

BEFORE THE ARBITRATOR

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

Case ID: 161.0043
Case Type: MA

(Arnold and Alexander Suspensions)

AWARD NO. 7958

Appearances:

Graham Wiemer, MacGillis Wiemer, LLC, Attorneys at Law, 11040 West Bluemound Road, Suite 100, Wauwatosa, Wisconsin, appearing on behalf of Milwaukee Deputy Sheriffs' Association.

Melinda Lawrence, Assistant Corporation Counsel, Milwaukee County, 901 North Ninth Street, Room 303, Milwaukee, Wisconsin, appearing on behalf of Milwaukee County.

ARBITRATION AWARD

The Milwaukee Deputy Sheriffs' Association, hereinafter referred to as MDSA or 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 above-captioned grievance. The undersigned was so designated. No hearing was held in this matter. Instead, the parties submitted stipulated facts and exhibits on July 26, 2019. Afterwards, the parties filed briefs and reply briefs whereupon the record was closed on September 25, 2019. Having considered the evidence, the arguments of the parties, and the record as a whole, the undersigned issues the following Award.

ISSUE

The parties did not stipulate to the issue to be decided herein. The Association framed the issue as follows:

Was there just cause to suspend Deputy Sheriffs Arnold and Alexander for one day each?

The County framed the issue as follows:

Should the Arbitrator overturn the Sheriff's decision to impose a one (1) day suspension upon Detective Arnold and Deputy Alexander for violation of Milwaukee County Sheriff's Office Rule 202.20, Efficiency and Competence, and Rule 202.46, Personal Safety Conduct? If so, what is the appropriate discipline under the circumstances?

I have adopted the Association's proposed wording of the issue. My rationale for doing so will be addressed in the Discussion. Thus, the issue which will be decided herein is as follows:

Was there just cause to suspend Deputy Sheriffs Arnold and Alexander for one day each? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 2015-2018 collective bargaining agreement contained the following pertinent provisions:

§1.02 MANAGEMENT RIGHTS

The County of Milwaukee retains and reserves the sole right to manage its affairs in accordance with all applicable laws, ordinances, regulations and executive orders. Included in this responsibility, but not limited thereto, is:

...

The right, subject to civil service procedures and § 63.01 to 63.17, Stats., and the 3 terms of this Agreement related thereto, to suspend, discharge, demote or take other disciplinary action

* * *

**§5.04 DISCIPLINARY SUSPENSIONS NOT APPEALABLE
UNDER WISCONSIN STATE STATUTE 63.10**

In cases where an employee is suspended for a period of ten (10) days or less by is [sic] department head, pursuant to the provisions of s. 63.10, Stats., the Association shall have the right to refer such disciplinary suspension to arbitration. Such reference shall in all cases be made within 10 working days from the effective date of such suspension. The decision of the Arbitrator shall be served upon the Department of Labor Relations and the Association. In such proceedings, the provisions of s. 5.02(2)(c) shall apply.

PERTINENT SHERIFF'S OFFICE PROVISIONS**202.20 – Efficiency and Competence**

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 the equivalently trained members.

202.46 – Personal Safety Conduct

Member shall not, by action or inaction create a situation of risk of injury to themselves or others. In performing their duties, officers are specifically charged to conduct themselves with due regard for personal safety of themselves, fellow officers, and the public.

BACKGROUND

The County operates a Sheriff's Department, hereinafter referred to as the department. The Association is the exclusive collective bargaining representative for the department's deputy sheriffs.

Jamie Arnold and Kimberly Alexander are both deputy sheriffs in the department. Arnold is a 22-year veteran of the department. Alexander is a nearly 4-year veteran of the department. Both are assigned to the Police Services Bureau-Patrol Division, and both work the first shift.

Some additional background will be noted in the Discussion.

FACTS

Arnold and Alexander were disciplined for failing to search a person for weapons before that person was placed in the backseat of a squad car.

Here is what happened. About 11:00 a.m. on June 12, 2018, both Arnold and Alexander responded to a “shots fired” incident at the entrance ramp to Northbound Interstate 43 at Lapham Avenue. Arnold arrived on the scene before Alexander did. Arnold encountered Marquel Hinkle, hereinafter referred to as Hinkle, at the scene. Based on the information given to him by the dispatch center before he arrived on the scene, Arnold believed Hinkle was the victim of a shooting. He therefore performed an initial medical assessment known as a “body check” on Hinkle to determine whether he had been shot or had any obvious physical injuries. In doing that, Arnold did not search Hinkle for weapons. While Arnold was performing the medical assessment on Hinkle, Alexander arrived on the scene. Alexander saw Arnold touching Hinkle’s pockets and turning Hinkle around to check his back area. Based on that, Alexander concluded Arnold was doing a search on Hinkle or conducting a “pat-down” on him. As a result of seeing what she believed to be a pat-down, Alexander thought Hinkle was unarmed. Arnold then turned Hinkle over to Alexander (meaning Alexander took physical custody of Hinkle). When this handoff occurred, Alexander did not ask Arnold if he had searched Hinkle for weapons or other contraband. Similarly, Arnold did not say anything to Alexander about not searching Hinkle for weapons and contraband. Thus, neither officer asked the other officer whether Hinkle had been searched for weapons and contraband. Additionally, neither officer asked Hinkle if he had weapons and/or contraband in his possession.

Alexander then put Hinkle in the back seat of her squad car to await medical evaluation. Before Alexander did that, she did not search Hinkle. The department’s procedure requires that persons who are placed in the back of a squad car are to be searched beforehand. Unbeknownst to Arnold and Alexander, Hinkle had a loaded 9 mm handgun in the waistband of his pants when he was placed in the back seat of the squad car. While Hinkle was in the back seat of the squad car, he got the handgun out of his pants and handled it. While handling the gun, it accidentally discharged. When the gun discharged it was pointed down, so the bullet went through the car’s floorboard. The camera in Alexander’s squad car shows that after the gun discharged, smoke appeared and Hinkle covered his ears. Alexander and Arnold reacted to the gun shot in the squad car by opening the car door and removing Hinkle from the car. At that point, they saw Hinkle’s gun on the car’s floorboard.

No one was physically injured by the gun’s discharge. As noted above, the bullet pierced the floor of the squad car which damaged the car’s brake line. It cost about \$700 to repair the damaged done to the squad car. Hinkle was subsequently convicted of the crime of carrying a concealed weapon.

* * *

County Sheriff Richard Schmidt subsequently authorized an internal investigation in the matter just noted. The investigation was conducted by Lieutenant James Novotny of the

department's Internal Affairs Division. As part of his investigation, Novotny interviewed Arnold and Alexander. Afterwards, Novotny wrote a report and made certain findings. In his report, which is called an Investigative Summary, Novotny found that Arnold and Alexander committed two departmental rule violations and four County civil service rule violations. The department rules they were accused of violating were: 202.20 (Efficiency and Competence); and 202.46 (Personal Safety Conduct). 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.

Rule 202.46 provides thus:

Members shall not, by action or inaction, create a situation of risk or injury to themselves or others. In performing their duties, officers are specifically charged to conduct themselves with due regard for the personal safety of themselves, fellow officers, and the public.

The County civil service rules Arnold and Alexander were accused of violating are part of Rule VII, Section 4(1). Arnold and Alexander allegedly violated subparagraph (b) which prohibits "[u]nauthorized use, misuse, destruction of or damage to any property including vehicles, said damage occurring because of neglect while on county business"; subparagraph (i) which prohibits "[v]iolation of rules or practices relating to safety"; subparagraph (l) which prohibits "[r]efusing or failing to comply with departmental work rules, policies or procedures"; and subparagraph (u) which prohibits "[s]ubstandard or careless job performance."

Novotny's findings were subsequently reviewed by Schmidt. On September 13, 2018, Schmidt issued a notice of suspension which suspended Arnold and Alexander for one day each with a ten-day suspension stayed for a period of one year and discarded if no further incidents occurred. In the attachment thereto, the text from Novotny's report was copied verbatim. The attachment also referenced the work rules that were identified in Novotny's report. Schmidt adopted Novotny's findings as his own and disciplined Arnold and Alexander for the reasons set forth in Novotny's report.

Based on the parties' collective bargaining agreement, Arnold's and Alexander's suspensions were appealed to arbitration.

DISCUSSION

The threshold question to be addressed is what disciplinary standard is going to be applied to the discipline being reviewed herein. The County asks me to apply an "arbitrary and

capricious” standard, noting there is no reference to “just cause” in the parties’ collective bargaining agreement. The Association asks me to apply a “just cause” standard. A “just cause” standard sets a higher bar for an employer to clear than an “arbitrary and capricious” standard does.

While it is true that the collective bargaining agreement involved here does not contain a reference to “just cause,” the undersigned has issued about two dozen arbitration awards involving the instant parties in the last 15 years wherein I reviewed disciplinary suspensions. In each of those cases, I applied a just cause standard because the parties stipulated that the issue to be decided in each case was whether there was just cause for the suspension imposed. Here, though, nothing was said in the parties’ stipulated facts about the issue to be decided. Given that silence on the issue to be decided, the question before me is whether I should apply an arbitrary and capricious standard or a just cause standard. In a recent arbitration award involving the instant parties, Arbitrator Peter G. Davis was presented with the same question. He opined thus:

Turning to the question of what is the applicable contractual standard as to disciplinary suspensions, the County contends that an “arbitrary and capricious” standard should apply given the absence of a reference to “just cause” in the parties’ agreement. The Association alleges that “just cause” is the contractual standard to be applied.

If this were the first grievance arbitration between the parties as to a disciplinary suspension, the absence of a specified contractual standard would be problematic. However, this is not the first such arbitration proceeding between the parties, and in prior proceedings the parties have stipulated that “just cause” is the applicable standard. [Citation omitted.] In light of those stipulations and in the absence of evidence of a change in contractual language that existed when those stipulations were made, I conclude the applicable contractual standard is “just cause” unless and until the parties affirmatively bargain a different standard.

Milwaukee County, Award No. 7957 (Oct. 2, 2019). I concur with his rationale. Accordingly, I’m going to apply a just cause standard here. That being so, I’ve adopted the Association’s proposed wording of the issue since it referenced just cause.

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.

I'm going to start my discussion by looking at the proverbial big picture. What happened here can be summarized thus: a person who had a loaded handgun in his possession was placed in the back seat of a squad car; that person then accidentally discharged the weapon in the car.

Neither of those things should have happened. Both happened though.

It's common in any workplace for things to happen that are not supposed to happen. Using neutral terminology, accidents happen. Using more colorful terminology, screw ups happen. When accidents/screw ups occur, fault is often assigned afterwards. That is what is involved here. While the officers involved characterize the review of their actions as "Monday morning quarterbacking," my response to that is simply put: that's life, particularly for police officers.

There is no question that fault for the second matter (i.e. the gun being fired) is attributable solely to just one person, the person who possessed the gun and pulled the trigger (Hinkle). That's all that needs to be said about that.

What's involved here is whether fault can fairly be assigned to Arnold and Alexander for their roles in what I previously described as the first matter (i.e. that a person with a loaded handgun in their possession was not searched for weapons before being placed in the backseat of a squad car). The Employer contends that it can, while the Association disputes that contention. Based on the following rationale, I find fault can fairly be assigned to Arnold and Alexander for their roles in that matter.

I'll look at Arnold's role in this matter first. He performed a body check on Hinkle to determine if he had been shot. The body check that Arnold performed involved moving Hinkle's clothing around and visually inspecting him for any obvious injuries. In the course of doing that he did not search Hinkle for weapons. It's the Employer's view that since Arnold was doing those things, he could have searched Hinkle for weapons while he was at it. I'm hard pressed to disagree.

The focus now turns to Alexander's role in this matter. When Alexander arrived at the scene, she saw Arnold touching Hinkle's pockets and turning Hinkle around to see his back area. Alexander inferred from that that Arnold was conducting a pat-down of Hinkle. Arnold then turned Hinkle over to Alexander.

It can logically be inferred from the record that each officer knew what would happen to Hinkle next, namely that Hinkle would be placed in the back seat of a squad car. Putting someone into the backseat of a squad car is a standard safety measure. When that happens, there is no guilt or innocence involved. The individual simply needs to be put somewhere safe, and the squad car provides temporary safety. The two officers also knew that the department's procedure is that all persons who are placed into the back seat of a squad car are to be searched beforehand. To ensure that end, the two officers could have spoken to each other about whether Hinkle had been searched for weapons. Specifically, Arnold could have told Alexander that he had not searched Hinkle for weapons. For her part, Alexander could have asked Arnold whether he had

searched Hinkle for weapons. However, neither officer said anything to the other about searching Hinkle for weapons. If either officer had said something to the other about same, it can reasonably be inferred that one of them would have searched Hinkle. That didn't happen though.

Alexander then put Hinkle in the backseat of her squad car. Before she did that, she did not search Hinkle for weapons. We know what happened next.

Under these circumstances, I find that Arnold and Alexander failed to execute their tasks effectively when they placed Hinkle in the back of a squad car without first checking him for weapons. The department's protocol dictates that persons who are placed in the back of a squad car are to be searched for weapons first. There are no exceptions to that policy. Consequently, it applied to that situation, even though Arnold and Alexander thought Hinkle was a victim in a shooting and not a potential threat. I therefore find that Arnold and Alexander failed to adequately perform their job duties when they neglected to search Hinkle for weapons prior to placing him in the squad car. They allowed a dangerous situation to develop because unbeknownst to either of them Hinkle possessed a loaded gun. As already noted, the department's protocol required that Hinkle be searched before he was placed in the squad car. Had that happened, it can reasonably be surmised that the gun would have been found on Hinkle. Since neither officer searched Hinkle for weapons though, fault can fairly be attributed to both officers. Their inaction and inattention to their duties created a dangerous situation to develop that could have turned out worse than it did.

It follows from the above that Arnold and Alexander committed misconduct for which they could be disciplined. Arnold's misconduct was performing an inadequate search on Hinkle. Alexander's misconduct was failing to perform any search on Hinkle at all.

* * *

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. I find that it was for the following reasons.

First, both Arnold and Alexander received the same discipline: a one-day suspension with a ten-day suspension stayed for a period of one year and discarded if no further incident occurred.

Second, the focus turns to the officers' disciplinary history with the department. The record shows that Arnold had no prior suspensions and Alexander had received a two-day suspension in 2017. According to the Association, the Employer should have given both employees, at most, a written warning. While employers sometimes start the disciplinary process by giving an employee a written warning, the parties' current collective bargaining agreement does not require that result. That being so, the Employer has retained the right to start the disciplinary process at the step it deems appropriate.

Next, the Employer cites the discipline imposed on Deputies Shantel Belot, Lacy Garey, and Adam Johnson as comparables. All three cases involved firearms that should have been found by the officers but were not. In the Belot case, the officer received a 30-day suspension for failing to search a vehicle prior to the vehicle being towed and, consequently, failing to locate an AK47 and 220 rounds of ammunition in that car. In the Garey case, the officer received a 2-day suspension with 15 days stayed for failing to adequately search an arrestee, resulting in the arrestee's loaded firearm later being found in the squad car. In the Johnson case, the officer received a one-day suspension for failing to locate a handgun on an arrestee and allowing the arrestee to hide the gun under the seat of the squad car where it was later found. In none of these three cases was the firearm discharged, nor was there any damage to County property (like there was in the instant case).

The misconduct of the three officers just referenced is comparable to the misconduct involved here for this reason: all involved firearms that should have been discovered by the officer but were not. Given that common factual similarity, the discipline imposed in the three proffered cases can fairly be compared to the discipline imposed here. Doing that leads to this conclusion: the discipline Arnold and Alexander received was consistent with, or less than, the discipline imposed on those three similarly situated officers.

I make that finding with the following caveat. Normally, it is easy to compare the length of disciplinary suspensions and make objective comparisons about them. Here though, the stayed part of the discipline makes this comparison harder. Quite frankly, I don't know what to make of the stayed part of the discipline. Here's why. Are the numbers of one and ten supposed to be added together so the understanding is that, in reality, Arnold and Alexander received an 11-day suspension of which they have only served one day? Also, under what circumstances can the stayed discipline be activated by the Employer? The record does not say. Given the questions I just posed about the stayed portion of the officers' discipline, I'm going to give primary emphasis to the discipline that has been served. What they have served so far is a one-day suspension. As noted above, when that number is compared to the suspensions imposed on the three officers referenced above, it results in a finding that Arnold's and Alexander's suspensions were not more severe than the suspensions imposed on those three officers.

I therefore find that the suspensions meted out to Arnold and Alexander pass arbitral muster. Their suspensions were not excessive, disproportionate to their misconduct, or an abuse of management discretion, but rather were reasonably related to their proven misconduct. The County therefore had just cause for the discipline imposed.

Based on the above, I enter the following:

AWARD

That there was just cause to suspend Deputy Sheriffs Arnold and Alexander for one day each. Therefore, their appeal is denied.

Dated at Madison, Wisconsin, this 23rd day of October, 2019.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones, Arbitrator