

BEFORE THE ARBITRATOR

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

Case 161.0068

(Alejandro Lezama Suspension Appeal)

AWARD NO. 7970

Appearances:

Graham Wiemer, MacGillis Wiemer, LLC, 11040 W. Bluemound Road, Suite 100, Milwaukee, Wisconsin, 53226, appearing on behalf of Milwaukee Deputy Sheriffs' Association.

Melinda Lawrence, Assistant Corporation Counsel, Milwaukee County, 901 N. 9th Street, Suite 303, 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 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 Alejandro Lezama's one day suspension. The undersigned was so designated. A Zoom hearing was held in on March 5, 2021. The hearing was not transcribed. The parties filed briefs on March 19, 2021, whereupon the record was closed. Having considered the evidence, the arguments of the parties and the record as a whole, the undersigned issues the following Award.

ISSUE

At the hearing, the parties stipulated to the following issue:

Was there just cause to suspend Deputy Alejandro Lezama for one day? If not, what is the appropriate remedy?

PERTINENT CONTACT LANGUAGE

The parties' 2015 – 2018 collective bargaining agreement (CBA) provides in pertinent part:

§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

202.19 – Treatment of Citizens and Employees:

Members shall perform all duties impartially, without favor, affection or ill will; and without regard to status, sex, race, political belief, or aspiration. All citizens and employees shall be treated equally; with courtesy, consideration and dignity.

Civil Service rule VII, Section 4 – Causes for discharge, suspension or demotion and/or reevaluation.

(1)(l) Refusing or failing to comply with departmental work rules, policies or procedures

BACKGROUND

The County operates a Sheriff's Department. The Association is the exclusive collective bargaining representative for the Department's deputy sheriffs.

Deputy Alejandro Lezama was hired in August, 2017. Lezama is assigned to the patrol Division where, as part of his job, he makes traffic stops. Prior to the discipline being reviewed herein, Lezama had received no formal discipline (meaning he had previously not been suspended or received a written reprimand). He had been "counseled" though by supervisors over a dozen times. Three of them involve his treatment of civilians and one of the three involve Lezama's demeanor during a traffic stop.

FACTS

This case involves a traffic stop which Lezama made on August 10, 2020 and his interaction with the driver during that stop. Video of the entire interaction was recorded via a camera in his squad car and his own body cam. Thus, there is video footage of the entire traffic stop. This video also contained sound. Because everything that was said was recorded on this video, there is no question about what was said.

That day, at 10:30 am, Lezama was patrolling I-94 in his marked squad car when he saw a driver speeding and unsafely changing lanes. He activated his emergency lights and siren. The driver of the car, Adia Thomas, moved her car from the left lane into the distress lane at the Stadium interchange and stopped. This distress lane has traffic on either side of it; on the left is traffic from westbound I-94 and on the right is traffic from a highway entering westbound I-94 from the interchange. Lezama positioned his squad car behind Thomas' car. There was just one person in the vehicle he had stopped.

Lezama got out of his squad and walked up to the driver's side of Thomas' car where he identified himself and told Thomas that he had stopped her for speeding, deviating from her lane and driving in a reckless manner. He then asked her if there was a reason she was driving like that and she replied that she was trying to get to an appointment. Lezama told her she should leave on time and not speed through traffic. Lezama then tried to write down the car's VIN number, but it was obscured with papers on the dashboard that covered it. He then told her to "keep your hands up so I can write down your VIN number, to which she replied "huh?" At that point Lezama repeated his order and she placed her hands on the steering wheel. Since the driver window was down, Lezama then reached into the car and moved papers that were on the dashboard covering the VIN number. Lezama then asked Thomas for her driver's license and she retrieved it. As she showed it to Lezama, he told her she was covering part of the license number with her thumb whereupon she adjusted her grasp of the license. Lezama then told Thomas "You also have an excessive tint on your vehicle", to which she replied "huh?" Lezama then repeated his statement and asked her if she knows what the legal limit of tint is. As she tried to respond, Lezama interrupted her and said "No it's not." Thomas then continued to try to talk about the window tint but Lezama interrupted her again and asked her to stop moving her license so he could write down the information. Thomas then asked Lezama "Why do you have an attitude?" Lezama did not reply to her question. Since he did not reply, Thomas returned to the topic which Lezama had previously asked her about, to wit: window tint. As Thomas talked about the window tint matter Lezama interrupted her and told her that her car did not have the legal tint (on it). At that point Lezama then pivoted to a new topic and asked Thomas if she had insurance on the vehicle. She replied that she did, but did not have her insurance card with her. At that point, Lezama returned to his squad car.

Lezama was then in his squad car for about ten minutes while he wrote up the citations he planned to give to Thomas. He wrote up three tickets: one for unreasonable speed, one for unsafe lane deviation and one for operating a vehicle without proof of insurance.

When Lezama returned to the driver's side of the vehicle, Thomas was on her cell phone talking with someone. Thomas then told Lezama that her mother was coming to the scene (of the traffic stop) to bring the insurance card. Lezama told Thomas that no one should come to the scene because he was about to release her with her citations. Lezama then told Thomas "If she comes to the scene, I'm going to give her a ticket too." He then told Thomas "Get off the phone so I can explain this to you." Thomas, who was still on the phone with the person, then tried to explain to that person what Lezama had just said. Lezama then said to Thomas "Okay, are you gonna get off the phone so I can explain this to you, or should I just give you the tickets?" Thomas then replied "I'm listening sir." Lezama then told Thomas that she was receiving three citations. When he told Thomas that one of them was for operating without proof of insurance, Thomas responded that she had proof of insurance. Lezama then replied "You weren't listening to what I said, okay" and then continued to explain the other citations. Lezama then said "I could be giving you more tickets, but I'm not going to right now." Thomas then told Lezama that she had a picture of her insurance card on her phone, whereupon she tried to find it on her phone. Lezama replied "Well, you can go to court for that, okay. Here you go." Lezama, who had all three citations rolled up, then extended them to Thomas who asked him "You can't fix it right here?" At that point Lezama shook the citations towards Thomas and said loudly "Here you go. You can go to court for that." When Thomas did not immediately take the citations out of his hand, Lezama said "Alright, I'm dropping these off right here" as if to indicate he was simply going to drop the citations into the vehicle. Thomas then took the citations. Lezama then told her to speed up in the distress lane and merge into traffic. Lezama then returned to his squad car.

Thomas did not immediately move her car and merge back into traffic. That irritated Lezama who then used his squad car's public address system and said "You need to move your vehicle out of traffic." When Thomas did not move, Lezama said again "Move your vehicle out of traffic" and sounded his squad's airhorn. One minute later, Thomas still had not moved, whereupon Lezama got out of his squad and went up to Thomas's vehicle. Then he said "Is there any reason why you're not moving your vehicle," to which Thomas responded that she's trying to pull out and points out that her directional signal is on. Lezama replied that the directional signal had not been on and "That's why I honked at you." When she tried to respond, Lezama interrupted her, telling her to speed up and merge back into traffic and that she's free to go. Lezama then walked back to his squad car while Thomas was still talking to him.

About a half minute later Thomas drove away and their interaction ended.

Later that same day, Thomas filed a complaint with the Sheriff's Office regarding the contact she had with Lezama. In her complaint Thomas wrote that during their interaction Lezama was "very rude and argumentative"; that "he reached into my car without my permission"; that when he asked her about proof of insurance, she offered to "show him pictures of it", but he was not interested and gave her a ticket for that anyway; and that with regard to Lezama's honking at her afterwards, she wrote that she "couldn't [pull out] because traffic was coming too fast." Thomas' complaint was then forwarded to the Patrol Division for fact-finding. On August 12, 2020, Patrol Division Captain James Novotny notified the Internal Affairs Division (IAD) that

after reviewing squad and body-worn camera footage of the incident, he believed that Thomas' complaint may be substantive and requested an IAD investigation.

Thomas was interviewed as part of that investigation. She told the investigator that Lezama was "really aggressive", "really rude", and wouldn't listen to her. She also said that when Lezama asked her to provide proof of insurance, she offered to show him proof from her cell phone because she didn't have a hard copy of her insurance card, but he cited her for no proof of insurance anyway.

Lezama was also interviewed as part of that investigation. After he reviewed the video, he acknowledged that he was "a little short" with Thomas and talked over her, but he "was just trying to get the stop over with." When he was asked if Thomas' statement to him that he had an "attitude" was a cue about his demeanor toward her, he responded that "I might have had a lapse in judgment, as far as her telling me that, and I just wasn't paying attention." When he was asked if Thomas said she had proof of insurance on her phone, Lezama said "he may not have heard her due to traffic noise."

Following IAD's investigation, Captain Jason Hodel prepared a written report concerning this matter. That report was submitted to the sheriff.

On December 11, 2020, Sherriff Earnell Lucas concluded that by his conduct, Lezama had violated a department rule and a civil service rule. The department rule alleged to have been violated was 202.19 (Treatment of Citizens and Employees) and the civil service rule was Rule VII, Section 4(1)(1) (Refusing or failing to comply with departmental work rules, policies or procedures). He suspended Lezama for one day.

Based on the parties' CBA, Lezama's suspension was appealed to arbitration.

DISCUSSION

The parties stipulated that the issue to be decided here is whether there was just cause to suspend Deputy Lezama for one day. I answer that question in the affirmative, meaning I find the Employer had just cause to impose a one-day suspension on Lezama. My rationale follows.

The threshold question is what standard is going to be used to determine just cause. The phrase "just cause" is not defined in the parties' CBA, 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 analyzing what "just cause" means, one commonly accepted approach – and the approach the undersigned has applied in hundreds of discipline cases - 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 commensurate with the

offense given all the relevant facts and circumstances. That is 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.

Before I address that point though, I've decided to comment on the following. This is not the first time I've had a case with the instant parties where the conduct of a deputy towards a citizen was involved. About 25 years ago I had such a case. Back then, there were no tape recordings or videos that had recorded the interaction involved. Instead, all I had to go on was witness testimony and the witnesses competing versions of what had happened. Their conflicting testimony meant I had to make a credibility call about who said what to whom, and additionally, how they said it.

The reason that I referenced the foregoing, of course, is because I don't need to make a credibility call in this case. That's because everything that Lezama and Thomas said to each other was recorded on the video. Sometimes I review video that is of poor quality. That's not the situation here. Additionally, sometimes I review video that does not have sound or where I can't hear everything that is said. Once again, that's not the situation here. The sound quality on this video was excellent, so I was able to hear everything that Lezama and Thomas said to each other. That is especially noteworthy when one considers the fact that they were talking on the interstate where there was substantial background noise from all the vehicle traffic on both sides of them. Another reason I mentioned the vehicle traffic noise is this: when Lezama was interviewed by IAD, he said "he may not have heard" Thomas say that she had proof of insurance on her phone because of the "traffic noise". Well, I heard Thomas say it on the video, and that is why I included it in my statement of the facts.

The point is this: because of the existence of the videotape, we did not need to have witness testimony about what happened. Everything that happened was recorded on the videotape. As Lezama said in his IAD interview, the video speaks for itself.

I find that the video corroborates Thomas' claim that Lezama treated her discourteously during the stop. Here's why. In roughly the first minute of their interaction Lezama did two things that set the stage, so to speak, for what followed. First, he reached into Thomas' car to move papers on the dashboard without asking her permission to do so. When asked in his IAD interview why he did that, he replied that he "thought it would be faster." Second, when Thomas tried to respond to Lezama's initial questions, he interrupted her and talked over her. Based on what happened next, it can be inferred that Thomas thought that by doing those things and acting that way Lezama had an "attitude". Thomas effectively verbalized her view when she made this short query to Lezama: "why do you have an attitude?" Thomas's short query was a strong verbal cue to Lezama how negatively he was coming off to Thomas. This statement could have prompted Lezama to change his demeanor. Unfortunately, it did not. Instead, for the remainder of their interaction, Lezama's demeanor did not change. He continued to interrupt Thomas when she spoke and talked over her. Further examples of his discourteousness occurred when he shook the tickets at her and said he

was going to drop the tickets in Thomas' car and when he walked away from Thomas while she was still responding to his question.

While the Association contends that Lezama's "demeanor and brevity" was reasonable under the circumstances, and that he was not "rude and argumentative" as Thomas alleged, that's not how department supervisors saw it. They decided that Lezama had been discourteous toward Thomas in that traffic stop and that his demeanor had been unprofessional. That is telling, because department supervisors know how difficult a deputy's job can be when they are giving a citizen a traffic ticket (or, in this case, three). I concur with management's decision that in this particular traffic stop, Lezama's conduct crossed the proverbial line of acceptable workplace conduct. Consequently, Lezama committed workplace misconduct by how he comported himself during his traffic stop with Thomas. It follows from that that he could be disciplined.

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 Association asks me to reduce Lezama's discipline to a written warning or less. To support their claim, it notes that Lezama had not previously been formally disciplined. That's true, he had not. While he had not previously been formally disciplined, he had been counseled by his supervisors over a dozen times for a variety of work-related concerns. Three of those counseling sessions are noteworthy here because in those situations, various supervisors had counseled Lezama in 2019 and 2020 about his treatment of civilians. In one of those cases, a citizen had filed a complaint against Lezama for his demeanor when making a traffic stop. That, of course, is the same thing that happened here. After the Employer reviewed that counseling session, it decided that another counseling session for the same topic would not be sufficient to get Lezama to change his conduct and demeanor in future traffic stops. It therefore decided to get Lezama's attention by imposing formal discipline. It could do that. The formal discipline it selected was a one-day suspension. While there are some CBAs that require that an employee must receive a written warning before a suspension can be issued, there is nothing in this CBA that requires that. That being so, the Employer was not contractually obligated to impose a written warning on Lezama for his misconduct here. When an employer decides to discipline an employee with a clean disciplinary history for misconduct that is not a so-called cardinal offense, they usually start with a one-day suspension. That's because that discipline is considered the standard starting point for formal discipline. Since that is exactly what the Employer imposed here, I find that a one-day suspension was not an excessive punishment.

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

AWARD

There was just cause to suspend Deputy Lezama for one day. Therefore, his appeal is denied.

Issued at Madison, Wisconsin, this 9th day of April, 2021.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones, Arbitrator