

BEFORE THE ARBITRATOR

In the Matter of a Dispute Between

JAMES LUCKY

and

MILWAUKEE COUNTY

Case 161.0073

AWARD NO. 7979

Appearances:

James Lucky, 10325 W. Plum Tree Circle, #204, Hales Corners, Wisconsin, appearing on his own behalf.

Melinda Lawrence, Assistant Corporation Counsel, Milwaukee County, 901 N. 9th Street, Suite 303, Milwaukee, Wisconsin, appearing on behalf of Milwaukee County.

ARBITRATION AWARD

The Milwaukee Deputy Sheriffs' Association (hereinafter referred to as the MDSA or 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. On July 2, 2021, 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 James Lucky's five-day suspension. The undersigned was so designated. The matter was subsequently scheduled for hearing for October 21, 2021. On October 1, 2021, the Association's attorney, Graham Wiemer of the MacGillis Wiemer law firm, notified the arbitrator that his firm and the Association "are no longer able to continue participating in the above arbitration." Thus, Wiemer and the Association withdrew as Lucky's representative. The arbitrator, Mr. Lucky, and the County's attorney (Melinda Lawrence) then exchanged numerous emails concerning whether the hearing would be held on the scheduled date, as well as numerous other matters. During those emails, Mr. Lucky indicated he would represent himself at the hearing. Because of that, Mr. Lucky is listed by name in the caption of this Award rather than the MDSA. On October 21, 2021, a hearing was held via Zoom. The hearing was not transcribed. The parties made oral argument at the conclusion of the hearing. Thus, neither side filed a post-hearing brief. 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. Based on the entire record, I find that the issue which is going to be decided herein is:

Was there just cause to suspend Deputy James Lucky for five days? If not, what is the appropriate remedy?

PERTINENT CONTACT LANGUAGE

The parties' 2015 – 2018 collective bargaining agreement (CBA) provided 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:

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

(1)(k) Refusing or failing to obey orders of supervisor whether written or oral

(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.

James Lucky has been a deputy sheriff since 2017. When this matter arose, he was assigned to the Patrol Division, first shift. His supervisor at the time was Sgt. Sarah Byers. She has been a supervisor in the department for 22 years. Lucky is black and Byers is white. By his own admission, Lucky is a “loud talker”.

Lucky feels that Byers has long harassed him and has it out for him. The record shows that the two have had ongoing issues with each other and, as a result, have clashed. Because of those conflicts, tension exists between them. That history of conflict is germane to this matter.

FACTS

On November 24, 2020, the two had a workplace altercation. The altercation had three parts to it which are reviewed below. While there is also a fourth part to the story, Byers was not present for that part.

Sometime prior to November 24, Byers had notified Lucky in writing that he had to work mandatory overtime on the upcoming Thanksgiving Day. This mandatory overtime assignment greatly irritated Lucky, as he believed it had been assigned to him out of turn (meaning someone else should have been mandated to work it rather than him).

On November 24, 2020, at about 6:15 am, Byers met with the deputies working first shift for the daily roll call. Lucky was one of the deputies working that shift. At the end of that meeting, Byers asked if there were any questions. Lucky brought up the Thanksgiving Day assignment just referenced and asked Byers why he had been mandated to work overtime on Thanksgiving Day. Byers responded that it was his turn to be mandated, whereupon Lucky strongly disputed that assertion and contended it was not his turn to be mandated. Witnesses who were at that meeting could tell that Lucky was upset about being mandated and described him as agitated and annoyed, while Byers was described by witnesses as calm. Byers then offered to show Lucky the paperwork buttressing her position that it was his turn to work mandatory overtime on Thanksgiving Day. Lucky accepted Byers' offer to show him the paperwork, but he responded several times that he wanted to see the paperwork right now. Byers knew from previous interactions with Lucky that he (Lucky) would not allow her to put the matter off to another time. Knowing that, Byers grudgingly agreed to Lucky's request that she show him the paperwork immediately. To do that, the two had to walk to Byers' desk which was in a different part of the building than where they were at.

The next part of this story involves what happened as they walked to Byers' desk and passed through three doors in the building in the course of getting there. Initially, Byers was about six feet ahead of Lucky. As they walked though, the gap between them narrowed and Lucky got closer and closer to Byers. In the words of the deputy who was following Lucky, he was “on her tail.” This upset Byers because she felt Lucky was not maintaining a sufficient social distance from her. At the first door, Byers held the door open for Lucky to walk through. When they got to the second door, Byers decided she did not want to continue to open each door for Lucky that they encountered so she did something different. This time, she flung the second door open wide so that Lucky could pass through it without her having to hold the door open for him. While Byers thought

that by doing that, she was being both polite and maintaining social distance, that was not how Lucky perceived it. In his view, he thought that by opening the door wide, Byers was intentionally trying to hit him with the door. Although Byers denied trying to hit Lucky with the door, Lucky believed otherwise. Because of that, he then complained to Byers about how she had just opened the door wide and that she hadn't held the door open for him (as she did with the first door). In response to that criticism, Byers said she had done it (i.e., opened the door wide) "because of social distancing." Lucky replied, "That's not a good answer for me." A deputy who was walking behind Lucky testified that he did not share Lucky's belief that Byers tried to hit him (Lucky) with the door. Instead, he thought that Byers pushed the door open wide so Lucky wouldn't have to open it himself. When Byers got to the third (and last) door, she attempted to pull the door open as wide as she had done with the second door, but the door's hydraulics were different and, as a result, the door did not swing open as wide as the second door had. While Byers got through the door, it closed by the time Lucky got to it. Thus, Lucky had to open that door himself. This greatly upset him and he yelled at Byers, "oh sure, now you slam the door in my face." A deputy who was walking behind Lucky testified that Lucky was not that close to the door when it closed and the door did not come close to closing in Lucky's face. As they continued walking toward Byers' desk, Lucky told Byers in a loud voice that she had just "disrespected him".

The next part of this story involves what happened after they got to the room where Byers' desk is located. After they got there, Lucky did not go into the room with Byers. Instead, he stayed out in the hallway. As he did, Byers went to her desk and located the pertinent overtime paperwork that Lucky had indicated he wanted to see. Byers then attempted to show that paperwork to Lucky, but he blew her off and let her know that he was no longer interested in addressing the mandatory overtime on Thanksgiving Day matter; instead, he wanted to continue to talk about the door matter and how [he believed] Byers had just "disrespected him". Byers then tried to speak to Lucky about the Thanksgiving Day overtime assignment matter, but Lucky would not let Byers do that. He talked over her in a loud and angry voice that drowned her out. While Byers raised her voice and yelled back at Lucky, Lucky's yelling was far louder than Byers. At one point, Byers asked Lucky to lower his voice, but he did not do so. At that point, Byers concluded that her attempts to address the merits of the overtime matter with Lucky were fruitless, so she changed course so to speak. She then directed Lucky to "go into service." That directive meant that Lucky was supposed to begin working (i.e., he was to leave the building, go to his squad car, and tell dispatch he was ready to respond to calls for service). Lucky was nonresponsive to Byers' directive. Because of that, Byers decided to use different words and make it a direct order so Lucky understood her intent. Byers then said to Lucky "I am ordering you, as your direct supervisor, to go into service." The number of times that Byers gave Lucky this direct order is disputed. According to Lucky, Byers just said it once. According to Byers, she said it no less than three times. In any event, Lucky was nonresponsive to this direct order to go into service. When Lucky made no efforts to move, Byers asked him "Are you refusing an order by a supervisor to go into service", and Lucky stated "yes." Lucky then told Byers that he wanted to speak to a higher-ranking supervisor. According to Lucky, he made his "request" that that happen "nicely." That was not how Byers perceived it. She thought that Lucky "demanded" to speak to a supervisor. In response, Byers told Lucky that she was the highest-ranking officer in the patrol division available at the time (i.e., about 6:30 am). Lucky was not satisfied with Byers' response, and he again repeated that he wanted to speak to a different supervisor. Byers then called the inspector [who is the second highest ranking person in the

department] and told him that Lucky was refusing to go into service. As Byers talked on the phone with the inspector, Lucky [who was in the room next door] continued to loudly berate Byers. Because Lucky's yelling was a distraction to her talking on the phone, Byers closed the door to her office. Her doing that further enraged Lucky. The inspector told Byers to call Capt. Witek [who was on duty at the airport] about the matter. Byers then called Capt. Witek and told him that Lucky was refusing to go into service.

At some point while Byers was talking with the two supervisors, Lucky left the building and went to his squad car. After he got there he did not go into service. Instead, he just sat in his squad car and stewed over what had happened. Lucky's stated reason for not going into service at that point was because he was still very angry and agitated with Byers for, as he put it, "piling up stuff on me." Again, in his own words, he was "fed up with her at that point."

While Lucky was sitting in his squad car, Capt. Witek called Lucky on the phone. Until that day, Witek and Lucky did not know each other and had never talked. Thus, they had no history with each other. Their phone call was not short. By Lucky's estimation, it lasted 30 minutes. In that phone call, Lucky told Witek that he was refusing to go into service because he was angry with Byers for mandating him to work overtime on Thanksgiving Day and because she had "disrespected him" in the opening and closing of doors as they walked to her desk. Lucky also told Witek that because he was angry with Byers, "he didn't want to go out there" (i.e., go into service) "and have contact with any citizens" (while he was angry). After Witek listened to Lucky's reasons for not going into service and his complaints about Byers, Witek told Lucky that if he believed Byers had done something inappropriate he could grieve it, but that he had to go into service and could not refuse to do so as he had been doing. At the end of the phone call Lucky agreed to go into service. As Lucky himself put it, Witek "calmed him down" and got him back to his "normal state" after being so angry and agitated. At 7:34 am, Lucky called dispatch and told them he was going into service.

The record shows that during the phone call just referenced, dispatch called Lucky four times to respond to requests for service. Lucky did not answer the first three calls. When he was called a fourth time, Lucky told the dispatcher he was unavailable to take the call (for service) because he was meeting with a captain. Each time, dispatch had to send another squad to the call rather than Lucky.

After the phone call with Lucky ended, Witek called Byers and told her that he had spoken with Lucky and he (Lucky) was going into service. Witek also told Byers to complete an Investigation Authorization Request form regarding the incident, which she subsequently did.

An internal investigation into the matter just noted was conducted by Lt. James Novotny of the Internal Affairs Division. As part of his investigation, Novotny interviewed six witnesses, including Lucky and Byers. Afterwards, he wrote a report and made certain findings. His report, which is called an "Investigative Brief" was 26 pages long, single spaced. That report was submitted to the sheriff.

On May 21, 2021, Sheriff Earnell Lucas concluded that by his conduct referenced above, Lucky had violated a department rule and two civil service rules. The department rule alleged to have been violated was 202.06 (Insubordination) and the civil service rules were Rule VII, Section 4(1)(k) (Refusing or failing to obey orders of supervisors whether written or oral) and (l) (Refusing or failing to comply with departmental work rules, policies or procedures). He suspended Lucky for five days.

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

The record shows that in 2019, Lucky received an Employee Activity Documentation for insubordination. [Note: An EAD is a type of written counseling]. It was issued after he refused a verbal order from Lt. Mary Sawczuk to go into service. Sgt. Byers was not involved in that matter. The EAD indicated in pertinent part that "Lucky was counseled previously . . . regarding insubordination"

The record further shows that eight months ago, another arbitrator issued an award reviewing a seven-day suspension imposed on Lucky for other misconduct. In that award, the arbitrator found that just cause existed for a suspension, but he reduced its length from seven days to five days [*Milwaukee County Award No. 7972 (WERC 4/16/2021)* issued by Peter G. Davis].

DISCUSSION

At issue here is whether just cause existed to suspend Deputy Lucky for five days. I answer that question in the affirmative, meaning I find the Employer had just cause to impose a five-day suspension on him. 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 Lucky's conduct in the altercation, I'm first going to address Byers conduct in this matter because Lucky contends that the reason he was angry and agitated with Byers outside her office was because of how she "disrespected him" as they walked from the roll call room to Byers' office. He is referring, of course, to the door matter. In short, it's Lucky's view that Byers intentionally tried to hit him when she swung open the second door and intentionally closed the third door in his face. For her part, Byers denied that she intentionally did either of those things. After considering their conflicting views of what happened, I find that Byers did not intentionally try to hit Lucky when she swung the second door open wide or intentionally closed the third door in Lucky's face. Here's why. Byers' account of the door matter was corroborated by the deputy who followed behind Lucky as they all walked to Byers' office. Because of his vantage point, that deputy could see what unfolded ahead of him. He testified that he did not share Lucky's view that Byers tried to hit him with the (second) door. Instead, it appeared to him that Byers pushed the door open wide so Lucky wouldn't have to open it himself. With regard to the third door, that same deputy testified that Lucky was not that close to the door when it closed and the door did not come close to closing in Lucky's face. His testimony persuades me that while Lucky thought that Byers intentionally tried to hit him when she opened the second door wide and intentionally closed the third door in his face, the record facts simply do not support his claim. Consequently, Lucky's contention that Byers "mistreated him" and "disrespected him" as they walked to Byers' office is unavailing.

It follows from that finding that Lucky's attempt to place the blame on Byers for what subsequently happened is not persuasive. Thus, Lucky alone bears responsibility for what happened next, not Byers.

The focus now shifts to Lucky's conduct following the door matter. In reviewing it, I'm first going to address his conduct outside Byers' office. After that, I'll address his response to Byers' directive/order that he go into service.

While Lucky denies yelling at Byers and being angry and argumentative with her outside her office, the record conclusively shows otherwise. By doing that, Lucky created a disturbance in the workplace. During same, Byers tried to get Lucky to calm down, lower his voice and regain his composure. Her doing that was to no avail, and Lucky continued his verbal tirade. In contrast, even though Byers raised her voice to Lucky when he was yelling at her, Byers was still respectful to Lucky. To illustrate that, it is noted that at one point while Lucky was berating her, Byers called Lucky "sir." Her doing that shows that Byers was still professional toward Lucky during the incident, while he did not reciprocate. Although it's Lucky's view that his conduct towards Byers outside her office was acceptable, I find otherwise and conclude that his verbal tirade with Byers outside her office crossed the proverbial line of acceptable workplace conduct. Here's why. Employees are not supposed to yell, harangue or be argumentative, disrespectful or combative with their supervisors in the workplace. Simply put, that type of conduct is not supposed to occur. Instead, employees are supposed to treat their supervisors in a respectful fashion. Employees don't have to like their supervisors or be friends with them, but they do have to be professional and respectful toward them. If they are not, the workplace can break down and not function properly. As a result, employers have a legitimate and justifiable interest in preventing employees from

threatening supervisors or verbally abusing them. Such conduct is obviously detrimental to the workplace environment since it undercuts the authority of supervisors. No employer can be expected to tolerate it. Consequently, employees who do not treat their supervisors with respect and are unprofessional toward them – as Lucky was towards Byers outside her office on the day in question – can be disciplined for doing that.

Lucky offers these defenses to excuse and/or mitigate his conduct outside Byers' office. First, he points out that while he was yelling at Byers, he did not curse or use profanity. He thinks that is significant, and essentially wants credit for it. I disagree. While cursing and using profanity to a supervisor certainly qualifies as misconduct, there can still be misconduct in the absence of same. What Lucky did to Byers outside her office also qualifies.

Second, Lucky contends that Byers did not show him the paperwork regarding his Thanksgiving Day overtime assignment. Again, the record facts show otherwise. After Byers found the pertinent paperwork at her desk, she attempted to show it to Lucky, but he was no longer interested in addressing that matter with her. Instead, he had moved on to the door matter, and was so obsessed with it that it replaced the overtime matter as the subject of his ire. Under these circumstances, Lucky is hard pressed to persuasively claim that Byers did not show him the overtime paperwork.

The focus now shifts to Lucky's response to Byers' directive/order that he go into service. I begin my discussion on same by noting that Lucky admits that Byers gave him a direct order to do that. He further admits that he did not initially comply with her order. Notwithstanding those admissions, it's his view that he did nothing wrong.

As he sees it, he had a "good reason" for not complying with Byers' directive/order because a) he was angry with her for "disrespecting him" when they went through the doors; b) he felt it was not a legitimate order because he thought Byers said it "to get me out of her face"; and c) he disagreed with the order. I've already addressed the first claim and found that Lucky's contention that Byers' "disrespected him" at the doors lacked merit. As for the second claim (i.e., that Byers gave him the directive to go into service simply "to get me out of her face"), it is assumed for the purpose of discussion that Lucky is correct and that is why Byers gave him the order. However, even if that was the case, it does not matter for this reason: Byers is a supervisor. As such, she is empowered to direct Lucky (and other deputies) to go into service when they have not yet done so. It follows from that that Byers did not "abuse" her power as a supervisor by giving him that order. As for Lucky's third claim (i.e., that he disagreed with the order), that claim is also meritless. Here's why. When employees are given a work directive or order, they are supposed to timely comply with the directive and do what they are told whether they like it or not. Simply put, that is how the workplace operates. Employers have a legitimate interest in ensuring that employees follow the directives they are given. While there are some exceptions to this general rule when the directives are illegal or unsafe, none of those exceptions apply here. When employees fail to follow workplace orders or directives, that conduct is obviously detrimental to the workplace. If employees object to an order they are given, in some instances they can grieve it afterwards. However, they cannot fail to carry out the order at the time it is given (hence, the old workplace adage "work now, grieve later"). Employees who do not follow legitimate workplace

orders/directives can be disciplined for doing that. Thus, to the extent that Lucky thought he did not need to timely comply with Byers' directive/order, he was just plain wrong. He did.

Finally, Lucky emphasizes that he went into service about 7:30 am after he had talked to Witek for a half hour and Witek had, in Lucky's own words, "calmed him down." Lucky wants credit for that. However, he does not get credit for "eventually" going into service. Simply put, that's not how things work in a paramilitary organization like the MDSO. As already noted, Lucky should have gone into service at 6:30 am when Byers ordered him to do so. When he didn't go into service at that time, he essentially took himself out of service for an hour. His doing that was problematic for the Department because it meant that the Department had one less squad car available to answer calls from dispatch. That, in turn, meant that other deputies had to cover for him, and the Department was deprived of his service for an hour. Only supervisors are empowered to take a deputy out of service, and neither Byers nor Witek did that. That being so, Lucky's claim that he never took himself out of service lacks support in the record.

Having considered Lucky's defenses and found them insufficient to excuse and/or mitigate his conduct, I find that Lucky engaged in misconduct warranting discipline when he failed to comply with Byers' order that he go into service at 6:30 am on the day in question. His failure to that for an hour constituted insubordination.

The discussion above establishes that on the day in question, Lucky engaged in two separate acts of misconduct for which he could be disciplined. This was not, as Lucky contends, a minor incident that was blown out of proportion or exaggerated. It was far more serious than that.

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.

As was noted in the FACTS, Lucky has been previously counseled about insubordinate behavior towards supervisors. That, of course, is the same thing that happened here. Given those prior counselings, the County was within its rights to impose a suspension on Lucky.

As for the length of the suspension imposed here (i.e., five days), it is relevant that just eight months ago, another arbitrator reviewed a seven-day suspension imposed on Lucky for other misconduct. He reduced the suspension to five days. Given that prior discipline and suspension, another five-day suspension was not an excessive punishment for the misconduct involved here. Hence, that discipline passes arbitral muster.

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

AWARD

There was just cause to suspend Deputy Lucky for five days. Therefore, his appeal is denied.

Issued at Madison, Wisconsin, this 7th day of December, 2021.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones, Arbitrator