

BEFORE THE ARBITRATOR

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 In the Matter of the Arbitration :  
 of a Dispute Between :  
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 MARATHON COUNTY COURTHOUSE & :  
 AFFILIATED DEPARTMENTS, : Case 160  
 NON-PROFESSIONAL EMPLOYEES : No. 43197  
 LOCAL 2492-E, AFSCME, AFL-CIO : MA-5915  
 :  
 and :  
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 MARATHON COUNTY :  
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Appearances:

Mr. Phil Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, N-4  
Mr. Dean Dietrich and Mr. Jeffrey T. Jones, Mulcahy & Wherry, S.C., Attorn

ARBITRATION AWARD

Marathon County Courthouse & Affiliated Departments, Non-Professional Employees, Local 2492-E, AFSCME, AFL-CIO, and Marathon County, hereafter the Union and the County, are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder before a Wisconsin Employment Relations Commission, herein W.E.R.C., staff arbitrator. Pursuant thereto, Stuart Levitan, a staff member with the W.E.R.C., was appointed to hear this matter and hearing was held in Wausau, Wisconsin, on February 14, 1990. A stenographic transcript of the hearing was made and briefs and reply briefs were filed by May 24, 1990. Thereafter, because of Arbitrator Levitan's unavailability, 1/ and with the agreement of the parties, W.E.R.C. Staff Arbitrator Amedeo Greco was substituted as the Arbitrator herein.

ISSUE:

Since the parties were unable to jointly frame the issue, I have framed it as follows:

"Did the County have just cause to discharge grievant Steven Reissmann and, if not, what is the appropriate remedy?"

DISCUSSION:

Corrections Officer Reissmann began working for the County as a Corrections Officer in the latter part of 1987. On May 30, 1989, he received an oral reprimand, which was never grieved, for "physically grabbing" a fellow officer and "knocking him to the floor. . ." He was terminated on September 6, 1989, after he was involved in a physical and verbal encounter with fellow Corrections Officer Robert Hamilton on August 29 while both were on duty at the County jail. Hamilton was also fired over the incident.

Reissmann on September 6 filed the instant grievance where he asserted that the County lacked just cause to fire him. (Hamilton filed a similar grievance and his case was appealed to arbitration to Arbitrator Mary Jo Schiavoni.) 2/

In support thereof, the Union primarily argues that the discipline imposed on Reissmann was too severe for the "scuffle" which admittedly occurred because "no one was hurt and no punches were landed"; that Reissmann's "role in the physical confrontation was basically a defensive one"; and that there has been disparate treatment "with respect to inappropriate incidents of violence" at the jail; that various mitigating factors dictate setting Reissmann's termination aside; and that the facts here must be considered alongside the "grim backdrop" of violence, trauma, suicide, and high level of anxiety that one finds in a jail.

The County, in turn, contends that it had just cause to discharge Reissmann because he assaulted a fellow officer and then taunted him to continue the fight. It also asserts that the arbitrator "must defer to the County's determination as to the proper penalty to be imposed for the grievant's misconduct" and that there in fact is no merit to the Union's claim of disparate treatment.

The resolution of this issue turns on exactly what happened between Reissmann and Hamilton.

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1/ It should be noted at the outset that I have had no discussions whatsoever with Mr. Levitan regarding this matter.

2/ Likewise, I have had no discussions with Arbitrator Schiavoni regarding the case before her.

Reissmann testified in this proceeding that Hamilton in the afternoon of August 29 yelled at him when he was escorting a female prisoner back to her jail cell; that as Hamilton walked away, he yelled, "Get your ass back here. I want to talk to you"; that the two met face-to-face and yelled at each other when Hamilton grabbed him; that he shoved Hamilton away who then fell to the ground; that when he arose, Hamilton started swinging at him; that he then grabbed Hamilton who ripped his shirt; and that fellow officer John Moreau then stepped between them and took Hamilton away. Reissmann testified that a few minutes later he asked Hamilton whether he was going to pay for his torn shirt, to which Hamilton said, "Fuck no!", and that the two of them started yelling again; that when officer Shirley Hahn tried to step in, he used profanity to tell her to butt out; and that he then went to the break room.

Hamilton did not testify in this proceeding. The transcript of his arbitration hearing, however, has been made part of this record. Hamilton there testified that Reissmann was using too much physical force against a female prisoner on the day in question; that he told Reissmann to let her go and explained to him that a supervisor the day before had decided that a particular inmate should be locked up if fighting occurred between her and other prisoners; that as he was walking away, Reissmann shouted, "Come here, you little fucker"; that he walked back to Reissmann who then pointed his finger in his face; that each grabbed the other, causing Hamilton to fall to the floor; that Hamilton ripped Reissmann's shirt and swung at Reissmann; and that officers Hahn and Moreau stepped between them to end their encounter. A few minutes later according to Hamilton, Reissmann asked him whether he was going to fix his ripped shirt, to which Hamilton said no. After the two went their separate ways, Reissmann reappeared and challenged Reissmann to fight it out in the break room, to which Hamilton declined saying that the fight was over. Reissmann a few minutes later made the same challenge, to which Hamilton again declined. Officer Hahn then said that the behavior of both men was out of place and Reissmann responded by telling her, "Shut the fuck up, old woman!"

Officers Hahn and Moreau did not testify at the instant hearing. As a result, we do not have their first-hand views as to what transpired between Reissmann and Hamilton. Furthermore, since Hamilton did not testify here, and since I did not personally observe Reissmann or any of the other witnesses in this proceeding, it is impossible to make some of the credibility resolutions that an arbitrator would normally make in these kinds of cases. Because of these restrictions, and in order to give Reissmann all of the process to which he is due, I will assume arguendo that to the extent it is not contradicted by clear and convincing evidence in this record, all of his testimony is true and accurate.

Once that is done, we see that he and Hamilton had a physical altercation on August 29 when they pushed and/or shoved each other and that both officers were at fault in engaging in such misconduct. While Hamilton was the first to use physical force, it likewise is true that Reissmann started this incident by calling Hamilton over to him and that Reissmann thereafter taunted Hamilton. As a result, it cannot be said that Hamilton was any more blameworthy than Reissmann in this incident up to that point.

Once they were separated and walked away from each other, however, Reissmann subsequently compounded the situation by trying to bait Hamilton into fighting, not once, but twice. As a result, he clearly was the provocateur at that point and he was more blameworthy than Hamilton. Reissmann thereafter made matters even worse in the ensuing investigation when, according to the uncontradicted testimony of Sheriff LeRoy A. Schillinger, he lied and denied that he tried to get Hamilton to fight with him in the break room. In addition, Reissmann had been previously disciplined only a few months earlier when he jumped on another Corrections Officer and knocked him to the floor.

When all these facts are viewed together, it must be concluded that the County had just cause to discharge him, as he has demonstrated that he lacks the emotional discipline and integrity to remain as a Corrections Officer. For while the Union itself points out that a "grim backdrop" of evidence, trauma, suicide, and anxiety surround the operations of a jail, it is those very same factors which make it absolutely imperative that all employees employed there have the self control to cope with such an unusual environment. Based upon this record, it is clear that Reissmann falls short in meeting the exacting duties of his position.

In so finding, I am of course mindful of the Union's claim that Reissmann was the victim of disparate treatment because the County did not terminate former supervisor Joan Kuehl who, the record shows, 3/ hit a prisoner and was found guilty of using excessive force by the County. As punishment, the County demoted Kuehl from her supervisory position so that she now is in the bargaining unit.

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3/ Both Kuehl and Chief Deputy Dennis McCarthy testified in this proceeding to this incident.

The Union also asserts that Deputy Robert L. Kuell needlessly choked a prisoner to the point of nearly killing him and that the County never disciplined him for it, thus again showing disparate treatment. Unlike the Joan Kuehl incident, however, there is no concrete proof in this record that Deputy Kuehl in fact physically abused the prisoner in that fashion, as no final determination has been made regarding this incident.

Both of these incidents, though, are distinguishable from the facts here since neither one involved any physical altercations between employes which is the only issue I have before me. As a result, there simply is no basis for finding that the County has countenanced such altercations by imposing light discipline on other employes who engaged in the kind of misconduct conducted by Reissmann against a fellow employe.

Moreover, even if one were to assume arguendo that the County lacked just cause to fire Reissmann over his initial encounter with Hamilton, the fact remains that Reissmann also engaged in three other separate instances of misconduct by: (1) subsequently trying to taunt Hamilton into fighting after their first encounter; (2) lying about this later incident during the County's investigation of the matter; and (3) engaging in the physical misconduct giving rise to his final oral warning. Since there is no evidence of any kind whatsoever in this record that the County has ever countenanced these other kinds of misconduct, there simply is no merit to the claim of disparate treatment.

In light of the foregoing, it is my

AWARD

That the County had just cause to terminate grievant Steven Reissmann; the grievance is therefore denied and dismissed.

Dated at Madison, Wisconsin this 6th day of November, 1990.

By Amedeo Greco /s/  
Amedeo Greco, Arbitrator