

BEFORE THE ARBITRATOR

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

Case ID: 161.0034
Case Type: MA
(Bacich Suspension)

AWARD NO. 7944

Appearances:

Sean E. Lees, MacGillis Wiemer, LLC, 11040 W. Bluemound Road, Suite 100, Wauwatosa, Wisconsin, 53226, appearing on behalf of the Milwaukee Deputy Sheriffs' Association.

James M. Carroll, Milwaukee County Office of Corporation Counsel, 901 N. 9th Street, Room 303, Milwaukee, Wisconsin, 53233, appearing on behalf of Milwaukee County.

ARBITRATION AWARD

The Milwaukee Deputy Sheriffs' Association ("Association") and Milwaukee County ("Employer") are parties to a collective bargaining agreement ("Agreement") in effect at times relevant to this dispute. The Agreement provides for final and binding arbitration of disputes arising thereunder. On April 12, 2017, the Association filed a request with the Wisconsin Employment Relations Commission to initiate grievance arbitration concerning the discipline of Deputy Shawn Bacich. The filing requested that the Commission appoint a commissioner or staff member to serve as arbitrator, and Karl Hanson was so appointed. Subsequently, Mr. Hanson left his employment with the WERC, and on August 21, 2017, the undersigned was appointed to serve as Arbitrator. A hearing, which was not transcribed, was held in Milwaukee, Wisconsin, on August 28, 2017. At its conclusion, the parties provided oral arguments concerning the evidence; but the Association also reserved the right to determine whether it would provide additional written arguments (and the County reserved the right to determine whether it would respond to such argument). On August 30, 2017, the Association indicated that it did not intend to provide written argument, and on that date the record in this matter was closed.

Now, being fully advised in the premises, the undersigned makes and issues the following Award.

BACKGROUND

Deputy Shawn Bacich has been employed by Milwaukee County since 1999, and he has 27 years of experience overall as a law enforcement officer. On August 23, 2016, a citizen complaint was filed against Bacich with the Milwaukee County Sheriff's Office Division of Internal Affairs. The complaint prompted an investigation by Internal Affairs, which ultimately resulted in Bacich's unpaid suspension from his employment for five days.

The complaint was filed by M.R., an African American employee of a Walgreens store located in Milwaukee. M.R. reported to Internal Affairs that shortly after 2:00 a.m. on July 22, 2016, she had been taking a break from her shift and was standing outside the Walgreens store, smoking a cigarette, and talking to a customer. Bacich had been inside the store, and M.R. recounted that as he exited he was chanting, "Bob is a God! Bob is a God!" M.R. understood Bacich to be referring to another Walgreens employee, and she responded to Bacich that Bob was on vacation. At that point, M.R. resumed her conversation with the other customer. Rather than leaving, however, Bacich remained standing where he was. M.R. assumed he was looking for his car or some person, but he turned back to M.R. and stated to her, "Can I ask you something?" He then said, "Why do black lives matter?" M.R. told Bacich that she could see that he had a little too much to drink, that this was the wrong subject for them to discuss, and that it was time for her to go in. At that point, M.R. accepted an empty shopping cart from a customer in the parking lot to take back into the store. According to M.R., however, Bacich snatched the cart away from her and stated, "No – no, you're going to f'in' explain to me just – just fess up for your people – what the F do I owe you people?" M.R. reported that Bacich was loud when he was making these comments, and he had started to draw the attention of others in the parking lot. (Although it was in the middle of the night, this Walgreens is apparently often busy at that hour with patrons from nearby bars, among others.) M.R. recounted that one man said to Bacich, "Hey, buddy, she's not gonna F'in give it to you tonight. You go home." M.R. became worried that the crowd might react to Bacich's statements in some way that would create a scene in front of the store, so she was intent on ending the conversation. Bacich responded, however, "No – no, she don't fuckin' understand – she's gonna answer for her whole race – what the F do I owe you people? What 200, 300 years?" At that point, M.R. extricated herself from the conversation, entered the store, and told her coworker, B.E., about what had occurred. B.E. went out and sternly directed Bacich to leave, and he did so.

M.R. told Internal Affairs that she had contacted the Milwaukee County Sheriff's Department with her complaint because she knew Bacich to be a County Deputy. It is undisputed on the record that Bacich had been a regular customer at the Walgreen's store for years, stopping at the store three or four times a week. M.R. contended that Bacich made it known every time he entered the store that he was a Sheriff's Deputy. Bacich insists that he did not broadcast his status as M.R. asserted, but he acknowledged that sometimes he stops at the store in uniform and that he occasionally has talked to store employees about his work.

On November 30, 2016, Internal Affairs also interviewed Bacich. He did not dispute during the interview that he had been at the Walgreens on the identified date and time, that he

had been drinking and was “probably over the limit”, and that at some point a Walgreens employee came out of the store and directed him to leave the parking lot. In other ways, however, Bacich’s account differed significantly from what M.R. had reported. To begin with, Bacich contended he had not been chanting “Bob is God” on his way out of the store. Rather, Bacich clarified that while he was still in the store he had made the statement comparing Bob to God, after learning from an employee that Bob was on vacation. After this exchange, Bacich recounted, the Walgreens employees were discussing their low wages, and Bacich asserted that “this is why everyone should vote for Trump”. He then exited the store, and on his way out he chanted “Trump, Trump, Trump!” As he was doing so, he passed a man and a woman who responded, “Trump is a racist bigot”. According to Bacich, this statement led to an exchange in which “the worst” thing he said, without raising his voice or using profanity, was that he is “sick of taking care of black people”. He denied all the other racially-oriented statements alleged by M.R. In doing so, he referred to these allegations as “absolute B.S.”, an “absolute lie”, and “outrageous”, and he asserted that there is something “wrong with this girl”, that she was “makin’ stuff up in her mind”, and that she is schizophrenic. He also expressed doubt as to whether she even had been present in the parking lot during the exchange.

At the August 28, 2017, hearing in this matter, however, Bacich told a different story. There he contended that he now recalls not one, but two separate late night incidents at the Walgreens parking lot. Bacich testified that on the night of July 22, while he was exiting the Walgreens, he in fact was chanting “Bob is God”. This action was prompted by having learned from a cashier inside the store that Bob was not working. When Bacich learned this news, he said, “Oh, Jesus”, and the cashier responded, “Jesus is not working either”. This exchange inspired Bacich’s connection between Bob and God. Bacich testified that upon then exiting the store he encountered two men standing shoulder-to-shoulder. Believing them to be panhandlers, who Bacich indicates were often present in the parking lot, Bacich stated to them, “Sorry, I don’t have any extra change”. Apparently taking offense, the two men responded with profanities. To this Bacich responded, “this is why people look at your generation as being the worst: you have no respect”. At this point, according to Bacich, M.R., who was also in the parking lot, said, “This is not going to end well”. She entered the store, and B.E. came out and directed Bacich to leave. He had not raised his voice, there had been no profanities, he had made no reference to race, and he did not think he had done anything wrong, but he followed her instructions.

Bacich testified that he had conflated this July 22 encounter with one on an entirely different night, several weeks earlier, in which he had come out of the Walgreens at about the same hour, in about the same conditions, shouting “Trump, Trump, Trump”. On this occasion, another patron responded, “Trump is a racist bigot”. In response to that statement, Bacich stated that he is sick of working to take care of black people by paying taxes. Bacich testified at hearing that he is certain neither M.R. nor any other black person was present for this exchange.

Several weeks after July 22, Bacich was back in the Walgreens store, and Bob was back from vacation. Bacich was in uniform, and Bob told Bacich that he was surprised Bacich was still working at the Sheriff’s Office, given what he heard about the outburst with M.R. Bacich told Bob he had just come from “Sherman Park”. Bacich was referring to an ongoing, sometimes violent episode of racial unrest that was occurring in the Sherman Park area of Milwaukee.

Referring to the riots, Bob told Bacich he assumed Bacich had probably “started it”. Bacich testified that he could not tell if Bob was serious.

Some part of the Walgreens parking lot is covered by a surveillance camera, but the record indicates that the footage does not capture enough of the events of July 22 to be elucidating, and the video was not submitted as an exhibit at hearing. Also, there was a store security guard present in the parking lot on July 22, but he did not intervene in the alleged exchange or take any other action. He and B.E. were interviewed during the investigation, and transcripts of their interviews were presented as evidence, but they did not testify. The same was true for M.R.

ISSUE

The parties stipulated to the following statement of the issue to be heard: “Was there just cause to suspend Deputy Bacich for five days? If not, what is the appropriate remedy?”

DISCUSSION

Notwithstanding the Grievant’s denials, the Internal Affairs investigation concluded that the Grievant had made the various racially-charged statements alleged by M.R., and this conduct was the basis for his discipline. The County relies at least in part on the exhibit that is a transcript of M.R.’s investigatory interview, but M.R. was not presented as a witness at hearing. The Association argues that the hearsay nature of that important evidence precludes the County from meeting its burden in this case. There is no need to address this perhaps difficult question, however, due to the Grievant’s admissions.

In the investigatory interview into the Grievant’s conduct, the Grievant admitted that on the day in question he had stated, publicly, that he was sick of working and paying taxes to take care of black people. At hearing, the Grievant again admitted that he made such a statement under the same circumstances, albeit on a different day. Some cases might be affected by a question as to whether the alleged conduct occurred on the specific date that was the focus of the investigation and the basis for the discipline, but not this one. What is significant here is the fact that the admitted conduct occurred, and what is not significant is whether it occurred on July 22 or a few weeks prior to that date.

Putting aside the timing of the statement, the Grievant makes two contentions regarding its substance: that his statement about taking care of black people was the only race-related comment he made; and that when he made the statement there were no minorities present. Neither of these contentions supports the Grievant’s case. The latter discounts the fact that racial generalizations have meaning and influence even when the only people present are not members of the subject race; and the former fails to account for the possibility that a single statement alone can be enough.

No doubt an employer does not have general control over the conduct of employees who are off duty and not on the employer's premises. Elkouri & Elkouri, How Arbitration Works, 6th Ed., pp 938-945. It is equally well-established, however, that police officers are held to a higher standard in this area. Id. at 1326-1328. Above most other employees, there is an expectation that they model good citizenship. The fact that the Grievant was off-duty, was not wearing a uniform, and did not flash a badge does not help his case. The record leaves no question as to a perceived connection, at least in the setting of the Grievant's regular Walgreens store, between the (even ununiformed) Grievant and the Milwaukee County Sheriff's Office. The fact that M.R. raised her complaint by contacting the Grievant's employer illustrates that point. Furthermore, there is a nexus between the Grievant's conduct of publicly making a racially-charged statement and the work he does in a municipality already dealing with strained race relations. The fact that Bob expressed surprise that Bacich still has a job and (even jokingly) attributed to Bacich the events at Sherman Park, where Bacich had just been on patrol, illustrates that point.

AWARD

The grievance is denied.

Signed at the City of Madison, Wisconsin, this 25th day of September, 2017.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Arbitrator Danielle L. Carne