

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :
 of a Dispute Between :
 :
 MARATHON COUNTY OFFICE AND :
 TECHNICAL EMPLOYEES, LOCAL 2492-E, :
 AFSCME, AFL-CIO :
 :
 : Case 161
 and : No. 43201
 : MA-5917
 MARATHON COUNTY :
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Appearances:

Mr. Philip Salamone, Staff Representative, Council 40, AFSCME, AFL-CIO, on behalf of the Union.
Mulcahy & Wherry, S.C., by Mr. Dean R. Dietrich and Mr. Jeffrey T. Jones, on behalf of the County.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Union and County respectively, are signatories to a collective bargaining agreement which provides for final and binding arbitration. Pursuant to said agreement, the undersigned was appointed by the Wisconsin Employment Relations Commission to hear the instant dispute. Hearing was held on February 22, 1990 in Wausau, Wisconsin. A stenographic transcript was made and received. After a number of extensions, the parties completed their briefing schedule on May 29, 1990. Based upon the record herein and the arguments of the parties, the undersigned issues the following Award.

ISSUE:

The parties were unable to stipulate to the framing of the issue:

The Union frames it as follows:

Is there just cause for discipline? If not, what is the appropriate remedy?

The County would define the issue as follows:

Whether the County violated the provisions of Article 2 of the labor agreement when it terminated the grievant for his conduct on August 29, 1989? If so, what is the appropriate remedy?

The undersigned accordingly frames it as follows:

Did the County violate the collective bargaining agreement when it discharged the grievant for his conduct on August 29, 1989? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS:

ARTICLE 2 - MANAGEMENT RIGHTS

The County possesses the sole right to operate the departments of the county and all management rights repose in it, but such rights must be exercised consistently with the other provisions of the contract. These rights include, but are not limited to, the following:

- A.To direct all operation of the respective departments;
- B.To establish reasonable work rules;
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- D.To suspend, demote, discharge, and take other disciplinary action against employees for just cause;
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- I.To manage and direct the working force, to make assignments of jobs, to determine the size and composition of the work force, to determine the work to be performed by employees, and to determine the competence and qualifications of employees;

. . .

Any dispute with respect to the reasonableness of the application of said management rights with employees covered by this Agreement may be processed through the grievance and arbitration procedure contained herein; however, the pendency of any grievance or arbitration shall not interfere with the rights of the County to continue to exercise these management rights.

RELEVANT SHERIFF'S DEPARTMENT RULES AND REGULATIONS:

Section 14304.00

.07 DERELICTION OF DUTY

A. Dereliction of duty on the part of any member prejudicial to the proper performance of the function of the department is cause for disciplinary action and/or dismissal. The following acts or omissions shall constitute dereliction of duty:

1. Failure to obey orders or willful, serious, or repeated violation of any rule, regulation or policy of the department.

. . .

4. Failing to assist or support fellow officers, or failure to perform duties out of fear or cowardice.

. . .

9. Displaying a reluctance to properly perform job, position or assigned duties or acting in a manner tending to bring discredit upon himself or the department . . .

10. The above should not be considered as the only items which may be considered dereliction of duty.

0.8 NEGLECT OF DUTY

. . .

B. Employees shall perform their duties in a manner which will tend to establish and maintain the highest standards of efficiency in carrying out the functions of their job and the objectives of the department.

. . .

.29 COURTESY

A. Employees shall be courteous and use respectful salutations when speaking or interacting with others.

B. Employees shall be tactful in the performance of their duties, shall control their tempers and exercise the utmost patience and discretion.

C. Employees shall not engage in argumentative discussion even in the face of extreme provocation and shall not use coarse, violent, profane, or insolent language.

. . .

FACTS:

The grievant, Robert Hamilton, has been employed by the County for approximately five years as a corrections officer. During the tenure of Hamilton's employment with the County, his evaluations were generally positive. He did, however, receive an oral reprimand for exercising poor judgment and improperly using equipment on November 19, 1988. While the County has consistently maintained that November 19, 1988 reprimand along with Hamilton's department as an officer is also a reason for the discharge, it is undisputed that a physical altercation which occurred on August 28, 1989, and events

following it are the primary reasons for the discharge. Thus, the events leading up to the August 28, 1989, incident will be addressed first.

The grievant testified that he had been having difficulties getting along with a fellow corrections officer, Steve Reissmann, for sometime. Approximately two or three weeks before the August incident, he called the Employee Assistance Program (EAP) about the verbal harassment that he felt he was constantly receiving from Reissmann. Admitting that he was experiencing problems in his personal life at the same time, including separation from his wife and the death of his father, Hamilton explained why he called. He stated that he called the EAP because he "couldn't figure out whether it was his fault [referring to Reissmann] that he was being the way he was to me or whether it was my fault because of problems that I had in my private life." The EAP instructed Hamilton to talk to his supervisor about the harassment he was receiving and to have her talk to both employees to see if something could be worked out. In the event that nothing could be worked out, the EAP instructed Hamilton to call if he wanted to go through some form of counseling.

Pursuant to the directions from the EAP, about two weeks prior to the incident, Hamilton spoke with his supervisor, Shirley Niewolny, about the problem with Reissmann. He testified as follows: "Well, about two weeks before that I had told her that we were having a lot of problems, very bad problems. It was a constant harassment all the time from him, and I asked her, you know, if (she could) do something about it, and as of that time she had not talked to me."

Niewolny did not, however, talk to either employee to discuss Hamilton's complaints prior to the incident, nor did she assign Hamilton or Reissmann to different work areas within the jail complex. Thereafter on August 28, 1989, Reissmann and Hamilton became involved in a fight at the jail.

The parties at hearing submitted several statements by eyewitnesses to the altercation. These statements by Hamilton, Reissmann, Supervisor Niewolny, and fellow corrections officers James Costa, John Moreau, Roy Melanson and Shirley Hahn describe what transpired during the day. Disregarding both Hamilton's and Reissmann's statements as being self-serving, it is nevertheless possible to construct the events that lead up to the fight. Officer Hahn also testified at hearing and where her testimony differed in some critical part with evidence contained in the statements, her testimony has been credited over the statements. This is the case because this arbitrator had the opportunity to observe her demeanor which appeared truthful and she was subjected to substantial cross-examination. Accordingly, her testimony is given greater weight than the stipulated hearsay statements received into evidence.

According to Jim Costa, Reissmann had been verbally abusing Hamilton most of the day prior to the commencement of the altercation. Costa's version of what occurred is that he was in central control when he was notified that an argument was erupting between two inmates. Hamilton, Reissmann, Hahn and Moreau went into A block to quell it. After the inmates were locked down, Costa who was apparently still in central control, observed Hamilton grab Reissmann by the front of his shirt and then saw Hamilton fall on his back. When Hamilton got off the floor, he "went at" Reissmann again. Costa speaking into the nearest speaker in central control told them "to knock it off."

Moreau testified that he, Reissmann, Hamilton and "Sam" [a nickname for Hahn] went into female housing to stop an argument. One of the inmates did not want to go into her cell and Reissmann "forcible (sic) picked her up, her feet left the ground, and moved her into her cell." After the lock down, Moreau turned away or looked towards door #53. When he turned back, he observed Hamilton and Reissmann arguing about whether Reissmann "had to be so forceable (sic) with the girl." According to Moreau, "Bob took a swing and the two started scuffling. Sam and I tried to stop them and I got in between the two and pushed them apart. Then they stood and glared at each other and yelled insults at each other. . . ."

Hahn's version both in her statement and during her testimony differs somewhat from that of Moreau and Costa. Her statement is as follows:

At approximately 2:25 p.m. on August 29, officers Hahn, Reissmann, Hamilton and new officer John Moreau went into A block. Inmates Guzman and Westberg were shouting at each other. Hahn instructed Westberg to go to her cell. Reissmann escorted Guzman to her cell. Hahn stated Reissmann was shoving Guzman towards her cell. Hamilton then told Reissmann to "ease up."

After the inmates were locked in, all officers exited A block, and walked towards booking area. Hahn overheard Reissmann say to Hamilton, "hey, you little f-----, get over here." Hahn turned around and saw Hamilton and Reissmann struggling. Hahn saw both take a swing, then Reissmann shoved Hamilton. Hamilton fell to the floor, got up and grabbed Reissmann.

John Moreau then stepped between Reissmann and Hamilton. Hamilton went toward the booking area and officers Hahn and Reissmann went to the west end of the jail to lock down the inmates.

On direct examination at the hearing, Hahn reconfirmed that Reissmann grabbed Guzman by the arm, that she tried to pull away and that he then tried to push her into the cell. She testified that Hamilton told Reissmann "Well ease up on her. You know, you didn't have to be so rough." In response to the question "Did you believe that this was rough -- that he was being rough with her?", she responded "I would have handled it differently. . . We could have talked Ms. Guzman into her cell and got the situation under control."

Hahn stated that as they left the cell area, Hamilton walked out first, then Reissmann, and that she heard Reissmann call Hamilton "a little f---er" and tell him he's supposed to get over there.

With respect to the actual physical confrontation, upon direct and cross examination and query from the arbitrator, Hahn testified as follows:

Q. Okay. Now, from -- where were you standing compared to where Hamilton and Reissmann were standing where they actually got in the scuffle, the pull down, the punch, whatever? Where were you standing?

A. A couple of feet behind them.

Q. All right. Do you have a perception of who, quote, unquote, started it or was the aggressor here?

A. I felt Steve started it because he was being -- he could have left the situation alone. There didn't have to be this biting back, this fighting, this swearing and stuff and egging him on, because he wouldn't stop and just leave it alone. He just kept on saying, "Come on you little f----r. Do this and do that." He egged him on. It wasn't something -- it could have stopped if he just would have walked away. It could have stopped.

Q. Okay. In terms of who took the first physical, made the first physical motion, do you have a perception on that?

A. From where I was standing I thought I saw both arms go up, an arm on each person. I thought I saw them both go from where I was standing. (Tr. 52, 53).

She was unshakable in her testimony that she saw both Reissmann and Hamilton grab each other simultaneously on both direct and cross-examination.

There is less dispute about what occurred after Moreau and Hahn separated Reissmann and Hamilton. Hamilton proceeded to the booking area while Hahn and Reissmann went down to the west end to lock down inmates. Hahn, Melanson, and Costa testified that when Reissmann returned to the booking area, Reissmann approached Hamilton. According to Costa, Reissmann entered the booking area and took off his glasses. Reissmann said to Hamilton, "Come on, m--f--," get your ass into the property room and have it out." "You're going to pay for my shirt" to which Hamilton responded "get out of here! Don't start something you can't finish."

Melanson confirms Costa's testimony in all respects as does Hahn who also stated that Hamilton told Reissmann to "knock this sh-- off." Essentially Hamilton declined to continue the fight any further.

Costa, Melanson, and Hahn all confirm that Hahn tried to verbally intervene, stating "stop it and grow up"; "you shouldn't fight at work, you don't fight at work." Reissmann replied to her "Shut up, you old woman." Hahn became so upset that she asked her supervisor to leave the shift early and was granted permission.

POSITION OF THE PARTIES:

County

The County argues that it had "just cause" to discharge Hamilton for fighting and for verbal abuse of a fellow officer. According to the County, under any definition of just cause, fighting, brawling, conduct which represents a willful disregard of the employer's interests, and the like are grounds for discharge. Citing numerous arbitral awards as precedent, it stresses that "fighting" on company premises warrants discharge. Noting instances where the discharge was sustained even when the other employe provoked the fight, the County maintains that the grievant could have and should have avoided the encounter by backing off or walking away.

Pointing to its management rights clause, Article 2, and various work rules established by the Sheriff's Department, the County claims that corrections officers are held to a higher standard of conduct than other employees. Because they must act in a manner which does not discredit the Sheriff's Department, fighting cannot be condoned.

The County stresses that the arbitrator should not substitute her discretion for that vested with the employer to determine the proper penalty to be imposed for an employes' misconduct. Since the County did not act in an unreasonable, arbitrary, or capricious manner, its discipline assessment must not be changed.

With respect to certain arguments made by the Union, the County insists that they are without merit. To hold that the grievant was justified in resorting to violence because of the workplace environment, would undermine the effectiveness of the jail facility. Moreover, according to the County the incident was more than the "scuffle" characterized by the Union and it was Hamilton who threw the first "punch." The County further disputes that Hamilton took the swing to protect himself because the other employe was considerably larger. It stresses that Hamilton should have backed off.

The County claims that, contrary to Union assertions, there is no evidence that management was aware that "bad blood" existed between the two employes so that the confrontation could have been avoided had the two been assigned to different job areas in the jail.

The County contends that there was no disparate treatment with respect to its discipline of Hamilton and two other employes. It stresses that the factual situations with respect to physical encounters in which two other employes were involved were entirely different from the instant case.

Based on all of the above, the County requests the arbitrator to dismiss the grievance in its entirety.

Union

The Union maintains that any jail is an extremely violent, and unpleasant place in which to work. It is, in short, a stressful workplace. Summing up the incident as being essentially a shoving match in which no one was injured, the Union maintains that there are several mitigating factors which must be considered in determining whether discharge was appropriate.

It argues that management knew that there was "bad blood" between the two employes and failed to take precautionary measures to prevent the confrontation. It also stresses that the grievant was provoked by an inappropriate and violent act, Reissmann's mistreatment of an inmate. According to the Union, arbitrators have determined that assessing aggression to determine who is the aggressor and then apportioning penalties to determine the degree of responsibility is an important arbitral function in fight cases. It cites numerous cases where arbitrators have reinstated employes if provocation existed. In the Union's view, the grievant's actions were defensive and the problem escalated into a physical encounter. It also notes that the grievant's refusal to continue the fight despite further baiting by the other employe involved is grounds for reducing the discipline.

Another factor emphasized by the Union is that there has been disparate treatment by the County when discipline of the grievant is compared to that of two other employes involved in physical confrontations with inmates.

The Union maintains that the County's assertions that the confrontations occurred in the presence of the public or inmates is not supported by the record. It stresses that the grievant had a fairly long period of employment and a good work record. Moreover, it claims that the credibility of management as to any ongoing performance problems is dubious or questionable.

In response to County argument that the arbitrator should not substitute her judgment for that of the employer, the Union points to over 400 cases where arbitrators reduced discharges to lesser penalties of which twenty-six involved discharges for fighting.

The Union does not dispute that some discipline is warranted but rather questions discharge as the appropriate remedy. It submits that discharge is far too harsh under the circumstances and requests reinstatement for the grievant.

DISCUSSION:

The issue as the undersigned has framed it can be divided into three components: namely, (1) whether there was just cause for discharge, the discipline assessed by the County; (2) if not, whether there was just cause for discipline other than discharge; and (3) the appropriate remedy should the County be found to have violated the collective bargaining agreement.

Implicit in any determination as to whether "just cause" exists, is the evaluation of whether the punishment or penalty is warranted for the act or transgression; i.e., does the "punishment" fit the "crime"? Or, in other words, is the County justified in discharging Hamilton for his behavior? Another aspect to be considered when ascertaining whether just cause exists is whether the punishment "corrects" the employe's behavior or problem. Both of these components have been considered in evaluating the County's discharge decision.

In answering the question of whether or not there was just cause for discharge, it is important to determine who incited the fight. Based upon the testimony of Costa and Hahn, it can be concluded that Reissmann provoked Hamilton. However as the County adroitly points out, Hamilton could have avoided the encounter by "walking away" from Reissmann instead of walking back towards him. The undersigned also finds that, as Hahn testified, "both employes grabbed each other at the same time." Having laid hands on each other, the physical encounter had already commenced. The undersigned therefore does not place great weight over the fact that Hamilton rose from the ground swinging. It is significant that once separated by fellow employes, Hamilton refused to respond to further invitations by Reissmann to continue the fight in the property room.

The County is correct in its assertion that fighting in the work place cannot be condoned. It may also be correct when it contends that corrections officers are subject to a higher standard of behavior than other county employes. Nothing in this decision should be construed to weaken or impair the County's legitimate authority as expressed in its management rights clause and work rules. Nevertheless, the undersigned, based on the express facts of this case, concludes that the County did not have just cause to discharge Hamilton. This determination is arrived at by consideration of the totality of circumstances involved herein.

First the evidence strongly suggests that Hamilton was subject to verbal abuse from Reissmann over a significant period of time. Moreover, he attempted to resolve his problem in the appropriate employer-sanctioned manner by seeking help from the EAP. He followed instructions given to him by the EAP in contacting his supervisor and apprising her of his difficulty with Reissmann. Despite these actions, the verbal harassment continued unabated and Hamilton responded to it on the date in question. The undersigned does not fault Supervisor Niewolny or the County for failing to act upon Hamilton's request but views the altercation as having occurred before Niewolny took action. The fact that Hamilton was subjected to continuous harassment does not excuse his behavior, but it must be considered in ascertaining whether the County's discharge is to be sustained.

Secondly, the immediate cause of the altercation was Hamilton's chiding Reissmann for having utilized excessive force in handling an inmate. Contrary to assertions by the County, the undersigned sees nothing wrong or provocative in Hamilton's discussion of this matter with Reissmann. Certainly it is in the County's interest to have employes monitor their fellow employes behavior and ultimately report it if it is out of line when it comes to the use of excessive force.

Third, and perhaps more importantly, Hamilton declined to continue the fight once fellow employes had separated the two. This, in the sense of addressing very real concerns of the County as to whether it is required to retain a volatile or emotionally unstable employe as a corrections officer, demonstrates that Hamilton did regain and maintain control of himself once reason prevailed. Moreover, it was Reissmann's volatile behavior, rather than Hamilton's, which resulted in Hahn's request to leave early.

Fourth, and lastly, Hamilton had a generally positive employment record prior to the incident. The testimony of shift supervisor Robert Dickman to the effect that Hamilton has been confrontative, verbally abusive, and had engaged in excessive force himself in past is not credited. While the County has shown that on one occasion, Hamilton used poor judgment and received a written reprimand on November 19, 1988, it has not demonstrated that Hamilton was confrontative, abusive or ever engaged in excessive force.

His evaluations suggest exactly the opposite, that he was a "fully satisfactory employe" from 1984 to the present. In 1985, the comment is that:

Hamilton . . . has shown that he is capable of handling the duties of a jailer in a professional manner. He has been doing a good job up to this point and exhibits good work habits.

In 1987, his evaluation contains the following:

By using a stern voice and common sense Bob has very few people that actually have to be physically escorted to the receiving area. In most cases he is able to talk them along.

In 1989, the concluding sentence is:

Shows good leadership ability in stressful jail situations involving immediate action.

The 1989 evaluation also states:

Has vast knowledge of standards policy, procedure etc. He has provided fellow, less experienced staff with the knowledge. Has done an excellent job of preparing said staff for independence. Sound decision maker.

The concluding statement on his most recent evaluation dated April for 1989, after issuance of the November 1988 reprimand, is bereft of negative remarks. It says:

Officer Hamilton remains self-motivated as he continues his employment here. He has freely given his time and effort in training fellow officers. He has volunteered his time and energy and expertise in maintaining and creating the physical plant at this facility. He has also provided management w/numerous methods which have led to a smoother operation. He has sound leadership skills, maintains a health relationship w/fellow officers and supervisory staff.

Hamilton's work history along with the mitigating factors detailed above convinces the undersigned that the County did not possess just cause for discharge.

The undersigned recognizes and is sensitive to the general arbitral rule that an arbitrator should not substitute his or her judgment for that of the employer as cited by the County. Just cause for discharge, however, as a standard by which to evaluate conduct, is more than a mere rubber stamp of the employer's actions in determining the appropriate discipline. Under the circumstances outlined in this case, discharge is too harsh a penalty.

Obviously, some form of discipline is appropriate. As noted above, even though mitigating circumstances existed, Hamilton's behavior warrants a significant penalty given the severity of his infraction of the County's work rules.

Because Hamilton could have and should have walked away from Reissmann's taunts, it is appropriate to deny any form of backpay.

Accordingly, it is my decision and

AWARD

1. That the County violated the collective bargaining agreement when it discharged the grievant for his conduct on August 29, 1990.

2. That the County did have just cause for discipline short of discharge.

3. That the appropriate remedy is reinstatement without backpay.

4. That the County is ordered to reinstate Hamilton without backpay to his position as corrections officer immediately.

Dated at Madison, Wisconsin this 3rd day of July, 1990.

By _____
Mary Jo Schiavoni, Arbitrator