).

The first question to be answered is whether being AWOP without prior approval constitutes workplace misconduct.

In answering that question, I've decided to note at the outset that in some misconduct cases, there's some subjective discretion involved in deciding whether the conduct is, or is not, misconduct. Take, for example, a routine theft case. In that type of case, the arbitrator has to decide – among other things – whether the employee's conduct actually constituted theft.

In this case though, there's no subjective discretion involved in deciding whether the employee's conduct is, or is not, misconduct. That's because the Employer has adopted a work rule that completely eliminates the subjective discretion referenced above. I'm referring, of course, to Rule 202.21. In the second and third paragraph of that rule, it says in plain language that when an employee who has no accrued sick time calls in sick, that "is an independent cause for disciplinary action." What that means is that if an employee who has no accrued sick time does not report to work and is AWOP without advance approval, that action is a per se violation of the rule. The practical impact of this rule is that when an employee who has no accrued sick time left is sick, they essentially have two choices: they can either report to work in their sick condition, or they can stay home. If they opt for the latter, they can be disciplined for violating Rule 202.21.

Set against that backdrop, Mason chose the latter option. That was his call to make. However, in making that choice, he was aware that the Employer considered that a rule violation. Given the existence of Rule 202.21, there's no independent discretion for me to exercise. I therefore find that when Mason missed his shift on the date in question and had no accrued sick time left to cover his absence, he violated Rule 202.21. That, in turn, constituted workplace misconduct for which he could be disciplined.

In so finding, I'm well aware that Mason's supervisor, Sgt. Wentzel, approved Mason's time card for the week in question. The Association sees Wentzel's approval as significant. I don't. In my view, when Wentzel approved Mason's time card, he was simply affirming that the information on it was accurate; he was not affirming that Mason was somehow immune from possible discipline for being AWOP. That was not his call to make.

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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.

The penalty which the Employer imposed on Mason was two-fold. First, he had to write a ten-page essay. Second, he was suspended for three days. I'm going to address these matters separately.

I'll address the essay first. The Association asserts that having Mason write an essay on absenteeism, in conjunction with a suspension, constituted impermissible "double dipping" on discipline. I disagree. While double disciplinary penalties, like what the Employer imposed here, are not common in the Milwaukee County Sheriff's Department, that doesn't mean that the Employer is somehow precluded from doing so. Clearly, it is not.

Aside from that though, there's not much point in my expounding further on this matter. Here's why. Sometimes, work that has been done can't be undone. That's the situation here because Mason has already written the essay. That being so, there's no point in my trying to undo the work he expended in writing the essay.

The focus now turns to the three-day suspension.

When an employer imposes a multi-day suspension on an employee that is subject to review under a just cause standard, 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 that the Employer did not meet that burden for the following reasons.

First, by the Employer's own admission, one of the things it relied on to justify a three-day suspension was Mason's "prior disciplinary record". The "prior disciplinary record" that the Employer expressly pointed to were two EADs which Mason got in 2011 and 2012. Those EADs memorialized "counseling sessions" that were unfavorable to Mason. However, just because those documents memorialized something unfavorable doesn't make them disciplinary in nature. Here's why. The Employer is well aware that if it wants to discipline an employee, there's an accepted way of doing it. Specifically, it's to give the employee a written reprimand/warning. That didn't happen in the two situations referenced in the EADs. Those situations were specifically denominated as "counseling session(s)". The record establishes that the parties do not consider "counseling sessions" memorialized in EADs to be disciplinary in nature. That means that "counseling sessions" are not part of the formal disciplinary process. As a result, EADs are an insufficient basis upon which to justify further progressive discipline.

At the hearing, the Employer's witness implied that there may have been other discipline (other than the EADs) that the Employer used as a basis to justify the suspension. The inference which I drew from that is that the Employer (possibly) considered Mason's one-day suspension which was overturned by an arbitrator in 2009. If the Employer did that, it should not have done so, because that arbitrator ordered that the one-day suspension be expunged from Mason's personnel file.

It follows from the foregoing that Mason has a clear disciplinary history with the Employer. What I mean by that statement is that he has no prior rule violations, written reprimands/warnings, or suspensions in his personnel file. That being so, the "prior disciplinary record" that the Employer cited as a justification for the suspension, does not exist.

Second, when an employer decides that an employee's misconduct warrants a suspension of some sort, they usually start with a relatively short suspension of, say, one day. That didn't happen here. Instead, the Inspector decided that a suspension of that length was not long enough, and he imposed a three-day suspension. At the hearing, the Employer's representatives offered no explanation regarding why the Inspector selected the number he selected, or offered an objective basis to justify that number. That's problematic, because it gives the appearance that the number of days was selected at random.

Third, the Employer relies on the case where a CO was absent from work and did not have any accrued sick time, and that employee received a five-day suspension. While the misconduct in that case is exactly the same as what happened here, no other specifics were provided about that case such as the employee's length of service and his disciplinary history. Those matters are of crucial importance and are lacking here. That case is also distinguishable on the grounds that the employee was a CO and COs are not represented by the MDSA.

In my view, the foregoing points militate against a three-day suspension. I therefore conclude that a three-day suspension was excessive under the circumstances. In so finding, I've decided to note that had the Employer imposed a suspension that was more in line with a first suspension, such as 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. Accordingly, I reduce Mason's discipline from a three-day suspension to a written warning. The Employer shall make Mason whole for the three days he was suspended.

In light of that finding, I've decided that I need not address the Association's due process arguments about the Employer's investigation in this case.

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 Mason for violating Department Rule 202.21; and

2. That just cause does not support a three-day suspension for that misconduct. That punishment was excessive and is therefore reduced to a written warning. The County is directed to make Mason whole for the three days he was suspended.

Dated at Madison, Wisconsin, this 26th day of March, 2013.

Raleigh Jones /s/
Raleigh Jones, Arbitrator

REJ/gjc
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